

SOUTH AFRICA / JUDGMENT

# Mountain Oaks Winery (Pty) Ltd and Another v Smith and Another (20117/2017) [2018] ZAWCHC 69 (11 June 2018)

[2018] ZAWCHC 69

## COURT

Western Cape High Court, Cape Town

## BEFORE

N P Boqwana

## CASE / FILE NUMBER

20117/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 20117/2017

In

the matter between:

MOUNTAIN  
OAKS WINERY (PTY) LTD  
First  
Applicant  
EIKENBOSCH  
FARM (PTY) LTD  
Second  
Applicant  
and  
MARION  
SMITH  
First  
Respondent  
ELGIN  
RIDGE WINES  
Second  
Respondent

Delivered:

11 June 2018

## JUDGMENT

BOQWANA, J

## Introduction

[1] The applicants brought an application before this Court seeking an order, inter alia, in the following terms:

*“1. That the First, alternatively Second Respondent be ordered, within five business days of the date of such order, to cause to be published on the home page and on the page entitled “Organic Wine Producers” of the website (<http://biodynamicorganicwine.co.za>) and simultaneously therewith, to submit to SAWIS for circulation by it to all its members, the following retraction;*

‘Please be advised that this website previously published on the table of organic wine producers, that “Mountain Oaks Wines” are not certified organic. We wish our readers to take note that this statement was incorrect. Mountain Oaks Wines are produced on the farm Eikenbosch, which is a certified organic farm in all respects and every Mountain Oaks Wine has been certified organic.’”

[2] The second applicant is the owner of “Eikenbosch Farm”, which styles itself as an organic farming operation. The wines are bottled and labelled under the brand “Mountain Oaks”.

[3] The first respondent is a business woman and resident at Elgin Ridge Farm, Appletizer Road, Elgin.

[4] The applicants allege that Mountain Oaks wines are properly certified as compliant with international standards for the production of organic wine. According to them such certification is not only prestigious, but is also a necessary condition for access to most export markets, such as the European Union (“EU”).

[5] Mr Mark Stevens, who is a director in both applicants and the deponent to the founding affidavit, alleges that in and during the period of September 2016 and 14 August 2017 (the exact date of publication is unknown to the applicants), the first respondent falsely published, on the website <http://biodynamicorganicwine.co.za> (“the website”), that Mountain Oaks “Wines” (alternatively “Winery”) are not certified organic. She withdrew this statement pursuant to a demand from Mr Stevens. According to the applicants the withdrawal of the statement is insufficient to address the continuing harm that has been caused to them.

[6] On 11 September 2016 the first respondent had sent an email to Mr Steven’s offices, explaining that she was interested in

starting a register of organic and biodynamic wine producers. The purpose of her email was to enquire whether Mountain Oaks was a certified organic or biodynamic wine producer. On 13 September 2016 Mr Stevens responded by stating that:

*“Eikenbosch Farm is a certified organic farming operation and wine is one of our outputs. We have been certified fully organic since 2005 and, although not biodynamic, I am well connected with the biodynamic movement and use their concepts to solve organic farming issues.... Our wine was marketed under the “Mountain Oaks” label but this was the creation*

of my ex-wife, as she was the wine maker with assistance from Ross Gower, and now that she has left the farm, the label will revert to “Eikenbosch”... Thought applied to the marketing of organic wine can only be a good thing and I look forward to expounding ideas in this regard”.

- [7] On the same day an email exchange occurred, in which the first respondent asked Mr Stevens who their certification body was, so that they could be added on her register. He told her that it was “SGS/LACON” and she thanked him. Mr Stevens alleges that he heard nothing further from the first respondent and thus gave the matter no thought.
- [8] On 15 August 2017, he received a group email from SA Wine Industry Information and System NPC (“SAWIS”), which is an

industry body set up for the purposes of disseminating topical information of interest to various stakeholders in the wine industry. Mr Stevens alleges that he followed up the link provided to the respondents’ website –<http://biodynamicorganicwine.co.za>

- and noted in bold and red that the first respondent had written that Mountain Oaks Wines, alternatively the Winery (he could not recall the exact wording), was “not certified organic”, although the website had subsequently been altered and following his demand the entry relating to Mountain Oaks was removed entirely. He could therefore not reproduce the statement on the website in the manner that it appeared at the time.
- [9] The applicants allege that the statement that Mountain Oaks Wines, or the Winery as the case maybe, is are not certified organic, is entirely false, as every vintage that Eikenbosch produced enjoyed full certification to the highest possible international standards for organic wine production. They contend that they were one of the very first wineries in the Cape to receive certification for organic wine production. Mr Stevens alleges that he was shocked and appalled that the first respondent had seen fit to publish such a gross and untruthful statement, which the applicants view as damaging to their reputation and brand.
- [10] Mr Stevens asserts that as he was directed to the website by the link in the SAWIS email, so too would be the rest of the SAWIS community – a community of thousands of other producers and stakeholders in the wine industry. According to him all of these persons would have seen the website as it stood prior to 15 August 2017, at which time it prominently contained false information about Mountain Oaks Wines (alternatively the Winery). The removal thereafter of the misinformation disseminated to those persons, was a prime example of “too little too late”. The applicants requested an apology from the first respondent, which she was not prepared to issue.

