IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case Number: D153/2024

In the matter between:

AFRICAN NATIONAL CONGRESS **APPLICANT**

and

UMKHONTO WESIZWE PARTY **FIRST RESPONDENT**
ELECTORAL COMMISSION OF SOUTH AFRICA **SECOND RESPONDENT**

JUDGMENT

CHETTY J

Introduction

[1] This is an urgent application brought by the applicant, the African National Congress ('the ANC') against the first respondent, the uMkhonto weSizwe Party ('the MKP')[1] in which the ANC seeks a final interdict on the grounds that the MKP infringed its trade mark, registered pursuant to the provisions of the Trade Marks Act 194 of 1993 ('the Trade Marks Act'). The grounds of infringement relied upon by the ANC are

[1] Both the ANC and the MKP are political parties registered with the Independent Electoral Commission within the meaning of s 15 of the Electoral Commission Act 51 of 1996 as at the time of hearing.

located in section 34(1)*(a)* and *(c)* of the Trade Marks Act. It is alleged that the MKP has, without authorisation from the ANC as the proprietor of the registered trade mark no 2014/22089, used the identical mark or a mark so similar as to likely cause confusion or deception in the mind of the average South African voter to the extent that she or he will not be able to distinguish between the ANC and the MKP at the ballot box, especially in light of the imminent national elections on 29 May 2024.

[2] In addition, the ANC contends that the MKP has, through the use of the name uMkhonto weSizwe and of its registered mark, accompanied by oral misrepresentations by MKP leaders, engaged in conduct amounting to passing off under common law. The contention is that millions of voters will know that the name uMkhonto weSizwe and its logo are synonymous with the history of the ANC, and in so doing, they are likely to cast a vote for the MKP while believing that they are in fact voting for the ANC. The unauthorised use of the mark and name is likely, so it is contended, to deceive the public into believing that there is some connection between the two opposing parties.

[3] In the event that the ANC prevails in its injunctive relief, it seeks an order for certain consequential relief that the MKP remove the infringing mark and desist from using the name uMkhonto weSizwe from all materials in its possession, including websites, social media accounts, banners, t-shirts, promotional and advertising material, and any other printed matter. Where the infringing mark is incapable of being removed from such material, the ANC seeks that such material be delivered-up to it for destruction.

[4] The application is strenuously opposed by the MKP, which raises a number of preliminary issues, including the jurisdiction of this court to entertain the application; that the matter is *res judicata* and that it is *lis pendens*. In regard to the infringement of the ANC's registered trade mark, it denies that the ANC is the proprietor of the mark - it attacks the validity of the underlying motive behind the deed of assignment in terms of which the ANC acquired proprietary rights to the disputed mark. In disputing the allegation that its conduct constitutes an infringement for the purposes of section 34(1)*(a)* and *(c)* of the Trade Marks Act, it contends that the name and the mark were never the property of the ANC, and on the contrary, as symbols of resistance against

the oppression of the apartheid state, the name uMkhonto weSizwe belongs to all those involved in the liberation of our country, not just to the ANC.

[5] As regards the unauthorised use of the mark, which has since 23 September 2023 been assigned to the ANC, the MKP contends that its use of the name and mark is lawful and sanctioned by the Independent Electoral Commission ('the IEC'). The thread which runs throughout the arguments raised by the MKP is that this court is the incorrect forum for this dispute to be determined. That apart, co-counsel for the MKP submitted that what is essentially 'dressed-up' as a trade mark infringement, is a battle between two opposing political parties.

[6] A reproduction of the registered mark no 2014/22089 appears below (left), alongside the mark currently being used by the MKP (right).

[7] I have briefly summarised the essential areas of disputes, as identified by the parties, which require the determination of this court. It is perhaps appropriate to indicate at the outset what, in my view, this matter is *not* about. Much debate took place between the respective counsel as to which of the two parties could rightfully claim the name uMkhonto weSizwe, and for that matter, the mark depicting the warrior with a shield and raised spear, as its own. Alternatively, it was contended that the name and mark belonged not to the ANC but instead to the nation, in the sense of these items being *res nullius*.[2] The ANC makes the point that if this was indeed the position, the MKP ought to have applied to expunge the existing trade mark.

[2] This is perhaps an incorrect characterisation of the concept, as something is *res nullius* when the owner (with full knowledge of his or her rights) abandons his or her property with the intention that it should become a *res nullius*. Abandonment can be either express or implied, which is gathered from the surrounding circumstances. No finding is made on abandonment despite the mark being registered by a third party in 2014, and which proprietary interest was only 'reinstated' in September 2023.

[8] Both parties relied on a wealth of historical literature, video footage, websites, and an assortment of posters, and pamphlets spanning almost 60 years, covering the existence of what was referred to as the 'military wing of the ANC', or in other quarters as the 'People's Army'. There is a dispute on the papers whether uMkhonto weSizwe was a unit of the ANC from inception, or whether it was born from the wider 'Congress movement' of the 1960s.[3]

[9] It is trite that motion proceedings are concerned with the resolution of legal disputes based on facts which are common cause.[4] This court is not the forum to settle a dispute where there are competing historical accounts of events which took place almost 60 years ago, as to who may rightfully lay claim to the name uMkhonto weSizwe, excluding for the moment the debate on the proprietorship of the registered trade name. That is an exercise best left to scholars, historians and politicians. Courts should confine themselves to determining questions of law. Accordingly, the decision I render in this matter will have no bearing on the outcome of the historical debate on the genesis of the uMkhonto weSizwe and its custodians.

[10] Before dealing with the specific allegations levelled against the MKP and the assertion that it intends to trade off the history of the ANC as a liberation movement

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[3] According to the ANC and on the basis of the ANC's statement to the Truth and Reconciliation Commission in August 1996, former President Mandela in June 1961, in the wake of the Sharpville Massacre, is reported to have said that the event marked the 'closing of a chapter on this question of a non-violent policy'. The ANC, with reference to the aforementioned statement to the Truth and Reconciliation Commission, states that in December 1961, after consultations between the ANC and the SACP, President Nelson Mandela and Mr Joe Slovo were tasked with the establishment of Umkhonto we Sizwe. According to the O'Malley Archives, described as an extensive collection of interviews conducted between 1985 and 2005, with many key personalities who influenced Africa's political history, the first explicit link between the ANC and Umkhonto we Sizwe was made at an agency conference held in Lobatse, then Bechuanaland, where it was referred to as 'the military wing of the struggle'. The MKP, on the other hand, contends that the ANC has never enjoyed exclusive ownership or proprietorship of Umkhonto we Sizwe, relying on President Mandela's description of it being formed by 'the Congresses', being a reference to the ANC, the Coloured People's Congress, the Congress of Democrats, and the South African Indian Congress. The MKP relies on the following books: T Simpson *Umkhonto we Sizwe: The ANC's Armed Struggle* (2016), and F Meli *A History of the ANC: South Africa Belongs to Us* (1988) for this contrary view as to the genesis of Umkhonto we Sizwe.

[4] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA); 2009 (4) BCLR 393 (SCA) para 26.

and of its 'fight against white racist domination and imperialist exploitation',[5] it was contended by the ANC that one must, of necessity, compare their history to that of the MKP. The answer, it was submitted, is that the MKP has no history to fall back on and has therefore devised a stratagem to falsely capitalise on the history of the ANC. Further, to overcome this political void as a party with no track record or history, it has sought to misappropriate the history of the ANC for itself through the use of its well-known logo (the registered mark) and through the name of uMkhonto weSizwe. The ANC regards this as a carefully orchestrated attempt to win over voters who would, but for the deception caused through the use of the logo and name of the MKP, vote for the ANC. The MKP, however, points out that there is no evidence of such deception or likelihood of voters being deceived. It must be borne in mind that an applicant for final relief needs to show an 'act of interference' meaning an 'injury actually committed or reasonably apprehended'.[6]

[11] In advancing the argument that the MKP is seeking to ride on the coattails of the history of the ANC as a liberation movement, when it (the MKP) in contrast, has none to offer, reliance was placed on *National Brands Ltd v Cape Cookies CC and another*[7] where the following was said:

'[40] National Brands submitted that Cape Cookies would be likely to take unfair advantage of "the power of attraction, the prestige and repute" of the SALTICRAX mark. It submitted with some force that this had been built up over a considerable period and with a considerable investment of money. Cape Cookies chose to go into direct competition with it. The use of the similar mark will enable Cape Cookies to "ride on the coat tails" of National Brands as regards the well-established SALTICRAX mark without itself having to expend time and money to

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[5] Reliance is placed on the words of the former President of the ANC, Oliver Tambo, at a speech on 15 December 1971 on the 10th anniversary of the formation of Umkhonto we Sizwe where he said 'The African National Congress of South Africa has remained faithful to the cause of Freedom. It leads the national struggle for the emancipation of all oppressed and exploited black people. It stands for a new order in South Africa where racism shall be a thing of the past and human dignity and equality shall prevail in the life of our country. But before that new order shall be born, many lives will be lost. We are ready to meet the challenge. The ANC and its military wing Umkhonto we Sizwe and all revolutionary opponents of the political system represent the unbreakable will and determination of the African people of South Africa to spare no effort or life in order to attain our goal – the total liberation of South Africa from white racist domination and imperialist exploitation. To achieve such a noble goal; to fight for the realisation of such a lofty ideal no sacrifice could be too great.' (https://www.anc1912.org.za/statement-by-oliver-tambo-to-the-people-of-south-africa-on-the-tenth-anniversary-of-umkhonto-we-sizwe-16-december-1971/, accessed 16 April 2024.)

[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227. More generally, see C B Prest *The Law and Practice of Interdicts* (1996) at 42 et seq.

[7] *National Brands Ltd v Cape Cookies CC and another* [2023] ZASCA 93; 2024 (2) SA 296 (SCA); [2023] 3 All SA 363 (SCA).

achieve an equally competitive position. It was submitted that this was why Cape Cookies chose a mark similar to SALTICRAX as opposed to a different mark under which it could have traded without that advantage. Cape Cookies was challenged to produce its instructions to the advertising agency so as to negate this inference but refused to do so on the grounds that they were confidential.

