

# Court ruling may spell end of generic giant's product

Aspen registered its Andosept trademark in 2005 and launched a pharyngeal product under that name in 2008, in direct competition with the market-leading product Andolex. The Andosept product was placed on pharmacy shelves in packaging similar to that used for Andolex.

Pursuant to a complaint lodged with the Advertising Standards Authority (ASA), by the owner of the Andolex brand, the lesser-known Australian company Wirra, the ASA ordered Aspen to withdraw its packaging on the basis that it imitated the Andolex packaging. Aspen changed its packaging but continued to sell its product under the trademark Andosept, which prompted Wirra to take court action.

According to Dale Healy, trademark partner at Adams & Adams, acting for Wirra, the company applied for a court order cancelling the Andosept trademark and an interdict restraining its continued use of the mark.

"Wirra's case was that the mark Andosept is so similar to its trademark Andolex which was registered twenty five years ago, as to be likely to deceive or cause confusion. In a surprising move Aspen undertook that, if its mark was cancelled, it would not continue to use it," says Healy.

According to Healy, the undertaking meant that the court did not have to consider Wirra's call for an interdict. Aspen's fate, therefore, depended entirely on whether or not its registered trademark would survive the attack.

## Court rules in favour of Australian company

The North Gauteng High Court has ordered the cancellation of the registered trademark Andosept, which will effectively prevent Aspen from continuing to sell its product.

"The court found that the trademarks were indeed deceptively similar and ordered the cancellation of Aspen's mark. This was on the basis that it was incorrectly registered in the face of Wirra's registration for Andolex and its established reputation in that mark and that Aspen's mark was an entry that wrongly remained on the Register of Trade Marks," says Healy.

Healy says the court took into account that both parties' products were over-the-counter medicines and, unlike the case with prescription-only medicines, pharmacists prescribing the correct medicine could not prevent confusion. The fact that the mark Andosept incorporates the unique and distinctive prefix ANDO - also weighed heavily with the court.

"Ultimately, the Registrar of Trade Marks, who was cited as a respondent in the case, was directed by the court to remove Aspen's trademark registration from his register. Barring a successful appeal by Aspen, the Registrar's removal of the

trademark from his register will signal the end of Aspen's sale of its Andosept product."

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