- [11] The applicants allege that they have produced organic wine annually from the 2005 vintage up to and including 2012 vintage. For reasons which are not relevant to this application, Mr Stevens caused the 2011 and 2012 vintages to be destroyed, in the presence of SARS officials. For various operational reasons the applicants have not produced wine subsequently, and therefore the youngest wine that the first applicant has produced is from the 2010 vintage. For that reason organic wine certification was not applied for after 2012 – again, because no wines were produced thereafter. As the applicants age their wines naturally, they still have stocks of the 2010 vintages, and older, on hand – which they release to their clients periodically. Accordingly, the only wines bearing the Mountain Oaks label are from the 2010 and preceding vintages.
- [12] The applicants allege that whilst the Mountain Oaks brand enjoys a strong local following, by being distributed direct from the cellar to top hotels and restaurants, their primary market is the EU. The applicants must therefore comply with the stringent EU regulations, and every vintage must be (and has been) certified organic by a certification body duly recognised in the EU for that purpose.
- [13] The applicants attach the most recent inspection certificate, dated 7 September 2017, which has the word “organic” next to wine products. Underneath that there is a phrase “Wine made with organic grapes”. The certificate was valid from 7 September 2017 to 31 December
2017. The applicants also attach an email, dated 27 September 2017, from one Barbara-Let van der Merwe, of Certification and Business Enhancement. In this email Ms van der Merwe explains why the wine status is referred to as “Wine grown with organic grapes” and not “Organic wine”. In her email she states the following:
- “The organic wine standard only came into being towards the end of 2012 and was only applicable to wines from 2013 to be certified against. Before 2013, all wines under the EU – regulation could only be certified as “made with organic grapes”. I attach for you the earliest SGS – certificate that also states this.”*
- [14] As the youngest vintage still in existence is the 2010 vintage, the applicants attached certification in respect of the wine that was produced at that stage. The first certificate, dated 19 February 2010, was issued by the Bio Dynamic & Organic Certification Authority (“BDOCA”), an association that was incorporated under section 21 of the Companies Act 61 of 1973 (“the 1973 Companies Act”) and under the Auspices of the Bio Dynamic Agricultural Association of South Africa. This certificate, clearly marked as “Organic Certificate”, was issued for the period of 1 January 2010 to 31 December 2010. It records the “Enterprise Name” as “Eikenbosch Farm”. Next to “Authorized Products” it lists, amongst others, “Organic Grapes...Organic wines”.
- [15] The next certificate, which expired on 31 December 2010, was issued by “Debio”, a Norwegian control body for organic production, operating under EU regulations for organic production, and accredited by Norwegian Accreditation. It reads as follows:

*“Debio confirms that Eikenbosch Farm is certified according to EU-Council regulation 2092/91 and the IFOAM (International Federation of Organic Agricultural Movements) Basic Standards for organic primary production and processing for the following products: ORGANIC WINES”*

- [16] The last certificate the applicants attached pertains to the 2011 wine, which it destroyed together with the 2012 wine, demonstrating for the sake of completeness that it had also been issued a certificate by Debio which confirmed that Eikenbosch Farm is certified according to the EU-Council Regulations 834/2007 and 889/2008, and Debio’s IFOAM Basic Standard for organic farming, for organic grape production. It also states that in collaboration with BDOCA, Debio grants certification for organic plant production on Eikenbosch Farm. Another Debio certificate, a “Certificate for organic processing methods”, dated 14 April 2011, addressed to Mr Stevens on behalf of Eikenbosch Farm, confirms compliance with the above Regulations and Debio’s standards for processing “Organic Wines”. These certificates’ expiry date was 31 December 2011.
- [17] The applicants allege they also possessed certification for the years preceding 2010, which they did not think it was necessary to overburden the Court papers with.
- [18] On the founding papers there is a bit of confusion as to precisely who the producer of the wine was, between the first and second

applicants. Mr Stevens cleared this up in the replying affidavit by stating that he had interposed the first and second applicants at times in the founding affidavit, but such confusion is absent from the correspondence exchanged with the first respondent.

