

SOUTH AFRICA / JUDGMENT

Swartkops Sea Salt (Pty) Ltd v Cerebos Ltd (CA 03/2012) [2013] ZAECGHC 45; 2013 BIP 453 (ECG) (10 May 2013)

[2013] ZAECGHC 45

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, D Chetty, N Dambuza

CASE / FILE NUMBER

CA 03/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE – GRAHAMSTOWN)

CASE NO.: CA 03/2012

In the matter between:

SWARTKOPS SEA SALT (PTY) LIMITED

.....Appellant

And

CEREBOS LIMITED

.....Respondent

JUDGMENT

BESHE J:

- [1] The appellant, who was the applicant in the court a quo, launched an application for an order in the following terms:
1. Interdicting and restraining the respondent from passing-off its braai salt as that of the applicant or as being connected in the course of trade with the applicant, by using, in regard thereto, the get-up of its current Buffalo Braai Salt or any get-up which is confusingly or deceptively similar to the get-up of the applicant's original orange braai salt or the get-up of the applicant's range of orange braai salt;

2. Ordering an enquiry into damages suffered by the applicant as a result of the respondent's unlawful conduct;
3. In the event of an enquiry in terms of prayer (2) above being ordered and the parties being unable to reach agreement as to the future pleadings to be filed, discovery, inspection or other matters of procedure relating to the enquiry, an order authorising either of or any party to make application to this Honourable Court for directions in regard thereto; and
4. Ordering respondent to pay the costs of the application.

[2] The application was thus based on the delictual wrong of passing off. Appellant's complaint being that respondent's recently launched braai salt has a get-up which is confusingly or deceptively similar to the get-up of appellant's braai salt. Having found that the respondent has sufficiently distinguished the get-up of its braai salt from that of the appellant and that there was therefore no prospect of confusion on the part of the ordinary customer, Rorke AJ dismissed the application. This is an appeal against Rorke AJ's decision with his leave.

[3] The appellant is a producer and wholesaler of table and industrial salt and has been selling these products throughout South Africa since the 1950's under the Marina brand name. Its table products include: a braai salt range, household salt, all-purpose salt, tip & flo 5 star, ityiwa, letsoae, topsell, non-iodated bakers salt, cyclone salt and seeso. Appellant's braai salt was launched in 1980 in its current packaging and get-up. Likewise the respondent is a producer and wholesaler of various salt products under two main brand names, Cerebos and Buffalo. Its operations began in 1965. Appellant and respondent are competitors in the production and sale of their respective products.

[4] The following constitutes features of the packaging and get-up of appellant's braai salt:

orange plastic container.

having a brown cap.

containing 400 grams of salt.

appellant's trade mark "Marina" appears in a white oval bordered by a blue line and surmounted by a smaller blue oval containing a stylized wave in white appearing at the top of a wraparound orange label.

beneath the Marina logo the words "braai salt" appear in dark brown and white above a depiction of meat on a braai stand.

the salt inside the container is yellow in colour.

[5] Prior to the 2010 December holiday season respondent launched the braai salt that became the subject of appellant's complaint. Features of the packaging and get-up of this braai salt were the following:

orange plastic container.

having a brown cap.

containing 400 grams of salt.

respondent's trade mark Buffalo appears within a white oval bordered by a blue line and is surmounted by a smaller blue oval containing a stylized buffalo in white.

beneath the Buffalo logo the words braai salt appear in orange above a depiction of meat on a braai stand.

the salt inside the container is yellow in colour

[6] In the court a quo appellant contended that respondent's braai salt get-up was confusingly similar to the get-up of its braai salt. Alleging that respondent's use of its braai salt get-up amounted to passing off of its salt as being or of being part of appellant's braai salt or as being connected in the course of trade to appellant's braai salt.

[7] In order for an application based on wrongful passing off to succeed, the applicant is required to prove:

(i) A reputation of its product get-up, that the elements of its get-up are associated with the applicant's product in the minds of the public;

and

(ii) That the get-up of the impugned product is likely to confuse or mislead members of the public into believing that the product is that of the applicant or is associated in the course of trade with the applicant.

In summary the applicant must prove:

(a) Goodwill or reputation.

