

SOUTH AFRICA / JUDGMENT

Swartkops Sea Salt v Cerebos Ltd

(972/11) [2011] ZAECPHC 46; 2011 BIP 411 (ECP) (25 October 2011)

[2011] ZAECPHC 46

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

S C Rorke

CASE / FILE NUMBER

972/11

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Source record**REPORTABLE****Date of argument : 29 September 2011****Date of delivery : 25 October 2011****IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE HIGH****COURT, PORT ELIZABETH)****CASE NO. 972/11**

In the matter between :

SWARTKOPS SEA SALT

(PTY) LTDAPPLICANT

and

CEREBOS LIMITED

.....RESPONDENT

JUDGMENT**RORKE, AJ :**

This application relates to the delictual wrong of passing off.

The Applicant (“Swartkops”) seeks an order against the Respondent (“Cerebos”) interdicting and restraining the latter from passing off its braai salt as that of the former. Its complaint is that Cerebos’ recently launched Buffalo braai salt product has a get up which is confusingly or deceptively similar to the get up of Swartkops’ longstanding Marina braai salt product. Both Swartkops and Cerebos are competing salt producers and wholesalers. Swartkops sells its

products under the brand “Marina” while Cerebos sells its salt products under two different brands, “Cerebos” and “Buffalo”. This application relates only to Cerebos’ “Buffalo” brand of braai salts.

Swartkops’s braai salt was launched in 1980 in packaging and get up which has not changed in the more than 30 years since its launch.

During the course of 2010 Cerebos took a decision to relaunch its Buffalo brand which had previously been used in the colours blue and white, which are the primary colours of the Cerebos trade mark and Cerebos products. Cerebos identified a need and realised an opportunity existed to introduce a seasonings range into the economical braai salt segment of the market. Cerebos proceeded to develop a low cost braai salt product under its redesigned Buffalo trademark and used principally the colours orange, brown and red in relation to this product. The product was launched, under pressure of time constraints, prior to the December 2010 holiday season.

The launch by Cerebos of its braai salt product in December 2010 had, by 21 January 2011, drawn complaint from Swartkops. The latter contended in a letter from its attorneys that Cerebos was guilty of passing off and demanded the immediate cessation of this allegedly unlawful conduct. As a consequence of this and further demands made by Swartkops on Cerebos, Cerebos undertook to and ultimately did change the cap of its Buffalo braai salt; subsequently it also changed the design of its label in certain respects. This it did under denial that its product passed off Swartkops’ product and without prejudice to its rights.

Swartkops remained dissatisfied with the Buffalo braai salt product in its new form. It contended that Cerebos continued to pass off its product for that of Swartkops and it therefore launched the present proceedings seeking interdictory relief.

Passing off protects a trader against deception arising from a misrepresentation by a rival concerning the trade source or business connection of the rival’s goods or services.¹

Passing off is wrongful because it results, or is calculated to result, in the improper filching of another’s trade and/or in an improper infringement of his goodwill and/or in causing injury to that other’s trade reputation. Such a representation may be made impliedly by a trader adopting a get up for its goods which so resembles another’s get up that it induces the public to be confused or to be deceived into thinking that the first trader’s goods or services emanate from the other trader or that there is an association between them.²

An applicant who seeks relief of this kind based on an implied representation, as Swartkops does here, must establish two things. First, it must establish that its get up has become distinctive of its goods or services in a sense that the public associates such get up with the goods or services marketed by it. If it has done so, it has acquired the necessary reputation. Second, it must satisfy a Court that the get up used by the respondent is so used as to cause the public to be confused or deceived in the manner described above.³

It is to a consideration of these two issues to which I now turn.

Reputation

Mr G E Morley SC has argued that Swartkops has not established a reputation in its Marina braai salt product. A significant foundational block for his argument is the contention that neither the container nor its colour are capable of attracting a reputation. In support of this argument he refers to *Die Bergkelder Beperk v Vredendaal Ko-op Wynmakery* 4 where it was held that according to public perception containers and shapes generally do not serve as source identifiers. They are perceived to be functional and, if not run of the mill, to be decorative and not a badge of origin. Thus, in *Reckitt & Coleman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd*,⁵ the Court pointed out that purchasers of ordinary household goods know that similar goods having different origins often have similar containers.

Counsel also refers to *Online Lottery Services (Pty) Ltd v National Lotteries Board* 6 where it was held that our Courts will not easily find that descriptive words have become distinctive of the business or products of the person using them. By a parity of reasoning, he argues that I should not readily find that the colour orange has become distinctive of Cerebos's business or products.