[41] In my view, National Brands went beyond simply parroting the provisions of the section. The trademark SALTICRAX was registered in 1951. It was the only mark containing "crax" until 2009, when Cape Cookies registered the disputed VITACRAX mark. National Brands spent more than R11 million in advertising SALTICRAX over a 15-year period and achieved strong market penetration over many years. The products marketed under the SNACKCRAX mark are virtually the same as SALTICRAX biscuits. The significance of this is that Cape Cookies does not have to embark upon any marketing campaign of its own (and there is no evidence that it has thus far done so) to achieve market penetration, despite the fact that it will be trading in the same stores with a similar product and in the same consumer niche market.'

Counsel for the ANC submitted that similarly to *Cape Cookies*, if the MKP were allowed to retain its present name and utilise the logo of the warrior brandishing the spear, the MKP 'would reasonably probably, or be likely to, take unfair advantage of the distinctive character or repute'[8] of the ANC and its reputation or brand.

[12] An equally important facet of the litigation before this court is the litigation initiated by the ANC in the Electoral Court on 10 January 2024, in which it sought to set aside the decision of the IEC and its Chief Electoral Officer ('CEO') to register the MKP as a political party on 7 September 2023.[9] The background to that litigation has important undertones for the order I make in this matter. The ANC in those proceedings asserted that the 'registration of a political party lies at the very foundation of our constitutional democracy'. In contrast, in the proceedings before me, the relief that the ANC seeks will effectively negate those same constitutionally protected rights under section 19 of the Constitution[10] of the MKP. It is cold comfort in reply to contend

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[8] Ibid para 42.
[9] See *African National Congress v Electoral Commission of South Africa and others* [2024] ZAEC 3.
[10] Section 19 of the Constitution provides as follows: '19. Political rights.—(1) Every citizen is free to make political choices, which includes the right—
(*a*) to form a political party;
(*b*) to participate in the activities of, or recruit members for, a political party; and
(*c*) to campaign for a political party or cause.

that the options available to the MKP, in the event of an order being granted against it, would be to apply (given the closeness to the date of the elections on 29 May 2024, less than a month and a half away) in terms of section 16A of the Electoral Commission Act 51 of 1996 ('the Electoral Commission Act') to change its name, abbreviated name, or distinguishing mark or symbol. This is a theoretical possibility, but a near practical impossibility.

Background

[13] The relevant chronology is the following:

(a) On 1 June 2023, the MKP applied to register as a political party with the IEC.

(b) On 9 June 2023 a notice as prescribed in terms of section 16(1)*(a)* of the Electoral Commission Act is published in the *Government Gazette*.[11] It bears noting that the notice states that uMkhonto weSizwe applied for registration as a political party on 1 June 2023; that it would be known through the abbreviation as 'MK', and that it would use two distinguishing symbols which bear reference to an African warrior with a spear in both depictions. On 30 June 2023, a further notice is published in the *Government Gazette* in which the MKP elected to use only one of the depictions previously gazetted as the symbol by which its party would be distinguished from others.[12]

(c) The MKP's application was initially rejected by the Deputy CEO ('DCEO') of the IEC. It was permitted to supplement its application, as opposed to being asked to withdraw it.

(d) Section 15(4B) of the Electoral Commission Act provides for any person to object to an application within 14 days of the date of publication. No objections were received.

(e) On 7 September 2023, the General Manager of Electoral Matters at the IEC recommended to the DCEO that uMkhonto weSizwe be registered as a political party.

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(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right—
(*a*) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(*b*) to stand for public office and, if elected, to hold office.'

[11] *Government Gazette* 48770, 9 June 2023.

[12] *Government Gazette* 48858, 30 June 2023.

Of particular importance in the context of this application, is the memorandum recommending registration which reads as follows:

'RE : Application for registration as a Political Party: uMkhonto Wesizwe (MK)

Attached please find the application for registration of the political party mentioned above, with supporting documentation. Scrutiny of the application revealed that:

- The application was fully completed and submitted in the prescribed format;
- The party's name, abbreviation and symbols are unique to the extent where it should not be confused with any other party;
- Neither the party's name; abbreviation, symbol; deed of foundation or constitution contain anything that should incite violence or hatred or would cause serious offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, relief, culture or language;
- The application complies with all requirements of the Electoral Commission Act, 1996 (Act 51 of 1996) and the Regulations for the Registration of Political Parties;
- The 14 days period has already elapsed.

It is accordingly recommended that the uMkhonto Wesizwe (MK) be registered.'

(f) Following the successful registration of the MKP as a political party in terms of section 15 of the Electoral Commission Act, the ANC lodged an appeal against the decision of the IEC on 20 September 2023, primarily on the grounds that the MKP had infringed its trade mark (the warrior with the spear) and its name (uMkhonto weSizwe) being a reference to the 'People's Army, an inextricable component of the ANC's liberation movement'. The appeal was supported by Legacy Projects, a non-profit organisation, which was also at the time the registered proprietor of the mark of the African warrior with a shield and spear, registered under no 2014/22089 in Class 41, under the category of services for 'education, entertainment, cultural activities, including legacy projects'. Further support for the appeal came from the uMkhonto we Sizwe Liberation War Veterans, an entity supposedly[13] representing military veterans from the liberation movement.

(g) The appeal against the decision of the DCEO was dismissed by the IEC on 24 November 2023, after a consideration of the 'facts, the Commissions Act together with

[13] I say this because of the existence of the more well-known uMkhonto we Sizwe Military Veterans' Association (MKMVA) and the lesser known MK National Council, both of which were disbanded in 2021 according to an article in *The Mail & Guardian* on 8 June 2021 titled 'ANC disbands the MK Military Veterans Association'.

the Regulations for Political Parties'. As the ANC lodged its appeal outside of the 14-day period in terms of section 15(4) of the Electoral Commission Act and is not 'an applicant' who was aggrieved by the decision of the Chief Electoral Office, the appeal was dismissed for want of compliance with section 15(4B). No appeal or review was lodged against this decision to the Electoral Court.

[14] Against this backdrop, the ANC then launched a challenge against the registration of the MKP in the Electoral Court on 10 January 2024 and in this court on the same date. Both applications were launched as urgent applications.

Urgency

[15] It is proper to first deal with the issue of urgency, as this was one of the preliminary challenges on which the MKP seeks to have the application dismissed. The ANC, in explaining the reasons for urgently approaching this court to protect its reputation in the name uMkhonto we Sizwe and its logo, attributes this to continued false utterances made by former President Zuma and a Mr Khumalo, a leader of the MKP, in which alleged claims were made of a closeness or a link between the ANC and the MKP. The ANC refers to meetings addressed by Mr Zuma on 26 and 30 December 2023 where similar claims were made.

[16] It is apparent from the MKP's answering affidavit that on 16 December 2023 Mr Zuma pledged his support and his intention to vote for the MKP. The MKP contends that it was this event that formed the catalyst for the application in this court and the Electoral Court. The submission is that no action had been taken by the ANC from the time when the MKP first gave notice of its intention to register as a political party in June 2023. These intentions were publicised in the *Government Gazette*, the official manner of publication prescribed in the Electoral Commission Act, and the manner in which official acts are brought to the attention of the general public.

[17] Instead of the ANC scouring the *Government Gazette* for matters of national interest, the issue of the registration of new political parties, their names, and their distinguishing symbols went unnoticed. No objection was lodged, as the ANC would have been permitted to, in terms of section 15(4B) of the Electoral Commission Act. The founding affidavit of the ANC is conspicuously thin on the issue of urgency, and,

in particular, what steps it took when it first learnt of the formal existence of the MKP. In fact, it does not traverse this ground at all. One has to gather this information from its founding papers in the Electoral Court application. The authorities are explicit that Uniform rule 6(12)*(b)* requires an applicant to specifically make out a case for urgency in the founding affidavit. It is not for the court to search for facts elsewhere. Notwithstanding this, the MKP has placed the full set of the papers from the Electoral Court before this court and made reference to them at the hearing. No objection was taken, nor do I think that any could have been sustained.

[18] According to the ANC, it was 'soon after 4 August 2023' when it learnt that the IEC had rejected the initial application of the MKP for registration and that the latter was required to submit a new application. Despite this information coming to its attention, and having knowledge that at the very least, a rival political party was using the name of uMkhonto weSizwe, the ANC took no immediate action to protect its reputation and goodwill, one of the pillars on which this present application is predicated. No attempt was made to contact the IEC to enquire into the matter or to request any of the prescribed forms that would have been lodged with the IEC pursuant to section 15 of the Electoral Commission Act, in which the proposed name, abbreviation, and distinguishing symbol to be used, would be reflected. Even by 4 August 2023, through the exercise of a moderate level of diligence, the ANC could have ascertained the content of the *Government Gazette* of 9 June 2023 in which notice was first publicly given of the distinguishing mark of the MKP and its name. This did not occur. By the ANC's own account in its papers before the Electoral Court, on 11 September 2023 it came across a letter from the IEC confirming the registration of the MKP as a registered political party. It gathered this information via social media. It is under these circumstances that the ANC states it came to know of the MKP's registration.

[19] On 20 September 2023, the ANC lodged an appeal with the IEC against the decision of the DCEO to register the MKP. The contents of the appeal are revealing and leave no doubt that all of the essential ingredients existed at that time (assuming that it did not on 4 August 2023 or earlier) for an application for injunctive relief to be brought against the MKP. I quote from the submissions made by Mr FA Mbalula, the Secretary-General of the ANC (who is also the deponent to the founding affidavit in

the present application, as well as in the matter before the Electoral Court) for the sake of completeness:

‘(1) uMkhonto weSizwe (MK) - the People’s Army - was launched on 16 December 1961. The Manifesto of uMkhonto weSizwe states unambiguously that: “Umkhonto we Sizwe fully supports the national liberation movement, and our members jointly and individually, place themselves under the overall political guidance of that movement”. A copy of the Manifesto, as it appears on the ANC website, is attached as Annexure C.

In the popular discourse uMkhonto weSizwe was, and is, known as the “armed wing of the African National Congress (ANC)”. Accordingly, it is a matter of undisputed historical record that there exists an inextricable link between uMkhonto weSizwe and the ANC. Therefore, any political party registered under this name, and the symbol that is inextricably linked to it, will by necessary implication “deceive or confuse voters” as contemplated in section 16(1)(b) of the Act.

