

Juju and brands



By [Alan Smith](#)

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The right to exploit the name of a famous person commercially has been the topic of some debate, decision-making and policy consideration in local and international forums. This article briefly explores the legal issues that arise from a situation of this nature.

On the one end of the playing field are the entrepreneurs, grabbing consumer spend by promoting their goods and services under famous names whilst having no right or authority to do so, as far as this may be required. At the other end, we have the celebrities and their agencies, jealously guarding the buying power tied to the associated "golden monikers".

Enter Obakeng Ramabodu, with a perfect example of the interplay between trademark rights, the principles of a free-market economy and what, to many of us, appears to be a right to free commercial speech. Ramabodu is the creator and owner of a clothing line based on the identity of one of South Africa's most controversial politicians, Julius Malema. The range, marketed under the JUJU trademark, reportedly exists without official endorsement or association with the politician. Here is an extract from a press release by Ramabodu on the subject:

"[t]he JUJU fashion label is my innovation. I identified an opportunity and am taking full advantage of it. If you are an entrepreneur, especially a young black entrepreneur from the township without any access to finance, be it from the bank or from family and friends, you continually need to reinvent yourself and the label to make it in this industry. The time for depending on government handouts is over; we must strive to do things for ourselves." Source: Politicsweb, 29 January 2012)

(See also [Juju clothing label to be made in China](#); [Juju designer is a traitor - union](#) and [Juju clobber taken off shelves](#).)

As will be seen from the discussion of relevant case law, at the heart of this determination is whether the use of the relevant mark will be interpreted by the consumer public as use of a 'badge of origin' or the use of a 'badge of allegiance'.

Presley Trade Mark [1999] RPC 567 CA

When an applicant endeavoured to register the trademarks ELVIS and ELVIS PRESLEY in relation to "[t]oilet preparations, perfumes, *eau de cologne*; preparations for the hair and teeth; soaps, bath and shower preparations; deodorants, antiperspirants and cosmetics", litigation followed.

The court disagreed with submissions that the trademarks could act as source identifiers in relation to the relevant goods. It found that members of the public purchased ELVIS PRESLEY merchandise for the simple reason that ELVIS's name and

likeness adorned them. The marks in the applications for registration, so the court found, did not serve as badges of origin and, therefore, were not registrable.

Pertinently, the court held that, in the field of memorabilia bearing the name or likeness of a "famous figure", it must be for that person to ensure that the public associated his or her name with the source of the goods. The court reasoned that there should be no *a priori* assumption that only a celebrity or his successor could ever market (or license the marketing of) his own character.

South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another 2003 (3) SA 313 (SCA)

In a matter that was much closer to home, the name of the South African national soccer team, Bafana Bafana, became the subject of litigation. The South African Football Association (SAFA) claimed rights in the BAFANA BAFANA trademark and attacked an existing registration for the mark in the name of another party. The court, in its determination, referred to another matter dealing with the similar principles, where the Honourable Stegmann J expressed the view that:

"[t]he mere fact that a person has made a name famous does not give him a right of property in the name... Provided that he does not commit the delicts of defamation or passing off or offend against any specific statutory prohibition, there is no reason why an entrepreneur should not take the benefit of such advantage as he may be able to gain in the marketing of his goods and services by associating them with names that have become famous".

The court, on the evidence, found that SAFA had not made use of the BAFANA BAFANA trademark in relation to clothing but, rather, that the mark had been used to indicate sponsorship (i.e. a badge of allegiance). As a result, SAFA did not have proprietary rights in relation to the goods of interest.

Linkin Park LLC's trademark application [2006] ETMR 74

In a matter before the Comptroller-General in the United Kingdom, Linkin Park LLC applied to register the trademark LINKIN PARK, the name of the internationally acclaimed rock band, in respect of a wide range of goods and services, particularly "printed matter, posters and poster books".

The comptroller-general had to decide whether or not the proposed mark was capable of distinguishing the printed goods and qualified for registration. The Registrar considered that third parties commonly marketed and traded in posters and poster books bearing the names of music bands and reasoned that the public would not consider the LINKIN PARK trademark to denote a trade origin in relation to the goods of interest.

These decisions illustrate that the courts and other forums will not simply acknowledge that recognition of the name of a well-known celebrity or team creates a basis for the registration of the name as a trademark in relation to particular goods, specifically those generally associated with merchandising. One might get the impression that decision makers are willing to say "hey, they make enough already, go on and sell a few shirts!" Under appropriate circumstances, therefore, businesses may have prospects of making money off the reputation associated with the names of the rich and famous.

It's not only trademark issues that you need to consider

The issue, of course, is not that clear cut. Trademark issues are not the only ones that must be considered. There are such factors as the right to privacy (although the people concerned usually thrive on publicity), dignity and goodwill, as well as copyright. We have yet to see how the commercial use of famous names will be dealt with in terms of other laws. Currently, the Advertising Standards Authority (ASA) is probably the forum of choice.

The starting point in our analysis was the business of Obakeng Ramabodu and his JUJU apparel. In the trademark context, one must ask whether or not, in the circumstances, a national member of the consumer public will interpret the JUJU mark appearing on the clothing as a 'badge of origin' or, rather, as a 'badge of allegiance'. Differently put, are consumers likely

to assume that the shirts in question are made by or under license from Malema and that they are, therefore, commercially linked to him?

Publicly, Ramabodu has stated that his shirts are not endorsed or commercially associated with Malema and the use of the JUJU mark by those concerned will, if ever tested, possibly be seen as decorative, an indication of allegiance to a politician and a smack of free-enterprise.

There is, unfortunately, no hard and fast rule to regulate the use of celebrity names as trademarks.

Each matter will have to be decided upon its own merits. As far as Ramabodu's business and his JUJU apparel is concerned, one can only commend him for his spirit of innovation and enterprise. With our high levels of unemployment and drag on state resources, one hopes to find more like him around.

ABOUT ALAN SMITH

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