

SOUTH AFRICA / JUDGMENT

Milestone Beverage CC and Others v Scottish Whisky Association and Others (2882/2017) [2019] ZAGPPHC 394 (27 August 2019)

[2019] ZAGPPHC 394**COURT**

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

2882/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE NO: 2882/2017

27/8/2019

In

the matter between: MILESTONE
BEVERAGE CC
First Applicant
THE
TRUSTEES FOR THE TIME BEING OF THE
T
AND S HAUPT FAMILY TRUST
(021433/2014)
Second Applicant
SEAN

PETER HAUPT (ID: [...])
Third Applicant
and
THE
SCOTSH WHISKY ASSOCIATION
First Respondent
CHIVAS
BROTHERS LTD
Second Respondent
CHIVAS
HOLDINGS (IP) LTD
Third Respondent
PERNOD
RICARD SOUTH AFRICA (PTY) LTD
Fourth Respondent

JUDGMENT

KUBUSHI J,

INTRODUCTION

- [1] In the main application the respondents (applicants in the main application) had launched an application against the first to the seventh respondents (in the main application) based on unlawful competition in the whisky industry. The application was only opposed by the first, second and third applicants (respondents in the main application).
- [2] The main application concerned the first applicant's ROYAL DOUGLAS and KING ARTHUR alcoholic beverage products, which firstly, were said to have get-ups misrepresenting to the public that they were whisky and/or Scotch Whisky products, whilst the relevant products were in fact, cane spirit or vodka that was coloured to have the appearance of whisky. Secondly, the get-ups contained misleading statements and/or information about the nature and quality of the liquor being sold, in particular, that the products were whisky flavoured, whisky and/or Scotch Whisky and contained alcohol strength of 43,5%, when it was not so.

- [3] In that application I found in favour of the respondents and at the request of the applicants I reserved the issue of costs for later adjudication. The applicants seek now to appeal my judgment and order I granted in the main application and the reserved costs are sought to be adjudicated. Hence, there are two applications before me, namely, the application to adjudicate the reserved costs and the application for leave to appeal my aforesaid judgment and order. I undertook during argument by the parties that I

will grant a composite order. I, therefore, deal with both applications hereunder in turn.

THE RESERVED COSTS

- [4] The reason for the applicants' request to defer judgment on cost and to allow the parties to make submissions in respect thereof is predicated on the applicants' filing, on 10 March 2017, of a notice in terms of rule 34 of the Uniform Rules of Court. The notice in terms of rule 34 was served on the respondents shortly after service of the answering affidavit in which the applicants had undertaken not to make use of the ROYAL DOUGLAS get-up (which the respondents had complained about) in relation to alcoholic beverages in future.
- [5] The undertaking was further reiterated in the rule 34 notice wherein the applicants, without prejudice and based purely on commercial considerations, undertook not to use ROYAL DOUGLAS in relation to alcoholic beverages in future, provided that the applicants agreed with each other that each will bear own costs in relation to the matter, in so far as such costs relate to ROYAL DOUGLAS (as opposed to KING ARTHUR).
- [6] The reason for filing the rule 34 notice, as I understand it, was to curb any further litigation failing that to curb costs to the date of such notice should the matter be decided in favour of the respondents.[1] It is on this basis that when the parties appeared before me to argue the question of the costs, the applicants contended that notwithstanding their filing of the rule 34 notice,

the respondents failed to accept their tender which resulted in further costs being incurred and time being spent by the parties in the prosecution of the main application.

- [7] The applicants' proposition is that they should not be mulcted with costs that relate to the continuance of the application after the service of the notice, at least not in relation to ROYAL DOUGLAS. It is the applicants' argument that most of the information in the application after 10 March 2017 relates, unduly so, to ROYAL DOUGLAS. For example, so the applicants contend, the founding affidavit of the respondents consisted of ninety-eight
- (98) paragraphs and included forty-three (43) annexures. Only paragraphs 79 to 84 of the founding affidavit dealt with the KING ARTHUR products. The majority of the contents of the founding affidavit, including annexures, dealt with ROYAL DOUGLAS.