(2) The distinguishing mark or symbol of uMkhonto weSizwe (Party), as it appears in Annexure B, has been registered in terms of section 29(2) of the Trade Marks Act, 1993 with the effect from 20 August 2014 for a period of ten (10) years by the MK Legacy Project, a non-profit organisation devoted to the preservation of the heritage of the liberation movement, including uMkhonto weSizwe - the People’s Army. The Certificate of Registration is attached as Annexure D.

As such, the registration of uMkhonto weSizwe as a political party, using the symbol and the name that is inextricably associated with, would be in violation of these intellectual property rights.

We attach hereto as Annexure E a letter from the MK Legacy Project expressing the objection to this flagrant misuse of these intellectual property rights. Furthermore, they point out that the MK Legacy Project is in the process of ceding this trade mark to the ANC.

(3) uMkhonto weSizwe was formally disbanded as the People’s Army on 16 December 1993. Veterans of uMkhonto weSizwe have subsequently formed associations and organisations to preserve the legacy of MK and to represent the interests MK veterans of the liberation war.

These include the uMkhonto weSizwe Military Veterans Association (MKMVA), the MK Council (MKC), and most recently, following the disbanding and merger of the former two structures, the uMkhonto weSizwe Liberation War Veterans (MKLWV). All of these organisations and associations have been closely associated with, and supportive of, the ANC.

> It is therefore a source of profound concern and distress to many MK veterans that the name and symbols of the People's Army in which they served are being misused for political expediency. We attach hereto as Annexure F a letter from the MKLWV expressing their objection to the egregious misuse of the name and their support for this application.

Accordingly, for the reasons set out above, the ANC appeals to the Electoral Commission in terms of section 16(2) and (3) of the Electoral Commission Act to set aside the decision of the Chief Electoral Officer to register uMkhonto weSizwe (Party) as a political party.'

[20] As set out earlier, the ANC's appeal to the IEC was dismissed on 24 November 2023. If the ANC was aggrieved by the decision, it had a remedy to resort to the Electoral Court to review 'any decision of the Commission relating to an electoral matter', and it could have done so on an urgent basis and the matter could have been disposed of expeditiously.[14] The ANC does not set out in its founding affidavit what steps it took between the dismissal of the appeal on 24 November 2023 to 10 January 2024, when it launched this application.

[21] When considering its explanation in the Electoral Court for the identical time span, in requesting condonation, it stated that after receiving the IEC's decision on 24 November 2023, it discussed the matter internally within its decision-making structures and decided to pursue legal proceedings. It seems to me, however, and I accept that the point was not argued by either counsel, that there would have been no conceivable reason why Mr Mbalula, as the Secretary-General, could not have acted more swiftly and with greater promptitude after the decision on 24 November 2023, and why it was necessary for him to first discuss the matter internally with other decision-making structures.

[22] I say this because the delegation of authority relied on by him for bringing the present application was granted by the National Executive Committee ('the NEC') of the ANC almost a year earlier, on 28 January 2023. That being the case, there would have been no reason for him to discuss the matter with any of the structures before pursuing legal proceedings. The delegation expressly recognised that the NEC only meets periodically, and for that reason, it gave the Secretary-General the power to

[14] Section 20(1) of the Electoral Commission Act.

take ‘all steps necessary for the due fulfilment of the aims and objectives of the ANC’. It is reasonable to assume that one such step would have been to protect the reputation and brand of the ANC, particularly from rival political affiliations. The delegation plainly gave authority to Mr Mbalula to institute and defend legal proceedings.

[23] In light of the above, I am not persuaded that any delay attributed to waiting to discuss the matter with other decision-making structures is a sound and proper explanation for delay, especially when the ANC fails to state the exact dates when it met with its decision-making structures, or why it delayed in timeously instructing lawyers to act on its behalf.

[24] In the founding affidavit, Mr Mbalula recognises the urgent need to protect the unauthorised use of the ANC’s intellectual property and that in light of the looming elections, time is of the essence. He further asserts that the application is urgent to halt deliberate acts on the part of the MKP which are causing voter confusion, and which will erode free and fair elections in May 2024. The delay in launching this application runs counter to his assertions.

[25] These assertions directly implicate rights under section 19 of the Constitution. They are, however, contrary to the argument by the ANC’s counsel that this matter is only concerned with the protection of the ANC’s intellectual property rights. That is too simplistic a view of the matter, and perhaps the reason why the MKP contends that the application is one which is disguised as falling under the ambit of trade mark and intellectual property, when in truth it falls squarely within the heartland of political rights and election law. I will consider this aspect in more detail when dealing with the jurisdictional power of this court to hear the application.

[26] Apart from the MKP having to fend off a challenge on similar issues in the Electoral Court, it was obliged on short notice to prepare a substantive response to the application, in which reference was made to several online publications and articles by historians. Faced with the time frames set by the ANC, the MKP was obliged to comply, lest it run the risk of an order being granted against it by default.

[27] To the extent that this application falls to be considered under the rubric of trade mark infringement, RW Alberts, writing in *De Jure*[15] notes that 'a trade mark proprietor should take steps to enjoin infringing use as soon as possible after a third party commences [using the registered mark]'. The contention of the MKP is that the ANC was aware of the application for its registration in June 2023 and did nothing until it launched this application almost seven months later. Can one assume, given the lack of speed on the part of the ANC, that there was no reputational risk to its brand for all this time until the utterances and announcement by Mr Zuma in the latter half of December 2023? If so, this undermines the ANC contentions, first as to urgency, and second as to the risk and the absence of any alternative to the injunctive relief it seeks. As Harms DP noted in *Turbek Trading CC v A & D Spitz Ltd,*[16] a delay in bringing injunctive proceedings may result in the court exercising its discretion to refuse an interim or even a final interdict. Assuming that the ANC only came to acquire knowledge of this fact on 4 August 2023 (or even on 20 September 2023 when it appealed against the decision of the IEC), the launching of an application almost four to five months later, without any specific trigger evident from the founding papers, the explanation proffered by the MKP is, in the circumstances, entirely plausible. This relates to the decision and announcement by Mr Zuma on 16 December 2023 that he intended to vote for the MKP as opposed to the ANC. In that event, the explanation

[15] R W Alberts 'The timeous enforcement of trade mark rights' (2015) 48 *De Jure* 172 at 172.

[16] In *Turbek Trading CC v A & D Spitz Ltd and another* [2009] ZASCA 158; [2010] 2 All SA 284 (SCA) para 15 the following is stated:
'The factual basis of the defence was, briefly put, that Spitz had known since 1 October 2001 of Turbek's trade mark applications and its use of the mark "KG" on footwear but only took steps to enforce its alleged common-law rights when it instituted the present proceedings during July 2007. This delay, according to the submission, amounted to acquiescence which disentitled Spitz from attacking the registrations or obtaining an interdict. Counsel relied on a statement by Patel J that our law recognises a defence of acquiescence distinct from estoppel and that the doctrine can be applied to halt cases where necessary to attain just and equitable results (*Botha v White* 2004 (3) SA 184 (T) at paragraphs 24 and 31). That Patel J had failed to take account of binding authority that contradicted his bald statement and that he had misread authority on which he sought to rely was pointed out by Thring J in *New Media Publishing (Pty) Ltd v Eating Out Webb Services CC* 2005 (5) SA 388 (C) at 406I-407J. During argument it became clear that counsel was unable to contend more than that delay may in a suitable case be evidence of an intention to waive, evidence of a misrepresentation that might found estoppel, or evidence of consent for purposes of the *volenti non fit injuria* principle. In other words, counsel was unable to substantiate his submission that acquiescence is a substantive defence in our law. Delay, in the context of trade mark law, may provide evidence of a loss of goodwill or distinctiveness but that was not Turbek's case on the papers. All this does not mean that delay may not have procedural consequences; for instance, it may be a factor to take into account in exercising a court's discretion to refuse to issue a declaration of rights or an interim interdict or, maybe, even a final interdict, leaving the claimant to pursue other remedies such as damages.'

for urgency is entirely self-created, and the application should be dismissed on this basis alone.

[28] If the matter falls within the realm of the protection of a political party's right to free and fair elections in terms of section 19 of the Constitution, as opposed to the narrow window of trade mark infringement, then the obligation on the party seeking to protect its rights, is to act without delay. This is apparent from the decision of the Constitutional Court in *AParty and another v Minister of Home Affairs and another; Moloko and others v Minister of Home Affairs and another,*[17] where it was pointed out that 'it is not desirable that issues of such considerable importance and complexity', such as those concerning the right to free political activity, to be 'determined in haste'. Ngcobo J put it thus:

'[65] . . . Approaching courts at the eleventh hour puts extreme pressure on all involved, including respondents and the courts, as these cases amply demonstrate. It results in courts having to deal with difficult issues of considerable importance under compressed time limits. . . [66] Matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections. If they are brought too close to the elections, this might result in the postponement of the elections. This is not desirable in a democratic society. There may well be circumstances where bringing a challenge earlier is not possible, having regard to the nature of the dispute. These circumstances would be very rare. Where the challenge could and should have been brought earlier, a litigant must put out facts, covering the entire period of delay, explaining why the challenge could not have been brought earlier. Failure to do so may well result in the refusal of the relief.'

[29] The explanation tendered by the ANC for launching the urgent application falters at every level when held up against the standard set out by the Constitutional Court in *AParty*. On the facts before me, I can reach no other conclusion than that the urgency was self-created, alternatively that, until mid-December 2023, the ANC did not perceive the MKP as an 'infringer', even though it appropriated a name synonymous with the history of the ANC and adopted a logo identical or strikingly similar to that of uMkhonto weSizwe, nor did it seek to contest the decision of the IEC

[17] *AParty and another v Minister of Home Affairs and another; Moloko and others v Minister of Home Affairs and another* [2009] ZACC 4; 2009 (3) SA 649 (CC) para 57 ('*AParty*').

by way of an appeal or review. It took no steps to safeguard its reputation and brand,[18] when it was abundantly clear that the MKP had registered as a political party, intending to contest the elections at national, provincial, and local levels. It initially elected to pursue the matter through the mechanisms contained in the Electoral Commission Act, only to seemingly abandon that forum after the dismissal of its appeal on 24 November 2023.