- [19] It is clear from the perusal of the documents attached to the applicants’ papers that Eikenbosch Farm is the entity that was

issued with the certificates relating to the matter in question. In the replying affidavit Mr Stevens alleges that the second applicant (as opposed to what was alleged in the founding affidavit), is the producer of the organic grapes on Eikenbosch Farm, the owner of the cellar on Eikenbosch Farm where the organic wines are made, and the owner of the stocks of organic wine, which are labelled and then supplied to the first applicant for on sale to customers. According to him, the second applicant has obtained all the necessary certification for all its organic produce on Eikenbosch Farm. It has, in addition, obtained all the necessary certification through private certification bodies. The first applicant has acquired the duly certified organic wines from the second applicant and marketed them, with due reliance on the organic certification obtained by the second applicant, as it is entitled to do. Furthermore the first applicant has only ever marketed the second applicant’s wines.

- [20] The first respondent, on the other hand, alleges that the domain name “biodynamicorganicwine.co.za” was registered on her instruction, on 9 March 2017, and in her name. It was launched and made available for public access from 14 August 2017. The purpose of the website as stated on her home page is that:

*“The Biodynamic and Organic Wines of South Africa is an association of certified Biodynamic and Organic wine producers. The association was created to form a platform for bringing together certified by Biodynamic and Organic wine producers to help consumers and media to easily see which wine producers are certified biodynamic and organic in South Africa.” (Own emphasis)*

- [21] For organic producers, certification is an important aspect of what they do. Certification assures consumers that what they are getting is really organic. Organic wines are made using only natural produce; no synthetic chemical additives are permitted.

Certified organic wine producers are listed on the “organic wine producers” page which contains “...details for grape growers who either have certified grapes, or are in conversion to organic vineyards but do not make their own wine”.

- [22] According to the first respondent, the statement posted on the website from 14 August 2017 to 15 August 2017, for approximately 48 hours, in the “NOTES” column, was in respect of the producer “Mountain Oaks Winery” and the statement read “No longer organic”. The respondents attached a printout of what they allege to be the exact statement. This printout is not from the website itself, but produced from the records of Miraska Thomas, who is the computer programmer assisting in the maintenance and updating of the respondents’ website.
- [23] The first respondent alleges that the applicants have not provided any evidence in support of what she terms “bald allegations”
- that they were certified for organic wine production at the time when the publication was made. She alleges further that the certificate dated 17 October 2014 to 21 October 2015, which is the last certificate obtained by Eikenbosch Farm prior to the statement complained of having been made, did not certify Mountain Oaks as producing organic wines, and in the interest of being complete it also did not certify Eikenbosch Farm as producing organic wines. Further, the certificate dated 7 September 2017 to 31 December 2017, only certified Eikenbosch Farm for “wine made from organic grapes” for these dates, and not “organic wines”. This certificate was only signed on 7 September 2017, nearly three weeks after the publication was made, and subsequently removed from their website. The first respondent also alleges that from her investigation, the inspection certificate from LACON contained no “processing certification”, that the applicants are not certified to make organic wine and therefore cannot export wine to the EU as organic wine.
- [24] The first respondent states that since 1991, and prior to 1 August 2012, wine was labelled as “made with organic grapes” and standards and regulations for the process of organic wine making did not exist in the EU.
- [25] After 1 August 2012, EU standards and regulations changed and the process for organic wine making was published. Since that date, wines complying with the relevant standards and regulations, and appropriately certified, could make use of such certification

authorities' certification trademarks, depicting that the wine contained in the bottle was produced organically and therefore constituted "organic wine".

[26] The first respondent further refers to an email from SGS South Africa (Pty) Ltd, dated 23 July 2013, which stated, inter alia, that:

*"[f]or the 2013 harvest for wine certified according to the EU regulation the claim of "made with organic grapes" or "organic viticulture" is no longer allowed. Wine will either comply with EU regulation and be labelled as Organic Wine or will be conventional."*

[27] She also refers to the EU Rules for Organic Wine Production, highlighting the history and background pertaining to the distinction between organic wine and wine made from organic grapes.

[28] According to her, as neither Mountain Oaks nor Eikenbosch Farm has made wine since 2011, they have never produced a certified organic wine within the meaning of the EU standards and regulations for the production of organic wine and, therefore could not be on the list contained under the organic wine producers' page.

[29] According to the first respondent, compelling her to issue a retraction as sought by the applicants, without the applicants having the requisite authorisation to claim that they are currently certified for the production of organic wine, would be tantamount to trademark infringement. She alleges that no certificates had been given to her showing that either Mountain Oaks or Eikenbosch Farm are certified to produce organic wines and therefore the statement required by the applicants would be both misleading and untrue.

