



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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

**VERIMARK (PTY) LTD v BAYERISCHE MOTOREN WERKE
AKTIENGESELLSCHAFT**

The SCA today upheld an appeal against a judgment in the High Court in terms of which the High Court held that Verimark infringed BMW's trade mark, the well-known BMW logo, registered in respect of vehicle polishes, by using a picture of a BMW car on which the logo is visible, on packaging and advertisements in respect of the Diamond Guard vehicle polish being marketed by it.

The SCA stated that a trade mark serves as a badge of origin; that the car was being used to illustrate Diamond Guard's properties and that no-one would perceive that there existed a material link between BMW and Diamond Guard or that the logo on the car performed any guarantee of origin function in relation to Diamond Guard. It therefore concluded that the logo was not being used as a trade mark and that no infringement of the trade mark was committed in terms of s 34(1)(a) of the Trade Marks Act 194 of 1993. The section provides that the unauthorised use of a mark identical to a registered trade mark, in the course of trade, in relation to goods or services in respect of which the trade mark is registered, constitutes an infringement of the registered trade mark.

The SCA at the same time dismissed an appeal against the dismissal by the High Court of BMW's claim that Verimark's use of the BMW logo, being a well-known registered trade mark in respect of vehicles, would be likely to take unfair advantage of the distinctive character or repute of the registered trade mark, thereby infringing the registered trade mark in terms of s 34(1)(c) of the Trade Marks Act. The SCA agreed with the High Court that although Verimark may be taking advantage of the reputation of the BMW logo, it is not done in a manner that is unfair; Verimark's

emphasis is on the effectiveness of its own product sold under established trade marks and cannot be expected to advertise car polish without using any make of car; it would be contrived to expect of Verimark to show vehicles in such a way that their logos are not visible. It concluded that it failed to see how the use of the logo could affect the advertising value of the logo detrimentally.

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