- [8] The applicants' argument, in essence, is that the tender and/or undertaking disposed of most of the respondents' complaints raised in the founding affidavit, alternatively, partially disposed of the application. This tender and/or undertaking, so the argument goes, was made in a bona fide attempt to avoid unnecessary litigation and that a reasonable litigant, would, under the circumstances, have accepted the tender which would have resulted in a significant amount of time, costs and resources of both parties and the court being saved.
- [9] To the contrary, the respondents in opposition to the applicants' proposition that they not be mulcted with the costs of the application, argues that: firstly, the rule 34 notice served by the applicants falls short of the provisions of sub-rule 34 (2) which contemplates a tender to perform an act claimed by a plaintiff; secondly, the tender of 10 March 2017 by the applicants was not sufficient and reliable, in that the tender made was inadequate and does not beat the relief sought by the respondents; and in addition, the applicants' attempt to avoid the normal consequences of costs following the results offends the *res iudicata* rule in that it necessitates a reconsideration of the findings already made by the court. The contention is that the findings of fact made by the court stand and cannot be traversed afresh and as such, the relief sought by the applicants is not competent.
- [10] Rule 34 (2) of the Uniform Rules of Court provides as follows:
- "Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender, unconditionally or without prejudice, to perform such act. Unless such act must be performed by the defendant personally, he shall execute an irrevocable power of attorney authorising the performance of such act which he shall deliver to the registrar together with the tender."
- [11] In terms of rule 34 (11) an offer or tender referred to in this rule may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.
- [12] It has been held that a court has an overriding discretion on costs under rule 34.[2] It follows that the rule does not dictate that costs be granted, in all cases, in favour of a defendant who has made a tender and/or undertaking as is in this instance. The law is that, the Judge called upon to consider the question of costs has an unfettered discretion. The Judge's discretion is said not to be a 'broad' discretion (or discretion in the wide sense or a discretion loosely so called) which obliges the court to have regard to a number of features in coming to its conclusion. The discretion is a discretion in the strict sense or narrow sense (also called a strong or true discretion).[3]
- [13] The tender in my view was limited to the dress up of ROYAL DOUGLAS as at 10 March 2017. The dress up was changed but that did not satisfy the applicants. As such, the order I make in my judgment in regard to ROYAL DOUGLAS goes beyond the undertaking of 10 March 2017.
- [14] Paragraphs [10] and [11] of my judgment reads as follows:

"[10] But, at the time the matter was heard, it became common cause that the respondents had indeed replaced the first sets of get-up as depicted in the applicants' papers and was at the time already marketing, distributing and selling the products dressed in the second sets of get-up. Specifically, the first respondent had addressed the website complaint and amended it to reflect the products in their second sets of get-up and that the products were no longer being marketed and sold as whisky products but as whisky flavoured spirit aperitifs.

- [11] Be as it may, the applicants are not satisfied about what they refer to as cosmetic changes which, according to them, have done nothing to alleviate their concerns. They, consequently, object to the second sets of get-up and maintain that the second sets of get-up still contain misleading statements about the nature and quality of the spirit being sold: the representation about the alcohol strength of these products as well as that they are not whisky flavoured. The applicants were able to continue with their claim mainly because in the notice of motion they contended for an order interdicting and restraining the selling or offering for sale of products with the first sets of get-up or labels or similar sets of get-up or labels. (my emphasis) Thus they contend that the second sets of get-up are similar to the first sets of get-up and the respondents should be interdicted and restrained from selling or offering the relevant products for sale in those get-ups."
- [15] It is in that sense that I would have held that the undertaking by the applicants does not beat the tender and/or the undertaking made. In addition I found in my judgment that the unlawful acts were not just confined to the use of KING ARTHUR but extended to ROYAL DOUGLAS, as well, as such, the respondents were correct to have proceeded with the application against ROYAL DOUGLAS. I make this finding, without having to go into the other grounds of opposition raised by the respondents. On this ground alone, the applicants' application that the respondents are not entitled to costs after the service of the rule 34 notice or at least in relation to ROYAL DOUGLAS must fail.
- [16] Costs in my view should follow the successful party. I, therefore, exercise my discretion in awarding the costs of the main application in favour of the respondents.