[30] The respondents allege that the website had 95 visitors in the period where the reference to Mountain Oaks was listed.

## Discussion

[31] It is common cause that a publication of a statement relating to "Mountain Oaks Winery" was made by the first respondent

on her website. The issue is whether the statement in question was reflective of the factual position as at the time of the

publication of the statement. The first respondent alleges that the statement published did not say that Mountain Oaks Winery was "not organic", but that it was "no longer organic". In the first instance and to my mind the

statement "no longer organic" suggests that at some point the wine produced by Mountain Oaks Winery was organic, but at the time of publication of the statement it was no longer organic. If the first respondent did not have information supporting organic certification, as she alleges, the question is why she would state that the wine was no longer organic as if she possessed information, or knew that at some point Mountain Oaks Winery was organic. She also did not

seem to appreciate the fact that Mountain Oaks did not actually produce the wine, it merely marketed and sold it on behalf of Eikenbosch Farm, as stated in Mr Stevens' email dated 13 September 2016, as thus: "Eikenbosch Farm is a certified organic farming operation and wine is one of our outputs....Our wine was marketed under the "Mountain Oaks".

[32] On its own the statement "no longer organic" cannot be said to have been correct in the absence of any evidence to support such a position. In other words, if the first respondent was as careful as she claims to be, to ensure that the information provided to consumers is correct, then why would she publish information that was doubtful, purely on the basis of an email written by Mr Stevens to the effect that "Mountain Oaks" was used by his ex-wife and that they were in the process of going back to "Eikenbosch". Even that email does not say that Mountain Oaks was no longer organic. It is really not clear on what basis the first respondent would rely on that email to support that conclusion. The reason this question is important, is because the first respondent was careful to get a certificate that an entity is certified as a producer of organic wines before it could be listed as such on the website, which begs the question as to why she would act on information that was incomplete or ambiguous.

[33] The first respondent's contention is that at the time of publication, there was no certificate to the effect that the applicants produced organic wine. Her whole argument is premised on the fact that after 1 August 2012, the EU standards and regulations changed and a process for organic wine making was published. According to her, what the applicants showed was certification relating to wine made with organic grapes, instead of organic wine.

[34] In my view, the issue cannot be as simple as that. Firstly, it is clearly stated in the new EU Regulations No 203/2012 that the regulations shall apply from 1 August 2012. Furthermore, clause 9 of this regulation crucially provides:

*"9. Wine is a product with a long shelf-life and some wines are stored traditionally for several years in barrels or tanks before being placed on the market. Under the conditions of Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs and for a limited period in accordance with Regulation (EC) No 889/2008, the marketing of such wines by maintaining the labelling requirements under that Regulation should be allowed until stocks are exhausted."* (Footnote omitted - Own emphasis)

[35] Other important clauses in the Regulation are clauses 10 and 11 which state that:

*"10. Some of the stored wines were already produced by a wine-making process which already complies with the rules on the production of organic wine provided for by this Regulation. Where this can be proven, the use of the Community organic production logo as referred to in Article 25 (1) of Regulation (EC) No 834/2007, called from 1 July 2010 the 'Organic logo of the EU', should be authorised, to allow for fair comparison and competition between organic wines produced before and after the entry into force of this Regulation. If this is not the case, the wine should be labelled exclusively as 'wine made from organic grapes', without bearing the organic logo of the EU, provided that the wine is produced in accordance with Regulation (EEC) No 2092/91 and Regulation (EC) No 889/2008 before its*

*amendment by this regulation.*

11. Regulation (EC) No 889/2008 should therefore be amended accordingly.” (Own emphasis)

[36] It is evident from the above clauses of the Regulation that its drafters did foresee a need to make provision for wine that was produced pre-August 2012, but which was still kept in storage. In this regard they stated that such wine could still be marketed under Regulation (EC) No 834/2007. However, they made provision for a distinction between the labels, or logos, to be used for organically produced wines from the pre-August 2012 era and that which was produced thereafter, as appears in clause 10 quoted above.

[37] This explains why the certificates issued after the 2012 period, in respect of the applicants’ wine that was still kept in the cellar, referred to “wine made from organic grapes”. The drafters clearly did not, by making a distinction between the logos to be used for wines produced between those two periods, deem all wine produced before 1 August 2012 to be “no longer organic”, as the first respondent appears to suggest. To the contrary, organic wine status is recognised in both wines produced before and after the coming into force of Regulation (EC) No 203/2012. The recognition of the pre-August 2012 wine is an attempt to ensure that the two different types of wine would be able to compete on an equal footing, rather than the one necessarily having an advantage over the other. The phrase “to allow for fair comparison and competition between organic wines produced before and after the entry into force of this Regulation” clarifies that issue in my view.