(b) Likelihood of deception or confusion.

See *Adcock-Ingram Products LTD v Beecham S.A.* 1977 (4) 434 WLD at 436 to 437.

[8] In the court a quo Rorke AJ found that the appellant had set out sufficient evidence to establish the necessary reputation in its braai salt product. The court a quo's finding in this regard is not assailed on appeal. It is in respect of the second requirement that the learned acting judge's judgment is assailed – namely, whether there is a likelihood of confusion or deception. The appeal in this regard is premised on the ground that the court a quo erred in holding that it was necessary to carry out a critical analysis of the differences and similarities of the get-up of the two products and that it could not rely only on a first and general impression in order to determine whether the representation made by the respondent is likely to cause confusion. It is contended that the court a quo applied an incorrect test.

[9] In a bid to prove that there was a likelihood of consumers being misled into believing that respondent's braai salt is that of an appellant, the latter tendered the evidence of two purchasers Ms Emeraldal Myburgh and Mr Peter Labuschagne. In March 2011 Ms Myburgh addressed an email to the appellant wherein she wrote about a visit to Pick 'n Pay, where thinking she was

buying appellant's braai salt, she took from the spice shelf a braai salt in an orange bottle. She only realised on reaching the pay point that it was not appellant's Marina product but respondent's Buffalo product. During the same period, Mr Labuschagne wrote to the appellant to enquire whether they had changed the brand name (Marina) of their braai salt to Buffalo. This was after he had seen a braai salt in an orange canister at Pick 'n Pay bearing "Buffalo" instead of 'Marina'.

[10] This evidence was rejected by the court a quo. Ms Myburgh's evidence was rejected on the basis that she was not an average purchaser but a careless buyer. Mr Labuschagne's on the basis that he apparently was not deceived into believing that the braai salt was that of the appellant because upon picking up the braai salt he realised he was dealing with something different. The court a quo also found that the evidence of the two individuals over a nine month period is not sufficient to indicate actual confusion on the part of an average purchaser.

[11] In *Blue Lion Manufacturing (Pty)Ltd v National Brands Ltd* 2001 (3) SA 884 at 889 Schutz JA had this to say regarding evidence as to whether the get-up of a product is likely to be deceptive:

"It has often been said (e.g. Pasquali at 476) that opinion evidence as to whether a particular packaging is likely to deceive is of little value; as that is the question which the court must decide. But as the immediately succeeding passage in the judgment of Solomon J in Pasquali shows, evidence that persons have actually been deceived is of far greater importance."

As regards a question raised as to why there was only one witness who claimed to have been deceived to buy biscuits she did not intend buying because of the packaging, the learned judge of appeal pointed out that few witnesses will bother to go back to the manufacturer to complain about a small purchase, and that purchasers are "likely to go to the retailer to obtain satisfaction or just learn for next time".

[12] In casu, within four months of the launching of respondent's braai salt (not nine months as the court a quo found) there is evidence from two witnesses that they were deceived into believing that respondent's braai salt was that of the appellant or is connected to it. In my view the evidence of the two witnesses in this regard is indicative of actual confusion on the part of the average purchaser.

[13] Before us, Mr Marriot who appeared for the appellant submitted that the court a quo erred in holding that it was necessary to carry out a critical analysis of the differences and similarities of the get-up of the two braai salts in question and by finding that it could not rely only on the first and general impression to determine whether the representation made by the respondent is likely to cause confusion. By so doing, argued Mr Marriot, the court a quo applied an incorrect test.

[14] The fundamental principles that are applicable in a passing off action were succinctly stated by Schutz JA in *Blue Lion Manufacturing (Pty) Ltd v Natural Brands Ltd supra* at 887 D - G to be the following:

“The more detailed rules have been articulated so frequently and consistently that I need to make only the briefest reference to them. When one is concerned with alleged passing off by imitation of get-up, as is the case in the matter before us, one postulates

neither the very careful nor the very careless buyer, but an average purchaser, who has a general idea in his mind’s eye of what he means to get but not an accurate representation of it. Nor will he necessarily have the advantage of seeing the two products side by side. Nor will he be alerted to single out fine points of distinction or definition. Nor even, as pointed out by Greenberg J (from whom I have been quoting) in *Crossfield & Son Ltd v Crystalizers Ltd 1925 WLD 216 (a) 220*, will have the benefit of counsel’s opinion before going out to buy. Nor will he necessarily be able to read simple words, as there are distressingly many people in South Africa who are illiterate.