[30] Non-compliance with the rules and with the time periods are not simply there for the asking. This is particularly so, in a case such as this, where the outcome of the matter has widespread implications affecting potentially scores of people, whose political freedoms, protected under section 19 of the Constitution, may be undermined, having regard to the extent of the relief sought by the ANC. For these reasons, in the exercise of my discretion, I would not entertain the application due to the lack of urgency.

Jurisdiction

[31] The MKP also challenges the jurisdiction of this court to entertain the application, contending that this matter rightfully belongs before the Electoral Court. The ANC, however, contends that the matter has been brought in the correct forum, as section 34(3) of the Trade Marks Act is clear with regard to jurisdiction that only a

[18] The infringement of a trade mark does imply some urgency. In *Car Find (Pty) Ltd v Car Trader (Pty) Ltd and others* [2016] ZAGPJHC 28 para 2 the following was held:
'Before dealing with the issue I pause to consider the urgency of the application. The applicant launched the application by way of urgency. The respondents contend that such urgency as there may exist is self-created. It is true that, as pointed out by counsel for the respondents, the applicant was aware of the respondents' use of its trade mark some three months prior to the launching of the application and further that only 2 days were allowed for the filing of an answering affidavit. On the other hand, the infringement of a trade mark is at stake, which by its nature implies some urgency, as "The life of a trade mark depends on the promptitude with which it is vindicated…" (Kerr on *Injunctions* 363, quoted in *Tullen Industries Ltd v A de Souza Costa (Pty) Ltd* 1976 (4) SA 220 (W) 220B).'

high court can grant relief for trade mark infringement.[19] A court is defined in section 2 of the Trade Marks Act as follows:

'means the Transvaal Provincial Division of the Supreme Court of South Africa, but in relation to any claim or counter-claim for removal, amendment or variation of, or other relief affecting any entry in, the register arising from or forming part of proceedings instituted in any other division of the said Supreme Court having jurisdiction in relation to the proceedings, includes that division in respect of such claim or counter-claim.'

In *PPI Makelaars and another v Professional Provident Society of South Africa*,[20] the SCA confirmed what was held in *Professional Provident Society of South Africa v P.P.I. Makelaars and another*[21] that:

'Any division or local division of the Supreme Court of South Africa has jurisdiction to hear an infringement action subject, of course, to one or more of the traditional grounds of jurisdiction being present.'

[32] The Electoral Court and the Electoral Commission are both created in terms of the Electoral Commission Act. Neither the Electoral Court nor the Electoral Commission is listed as a high court division in section 6, read with section 53*(b),* of the Superior Courts Act 10 of 2013. However, in terms of section 18 of the Electoral Commission Act, the Electoral Court has 'the status of the Supreme Court'. Although it has the status of the Supreme Court, its jurisdiction extends only to electoral matters. In *Kham*,[22] the Constitutional Court held as follows:

'Is there anything in the context that would warrant a more restrictive interpretation of the section and hence of the Electoral Court's jurisdiction? I think not. The clear purpose was to

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[19] Section 34(3) reads as follows:
'(3) Where a trade mark registered in terms of this Act has been infringed, any High Court having jurisdiction may grant the proprietor the following relief, namely—
(*a*) an interdict;
(*b*) an order for removal of the infringing mark from all material and, where the infringing mark is inseparable or incapable of being removed from the material, an order that all such material be delivered up to the proprietor;
(*c*) damages, including those arising from acts performed after advertisement of the acceptance of an application for registration which, if performed after registration, would amount to infringement of the rights acquired by registration;
(*d*) in lieu of damages, at the option of the proprietor, a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned, including any use which took place after advertisement of the acceptance of an application for registration and which, if taking place after registration, would amount to infringement of the rights acquired by registration.' (My underlining.)

[20] *PPI Makelaars and another v Professional Provident Society of South Africa* 1998 (1) SA 595 (SCA).

[21] *Professional Provident Society of South Africa v P.P.I. Makelaars and another* [1996] 2 All SA 206 (W) at 210.

[22] *Kham and others v Electoral Commission of South Africa and another* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) para 40 ('*Kham*').

establish a court that would be able to deal with all electoral matters. It was constituted with the same status as the High Court and with a judge of the Supreme Court of Appeal as its chairperson. It is to resolve electoral disputes as a matter of urgency. There is not the slightest indication that the intention was to limit the range of disputes that would fall within the ambit of the Electoral Court's jurisdiction, so that some electoral issues would fall within its jurisdiction and others not. Instead, the breadth of language used suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters. And our jurisprudence holds that when a specialist court is created the apparent purpose of creating a single forum for resolving disputes of a particular type is not to be stultified by a resort to undue literalism and too careful a parsing of statutory language.' (My underlining for emphasis, footnotes omitted.)

[33] In terms of section 96 of the Electoral Act 73 of 1998, '[t]he Electoral Court has final jurisdiction in respect of *all* electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review'. This section only grants jurisdiction in respect of electoral disputes and matters arising out of the Electoral Code of Conduct (which is contained in Schedule 2 to the Electoral Act). Paragraph 9(1)*(c)* of the Code prohibits the plagiarising of 'symbols, colours or acronyms of other registered parties', which is essentially the complaint of the ANC in this court.

[34] As I understood the case of the ANC, in terms of the averments set out in its founding affidavit, it seeks to prevent voter confusion following the registration of MKP as a registered political party in terms of section 15 of the Electoral Commission Act. Mr Mbalula, in his founding affidavit, says the following:

'21 There is overwhelming public interest in ensuring that when voters approach the voting booth, they are not confused as to the party which they are placing their trust in. It is a matter of clear public interest that any voter confusion, caused by the unauthorised use of the ANC's Intellectual property, is clarified before the elections take place. It is therefore to the benefit of all parties that the matter be clarified before the general elections as the next general elections will only be held in 5 years.

22 Given that we are in an electoral environment, time is of the essence. Each day between now and election day is important for any party to be able to campaign effectively. Deliberate acts to cause voter confusion erode free and fair elections…..'

[35] *Gcaba*[23] affirms that questions of jurisdiction are to be determined on the basis of the issues identified in the pleadings and, in application proceedings, affidavits represent both the pleadings and the evidence.[24] The Constitutional Court said the following:[25]

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case . . . In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.' (Footnote omitted.)

See also *Makhanya v University of Zululand*[26] where the jurisdiction of 'specialist courts' was considered.

[36] Applying the interpretive exercise in the preceding paragraphs to the present case, the ANC's description of the purpose of their application and the disputes that have arisen leaves no uncertainty, in my view, that it pertains to elections and political

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[23] *Gcaba v Minister for Safety and Security and others* [2009] ZACC 26; 2010 (1) SA 238 (CC) para 75 ('*Gcaba*').

[24] See also *Theron and another NNO v Loubser NO and others* [2013] ZASCA 195; 2014 (3) SA 323 (SCA) para 26; *Transnet Ltd v Rubenstein* [2005] ZASCA 60; 2006 (1) SA 591 (SCA) para 28; and *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.

[25] *Gcaba* para 75.

[26] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) para 25 provides as follows:

'But the state might also create special courts to resolve disputes of a particular kind. Generally those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by *(a)* conferring power on the special court and simultaneously *(b)* excluding the ordinary power of the High Court in such cases (it does that when "exclusive jurisdiction" is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the High Court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the High Courts). In the latter case the claim might be brought before either court.'

See also *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; (2019) 40 ILJ 2473 (SCA) para 7 where the following was stated:

'When a court's jurisdiction is challenged, the court should base its conclusion on the applicant's pleadings, as they contain the legal basis of the claim under which the applicant had chosen to invoke the court's competence.'

rights. In terms of section 20(1)*(a)* of the Electoral Commission Act, the Electoral Court may review '*any* decision of the Commission relating to an electoral matter'.

[37] Does the infringement of the ANC's registered trade mark and the name uMkhonto weSizwe, read in the context of the letter of appeal lodged by Mr Mbalula on 20 September 2023 against the decision of the IEC, constitute a trade mark dispute or an 'electoral matter' as contemplated in section 20 of the Electoral Commission Act? Section 20(2)*(a)* empowers the Electoral Court to 'hear and determine an appeal against *any* decision of the Commission' where it 'relates to the interpretation of *any* law'.[27] The language of the section is, in my view, deliberately couched in the widest terms to avoid a duplicity of actions essentially concerning elections, giving rise to the possibility of conflicting decisions in different *fora* where urgency and certainty are overriding factors in the holding of elections, which is a cornerstone of our democracy. It prevents placing form over substance and puts an immediate brake on forum shopping.

[38] As stated earlier, the Constitutional Court in *Kham* has expressed its views that the Electoral Court must be seized with 'all electoral matters'. In interpreting the ambit of the jurisdiction of the Electoral Court, it would be useful to do so in a manner that promotes the rights in section 19 of the Constitution rather than doing so through the narrow prism of the Trade Marks Act. Section 1*(d)* of the Constitution commits the country to 'universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness'. These founding values occupy 'a special place' in our Constitution.[28] Our historical context and the battle for the franchise have yielded an

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[27] In *Kham* para 39 the following was stated:
'The point that strikes one immediately about s 20(1) is that the jurisdiction it confers on the Electoral Court is extremely broad. It is a power to review "any decision" by the IEC. Many years ago Innes CJ pointed out that-

> "any is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but *prima facie* it is unlimited."

The use of the word "any" to describe the decisions of the IEC that are subject to the review powers of the Electoral Court must be taken to mean each and every decision, unless there is something in the context that justifies a more restrictive meaning.'

[28] *New Nation Movement NPC and others v President of the Republic of South Africa and others* [2020] ZACC 11; 2020 (6) SA 257 (CC) para 73, read in the context of paras 70-72.

interpretational principle that 'legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement'.[29]

[39] In challenging the decision of the IEC to register the MKP, Mr Mbalula on behalf of the ANC in his letter dated 20 September 2023, made specific reference to the infringement of the registered trade mark held by Legacy Projects. He added that the 'registration of uMkhonto weSizwe as a political party, using the symbol and the name that is inextricably associated with, would be in violation of these intellectual property rights'.