THE APPLICATION FOR LEAVE TO APPEAL

- [17] The applicants apply for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order I granted on 4 March 2019.
- [18] The application is brought in terms of sections 16 (1) (a) and 7 (1) (a) read with section 17 (6) (a) (i) and (ii) of the Superior Courts Act 10 of 2013 ("the Act") and in terms of rule 49 (1) (b) of the Uniform Rules of Court.
- [19] Section 17 (1) (a) of the Act is invoked in circumstances where the judge or judges concerned are of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[20] From the case law dealing with the interpretation of section 17 (1) (a)

- (i) of the Act as regards the test employed for determining whether leave to appeal should be granted, it is evident that the threshold has been raised. The use of the word "would" in the section has been held to denote a measure of certainty that another court will differ from the court whose judgment is sought to be appealed. In terms of the section, that there are reasonable prospect of success, should be in the opinion of the judge(s) whose judgment is sought to be appealed. The applicant in the application for leave to appeal must, as a result, convince the judge(s) involved that there are reasonable prospects of success on appeal and that another court would come to a different

conclusion.

[21] The applicants raised, in their heads of argument and in oral argument in court, a number of grounds, obviously opposed by the respondents, in an attempt to persuade me that there are reasonable prospects of success on appeal and that another court would come to a different conclusion. I have considered those grounds and having listened to the arguments for and against such application by all the parties, I am not convinced that there are reasonable prospects of success based on those grounds and that another court would come to a different conclusion.

[22] Section 17 (a)

- (1) (ii) of the Act, on the other hand, is invoked where there are compelling reasons why the appeal should be heard. The applicants have in this regard persuaded me that there are compelling reasons for granting them leave to appeal. The applicants' reasons that some of the issues sought to be taken on appeal pertains to points of law which involves interpretation and their counsel's argument in court that cases of passing off depends on first impressions where one judges' perception may differ from another were enough to persuade me.

[23] It is in that sense that I would grant the application for leave to appeal.

[24] The applicants' contention is that leave to appeal be granted directly to the Supreme Court of Appeal. Ordinarily, leave to appeal against the judgment of a single judge is to the Full Court of the Division. But in terms of section 17 (6) (a) leave can be granted directly to the Supreme Court of Appeal. I got no impression that the respondents were opposed that leave be granted directly to the Supreme Court of Appeal. I am satisfied that because of the issues sought to be resolved on appeal leave should be directly to the Supreme Court of Appeal.

[25] Consequently, I make the following order:

1. In relation to the costs of the main application -
 - a. The applicants (respondents in the main application) are ordered to pay the costs of the application.

2. In relation to the application for leave to appeal:
 - a. The application for leave to appeal is granted.
 - b. The applicants (respondents in the main application) are granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order handed down on 4 March 2019.
 - c. Costs are costs in the appeal.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicants' Counsel

: Adv. C. Puckrin SC

Adv. P. Ferreira

Applicant's Attorneys

: SG: G M DU Plessis: Adams & Adams

Respondent's Counsel : Adv. R.M. Robinson SC

Respondent's Attorneys : DM KISCH INC t/a KISCH IP

Date of hearing

: 12 August 2019

Date of judgment

: 27 August 2019

[1] Naylor v Jansen 2007 (1) SA 16 (SCA) at 23B - C.

[2] See Omega Africa Plastics (Pty) Ltd v Swiss Tool Manufacturing Co (Pty) Ltd 1978 (4) SA 675 {A} at 678H.

[3] See Naylor v Jansen 2007 (1) SA 16 (SCA) at para 14.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2019/394.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/milestone-beverage-cc-and-others-v-scottish-unknown-topic-agpphc-2019>

Prepared on 12 October 2026 · Esheria