

BUSINESS LAW & TAX

Grow SMMEs to avoid losing another decade

● Experts must understand the unique demands of the segment and deliver more bespoke solutions

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Improved outcomes for the local economy will only be achieved if advisers do far more than just tick boxes.

They must identify opportunities for efficiencies and growth, all to meet strategic goals and add value.

They must also ensure businesses are given a roadmap to success that includes navigating bumps in the road such as regulations and load-shedding.

A more strategic approach will ensure that the immense economic dividend of SMMEs is harnessed so that

SA secures its future. The consequences of not improving the SMME sector today will, sadly, lead to another decade of lost opportunities.

The SMME sector remains the engine room of growth and jobs for SA, yet not enough is being done to grow and support this “sweet spot” for the economy.

A spate of delisting from the JSE recently reflects how tough it is to survive, yet this – together with high unemployment and fewer job opportunities – is opening the door for more flexible, innovative businesses to thrive, whether out of necessity or choice.

According to the World

Bank, SMEs represent about 90% of businesses and more than 50% of employment worldwide, and formal SMEs contribute up to 40% of emerging economies’ national income (GDP). These numbers are significantly higher when informal SMEs are included. They are by far the biggest creator of jobs, and so

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this is clearly where the solution lies to SA’s ongoing unemployment crisis.

However, the International Finance Corporation (IFC) has noted that while SMMEs employ about half of SA’s workforce and contribute to about 34% of GDP, their voice is often excluded from the national conversation.

A joint report by the IFC and the World Bank, in partnership with SA’s National Treasury, aptly titled the “Unseen Sector”, found that micro, small and medium enterprise (MSME) sector growth stagnated over the past decade and that only 14% of small businesses in SA are formalised. That means many micro and small enterprises are creating opportunities for self-employment.

The recent Mastercard

SME Confidence Index finds that three out of four SMEs surveyed in SA are concerned about the rising cost of doing business. While more than half of SA SMEs are optimistic about the future, 80% of SMEs in the country project similar or increased revenue.

So where is it all going wrong? The answer is nuanced, based on numerous factors ranging from sociopolitical to lack of skills, support and access. These are all the areas in which more work is needed to ensure this sector grows significantly faster than it is now.

The report highlighted that informal businesses struggle more to access finance than their formal counterparts and that female ownership lags behind male small business

ownership in the country and is declining.

The Mastercard survey highlights the top three areas for support required by SMEs in Africa: training and upskilling staff (91%), digitalising businesses (88%) and access to a broader range of financial services (88%).

Experts in financial services must step up the support levels they provide SMMEs. The problem is many major players focus on large businesses, corporate deals and high net worth clients.

Still, the key is to truly believe in these businesses’ potential and why they must not be allowed to fail. This means that, as experts, we must harness data, understand the unique demands of the sector and deliver more bespoke solutions.

LEGAL SCOOP

Imitation can spark claims for misrepresentation

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The quote from Oscar Wilde – “Imitation is the sincerest form of flattery” – is well known. Less known is the full quote: “Imitation is the sincerest form of flattery that mediocrity can pay to greatness.”

In the commercial world, imitation of the great by the mediocre (or at least the less creative) expresses itself in the delict of passing off.

Passing off occurs when a person in business tries to capitalise on the goodwill of another business by representing, either expressly or by implication, that his goods or services are those of the other business, or that there is an association between his goods and services and those of the other.

Almost invariably, that representation takes the form of imitation; by using a format of packaging, labelling and presentation similar to the original, which is calculated to deceive consumers into purchasing the product of the offender, believing it to be, or the be connected with, the original.

Two decisions of the high court, delivered within days



LEGAL SCOOP

of one another in November 2023, dealt with passing off in relation to well-known consumer products and illustrate well what a party that complains of passing off needs to prove to succeed with a claim.

Akzonobel Coatings International BV and another v Dumax Paints (Pty) Ltd and Others was heard by the Free State division of the court. It concerned the well-known “Dulux” paint brand, manufactured by Akzonobel, the applicant. The respondent, as its name indicated, manufactures a competing product under the “Dumax” brand.

The applicant claimed that the respondent’s use of the “Dumax” name and a similar product “get up” (the overall commercial image of a product that indicates or identifies the source of the product) to the applicant’s, created a likelihood of deception. Akzonobel asked the court to issue an interdict

against the respondent. In making its decision the court made the point that “the law against passing-off is not designed to grant monopolies in successful get-ups’ and a certain measure of copying is permissible”.

In making this observation, the court recognised that businesses will naturally want to use ideas and methods that have proved to have worked and have become state of the art.

The bounds of lawfulness would be crossed only where a likelihood of deception arose.

In its judgment, the court noted that, in order to reach a conclusion that confusion is likely, the entire get-up of the respective products must be compared including the shapes, the markings and the decorations of the products as well as how the respective trademarks are applied to the products” but, the court held that taking the get-ups of the two rival parties into account, “the dissimilarities are obvious” and refused to grant an interdict on the claim of passing off (an interdict was in fact granted on the basis of a trademark infringement, in terms of section 34 of the Trade Marks Act, but this was based purely to the

similarities between the names “Dulux” and “Dumax”, in particular how the two names sounded when spoken).

The second matter, Shoprite Checkers (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd, was heard in the Western Cape Division. The case concerned the respondent, Pick n Pay’s “Crafted Collection” range of food products. The applicant, Shoprite Checkers (Checkers), claimed that the packaging and labelling of the products and get-up and presentation of the products was deceptively similar to Checkers’ own “Forage and Feast” range.

The court noted that in order to succeed in a claim for passing off, Checkers had to show, first, “that its get-up or mark has become distinctive of its goods or services, in the sense that the general public associate the get-up or mark with the goods or services exclusively with the applicant [sic].

Second, Checkers had to prove that the get-up used by [Pick n Pay] in the Crafted Collection is such, or used as to intentionally mislead, or cause the public to be confused or deceived into believing that there is an association between their

respective products or that Pick n Pay’s product emanates from Checkers”.

The court found that Checkers had proved that its products had acquired a reputation and goodwill in the market. In this regard, the court said, “get-up had developed into a distinguishable and reputable brand in the market evidence clearly shows that the applicant had established a significant goodwill and overvalued reputation over many years following the launch of the Forage and Feast range.”

The court went on to note that Checkers’ name did not appear on the packaging of its “Forage and Feast” range, and Pick n Pay’s name, while it did appear, was inconspicuous and not prominently displayed. Therefore, to an average consumer, it would not be clear that the products emanated from different

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companies. Furthermore, the overall similarities in the packaging get-up of both products were so significant that “confusion or deception is likely to arise among customers should the same or similar goods be sold in the marketplace, whether adjacent to one another or displayed on different shelves. It is highly probable that consumers will perceive both products as coming from the identical manufacturer.”

These two judgments, close together in time, are a useful reiteration for the branding and marketing industry of where the lines are to be drawn between “inspiration” and “imitation”. In every endeavour, including business, what works becomes state of the art and it makes sense to follow its lead, but where imitation crosses the line to the point where it is no longer clear which product emanates from which business, the innovator has valid grounds to object.

And indeed, as Oscar Wilde pointed out, imitation, while flattering, may indeed be a mark, not of ingenuity but of mediocrity.

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