[40] The grounds of appeal relied on in the letter of 20 September 2023 are identical to the basis on which the present application is brought in this court. In my view, having elected to challenge the registration of the MKP in terms of the mechanisms provided for in the Electoral Commission Act, and having lost such appeal on the basis that it failed to comply with section 15(4B) of that Act, it was not open to the ANC to change lanes and institute another application in a different forum, essentially seeking the same relief predicated on the same grounds advanced before the IEC. Having come unstuck, the ANC's remedy was to pursue a review of the IEC's decision to the Electoral Court. This remedy is specifically provided for in section 20 of the Electoral Commission Act. Instead, the ANC elected to abandon the remedy available to it in favour of an application before this court.

[41] The MKP considers this change to be indicative of forum shopping and the clearest indication that injunctive relief should be refused, as the ANC has not succeeded in demonstrating a clear right nor the absence of a suitable alternate remedy. Put differently, the decision of the IEC to authorise the use of the name and logo stipulated by the MKP, conferred on the MKP rights under section 19 of the Bill of Rights. Specifically, the CEO of the IEC has, in terms of section 16(1)*(b)* of the Electoral Commission Act, satisfied himself that the mark and name proposed by the

[29] Ibid para 107, citing Sachs J in *August and another v Electoral Commission and others* [1999] ZACC 3; 1999 (3) SA 1 (CC) para 17. See also *Ramakatsa and others v Magashule and others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) para 70 regarding the need for a generous and purposive interpretation to give rights-holders 'the full protection afforded by the guaranteed right'.

MKP will not 'deceive or confuse voters'.[30] That decision by a public functionary, acting in terms of a statutory power, remains valid and binding until set aside by a competent court. It is in this context that the ANC's assertion of a clear right entitling it to injunctive relief is placed in doubt.

[42] Moreover, there is merit in the objection to the jurisdiction of this court entertaining a dispute which originates out of the processes in terms of the Electoral Commission Act, which specifically mandates the Electoral Court to deal with all electoral matters, in the widest sense.[31] Even assuming that the high court had 'concurrent jurisdiction' to consider the trade mark dispute as fashioned by the ANC, once the ANC elected to appeal the decision of the IEC on 20 September 2023, the dye had been cast.

[43] The decision to dismiss the ANC's appeal on 24 November 2023, was a decision made by the IEC in the exercise of its powers under the Electoral Commission Act. Accordingly, to borrow from *Kham,*[32] the matter would have 'crystallised sufficiently for it to be pursued before the Electoral Court'. The ANC was duty bound

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[30] The IEC did not file an affidavit in opposition to the relief claimed or to explain its role in the matter. To that extent, the court is unaware of the factors considered by the DCEO in granting the MKP permission to use the mark applied for. One may infer that the process followed by the DCEO was not dissimilar to that of the registrar when applying section 10(14) of the Trade Marks Act. See 42 *Lawsa* 3 ed para 173:
'In *Cowbell AG v ICS Holdings Ltd*, the Supreme Court of Appeal described its test for purposes of section 17(1) of the Trade Marks Act of 1963 (1963 Act) as follows: "The decision involves a value judgment and "[t]he ultimate test is, after all, as I have already indicated, whether on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both are to be used together in a normal and fair manner, in the ordinary course of business". As the words "likely to deceive or cause confusion" occur in both section 10(12) and (14) the nature of the onus upon the applicant is in both cases the same, although under section 10(14) there is a further test to be applied, namely "are the respective goods or services the same or similar".' (Footnotes omitted.)

[31] See *Kham* para 41 where the Constitutional Court expounded on the wide reach available to the Electoral Court: 'In ordinary language, it is a power to reconsider and, if necessary, replace the decision of the IEC. It is not a narrow appeal power, bound to a record, where the court decides merely whether on that record the decision was right or wrong. Nor is it the even narrower review power, where the process through which the decision was taken is scrutinised, but the merits of the decision are not considered. Instead it is the widest possible type of review where the decision in question is subjected to reconsideration, if necessary on new or additional facts, and the body exercising review power is free to substitute its own decision for the decision under review.' It added at para 48 that where a decision is made by the IEC, either directly or through its principal administrative officer, it is subject to review by the Electoral Court under s 20(1)*(a)* of the Commission Act, and that in exercising its powers 'the Electoral Court was entitled to have regard to matters not known to the IEC at the time they made their decisions and to replace those decisions with its own'.

[32] *Kham* para 44.

to pursue its case only through the Electoral Court and no other forum, especially as the gravamen of its complaint fell within the heartland of guaranteed political rights, impacting on the rights and freedoms afforded to citizens to make political choices, to form a political party, to campaign, and to recruit members – all of which would fall within the ambit of 'electoral matter' as contemplated in section 20(1) of the Electoral Commission Act.

[45] The relief which the ANC seeks under the rubric of trade mark infringement, when considered in its context, falls par excellence into the sphere of 'electoral matter' and political rights through the wider prism of the Constitution. The ANC seeks ultimately that the MKP should change its name and logo, and relies on the Trade Marks Act as a vehicle for this relief. Its contention is that only the high court could grant such injunctive relief. The relief it seeks directly impacts on the political rights on the MKP and its members and potential voters. The political rights in section 19 are interlinked and give effect to our founding values in section 1*(d)*. They are also linked to other rights, such as the rights of association[33] and dignity,[34] and importantly, 'the right to vote, and the exercise of it, is a crucial working part of our democracy'.[35] As I have already stated, the contention by the ANC is based on a restrictive interpretation of section 34(3) of the Trade Marks Act and takes no account of the context in which enforcement is sought.

[46] For all of the reasons set out above, I agree with the MKP that the ANC's right of recourse was an appeal or review to the Electoral Court to challenge the dismissal of its appeal lodged on 20 September 2023. The ANC chose the wrong forum to assert it rights. This court has no jurisdiction.[36]

Locus standi

[33] Section 18 of the Constitution.
[34] Section 10 of the Constitution.
[35] *Richter v Minister of Home Affairs and others* [2009] ZACC 3; 2009 (3) SA 615 (CC) para 53.
[36] I am mindful of the caution expressed in *Commissioner, South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023 (4) SA 488 (SCA) para 26 of courts continuing to pronounce on a matter, including the issuing of orders, where they have no jurisdiction. For reasons set out later in this judgment, I proceed to determine the preliminary points raised, as well as the merits.

[47] The MKP takes issue with the *locus standi* of the ANC to institute these proceedings, in which it relies on an assignment contract entered into with Legacy Projects on 23 September 2023 in respect of the proprietorship in South Africa of the mark of an African warrior with a spear and shield. It is identical to the mark adopted by the People's Army and now, similar to the distinguishing mark of the MKP, as a political party. The MKP attacks the agreement on the grounds that is invalid, void for illegality and unenforceable upon various grounds, and that as at the time when this application was launched (10 January 2024), the assignment of proprietary interests had not yet been registered. It would appear from the averments in the replying affidavit that an application was made to the Registrar of Trade Marks, under cover of a letter dated 15 January 2024, with the Form TM6 accompanying the application.[37]

[48] It was contended that the ANC, for the ulterior political purpose of undoing the IEC's registration of the MKP, devised a scheme and entered into the assignment agreement to deprive the MKP of exercising its rights in terms of section 19 of the Constitution. The MKP relies on *Barkhuizen*[38] where it was remarked that courts can 'decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them'. However, as I understand the Constitutional Court in *Beadica,*[39] good faith and fairness were not elevated to a substantive basis to invalidate a contract. In any event, I am not persuaded that the assignment agreement is *contra bonos mores* or otherwise invalid and unenforceable. There is nothing before me on the papers that permits such a conclusion to be drawn. The timing of the assignment may raise eyebrows, but none of these concerns can be said to amount to a ground that deprives the ANC of its entitlement to act in furtherance of the agreement.[40]

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[37] As at the time of hearing this application, no confirmation of the registration of the assignment has been provided which confirms that the assignment has indeed been registered by the Companies and Intellectual Property Commission.

[38] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) para 30.

[39] *Beadica 231 CC and others v Trustees, Oregon Trust and Others* [2020] ZACC 13*;* 2020 (5) SA 247 (CC) para 57.

[40] The relevant time frame is that the assignment was signed on behalf of the ANC on 23 September 2023. The MKP had, on 7 September 2023, been registered as a political party with the IEC, including authority for the use of the party's name, abbreviation, and symbol. Even at the time of the ANC's appeal against this decision, on 20 September 2023, it was still not the registered proprietor of the 'disputed' mark.

[49] Objectively, when this application was launched, the ANC had not yet registered the assignment with the Registrar.[41] This, according to counsel for the ANC, is not an impediment, as according to the authors of *South African Law of Trade Marks,*[42] section 40(2) of the Trade Marks Act requires that the assignment be reduced to writing and that an application be made to the registrar within 12 months of the effective date. As I understand the section, and despite the ANC's reliance on the fact of registration as the authority for a registered proprietor to exercise exclusive rights in the use of a trade mark, the failure or omission to cause registration does not deprive the proprietor from taking steps to enforce the mark. The only consequence for a registration outside the 12-month period is a penalty imposed by the Registrar. It is therefore not correct to suggest, as counsel for the MKP does, that only registration confers title to institute infringement proceedings.