[38] It therefore follows that to refer to the applicants’ wine as being “no longer organic”, was erroneous. Mr Stevens explained throughout his papers that the only vintage he had in store was up to 2010, all the wine after that period having been destroyed, for reasons that appeared to be between himself and his ex-wife. He stated that there was no need to obtain processing and production certificates after 2010, as the second applicant was no longer producing wine.

[39] To the extent that the first respondent needed clarification with regards to the status of the applicants’ wine, or particularly

with reference to the email that she seems to have based her conclusions on, she should have contacted Mr Stevens as she had done

in September 2016. It is rather strange that, given the tone of the emails in 2016, which was cordial and co-operative, she would keep quiet for almost a year and for Mr Stevens to find out via an email link that Mountain Oaks Winery was stated as “no longer organic” on the first respondent’s website.

He was neither warned to this effect nor was he given an opportunity to comment on this before it was published.

[40] It is also strange that Mountain Oaks Winery would be listed on the page that is intended to list Organic Wine Producers; as I understand it, the intention of listing on that page was to produce a positive list of entities that actually produced organic wine. I agree with the applicants that it would follow that if a producer was not certified, then they should not have appeared on that list. If Mountain Oaks Winery has never been certified as an organic wine producer, why would it appear on the organic wine producers list on the website? Furthermore the relevant page of the website appeared to have a “Notes” column, where it was written that Mountain Oaks Winery was no longer organic. The further peculiarity is why full information, as given by Mr Steven in the email of September 2016, was not mentioned in the “Notes” column, if that was the basis of the statement posted.

[41] As to the factual position, Eikenbosch Farm was certified as a producer of organic wine for the 2010/2011 year, by accredited organisations

such as BDOCA and Debio, a South African entity and Norwegian accredited entity operating under the EU Regulations for organic production. Those certificates recognised compliance with production and processing standards. Therefore for the years from 2009 to 2011, the second applicant’s wines were certified as organic according to both South African and EU standards. It has not been suggested that those certificates were not authentic or valid. It appears from the certificates that they were issued on the strength of inspections that took place by the individuals that have been mentioned in those certificates, and the second applicant as a producer was found to have complied with the relevant standards applicable at the time of the issuance of the certificates. It is therefore incorrect to give an impression that the second applicant’s wines had either never been organic, at any point, or ceased to be organic at some point, or were as at the date of the publication on the website, producers of conventional wines.

[42] It is so that a new EU Regulation was introduced in 2012; however, it did not make wines previously certified in terms of the old

Regulations no longer organic. It created a distinction in logos to be used in wines produced pre- and post-August 2012. Hence the applicants were able to be issued certificates after that period, the latest being September 2017, labelled as “wine produced from organic grapes”. The presentation on “EU Rules for Organic Wine Production”, attached by the respondents to their answering papers, also confirms this. It states as follows, at page 29, under “Certification according to EU Rules”:

*“Wine from vintages predating the new regulation which were produced organically but which cannot for some reason demonstrate compliance with the requisites of the new regulation can continue to be sold as ‘wine from organic grapes’”. (Own emphasis)*

[43] Taking all those issues into account, I find no basis for the first respondent to have stated (as a matter of fact) that Mountain Oaks Winery was not organic or no longer organic – whatever the case may have been.

[44] Another point raised by the applicants, which I think is valid, is that the first respondent's website made no reference to which standard the producers were being gauged by. In her papers the first respondent alleges that the statement was published in the public interest, because the public needs to know which wine producers comply with Regulation (EU) No 203/2012 of 8 March

2012. No reference was made in her website to any of the EU regulations, old or new. Secondly, nowhere in her answering affidavit did she state that any of the producers listed on her organic wine producers' page complied with the new regulations. For what it is worth, the applicants also pointed out that the certification in relation to Elgin Ridge Wine Estates, issued in 2014 did not make reference to new Regulations, but to Regulation (EC) No 834/2007 and Regulation (EC) No 889/2008 which are old Regulations.

[45] I now turn to consider whether the relief sought by the applicants can be granted. They have sought an interdict. The

respondents' counsel submitted that the applicants cannot be granted the relief they seek in motion proceedings for a number of reasons. Firstly, he contends that the applicants must satisfy the requirements of defamation, as there is no general principle in our law entitling a party to approach the Courts for a retraction, or an apology (insofar as a retraction or apology is a competent remedy), without a finding of defamation. In his view, no clear right has been shown by the applicants. In addition to that, the applicants do not make out a case that damage has occurred, much less that that damage will be ongoing and will increase. Furthermore, no evidence is given in support of the allegation that any of the applicants' customers in fact read the alleged defamatory statement prior to its removal. The respondents further contend that an alternative claim of damages is available to the applicants and therefore they cannot be granted any interdictory relief.

