rate with the perceived risks of the investment. Higher risks always need to be compensated for by higher expected returns. Any failure to satisfy the combination of risk and return after taxes that is required by investors *in South Africa will have the result that less capital will be made available to South African* employers. Less capital must, in turn, increase the returns to the capital actually made available. Such higher returns occur in response to reduced supplies. Therefore if supplies of capital are discouraged, the consumer of goods and services will be forced to pay higher prices.

Similarly, if contracts of employment provide superior returns for some workers, the firms or, more particularly, the shareholders who employ these workers, will suffer lower returns on their existing investments in capital assets. The impact of any unexpectedly good deal for workers will be reflected in the price investors are willing to pay for shares in the profits of the affected enterprise. The losses of the shareholders will be equivalent to the gains of the workers.

The market value of the firm will decline by just enough to make the now lower expected returns for shareholders competitive with the returns available from other investments. In this way, through a decline in the market value *of its shares, the firm will face increased costs of raising additional capital.* The returns from additional investments in the firm — however financed — will have to be higher to compensate for this outcome. The result will be less investment and a slower rate of expansion for the firm. If the firm were representative of the industry or the economy, higher costs of production and reduced supplies would, in turn, involve higher prices for the goods or services produced. Thus, if the returns to investors are competitively determined by world markets, the consumer would again pay for the superior returns provided to the recipient of artificially favourable contracts of employment of one kind or another.

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TRADING IN PARALLEL IMPORTS

'Grey goods'

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A landmark judgment in trade mark law has recently been delivered by the Transvaal Provincial Division of the Supreme Court of South Africa.[1] The case dealt with trading by Television Radio Centre (TRC) in 'parallel imports' of Sony video recorders that TRC had bought in Europe and imported independently into South Africa.

Strydom AJ held that TRC had in the circumstances of the case infringed the registered trade mark 'Sony' in respect of a wide variety of electrical goods, including video recorders, by trading in 'genuine' Sony goods without the authority of Sony Corporation.

The evidence showed that a video recorder made by Sony Corporation for use in the European market cannot perform satisfactorily in South Africa without certain modifications of a not inconsequential nature. Sony Corporation, in fact, makes particular models of video recorders for use in South Africa, and exports them to and distributes them exclusively through Tedelex in South Africa. In terms of its exclusive distribution agreement with Sony Corporation Tedelex is required to provide guarantee and back-up services in respect of Sony goods imported and sold by it.

Sony Corporation does in certain circumstances export goods not specifically intended

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[1] *Sony Kabushiki Kaisha and Tedelex Sound and Vision (Pty) Ltd v Television Radio Centre (Pty) Ltd* (as yet unreported).

for the South African market to Tedelex, and in these instances Tedelex is authorized to make appropriate adaptations to the goods to enable them to meet South African requirements. Such adaptations are carried out according to procedures laid down by Sony Corporation and are strictly controlled by it. TRC had, however, made the adaptations to the European Sony video recorders that it imported without following the procedures laid down by Sony Corporation, indeed without its knowledge or authorization, and the converted machines it sold did not perform to Sony Corporation's standards or comply with its requirements. The machines as converted by TRC were in fact found to be inferior.

Before the institution of the court proceedings Sony Corporation's attorneys had written to TRC and appraised it of the exclusive distribution arrangement between Sony Corporation and Tedelex. The attorneys advised TRC that Sony Corporation authorized the use of the trade mark Sony in relation to goods produced by it only when the goods were imported into and sold in South Africa through the authorized channels, that is, through Tedelex. TRC was further informed that since it was selling goods under the trade mark 'Sony' that had not been imported into South Africa in this manner, TRC was not authorized to use the trade mark in relation to the sale of such goods. The attorneys added that, in so far as any implied licence or authority could be inferred to use the trade mark 'Sony' in a resale of the goods that TRC had imported, such implied authority was terminated by their letter, and that any future imports and resales of European Sony goods would constitute infringements of the trade mark 'Sony', being the use of that trade mark without authority. TRC was requested to furnish an undertaking that it would not deal in parallel imports or so-called grey goods in the future. It declined to do so.

Court proceedings against TRC instituted by Sony Corporation and Tedelex resulted. These proceedings were based initially on several causes of action, but ultimately the case proceeded purely on the basis of infringement of a trade mark. The court examined in some detail the applicants' arguments in regard to such an infringement resulting from withdrawal of authority to use the trade mark 'Sony' and had regard to the Appellate Division decision in the case of *Shalom Investments (Pty) Ltd and others v Dan River Mills Incorporated*[2] (commonly referred to as the *Dan River* case). In that case the court had held that the use of the trade mark 'Dan River' in relation to fabrics and clothes, when the clothing was in fact made from Dan River textiles but the acquisition of the Dan River fabrics was such that it was clear that Shalom Investments was not authorized to use the trade mark 'Dan River', constituted the infringement of the trade mark.

In the *Sony* case the court held that it is competent for a proprietor of a trade mark to withdraw the implied authority to use a trade mark that the manufacturer of goods has placed on those goods; that Sony Corporation had indeed withdrawn such implied authority; and that the subsequent use by TRC of the trade mark 'Sony' would be unauthorized by the proprietor of the trade mark. The court accordingly granted an interdict restraining TRC from infringing the trade mark on this basis.

It was common cause between the parties and was accepted by the court that the withdrawal of authority would apply only to grey goods to be acquired and resold by TRC in the future, and would not apply to grey goods in the possession of TRC at the time that the letter withdrawing the authority was received. In other words, it is implicit in the concept of this type of infringement of a trade mark that the grey goods must be *acquired* by the 'infringer' in the knowledge that the authority to use the trade mark upon such goods has been withdrawn from him before there can be any suggestion of infringement.

Secondly, after analysing the evidence, the court found that the alterations made to the grey goods by TRC were such as to render the adulterated goods no longer 'genuine'. In the light of this factual finding, the court held in addition that TRC had infringed the registered trade mark 'Sony' by using that mark without authority in relation to spurious goods.

It must be understood that the court's decision concerning infringement of the trade mark on the first basis was in no way dependent upon the alteration of the goods sold by TRC. This fact had relevance only to the second basis of infringement. In other words, it would not have mattered for the purposes of the decision on the first basis of infringement that the goods had not been altered at all.

The implications of this decision are far-reaching. In the application of this principle, any registered trade mark in respect of any goods can be infringed if the proprietor's goods are sold in circumstances that he has not 'authorized'. It is no longer necessary that there be any element of confusion between the trade-mark proprietor's goods and another's goods.

On the basis of this decision, the ability of the proprietor of a trade mark to control the distribution of his goods is greatly enhanced. The use of a registered trade mark for this purpose is a somewhat novel concept, and it is for this reason that I have described this decision as a landmark decision.

TRC is appealing against the judgment, and the outcome of the appeal is awaited with interest.

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[2] 1971 (1) SA 689 (A).