[50] The authorities hold that a proprietor must either have used a mark to the extent that it has acquired a reputation or he must have originated, acquired or adopted the trade mark, proposing to use it in the future.[43] Despite the ANC's version that the name uMkhonto weSizwe or MK remained synonymous with the organisation even after its disbandment in 1993, an entity named Legacy Projects applied for and was granted registration of the mark of the African warrior with the spear and shield. Some argument was advanced that the ANC, if it had goodwill in respect of the mark, had effectively ceased to retain such goodwill and reputation upon the registration thereof by Legacy Projects on 20 August 2014. Whatever contentions may be advanced by the ANC, effectively from 20 August 2014, Legacy Projects acquired the exclusive rights to the mark for a period of 10 years. Our courts have held that the term 'proprietor', as used in the context of the Trade Marks Act, does not imply a common

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[41] See C Visser 'The writing requirement for the assignment of copyright: Constitutive or probative?' (2005) 17 *SA Merc LJ* 360 at 363 where the following was stated:
'Section 39(7) of the Trade Marks Act states that "[n]o assignment of a registered trade mark or trade mark which is the subject of an application for registration shall be of any force or effect unless it is in writing and signed by or on behalf of the assignor". Although at first blush the wording of the relevant part of this provision echoes that of the relevant part of the wording of s 22(3) of the Copyright Act, the Copyright Act imposes a lesser sanction on non-compliance with the writing requirement than the Trade Marks Act- under the Copyright Act, such an assignment merely has "no effect", whereas, under the Trade Marks Act, it has no "force or effect".'
[42] G C Webster and N S Page *South African Law of Trade Marks* (November 2023 – SI 26) para 11.17.
[43] *Tie Rack plc v Tie Rack Stores (Pty) Ltd and another* 1989 (4) SA 427 (T) at 446G-I.

law right of ownership of property – one can only become the proprietor of the goodwill of a business in relation to the mark used.[44]

[51] Where the contract of assignment does present a problem, and where it becomes relevant to the issue of *locus standi*, is the *date* on which the ANC, at best, could have acquired a proprietary interest or title to claim exclusive use of the mark under the Trade Marks Act. The founding affidavit states that the ANC entered into an assignment agreement with Legacy Projects. The agreement was signed on 23 September 2023. In light of the authorities, prior to that date, the ANC would have had no grounds under the Trade Marks Act to enforce its title against an infringer. However, as an objective fact, on 7 September 2023, the IEC had already registered the MKP as a political party, and pursuant to sections 15 and 16 of the Electoral Commission Act had satisfied itself that the proposed name, abbreviated name, and distinguishing mark or symbol mentioned in the prescribed application form did not resemble that of any other registered party to the extent that they may deceive or confuse voters. This registration process and the decisions made by the CEO pursuant to sections 15 and 16 of the Electoral Commission Act give expression to the political rights protected in section 19 of the Constitution. The decision made by the CEO constitutes an administrative decision and, as acknowledged by the ANC, exists in fact and remains binding until set aside. In *Camps Bay Ratepayers' Association and another v Harrison and the Municipality of Cape Town,*[45] the Constitutional Court, in referring with approval to *Oudekraal Estates (Pty) Ltd v City of Cape Town*[46] said that:

'[A]dministrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent

[44] *Victoria's Secret Inc v Edgars Stores Ltd* 1994 (3) SA 739 (A); [1994] 4 All SA 307 (AD) at 744D-E it was held that the word 'proprietor' is not used in section 20(1) 'in relation to a common-law right of property. Nor does it import ownership of the "mark" as such'. It appears to be used in the sense of "one who has the exclusive right or title to the use . . . of a thing" (at 744F-G). In terms of section 20(1), 'one can claim to be the proprietor of a trade mark if one has appropriated a mark for use in relation to goods or services for the purpose stated, and so used it (at 744I-J. The word 'appropriate' in this context comprehends 'originate', 'acquire' and 'adopt' (at 744I-J).

[45] *Camps Bay Ratepayers' and Residents' Association and another v Harrison and another* [2010] ZACC 19; 2011 (4) SA 42 (CC) para 62.

[46] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 31. See also *MEC for Health, Eastern Cape, and another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2013] ZASCA 58; 2014 (3) SA 219 (SCA) para 20.

court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence.'

[52] The decision to register the MKP was challenged by the ANC, albeit on different grounds, and was dismissed by the Electoral Court.[47] The ANC, however, contends that this is of no relevance as there is no administrative decision that the MKP owns the intellectual property that resides with the ANC (at least from 23 September 2023), nor could the IEC's decision in terms of section 15(1) of the Electoral Commission Act translate into such a decision. In dismissing the challenge against the registration of the MKP, the Electoral Court has now confirmed the lawfulness of the IEC's decision. In my view, it matters not that the IEC did not adjudicate over the intellectual property claim of the ANC. The ANC, as stated earlier, pertinently raised these issues before the IEC in its letter of 20 September 2023, explicitly referring to them in the context of the protection of intellectual property rights and the Trade Marks Act. The appeal was dismissed. The ANC had the opportunity to invoke the expeditious mechanisms in the Electoral Commission Act to review or appeal against the decision. It elected not to. It is not open to the ANC to undo the section 15 authorisation (in its widest form, including authorisation to use the name and the mark applied for by the MKP) in this forum.

[53] The ANC is faced with a further problem arising from the deed of assignment with Legacy Projects. According to *South African Law of Trade Marks*[48]

'Although an assignment can have no force or effect until it is reduced to writing and signed our courts have recognised that a written assignment may be worded so as to have retrospective effect.'

No such wording appears from the assignment entered into between the ANC and Legacy Projects. Even if the assignment had contained such a provision, it cannot prejudice the rights of third parties:

'While such an assignment [of a trade mark] may be retrospective between the parties, it is submitted that, having regard to the clear wording of the section, <u>it cannot operate retrospectively so as to prejudice or affect the vested rights of third parties</u>.'[49] (My emphasis.)

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[47] *African National Congress v Electoral Commission of South Africa and Others* [2024] ZAEC 3.
[48] G C Webster and N S Page *South African Law of Trade Marks* (November 2023 – SI 26) para 11.16.
[49] Ibid.

[54] Accordingly, any proprietary interest that the ANC had in the warrior mark could only have been perfected by assignment on 23 September 2023. By that date, the MKP was registered as a political party and had acquired a vested interest in certain political rights (including the right to campaign under a particular name (uMkhonto weSizwe); to use an abbreviation (MK); and to use the mark of a warrior bearing a spear and shield). These rights, as I have alluded to earlier, were authorised by the IEC in pursuance of, and in giving effect to, the provisions in section 19 of the Constitution. They cannot merely be wished away or invoked to the prejudice of the MKP. If the ANC wished to challenge the granting of those rights, it could have done so by approaching the Electoral Court to review the decision of the IEC. In my view, the rights vesting in the MKP, remain in place. They have not been set aside by a competent court and this, in my view, constitutes a complete answer to the case of the ANC as it denudes it of its cause of action. On this ground alone, the application should be dismissed.

[56] The points in limine raised by the MKP have been upheld and are dispositive of the application. I have already dealt with the aspect of the delay in bringing this as an urgent application. Where an application is not urgent, the appropriate order is 'to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance'.[50] However, for reasons that are self-evident, having regard to the context of this matter, and despite my findings on the lack of urgency and that of jurisdiction, it is incumbent on me to deal with all of the preliminary issues and to pronounce on the merits. Ordinarily, as I have concluded that the court lacked jurisdiction, this would be the end of the application. In this case, if the matter were to proceed to an appeal court without me expressing a view on the merits, it would effectively require an appeal court (if the appeal were successful) to sit as a court of first instance on the merits.[51] Time would not permit the matter being remitted for a hearing on the merits. It is therefore necessary for this court to determine the *lis* between the parties in the event of the matter being taken on appeal. For similar reasons, even where a matter is considered moot, the legal importance of the matter,

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[50] *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA) para 9 (footnotes omitted).
[51] *Spilhaus Property Holdings (Pty) Ltd and others v Mobile Telephone Networks (Pty) Ltd and another* [2019] ZACC 16; 2019 (4) SA 406 (CC) para 44.

as well the future conduct of the parties may require a court to pronounce on the merits. There is no prejudice to either party as the merits were fully canvassed in argument. The overriding public interest in the matter is also accepted by both parties for the matter to be considered in its entirety.[52]

The merits - trade mark infringement

[55] Bearing in mind the disputed history as to the origins of the name uMkhonto weSizwe and the logo of the African warrior, I turn to consider the merits of the application based on a trade mark infringement allegedly perpetrated by the MKP. The basis for the relief sought to address the infringement is section 34(1) of the Trade Marks Act, which reads as follows:

'34. Infringement of registered trade mark.—(1) The rights acquired by registration of a trade mark shall be infringed by—

(a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

(b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;

(c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70 (2).'

Infringement under section 34(1)(a)

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[52] See *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 19, albeit that s 16(2)*(a)*(i) of the Superior Courts Act confers a discretion on a court of appeal to hear an appeal notwithstanding mootness as opposed to the high court which has no jurisdiction to entertain the merits of a matter once the subject matter of the litigation has ceased to exist before judgment. See *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZASCA 35 para 18; *Theron and another NNO v Loubser NO and others* [2013] ZASCA 195; 2014 (3) SA 323 (SCA).

[56] In order to succeed under section 34(1)*(a),* the ANC must show: (a) the use of a registered trade mark or of a confusing similar mark; (b) that it has been used in the course of trade; and (c) that the use is unauthorised. The Supreme Court of Appeal in *Verimark (Pty) Ltd v BMW AG*[53] described a trade mark as a 'badge of origin'.

[57] In *Bata Ltd v Face Fashions CC*[54] the Supreme Court of Appeal noted that

'The only question that has to be decided in respect of the alleged infringements under s 34(1)*(a)* is whether the appellant has established that a substantial number of persons will probably be deceived into believing or confused as to whether there is a material connection in the course of trade between the respondents' clothing and the appellant's trade mark (see *Plascon-Evans* at 640G-I).'