Mr Marriot, who appeared on behalf of Swartkops, argues that the correct approach is to determine whether the get up, taken as a whole, has established the requisite reputation. He refers to the remarks of Van Wyk J in *Stellenbosch Farmers' Winery v Stellenvale Winery* 7 where the learned Judge said :

"In passing off cases the complaint is not based upon any property right in a mark as such; it is based on the likelihood that the similarity of another's get up may mislead the public. (Halsbury 2nd ed. Vol. 32 p.614.) The result is that in passing off actions the comparison is between the whole get up of the applicant and the whole get up of the respondent (Halsbury 2nd Ed. p.614), whereas in infringement of trademark actions enquiries are confined to a comparison of the registered mark and with that portion of the respondent's get up which is alleged to infringe the applicant's registered rights."

In *Reckitt & Coleman*,⁸ the Appellate Division held that in assessing whether there is a likelihood of deception or confusion it is necessary to consider and compare the whole get up of each of the competing products.

Those remarks appear to have been made with reference to the second question to be decided, that is, whether there is a likelihood of deception or confusion. There does not appear to me, however, to be any reason in logic or principle why the same approach should not be followed in respect of the prior question, that is the question of reputation, in circumstances where the contention is that the get up as a whole has acquired a reputation. It is artificial in such circumstances, I think, to break down the component elements of the whole get up and then to argue that one or other or more of the component elements themselves cannot acquire a reputation. Such an approach appears to me to be illogical because the public, if it is deceived, will be deceived by the whole get up and not by component elements thereof.

It is true that Swartkops made much in its papers of the distinctive orange plastic container in which its braai salt is sold. There is repeated reference by Swartkops to its “original orange bottle braai salt.” Mr Morley SC argued that Swartkops, on a proper analysis of its affidavit, relied for its reputation only on its original orange bottle. I am not persuaded by that argument. The founding papers contain sufficient evidence of other distinctive features of Swartkops’ braai salt product which entitle it to argue, as it has done, that the get up of its product, as a whole, has acquired a reputation.

The factual enquiry is therefore whether the whole of the get up of Swartkops’ braai salt product has attracted the requisite reputation.

In this regard, Page J said in *Cambridge Plain AG and Another v Moore and Others* 9 that :

“Whilst each case must be decided on its own facts, there are undoubtedly cases where the manner and scale of use of the symbol in question can in itself be sufficient to warrant the conclusion that it must have become recognised by a substantial section of the relevant public as distinctive of the plaintiff’s goods, services or business. That conclusion has been drawn from such evidence in a number of cases. See e.g. Haggard Co v SA Tailorscraft (Pty) Ltd and Another 1985

- (4) SA 569 (T); *John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977
- (3) SA 144 (T); *United SA Brush Manufacturing Co Ltd v Kleenem Brushworks (Pty) Ltd* (CPD 16/7/78 SAPJ January 1981); *Easyfind International (SA) (Pty) Ltd v Instaplan Holdings and Another* 1983
- (3) SA 917 (W).”

I am in respectful agreement with those views. Is there sufficient evidence before me to warrant a conclusion that Swartkops’s braai salt product has become recognised by a substantial section of the public as distinctive of Swartkops goods? This question must, in my view, be answered in the affirmative. The evidence concerning Swartkops’s reputation in its braai salt product is largely uncontested. The get up of the original product has not been altered since it was first launched some 31 years ago. For all these years members of the public throughout South Africa have been buying this particular braai salt product in the same container with the same get up. The product is currently sold in more than a thousand stores nationwide. It has enjoyed – and continues to enjoy – significant sales volumes. It is sold in all retail food outlets in South Africa save for stores in the Pick ‘n Pay group. There has been extensive marketing of the product during this period.

Despite some criticism by counsel for Cerebos of the evidence tendered by Swartkops with regard to the volumes of sales of the latter’s products in Spar outlets, I am nonetheless persuaded that Swartkops has set out sufficient evidence in its papers, quite apart from the contested evidence relevant to Spar sales, to establish the necessary reputation in its braai salt product. I find accordingly.

Confusion

The next issue to which I turn is whether the get up used by Cerebos in its braai salt product is sufficiently similar to the get up of the braai salt product of Swartkops as to cause confusion or deception in the public.¹⁰

Counsel for both parties have referred me to a number of established principles which I am enjoined to bear in mind when considering this question. Before referring to those principles it is necessary for me to state that which seems obvious: each case must be decided on its own facts. The get up of the products in question in one case will almost never, if ever, be the same as the get up of the products in another matter. Reference to the facts of other cases will therefore be of little or no help in reaching an appropriate conclusion.