[46] The applicants, on the other hand, contend that the defamatory nature of the first respondent's conduct is incidental to the matter. They are entitled to the protection of the Courts by reason of a delict on the respondents' part, distinct from the delict of defamation.

[47] According to them, the publication, by a rival trader, of injurious falsehoods concerning its competitive business is actionable, as being unfair competition.

[48] The applicants rely on the judgment of the Constitutional Court in *Le Roux & Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011

(3) SA 274 (CC), as authority for the publication of the retraction sought in the notice of motion. In *Dey* the applicants, who were then learners at a high school in Pretoria, overlaid images of the faces of Dr Dey (then the deputy principle at the school) and that of the school principal, on an image of two naked men sitting in a sexually suggestive manner. The High Court found that the learners had defamed Dr Dey and awarded him damages. This was confirmed by the Supreme Court of Appeal.

[49] In the Constitutional Court the award for damages was reduced, and in addition it ordered the learners to tender an unconditional apology to Dr Dey for the injury they had caused him.

[50] An important feature in that case is that the Court was invited to develop Roman-Dutch common law, by giving due recognition to the value of an apology and retraction in restoring injured dignity. In paragraphs 197 – 200, the Court observed, inter alia, as follows:

*“[197] ...We think it is time for our Roman-Dutch common law to recognise the value of this kind of restorative justice. Moreover, we think it can be done in a manner which, at the same time, recognises the shared values of fairness that underlie both our common law and customary law, and which form the basis of the values and norms that our constitutional project enjoins us to strive for.*

[198] Roman-Dutch law was a ‘rational, enlightened system of law, motivated by considerations of fairness’ which combined ‘the wisdom of the Roman law jurists with the idealism of the Dutch scholars’. This feature of it was sometimes lost from view in pursuit of doctrinal purity, but in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness. And

this area of the law is no exception.

...

[200] Similar roots are to be found in customary law and tradition, but their interrelation with the Roman-Dutch remedies, and their melding into the single system of law under the Constitution, requires mature reflection and consideration of a future occasion.” (Footnotes omitted)

[51] In this connection, the Court, at paragraph 202, was of the view that:

*“[r]espect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional*

endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.”

[52] The Court ultimately found that the depiction of Dr Dey’s image was an actionable injury to his dignity and that he was entitled to an apology. It therefore ordered that an apology be tendered to him for the injury caused, in addition to the damages awarded.

[53] In another decision, that of *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as Amici Curiae)* 2011 (5) SA 329 (SCA), at paragraph 72, Nugent JA, stated the following:

*“[72] It seems to me that our courts are quite capable of expeditiously granting reparatory remedies, without damages, even without the intervention of legislation. As it is, an order that damages are payable implicitly declares that the plaintiff was unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a precondition to having the declaration. And if a declaration alone is claimed, there can also be no reason why it should not be claimed in the more expeditious procedure of application, instead of by action, which is traditionally considered to be necessary when illiquid damages are claimed. If a defence advanced by the defamer were to raise a factual dispute, then the factual dispute is capable of being resolved by oral evidence in the ordinary way, and to be resolved expeditiously.” (Own emphasis, footnote omitted.)*

[54] Although this was a minority concurring judgment, I do not think that the majority, by Brand JA, differed from the viewpoint that Nugent was advancing. The other members of the bench did not take issue with Nugent JA’s exposition of the alternative remedy of an apology, except that it was left open for the future. Snyders JA, who wrote another concurring minority judgment, simply remarked that the alternative remedies postulated by Nugent JA had not been properly ventilated in Court and therefore the direction taken by Nugent JA needed to be explored in future litigation of that kind.

[55] Nugent JA referred to *Le Roux supra* with approval, in the context of the reputational rights of a trading corporation. In this connection he posited a view that a trading corporation has an interest in its reputation which may be protected. It should have a right to insist that others do not damage its good name, unless there is legal justification to do so. (In this regard see paragraphs 74 to 81).

[56] I therefore see no reason why Nugent JA’s views could not be applied in the present case. The respondents’ submission

that retraction should be distinguished from an apology, in this context, is without merit.

[57] Retraction and an apology are often used together. This can be seen in paragraph of 74 of the *Media 24* decision *supra*; *Le Roux supra* at paragraph 197; and *University of Pretoria v South Africans for the Abolition of Vivisection and Another* 2007

(3) SA 395 (O) at paragraph 1.