[58] The principles for determining whether an infringement has taken place were set out succinctly by Corbett JA in *Plascon-Evans.*[55] It was stated that not only should the marks be compared side by side, but consideration must be given to whether the average customer in the marketplace would probably be deceived or confused by their similarity. The court then held the following, which is often quoted as setting the standard for assessing whether an infringement has taken place:

'In an infringement action the *onus* is on the plaintiff to show the probability or likelihood of deception or confusion. It is not incumbent upon the plaintiff to show that every person interested or concerned (usually as customer) in the class of goods for which his trade mark has been registered would probably be deceived or confused. It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant's mark is used are the goods of the proprietor of the registered mark, ie the plaintiff, or that there is a material connection between the defendant's goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection. The determination of these questions involves essentially a comparison between the mark used by the defendant and the registered mark and, having regard to the similarities and differences

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[53] *Verimark (Pty) Ltd v BMW AGBMW AG; Verimark (Pty) Ltd v BMW AGBMW AG v Verimark (Pty) Ltd* [2007] ZASCA 53; 2007 (6) SA 263 (SCA) para 5.
[54] *Bata Ltd v Face Fashions CC and another* 2001 (1) SA 844 (SCA) para 8.
[55] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 641A-E ('*Plascon-Evans*').

in the two marks, an assessment of the impact which the defendant's mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution. The comparison must be made with reference to the sense, sound and appearance of the marks. The marks must be viewed as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side, but also separately. It must be borne in mind that the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this. 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. As it has been put, marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole. And finally consideration must be given to the manner in which the marks are likely to be employed as, for example, the use of name marks in conjunction with a generic description of the goods.'[56]

[59] Applying the above test to the facts of the matter, to succeed in a claim under section 34(1)*(a)* the ANC, as the 'registered proprietor' of the mark, must establish that the MKP has used the mark in relation to the same goods (or services) for which the proprietor's trade mark is registered, which is either identical to or so nearly resembles the proprietor's registered trade mark as to likely deceive or cause confusion. It is important to bear in mind that when comparing the registered mark to that of the MKP, the latter has a bold green background. Counsel for the ANC suggested that this makes no difference, as the registered mark is not restricted to any colour. I beg to differ as the marks reflected above are what the voter will be confronted with. The section requires of the ANC to show that the MKP have used a confusingly similar mark in relation to the identical goods, to those for which the proprietor has obtained registration.

[60] Apart from the distinctive green background, on observation, the registered mark of the ANC and that used by the MKP are similar, although a careful eye will notice a difference at the height in which the spear is held by the warrior. In the case of the registered mark, the spear is held above the head, whereas it is held at the

[56] Ibid at 640G–641E.

midriff in the infringing mark. That this difference might not be apparent at first glance is recognised in the trade mark field as the doctrine of imperfect recollection.[57] The average, or ordinary purchaser is recognised as being someone who is 'neither the very careful nor the very careless buyer, but an average purchaser, who has a general idea in his mind's eye of what he means to get but not an exact and accurate representation of it'.[58] The confusion must be one that arises at first glance. In *Yuppiechef Holdings v (Pty) Ltd v Yuppie Gadget Holdings (Pty) Ltd*[59] it was held that: '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.'

[61] It is not disputed that the mark is registered in class 41, which provides for *'*education; providing of training; entertainment; sporting and cultural activities'.[60] It was not entirely clear to me how the use of the mark in political activities will fall into class 41. In its heads of argument and before me, counsel for the ANC explained that the logo or mark is registered in respect of the 'class heading' used by the World Intellectual Property Organisation (WIPO) to describe the services that fall within that class. This means that it covers all services covered by the class.[61] Class 41 includes within its scope the 'arranging and conducting of conferences, congresses and symposiums', and that the word 'congress' is according to the Oxford Dictionary 'a formal meeting or series of meetings for discussion between delegates, especially those from a political party, trade union, or from within a particular sphere of activity'. On that basis, it was contended that the word 'congress' is invariably associated with politics and that class 41 also includes the use of 'political debate training and coaching' and political speech writing. The test is whether, at first glance, the marks

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[57] *Sea Harvest Corporation (Pty) Ltd v Irvin & Johnson Ltd and Another* [2011] ZAWCHC 35; 2011 BIP 386 (WCC) para 30.
[58] *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2001 (3) SA 884 (SCA) para 3 ('*Blue Lion*').
[59] *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* [2016] ZASCA 118; 2016 BIP 269 (SCA) para 26 ('*Yuppiechef*'). See also *Puma AG Rudolf Dassler Sport v Global Warming (Pty) Ltd* [2009] ZASCA 89; 2010 (2) SA 600 (SCA) para 8.
[60] *Nice Classification* 11 ed (2021).
[61] *Leonard Dingler (Pty) Ltd v Afroberg Tobacco Manufacturing (Pty) Ltd and others* [2019] ZAGPPHC 176; 2019 BIP 137 (GP) para 11.

appear identical or if not identical, as Harms JA proposed in *PPI Makelaars and another v Professional Provident Society of South Africa,*[62] that the use is in relation to the same class of services, is used in the course of trade, and is unauthorised.

[62] I agree with counsel for the MKP that the ANC's case shifts fundamentally from what appears in its founding affidavit and has drifted significantly from the use pertaining to education, training and cultural activities, and stretches now to the class to include politics by virtue of the use of the word 'congresses'. During the course of the hearing, counsel for the ANC referred me to the Nice Classification dealing with class 41 and associated uses. My perusal of the document indicates that while it includes 'arranging of conferences and congresses', it does *not* include 'writing and publication of publicity texts' or of 'radio and television broadcasting'. The MKP contends that it uses its logo for the purpose of 'electoral politics'. This cannot be equated to "congresses".

[63] I am not persuaded by the ANC's argument that 'electoral politics' falls within the scope of class 41 and includes arranging and conducting of conferences and congresses, political debate training and coaching, and political speech writing. As a fall-back position, the ANC seeks to rely on video footage of the MKP using the mark at political rallies. It submits that the services for which the MKP uses its mark are identical to the services for which the ANC's trade mark is registered. I disagree. It could easily be described as campaigning, including radio and television broadcasting, which are uses falling outside of the class.[63] Moreover, one must not lose sight of the fact that the rights secured as a result of being registered as a political party include the right to campaign for a political party or cause, which is protected under section 19 of the Bill of Rights.

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[62] *PPI Makelaars And Another v Professional Provident Society of South Africa* 1998 (1) SA 595 (SCA) at 602G-H ('*PPI Makelaars*').

[63] Y*uppiechef* para 14, which deals with the limits of an infringement under section 34(1)*(a)*, says the following:

'That highlights both the scope and the limits of the protection provided by registration of the mark. It is prohibited use to use an identical, deceptive or confusingly similar mark in relation to goods falling within those classes. <u>But the use of the same mark on other goods or services, falling outside the class of goods or services covered by the registration, does not amount to an infringement under this section.'</u> (My underlining.)

[64] Turning to whether, for purposes of section 34(1)*(a)* of the Trade Marks Act, the parties' respective marks are so similar as to likely lead to deception or confusion, this enquiry must be seen in the context of stated purpose of the application in the founding affidavit. Mr Mbalula states that there is

'. . . overwhelming public interest in ensuring that when voters approach the voting booth, they are not confused as to the party which they are placing their trust in. It is a matter of clear public interest that any voter confusion, caused by the unauthorised use of the ANC's intellectual property, is clarified before the elections take place.' (My underlining.)

In the course of the hearing, counsel for the ANC attempted to extend that ambit of the case to include campaigning. This is not the case that the MKP has come to meet, and they should not be ambushed by such an approach.

[65] The enquiry is whether a voter, of reasonable intelligence, is likely to be deceived or confused by the use of the registered mark with that of the MKP. Prior to the hearing, I directed an enquiry to the parties to provide a graphic illustration of the mark (in colour) of the party registration authorised by the CEO of the IEC in terms of section 15(2)*(a)-(c)* of the Electoral Commission Act. These are marks appearing on the ballot sheet alongside the name of the political party. The response provided was the following:

[66] Applying the test in *Plascon-Evans*, and endorsed in *PPI Makelaars,* one must conduct a comparison between the two marks, side by side, having regard to their similarities and differences, and to assess what impact the MKP's mark would make on the average South African voter. The 'main or dominant features of the marks in question as well as the general impression and any striking features were all factors to be considered in deciding whether there was a likelihood of confusion or deception'.[64] In my view, even if the ANC choose to use their registered mark of the

[64] *Bata Ltd v Face Fashions CC and another* 2001 (1) SA 844 (SCA) para 9.

African warrior on the ballot sheet, despite the similarity of the image of the warrior, the distinctive green background used by the MKP would be sufficient for a voter to distinguish between the two marks and not be deceived. Ultimately, this is an assessment to be made by the IEC.

[67] The context in which the average voter will be confronted by these symbols must also be considered. They will be confronted with a choice of various political parties to choose from, each with their distinctive symbol. We know from the process of registration in terms of section 15 of the Electoral Commission Act that the IEC has already affirmed that the symbol to be used by the MKP will not deceive or confuse voters. The registered mark of the ANC will not feature on the ballot sheet presented to the voter on 29 May 2024. What will be presented to the voter, on behalf of the ANC and the MKP, is a choice between one of the two symbols shown in paragraph [65].

[68] Our history also tells us that despite our relatively short democracy, the South African public is finely attuned to the political rhetoric by various parties, particularly in light of the long struggle in this country to achieve the freedoms protected in section 19 of the Bill of Rights. The position of the average voter should not be compared to that of a consumer who may be misled when deciding whether to purchase a particular brand of coffee or teabags at the local supermarket, or a pair of athletic shoes at a sports store. There can be no confusion, in my view, that will confront a voter in the sanctity of the voting booth, when confronted with the symbols of the ANC and the MKP. The choice made, will hopefully be informed by their aspirations for a future in which the promise of the Constitution will be realised.

[69] Accordingly, I conclude that it has not been established that the marks resemble each other so closely that deception or confusion among voters is likely to arise. The registered mark of the ANC will not, according to the information presented to the court and depicted above, feature on the ballot sheet in the forthcoming elections. Even if it were, for reasons I have already referred to, there is enough to distinguish it in the eyes of the average voter so as not to cause deception or confusion. The ANC's contentions based on section 34(1)*(a)* of the Trade Marks Act must therefore fail.

Infringement under section 34(1)*(c)* and common law passing off

[70] Turning to the cause of action under section 34(1)*(c)* of the Trade Marks Act, the case of the ANC, as I understand it is that the MKP (through the use of its mark of the African warrior against a green background) will take unfair advantage of the ANC's mark in a manner detrimental to it, as well as to the character and reputation garnered through the mark. The third ground is based on the common law delict of passing off, in which the ANC contends that by using the name of uMkhonto weSizwe and the logo, it believes that it is likely that members of the public will be led to believe that there is some connection between the ANC and MKP, when this is not the case.