A Court must notionally transport itself from the Courtroom to the particular market place and stand in the shoes of those who might be expected to make use of the goods offered by the two trade rivals.¹¹

The class of persons which is likely to be the purchaser of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception.¹²

In *Blue Line Manufacturing (Pty) Ltd v National Brands Ltd* ¹³ the Court defined the average, or ordinary, purchaser as follows :

*“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 exact and 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 and Son v Crystalises Ltd* 1925 WLD 216 at 220, will he have had 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.”*

I was also referred to the principle of imperfect recollection¹⁴ and to the fact that a Court must not “peer too closely” at the similarities and differences in the get ups of the two products because the ordinary customer would simply not undertake that exercise; rather the test is one of first and general impression.¹⁵ Whilst that may be so, it is clear from the authorities that our Courts have undertaken a measure of critical analysis of the differences and similarities between the get up of the products of the two competing traders. I refer, by way of illustration, to the comparative analysis undertaken by Harms AJA in *Reckitt & Coleman*. ¹⁶ 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 lawful competition.

It must be borne in mind, in this regard, that an intention to compete is legitimate. An intention to compete must therefore not be confused with an intention to deceive¹⁷ and a Court must be sufficiently astute to ensure that such confusion does not arise when making a finding. This is so because a manufacturer has no monopoly in a get up. In *Distilleerderij Voorheen Simon Rijnbende en Zonen v Rolfes, Nebel & Co*¹⁸ Gregorowski J stated :

“These cases make it quite clear that a trader has no monopoly in the “get up” of his goods. However great the advantage and merits of his “get up” may be over that of his trade rivals, how ever much money, time and thought he may have expended over the designing of the particulars, when once he has used and published them they do not become his property but are common property, which can be appropriated by his rivals provided they do not mislead the public but make it perfectly clear that the goods in the “get up” are not his but theirs. When once this principle is clearly born in mind much confusion is, I think, avoided which in many cases of “passing off”

arises. Assuming that there has been no infringement of the trademark, the question in “passing off” actions is whether the respondent, where he has imitated the applicant’s “get up”, has sufficiently differentiated his goods from

those of the applicant. Under such circumstances the respondent is bound to make it perfectly clear that although he has adopted the applicant’s “get up”, the goods are his and not those of the applicant. If he succeeds in doing this then no liability rests upon him and no legal right of the applicant’s has been invaded.”

(my emphasis)

Ultimately, and perhaps most importantly, the likelihood of deception is a matter for the Court and a decision must not be surrendered to any witnesses.¹⁹

This last principle requires some comment in light of evidence tendered by the parties regarding the question of confusion. On 8 March one Esmerelda Myburgh wrote to Swartkops in which she recorded an incident at a Pick ‘n Pay outlet in Port Alfred. She had made her purchases and approached the till. Her companion realised that they had forgotten to purchase braai salt. As a consequence she ran back to the spice aisle. (“Ek hol toe terug na die speserygang toe”). There she saw the orange bottle and hurried back to the till (“... en wikkel toe terug til toe”). There she realised that the product she had in her hand was not that which she had intended buying. I am not persuaded that much weight should be attached to her evidence. She was clearly in a hurry and was inattentive in her conduct. Ms Myburgh, to my mind, was not the average purchaser who, in terms of Blue Line Manufacturing, I am required to consider. She is rather the careless buyer whose views I am enjoined to disregard.

There is evidence of alleged confusion from a second purchaser, one Pieter Labuschagne, who testified that during March this year he was delighted to see Swartkops’ braai salt product back on the shelves at the Port Elizabeth Pick ‘n Pay Hypermarket. He was more delighted when he realised it was on a special. He says: “I picked up the “Marina” special but at closer “inspection” I realised that something was not right, and in the end I was not sure what I was holding in my

hand. Was I deceived? ” Here, too, I am not persuaded by this evidence. Mr Labuschagne realised, immediately upon picking up the product, that he was dealing with something different. He was astute enough to realise that this may not be the Swartkops braai salt product. It does not seem to me that much weight can in these circumstances be attached to his evidence either.

A further difficulty with the evidence of both Mr Labuschagne and Ms Myburgh is that only their evidence is tendered by Swartkops in support of the contention that confusion has in fact arisen. I appreciate that evidence of confusion may be difficult to come by. However, both Ms Myburgh and Mr Labuschagne wrote to Swartkops describing their experiences. Nobody else did. I do not think that the evidence of these two individuals over a nine month period is indicative of actual confusion on the part of the average purchaser. Even if my criticisms of their evidence is unwarranted, I am ultimately required to form my own judgment as to the likelihood of deception. The evidence tendered by these two witnesses is not sufficient to persuade me that my conclusions regarding the likelihood of deception, which I deal with below, are wrong.