However, the law of passing off is not designed to grant monopolies in successful get-ups. A certain measure of copying is permissible. But the moment a party copies he is in danger and he escapes liability only if he makes it “perfectly clear” to the public that the articles that he is selling are not the other manufacturer’s, but his own articles, so that there is no probability of any ordinary purchaser being deceived. *Pasquali* at 479, *Crossfield* at 221 and *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W) at 437 F -438 A.*”

[15] In this case, taking a cue from Harms AJA’s approach in *Reckett & Coleman SA(Pty) Ltd v S C Johnson and Son SA (Pty) Ltd 1993 (2) SA 307 (A)* of undertaking a measure of a critical analysis of the differences and similarities of the competing products, the court a quo stated that:

“In my view, in order for a Court to make an appropriate and correct finding, it must undertake such an exercise – keeping in mind, of course, the relevant importance of the first and general impression. If a court does not undertake that exercise and relies solely on a first and general impression, it runs the risk of failing to distinguish between unlawful passing off and unlawful

competition.”

Thereafter, the learned acting judge, having warned himself not to peer too closely at the competing products, embarked on a close scrutiny of the two containers and noted the differences and similarities between the two containers. This examination runs into eleven paragraphs of the judgment. Having done so the court a quo drew the conclusion that the respondent had sufficiently distinguished the get-up of its product from that of the appellant and that there was no prospect of confusion on the part of the ordinary costumer.

[16] In my view by adopting this approach the court a quo lost sight of the principles laid down in *Blue Lion* (supra) as to what is likely to be the ordinary everyday buyer especially of commodities such as groceries, namely a person who has a general idea in his mind's eye of what he is looking for, who, however, does not have an accurate representation of it, who will not have the advantage of seeing the two products side by side, who will not be alerted to single out similarities and differences between the products.

[17] Schutz JA in *Blue Lion* (supra at page 899 D) suggests that one should have regard to the whole get-up, including the colours, the arrangement of the matter and the letters. In considering the whole get-up of the two products in question, and placing oneself in the shoes of a member of the public who has an idea of what he is looking for; for example Marina braai salt, perhaps with an imperfect recollection of the words that appear on the product he is looking for; who does not have a lot of time at his disposal to undertake a meticulous examination of the products on offer – who is confronted with a Braai Salt, in a orange canister with a brown cap containing 400 grams of yellow salt, with depiction of meat on a braai stand; with a trade mark that is contained in an oval, which in turn is surmounted by a smaller oval, amongst other things – one will be justified in thinking that respondent's braai salt is the Marina braai salt that he is looking for. In my view there is an immediate and striking similarity between the packaging and get-up of the rival products in question. Evidence of actual confusion on the part of Ms Myburgh and Mr Labuschagne as to the source of the

Buffalo braai salt they saw is proof of that.

[18] It is therefore my conclusion that the likelihood of deception and confusion has been established by the appellant.

[19] In the result therefore I propose the following order:

1. The appeal is allowed with costs.
2. The order of the court a quo is set aside and is substituted with the following order:

“1. It is ordered that the respondent be and is hereby interdicted and restrained from passing off its braai salt as that of the applicant or as being connected in the course of trade with the applicant, by using, in regard thereto, the get-up of its current Buffalo Braai Salt or any get-up which is confusingly or deceptively similar to the get-up of the applicant's original orange braai salt or the get-up of applicant's range of orange braai salts;

2. It is ordered that an enquiry into damages suffered by the applicant as a result of respondent's unlawful conduct be instituted;
3. In the event of the parties being unable to reach agreement as to the future pleadings to be filed, discovery, inspection or other matters of procedure relating to the enquiry referred to in 2. above, either of or any party is authorised to make an application to this court for direction in regard thereto."

N G BESHE

JUDGE OF THE HIGH COURT

CHETTY J

I agree. It is so ordered.

D CHETTY

DAMBUZA J

I agree.

N DAMBUZA

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