[71] It has been held[65] that section 34 (1)*(c)* was intended

'to provide protection against the dilution of a registered trade mark by the unauthorised use of an identical or similar mark in relation to any goods or services, notwithstanding the absence of confusion or deception. A plaintiff who relies upon an infringement in terms of s 34(1)*(c)* needs to establish:

(a) the defendant's use of a mark identical or similar to the plaintiff's registered mark;

(b) that the use -

(1) is unauthorised; and

(2) is in the course of trade; and

(3) would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the plaintiff's registered mark; and

(c) that the plaintiff's registered mark is well known in the Republic.'

[72] Unlawful competition is applicable to political parties. In *African National Congress v Congress of the People and others*,[66] the court said the following:

'Counsel were, rightly in my view, agreed that the law of unlawful competition applies to political parties; a political party may not employ unlawful means to attract votes.'

[73] I have already concluded above that although the registered mark of the ANC is similar to the symbol used by the MKP (the African warrior with the spear), the marks are sufficiently distinguishable by the use of the green background, and can be set apart by a voter on first impression without undue peering, by reason of the distinctive

[65] Ibid para 13.
[66] *African National Congress v Congress of the People and others* 2009 (3) SA 72 (T) para 9.

green background used by the MKP.[67] In my view, the use of the mark by the MKP will not likely lead to a conclusion by a voter that there is a link between the MKP and the ANC. Again, the enquiry must be seen in the context of the campaign by the MKP, as set out in its answering affidavit, that is seeks to offer voters an alternative to the ANC. If it is to succeed to any extent, it would have to show how different (as opposed to how similar) it is to the ANC. Any link of closeness, in my view, would be self-defeating for the MKP. I therefore cannot agree that voters will, upon seeing the logo of the MKP, be led to believe that it is in fact a party associated or part of the ANC. This is a bald assertion by the ANC, without anything being placed before me to substantiate the statement.

[74] While there is agreement between the parties that the symbol of the African warrior with the spear and shield has garnered a reputation over time as being synonymous with the struggle for the liberation in our country, as I have stated at the outset, it is not possible to resolve the dispute as to whether one particular political organisation may claim to be the guardian of the symbol or the name uMkhonto weSizwe.

[75] The case advanced by the ANC under the common law delictual remedy of passing off concerns the use of the name, uMkhonto weSizwe, the logo, and extraneous factors including statements by leaders of the MKP, including Mr Zuma, at

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[67] The following is stated in 42 *Lawsa* 3 ed para 235:
'In terms of section 34 of the Trade Marks Act, the comparison is limited to the plaintiff's registered trade mark and the mark used by the defendant. The fact that the defendant's goods are distinguished from those of the proprietor of the mark by matter extraneous to the mark is irrelevant for purposes of infringement. The likelihood of deception or confusion must be decided in relation to the trade mark itself and not in relation to the label of which it forms a part. In *Adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co Ltd* Botha J stated: "I agree also with the submission of counsel for the plaintiff that his enquiry is confined to the marks themselves and that no regard should be had to other features of the getup or other indications of origin of the goods as actually marketed by the plaintiff and the defendant respectively." In *Verimark* (*Pty*) *Ltd v BMW AG*, the appellant had used a picture of the front of a BMW car on its DIAMOND GUARD car polish, with the BMW logo trade mark visible. The Supreme Court of Appeal looked at the entire get-up of the product for the purposes of determining that Verimark was not using the BMW logo as a trade mark, not for the purposes of determining likelihood of confusion. In dealing with the respondent's reliance on the afore-mentioned *dictum* in the *Adidas* case the court commented as follows: "This *dictum* is, in context, correct although it has from time to time been used to blur the distinction between added matter extrinsic to a defendant's mark and added matter that is intrinsic thereto. In any event, the *dictum* dealt with the issue of determining identity or the likelihood of confusion or deception and not with the determination of the public's perception of what the defendant's mark is."' (Footnotes omitted.)

public rallies. The MKP invokes in its defence and in furtherance of its contention that the name uMkhonto weSizwe or its logo did not belong solely to the ANC, the statement by former President Mandela[68] that '[t]he name of this new organisation was Umkhonto we Sizwe (The Spear of the Nation) – or MK for short. The symbol of the spear was chosen because with this simple weapon Africans had resisted the incursion of whites for centuries'.

[76] Counsel for the MKP contended that the symbol of the African warrior could not be claimed by any one entity in Africa, in the same way that a clenched fist, although recognisable universally as a symbol of black power, cannot be arrogated by any one group.[69] For reasons that I have already set out, where two political rivals are competing for votes in a national election, it is unlikely for it to be in the interests of the MKP to associate itself with the ANC. On the contrary, and as submitted in the course of argument, any reflection to the electorate of a closeness or a link with the ANC would be self-defeating for the MKP.

[77] If I am wrong as to whether the mark used by the MKP is likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the ANC's registered mark, the issue remains whether the use is unauthorised – which is disputed by the MKP. It relies on the authority granted by the CEO of the IEC to use the particular distinguishing mark, as had been applied for. The issuance of a certificate of registration in terms of section 15(5) of the Electoral Commission Act perfects the registration process. As stated earlier, the MKP became vested with rights, enforceable in pursuance of the guarantee of political rights safeguarded in section 19 of the Bill of Rights. This includes the right to contest elections in which the ANC may be a rival political party. It bears noting what Schutz JA said in *Payen*

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[68] N R Mandela *Long Walk to Freedom* (1994) at 262.

[69] It has been written that the first likely appearance of a clenched fist as a symbolic gesture was in France during the 1848 revolution that resulted in the abdication of King Louis-Philippe, the last reigning French monarch. Others point out that one of the earliest known instances in the US of a protester brandishing a raised fist occurred in 1913 during the Paterson strike in New Jersey. Those opposing Nazis' atrocities and the spread of fascism across Europe eventually adopted the fist as a symbol against bigotry and persecution, growing into a symbol that is firmly embedded in anti-racist protests. J Stout 'History of the raised fist, a global symbol of fighting oppression', July 2020, https://www.nationalgeographic.com/history/article/history-of-raised-fist-global-symbol-fighting-oppression (accessed 19 April 2024).

Components SA Ltd v Bovic CC and others,[70] in the context of unlawful competition, that:

'Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most such cases it is one of the established categories or nothing.'

The court also stated that:[71]

'The broad and flexible principles relating to this branch of the law have been stated in this Division in *Schultz v Butt* 1986 (3) SA 667 (A) at 678F-679E and *Taylor and Horne* (*Pty*) *Ltd v Dentall* (*Pty*) *Ltd* 1991 (1) SA 412 (A). It is unnecessary for me to restate them. But I would repeat that in judging questions of unlawfulness, not only in this field, questions of policy may play an important part, and that in the field of unlawful competition an important one is the need for free competition.'

[78] The Trade Marks Act refers to 'permitted use' in section 38, but only to the extent where use is authorised by the proprietor. The MKP argues that its use of the mark, even if not permitted in terms of section 38 of the Trade Marks Act, is notwithstanding, not 'unauthorised' and not unlawful, as the decision of the CEO of the IEC, acting in terms of statute, remains valid and binding until set aside. On this basis, I am unable to conclude that the use of the mark is capable of being interpreted as an 'infringement' for the purpose of section 34 of the Trade Marks Act. Schutz JA in *Blue Lion*[72] issued the following caution where parties asserted claims of unfair competition:

'… the illegitimacy of using some general notion of unlawful competition to create an ersatz passing off with requirements (in the alternative) less exacting than those required by the common law. Some of the restraints that the common law places on the passing-off action (the one relevant to this case is the need to prove the likelihood of deception and confusion) are important in preventing the creation of impermissible monopolies.'

Conclusion

[79] In the result, on the merits, I am not satisfied that the ANC has made out a case for the injunctive or consequential relief sought. It failed to establish a clear right for final relief, either to the name or to the use of its registered mark. As set out earlier,

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[70] *Payen Components SA Ltd v Bovic CC and others* 1995 (4) SA 441 (A), [1995] 2 All SA 600 (A) at 453G-H.
[71] Ibid at 453B-C.
[72] *Blue Lion* para 1.

the ANC had an alternate remedy of approaching the Electoral Court to undo the registration of the MKP on the grounds it advanced in this court. It could have achieved substantial redress in that court. For reasons other than contending that only a high court could grant it relief under the Trade Marks Act, the reasons for abandoning its remedy though the Electoral Court are not known. In light of the conclusions I have reached on the issues of lack of urgency, absence of jurisdiction, and non-suiting the ANC in this court, as well a finding on the merits of the matter, the application falls to be dismissed.[73]

Costs

[80] This is not a case where the principles in *Biowatch Trust v Registrar, Genetic Resources, and others*[74] should apply. There was no challenge to the constitutionality of a law or of State conduct present in this matter. The ANC chose to bring this matter in the incorrect forum on the basis that its cause of action was rooted in the provisions of the Trade Marks Act. Even if this application could be described as involving constitutional issues, the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and others*[75] warned that the *Biowatch* rule 'does not mean risk-free constitutional litigation'.

[81] Counsel for the MKP submitted that the ANC be sanctioned with a punitive costs order for launching a misconceived, urgent application. The MKP has been substantially successful in this court. The MKP was obliged to respond at short notice to a multi-faceted application, which, as I have found, lacked urgency, and was brought in the wrong forum. Ultimately, the ANC was seeking to protect its own political rights, despite its reliance on intellectual property rights. The MKP was exercising its rights granted to it by the IEC, a statutory body. The exercise of those rights remains lawful.

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[73] As stated earlier, despite my conclusions on lack of urgency, absence of jurisdiction and locus standi, I considered it proper to determine the remaining preliminary points raised, as well as the merits. I did so having considered what was said by the Constitutional Court in *President of the Republic of South Africa v Democratic and Others* 2020 (1) SA 428 (CC) at para 35, cautioning that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now". This matter is distinguishable.

[74] *Biowatch Trust v Registrar, Genetic Resources, and others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[75] *Lawyers for Human Rights v Minister in the Presidency and others* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) para 18.

While the application might be misguided I do not find that it was frivolous or reckless. In the exercise of my discretion, I find that this is not a case justifying a punitive costs order. I am satisfied that costs on a party and party scale suffice.

Order

[80] In the result, I make the following order :

1. The application is dismissed with costs.

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MR CHETTY J

Appearances

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Date of hearing:	27 March 2024
Date of Judgment:	22 April 2024