Before turning to those conclusions, it is necessary that something be said about Mr Jeremy Sampson, an individual with expertise in the fields of branding, marketing, design and communication strategy. His evidence is that when marketing certain products they become associated with certain colours. He visited certain websites and two retail outlets in order to review current brand identities used in the salt category in South Africa. That research was, to my mind, excessively limited in its ambit and I place no reliance on his evidence in reaching the conclusions which I have.

With the foregoing principles in mind and without, I hope, peering too closely at the competing products, I turn now to an examination of them. For the convenience of the reader, a photograph of the competing products is annexed to this judgment and marked “A”. That on the left of the photograph with the Marina trade mark is the product of Swartkops and that on the right with the Buffalo trade mark is that of Cerebos. As can be seen from the photograph, both products come in orange containers which hold 400g of salt and they are the same height. There are, however, significant differences between the containers. The Swartkops container has prominent ridges, three of them above its label and four below the label. Those ridges are absent from the Cerebos container which has smooth sides where the ridges are found in the other product. The recess in the middle of the container to which the label is affixed is more indented in the Swartkops product than is the case in the Cerebos product.

These differences in the containers have the result that the profile of the respective containers are sufficiently different, to my mind, to distinguish the products in the mind of the ordinary purchaser.

The different profile is enhanced by the closures or caps which are different the one from the other not only in colour but also in shape and therefore profile. This, too, serves to distinguish the products to the ordinary purchaser.

I turn to the labels. The background of the Swartkops label is orange while that of the Cerebos label is brown. The effect of this is that the get up of the former's product is overwhelmingly orange whereas the latter's product has a darker and more brown appearance. The Cerebos label also has an area shaded black below the Buffalo trade mark and behind the other significant features of its label. This is not the case with the Swartkops label. This, too, serves to distinguish the product to the ordinary customer.

Because, as was held in *Reckitt & Coleman*,²⁰ purchasers of ordinary household goods know that similar goods having different origins often have similar containers, I am satisfied that the distinguishing features of these containers will alert the ordinary purchaser to the fact that he or she is being confronted with different products.

It is true that the trade marks "Marina" and "Buffalo" on the two products both appear in a white oval surmounted by a small oval device in the same place on the respective labels. There, however, the similarity ends. The Marina trade mark is in blue with the words "sea salt – seesout" immediately below it whereas the Buffalo trade mark is in black without any additional words. The Marina oval device is bordered in blue while the Buffalo oval device is bordered in black. The smaller oval device surmounting the Marina trade mark is a stylised wave in white on a blue background whereas

that above the Buffalo trade mark is a white buffalo against a black

background.

The different trade marks will obviously serve to draw the attention of the ordinary purchaser to the fact that he is dealing with different products. Whilst there are similarities in the overall configurations in which the different trade marks appear, there are nonetheless in my opinion also sufficient differences to ensure that the ordinary purchaser is not confused.

I turn now to the words "braai salt" which appear on both products. The use of these words is, of course, permitted because they are merely functional and serve the purpose of describing what product is in fact being sold. The manner in which the words themselves is presented, moreover, is very different. In the Swartkops product, the word "braai" is in brown on a white surround while the word "salt" is in white with a brown surround. The words are angled and rise to the right as one reads them.

On the Cerebos product, those words are much larger than on the other product. They are in red and orange with a black surround. They do not rise to the right and the word "braai" has stylised flames emerging from the top of the word. Here, too, the ordinary purchaser will be alerted to the fact that she or he is dealing with a different product.

Both products have a picture of food being cooked on a braai below the words “braai salt”. The picture of the food on the Swartkops product is in brown and white and is rather subdued in its presentation. On the other hand, the picture on the Cerebos product is visually far more striking and uses different colours being red, black, and an orange/brown. Although both pictures are of food on a braai, the manner in which they are presented is strikingly different. There is, to my mind, no possibility of the average purchaser ever confusing the one picture for the other.

Finally, below the pictures there are further differences to be found. The Swartkops product has the words “with spices ” in red with a white surround and immediately below that the legend “an exciting flavour for braaiers and a family favourite in the kitchen ” in white. The Cerebos product, on the other hand, has only the words “shake it ” below its braai picture. Those words are in red and mustard and have as a border duplicate black and white lines presented in a manner which is suggestive of the action of shaking. There is absolutely no similarity in respect of this aspect of the get up of the competing products.

