

SOUTH AFRICA / JUDGMENT

Distell Ltd v Stellenfine Wines (Pty) Ltd and Another (10161/12) [2012]

ZAWCHC 232 (5 December 2012)

[2012] ZAWCHC 232

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso

CASE / FILE NUMBER

10161/12

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE HIGH
COURT, CAPE TOWN)

Case

No: 10161/12

In

the matter between:

DISTELL
LIMITED

.....Applicant

and

STELLENFINE
WINES (PTY) LIMITED

.....1st

Respondent

THE
MINISTER OF AGRICULTURE,
FORESTRY
& FISHERIES

.....2nd Respondent

JUDGMENT

: 5 DECEMBER 2012

TRAVERSO, DJP

- [1] The applicant, Distell Limited, is a public company whose business focuses primarily on the manufacturing, marketing and distribution of a wide range of alcoholic and non-alcoholic beverages. This case involves only the alcoholic beverage described as a “cider”. It is common cause that the applicant is the foremost manufacturer, producer and supplier of ciders to the liquor retailers in the Republic.
- [2] The first respondent, Stellenfine Wines (Pty) Limited, is similarly a producer of various alcoholic beverages and is a competitor of the applicant in respect of a number of products.
- [3] For the sake of convenience I will throughout this judgment refer to the applicant as Distell and to the first respondent as

Stellenfinewines.

- [4] To put this application in its proper perspective, the following is of fundamental importance. On 23 May 2012 Distell launched an urgent application for a final interdict against Stellenfinewines restraining it from presenting its “Tell’s” products as “a cider or a beverage made from fermented apple juice”, and, further to compel Stellenfinewines to withdraw all stocks of Tell’s on the basis that the Tell’s product does not comply with the Liquor Products Act, No. 60 of 1989 (“toe 4cf).
- [5] The Act provides that in order to qualify as a cider a beverage must be made wholly from apple juice or a mixture of apple juice and a maximum of 25% of pear juice, with a minimum alcohol content of 2.5% and a maximum alcohol content of 15%. The Act also contains a prohibition of false or misleading descriptions of liquor products.
- [6] Distell’s case was based on the fact that tests done by a certain Dr. Hall indicated that the Tell’s product was not pure apple and/or pear juice, but was indicative of a product which was made up entirely, or almost entirely, of cane spirit (ie alcohol derived from sugar cane). Distell’s entire case was therefore that by disregarding the Act and its regulations, and by putting a cheaper and non-genuine product on the market, Stellenfinewines was competing unlawfully with DistellPs genuine, but more expensive product. Distell went as far as stating that the Tell’s product is no more than “a spirit cooler masquerading under the guise of cider1’.
- [7] Stellenfinewines filed answering papers which included an expert report by a certain Dr. Laurens, a forensic toxicologist, from the Pretoria University. He argued that the carbon isotope test performed by Dr. Hall was inappropriate to determine the origin of the ingredients. In response hereto Distell consulted yet another expert, Mr. Woodburne, who expressed certain criticism about Dr. Laurens’ report, and which contains new matter not

dealt with in the Distell's founding papers. Distell then attempted to explain away the fact that the tests by Dr. Hall and Dr. Laurens now show that the products were derived almost entirely from a C3 product and therefore complied with the Act and regulations by stating that Stellenfinewines made itself a party to some cover-up or fraudulent scheme by purchasing "more apple concentrate to make a genuine cider in a short term, simply for purposes of this application and to pull the wool over the eyes of the second respondent." These allegations are without any factual basis.

[8] Stellenfinewines developed Tell's in November 2011. It produced 630 cases of 24 bottles each. It commenced selling Tell's in liquor stores during or about February 2012. Only 86 cases have been sold, but in addition thereto, 114 cases were distributed for sample and promotional purposes. Stellenfinewines still has the remaining 430 cases in stock. According to Distell the volume of cider sold in South Africa in 2011 was in excess of 201 million litres. It is therefore apparent that Stellenfinewines is not a big player in the market. Be that as it may, the only dispute in this application is whether the Ted's cider produced by Stellenfinewines complies with the Act or not.

[9] Distell does not claim that any of its trademarks are being infringed or that its products are being passed off by Stellenfinewines. It relies solely on the alleged contravention of the Act. I am of the view that Distell failed to show that Stellenfinewines had

contravened the provisions of the Act. In its founding affidavit Distell asserted that none of the Tell's products is a cider or a beverage made from fermented apple juice. Faced with the answering affidavit, Distell changed its approach and now accepts that the 430 cases that Stellenfinewines has in stock contain true cider. This Distell attributes to the fact that Stellenfinewines is busy with a cover up strategy which involved purchasing more apple concentrate to make a genuine cider in a short term supply. As I have pointed out above, there is no factual basis for this allegation and it is speculative.

[10] This resulted in Mr. Melunsky, who appeared for Distell, to jettison his application for a final interdict during argument and to indicate that he was now applying for interim relief which in effect orders Stellenfinewines to comply with the Act, pending the determination of an action to be instituted for final relief in similar terms.

[11] The interim relief now sought by Distell is premised on the contingent event of Stellenfinewines' non-compliance with the requirements of the Act. It is trite that Courts are not generally inclined to grant relief for hypothetical situations or to remedy past conduct. See: Philip Morris Inc.

v. Marlboro Shirt Co. S.A.

“An interdict, however, is not a remedy for the past invasion of rights: Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company 1988 (1) SA 805 (T) at 809Fi In order to have been granted the relief claimed by it, Philip Morris was obliged to have established that at the time it instituted these proceedings in 1987 Marlboro Shirt was still representing that its merchandise was associated with Marlboro

cigarettes and that there was a reasonable likelihood that members of the public may then have been confused into believing that the merchandise of Marlboro Shirt was connected with Philip Morns. It became necessary, therefore, to examine the evidence which is relevant to the determination of that issue.”

[12] If the interim order sought by Distell is granted, it will do no more than confirm that Stellenfinewines must comply with the requirements of the Act. The provisions of the Act must be complied with whether or not the order is granted, and it therefore follows self-evidently that Distell will be no worse off if the interim order is not granted.

[13] It is common cause that the Department of Agriculture, Forestry and Fisheries, the second respondent, has not completed its pending investigation into the alleged breach of the provisions of the Act. Distell could easily have waited for the Department to complete this investigation before rushing to Court.

[14]In all the circumstances I am satisfied that Distell has failed to make out a case, even on a *priit*ia facie basis, and that it is not entitled to the interim relief sought.

[15] In the circumstances the following order is made:

15.1. The application is dismissed with costs, including the costs resulting from Distell’s counter-application launched on 23 July 2012 to have the matter postponed to the semi-urgent Roll;

15.2. Costs of the application including the costs of two Counsel where the services of two Counsel were used.

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