[58] In the *University of Pretoria* decision, the Court granted an order directing defamatory statements to be retracted and an apology to be published and simultaneously,

the correct facts be set out (at paragraphs 1 and 18).

[59] The *University of Pretoria* judgment is further authority for the proposition that it is competent for a court to grant an order directing respondents to retract statements which are factually incorrect and to set the record straight. An order containing a retraction and an

apology was also made by Willis J in the judgment of *Mineworkers Investment Company (Pty) Limited v Modibane* (2001/20548, 2001/21162) [2002] ZAGPHC 6 (18 June 2002), which was one of the earliest judgment to grapple with the question of whether an apology can be ordered in a defamation case. Damages in that case were only made payable in the event that an apology and retraction was not published in the Business Day Newspaper. The Court in that case, at paragraph 25, also found that:

*“[a] public apology which will usually be far less expensive than an award of damages, can ‘set the record straight’, restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression.”*

[60] Hiemstra AJ in the decision of *Isparta v Richter and Another* 2013 (6) SA 529 (GNP), at paragraph 41, supported apology or retraction as an appropriate remedy in its own right. In that instance, he stated the following:

*“[40] An apology in the same medium (Facebook) would have gone a long way towards mitigating the plaintiff’s damages. In fact, there is much to be said for the proposition that orders for damages for defamation are inappropriate. Nugent JA, in a minority judgment in Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as Amici Curiae), referred to a 1995 report of the New South Wales Law Commission, referred to by Willis J in Mineworkers Investment Co (Pty) Ltd v Modibane, which called damages as the sole remedy for defamation ‘remedially crude’. Nugent JA said in para [72]:*

*‘As it is, an order that damages are payable implicitly declares that the plaintiff was unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a pre-condition for having a declaration.’*

An apology to the plaintiff, or a retraction in writing, in the same forum that the offending statements had been made, also clears the name of the plaintiff.” (Footnotes omitted)

[61] In another decision, that of *Heroldt v Wills*

[2014] JOL 31479 (GSJ), the Court held at paragraph 39:

*“...In the circumstances of this case, I am satisfied that by issuing an interdict that the respondent is to remove the posting, the court will be providing a remedy for which there is no other by which the applicant, with the same effect, ‘kan geholpen worden’. Besides, the interdict which I propose to make will resolve the issue without the needless expense, drama, trauma and delay that are likely to accompany an action for damages in a case such as this.”*

[62] These cases indicate that our courts have moved on to recognise the value of an apology and retraction, as remedies that may serve to protect or vindicate reputational rights and that damages need not be a precondition before such remedies are realised. Secondly, what comes out of these cases is that such remedies are capable of being granted in motion proceedings if the necessary requirements are met. The third issue is that an order may include both a retraction and an apology and it would largely depend on the circumstances

of the case. Although many of the cases involved damages, the courts have found no difficulty in reasoning that an apology may be awarded as a remedy independent of damages.

[63] These cases involved defamation claims. The question that remains is whether, as the respondents contend, no remedy of an apology or retraction (even if the court finds that an apology/retraction is an appropriate remedy) may be ordered if defamation has not been proved. It will be recalled that the applicants in this case did not base their case on defamation per se. They contend, however, that whilst they have not based their case on defamation, they have proved it on the papers.

[64] To advance the basis of their case, they refer to the decision of Nuwater PTE Ltd and Another v Grahamtek Holdings Ltd and Another (7051/2016) [2016] ZAWCHC 113 (1 September 2016). They contend that, as was found in Nuwater, the publication of injurious falsehoods by a rival trader concerning its competitor's business, is actionable as being unfair

competition. (Also see *Schultz v Butt*

[1986] ZASCA 47; [1986] 2 All SA 403 (A)). This is a type of Aquilian Liability. The applicants contend that the respondents are their competitors and rivals in the wine industry, and most particularly in the market for organic wines. They contend that the statement made on the first respondent's website about Mountain Oaks Winery was false and undoubtedly harmful and therefore actionable under the *actio legis Aquiliae*. In Nuwater the applicants had sought an order directing the respondents to remove from their website advertising and publicity material, as well as certain claims and misrepresentations, which the applicants stated constituted unlawful competition, because they contained, inter alia, misrepresentations made by the respondents about the respondents' business track record and technology. According to the applicants, in that case, these misrepresentations gave the overall impression that the respondents had successfully developed and commercialised certain patents.