I am accordingly satisfied that Cerebos has sufficiently distinguished the get up of its product from that of Swartkops so that there is no prospect on the part of the ordinary customer of either confusion. Cerebos has, in my opinion, made it “perfectly clear”²¹ that its product is not that of Swartkops. It follows that I find that there was no fraudulent intent to deceive on the part of Cerebos as was argued on behalf of Swartkops. Whilst I have embarked upon what I consider to be a necessary measure of critical analysis of the get up, I have throughout borne in mind the relative importance of a first and general impression one experiences when viewing the competing products, as well as the principle of “imperfect recollection”. I have also borne in mind that braai salts are a low cost product sold in an economical segment of the market. Bearing in mind all these factors, I nonetheless remain satisfied that the conclusion which I have drawn is the correct one.

There remains one further argument advanced by Mr Marriott on behalf of Swartkops to consider. He refers to *PPI Makelaars and Another v Professional Provident Society of South Africa* ²² where Harms JA quoted with approval from the decision of *Broderick and Bascom Rope Co v Manoff* ²³ where the Court held that :

“The due protection of trade marks and similar rights requires that a competitive business, once convicted of unfair competition in a given particular, should thereafter be required to keep a safe distance away from the margin line – even if that requirement involves a handicap as compared with those who have not disqualified themselves.

He argued that Cerebos was required to keep a safe distance away from the margin line by virtue of the fact that it had launched its product with a particular get up which it had subsequently changed by virtue of the demands made upon it. I am not persuaded by this argument. I have not had the benefit of reading the *Broderick* case, but the reference to a conviction for unfair competition in the passage which has been quoted suggests to me that what is required is that there be a formal finding in some form or another that a person has made herself or himself guilty of unfair competition before she or he will have to keep a safer distance away from the

margin line. Here there is no question of such a finding having previously been made nor is there any basis for it to be made in these proceedings. As I have indicated earlier in this judgment, Cerebos made the earlier changes to the get up of its product without acknowledging that it was obliged to do so and without prejudice to its rights. But even if I am wrong, in this regard, and that Cerebos was as a matter of law required to go significantly further away from the margin line than would otherwise have been the case, the get up of its product is so different for the reasons which I have identified that I nonetheless remain satisfied, notwithstanding this “handicap”, that Cerebos has sufficiently distinguished its product from that of Swartkops.

The following order is accordingly issued :

47.1 The application is dismissed, with costs.

S C RORKE

Acting Judge of the High Court of South Africa

20 October 2011

Appearances :

For the Applicant: Mr G Marriott

Instructed by Smith Tabata Attorneys

For the Respondent: Mr G E Morley SC

Instructed by Mike Nurse Attorneys

1Online Lottery Services v National Lotteries Board 2010

(5) SA 349 (SCA) at para [37]

2Jenifer Williams & Associates v Life Line Southern Transvaal

[1996] ZASCA 46; 1996 (3) SA 408 (AD) at 418 D – G

3Jenifer Williams (supra) at 418 G – I

4[2006] ZASCA 5; 2006

(4) SA 275 SCA at para [8]

5 1993

(2) SA 307 (AD) at 317 F

6supra at paras [37] to [39]

7 1957

(4) SA 234 (C) at 240 C – E

8At 317 C

9 1987

(4) SA 821 (D) at 837 D – F

10Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977

(4) SA 434 (W) at 437 F – 438 A; Cambridge Plan AG and Another v Moore and Others 1987

(4) SA 821 (D) at 838 B; Reckitt & Coleman (supra) at 315 B

11Oude Meester Groep Beperk and Another v SA Breweries Ltd 1973 (4) SA 145 (W) at 161 C – E; John Craig (Pty) Ltd v Dupa Clothing Industries 1977

(3) SA 144 (T) at 153 G

12Reckitt & Coleman (supra) at 315 F – G

13 2001

(3) SA 884 (SCA) at para [3]

14Sea Harvest Corporation (Pty) Ltd v Irvin & Johnston Ltd and Another, Unreported decision by Cloete AJ in the Western Cape High Court, Cape Town, under Case No 2966/10 delivered on 17 March 2011

15Sea Harvest (supra) at paras [31] and [32]; Plascon-Evans Paints v Van Riebeeck Paints Ltd 1984

(3) 620 (AD) at 640 G – 641 E

16At 318 C – G

17Reckitt & Coleman at 318 C

18 1913 WLD 3 at p9; See also Blue Line Manufacturing (supra) at para [4]

19Reckitt & Coleman (supra) at 315 D

20At 317 F

21Distilleerderij Voorheen Simon Rijnbende en Zonen (supra) at p9; Blue Line Manufacturing (supra) at para [4]

22 1998

(1) SA 595 (SCA) at 605 C – D

23[1930] 41 F (2) d 353 at 354

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Prepared on 12 October 2026 · Esheria