[65] The Court found at paragraphs 24 & 25:

*"[24] Competitive trading is unlawful when it involves wrongful interference with another trader's rights such as to infringe that parties' right to attract custom. While it is actionable under the lex Aquilia, fault in the form of negligence or intent is not a requirement for interdictory relief to be granted and a final interdict may follow where there is shown to be a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.*

[25] Although there is no numerus clausus of acts which constitute unlawful competition, the generally recognised categories are misrepresentations made by a rival trader as to its own business; the publication by a rival trader of injurious falsehoods concerning the company's business; and the passing off by a competitor of its goods or business as being associated with that of the complainant, including the unfair use of a competitor's fruits and labour." (Footnotes omitted)

[66] It appears from the facts that the statement "no longer organic" was not accurate. I have no difficulty in holding that it was a misrepresentation, the publication of which would have been injurious to the reputation and goodwill of the applicants, who had traded and marketed their wines as organic since 2005. The first respondent was their competitor in that she was also involved in the production of organic wine. There should be no reason why the applicants should not succeed on the basis of unlawful competitive trading on the basis similar to Nuwater, supra.

[67] I turn to deal with whether defamation has, in any event, been shown. Defamation is defined as the wrongful and intentional

publication of a defamatory statement concerning another. (See *Khumalo and Others v Holomisa*

[2002] ZACC 12; 2002 (5) SA 401 (CC) at para 18.)

[68] In *Le Roux* supra, at paragraph 85, the Court states as follows:

*"Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamatory must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence."* (Footnotes omitted)

[69] Based on the facts, the first respondent has not been able to show that her conduct was not wrongful, or that it was justified in any respect. She had no reason to publish a statement that Mountain Oaks Winery was no longer organic, particularly because that was not the purpose of the website. The purpose of the website was to inform the public as to which producers were organic and not those that were not. Furthermore, her conduct was not consistent with her assertions of vigilance. The version that there was no intention to injure is rejected as it is not supported by the facts. There is no reason not to accept that the applicants, by virtue of the certification as producers of organic wine that they held since 2005, had built a reputation and goodwill over time.

[70] In the end, it is clear to me that a clear right has been shown to exist. As to the injury, I agree with the applicants that an injury has been actually committed or is one which is reasonably apprehended. It is continuous and although the statements were

removed, there is a continuing violation of the applicants' rights. Until the truth is published, the false information

regarding the applicants' organic status continues in circulation, and is likely to have stayed in the minds of those who

read the website. Consumers may reasonably conclude that the Mountain Okes Wines are not certified organic or are no longer certified

organic.

[71] On the issue of another satisfactory remedy, as Nugent JA pointed out in Media 24, particularly at paragraph 71, "[t]here is no reason why a wrong must be left to fester, on the basis that damages can later salve the festering, when the wrong is capable of being repaired before the festering occurs". The applicants contend also that the damages claimed may be difficult to assess. They further allege that it would be almost impossible to determine whether the restaurants or collectors of Mountain Oaks Wines have purchased less of the wine following the untrue statement. They contend that it is very likely that the damage would increase over time if the interdict is not granted.

[72] In my view, therefore, the requirements for a final interdict have been met and the applicants are entitled to the relief they seek. The removal of the statement by the first respondent was not sufficient. The applicants are accordingly entitled to a retraction, and publication of a statement which reflects the true state of affairs as at the time of the publication of the statement on the first respondent's website.

[73] I am not persuaded that costs on attorney and client scale is warranted, as sought by the applicants in this case.

[74] The following order is made:

1. The application succeeds with costs.
2. The first respondent is ordered, within ten business days of the date of this order, to cause to be published on the home page and on the page entitled "Organic Wine Producers" of the website (<http://biodynamicorganicwine.co.za>) and simultaneously therewith, to submit to SAWIS, for circulation by it to all its members, the following retraction:

*"Please be advised that this website previously published, on the page of organic wine producers, that 'Mountain Oaks Wines' are no longer certified organic. We wish our readers to take note that this statement was incorrect. Eikenbosch Farm is the producer of Mountain Oaks Wines and had, at the time of the publication of the statement, in stock vintages up to 2010. It had been certified as a producer of organic wines, for the wine in stock, by accredited organisations such as Bio-Dynamic and Organic Certification Authority ("BDOCA"), a South African entity and Debio, a Norwegian accredited entity*

*operating under the EU Regulations for organic production. Those certificates recognised compliance with applicable production and processing standards.*

Please note that this wine was produced prior to the new EU Regulations No 203/2012 which applied from 1 August 2012. Clauses 9, 10 and 11 of EU Regulations No 203/2012 would therefore be applicable in this case.”

3. The first respondent is ordered to pay the applicants’ costs.

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N P BOQWANA

Judge of the High Court

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#### APPEARANCES

For the Applicant: Adv D Welgemoed

Instructed by: Andrew Miller & Associates, Cape Town

For the Respondents: Adv F Landman

Instructed by:

Michael Ward Attorneys, Wynberg

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