LNIL 402-V / LNB 402-3

LONG JOHN INTERNATIONAL LTD v STELLENBOSCH WINE TRUST (PTY) LTD AND OTHERS

DURBAN AND COAST LOCAL DIVISION

BOOYSEN J

1988 August 25 1989 June 14

Trade and trade mark—Trade—Unlawful competition—Person who falsely and culpably misrepresents to public that his products are of particular character, composition or origin known by public under descriptive name with public reputation, without passing them off as 'genuine' products, and who causes patrimonial loss to producer of 'genuine' products, commits delict of unlawful competition—Injured party entitled to interdict restraining such conduct where patrimonial loss occurred or likely to be caused —Interdict still justified when all elements, save fault (culpability) present.

Trade and trade mark—Trade—Trade Practices Act 76 of 1976 —Section 9(b) *enacted, not only to protect members of public from being misled, but also to protect traders or producers of goods from actions of other traders who might mislead members of public to purchase latter's goods in preference to former's goods—Injured trader has* locus standi *to take action against offender under s 9*(b).

Trade and trade mark—Trade—Unlawful competition—Respondents producing, distributing and selling 'Ben Nevis Scotch Whisky Liqueur' in standard trade bottles used for many brands of whisky, bearing label showing two figures in traditional Scottish Highland dress, describing product as 'Scotch whisky liqueur named after Scotland's highest peak', and disclosing alcoholic strength of 30 % by volume—Certain retailers advertising 'Ben Nevis' as brand of Scotch whisky—Product displayed and marketed among whiskies —Applicant, producer and exporter of Scotch whisky, seeking interdicts on grounds that respondents falsely representing to public that 'Ben Nevis' a Scotch whisky—Such misrepresentation alleged to arise out of surrounding circumstances bearing upon interpretation of label and get-up—Applicant's statement that product consisting of whisky spirit base diluted with water to reduce alcoholic content from 43 % to 30 %, with inclusion of sweetener, not disputed—Analysis not showing presence of fresh or dried fruit or peels of aromatic plants, leaves, herbs, roots or seeds —Product thus not conforming with definition of 'whisky' or of 'liqueur' in s 8 of Wine, Other Fermented Beverages and Spirits Act 25 of 1957—Respondents accepting that product not a Scotch whisky, and denying that product so represented—Respondents describing product as Scotch whisky-based beverage of lower alcohol content than prescribed for whisky, with sweeter taste and smoother than whisky, meant to be drunk like whisky or other

spirits, and not as liqueur—Court finding that product projecting undoubted Scottish provenance for itself—Clear that 'Ben Nevis' bottle quite at home among majority of ordinary Scotch whisky

90/4/136 LONG JOHN INTERNAT v STELLENBOSCH WINE
ref : Reckitt v SC Johnson 93/2/321/A
appl: Concept Factory v Heyl 94/2/115/T
ref : Spinner Comm v Argus Newspapers 96/4/642/W

retailers placed ited product as f members of as a brand of whisky—'Ben Nevis' product accordingly found to have misrepresented itself as Scotch whisky—Respondents had attempted to disguise misrepresentation and trading off reputation of Scotch whisky through use of word 'liqueur'—Product not understood by public in classical sense; not a liqueur as defined by Act; not intended as classical liqueur—'Liqueur' not meaning and never meaning product described by respondent—Substantial number of members of public would thus read 'liqueur' as laudatory epithet—Court concluding that applicant, as producer of Scotch whisky, would suffer patrimonial loss if respondents continued to diminish market for Scotch whisky by misleading substantial number of members of public, who would otherwise have bought Scotch whisky, into buying and drinking respondents' product —Interdicts granted.

A person who falsely and culpably represents to the public that his products are products of a particular character, composition or origin known by the public under a descriptive name which has gained a public reputation, without passing them off as the products of the plaintiff, who produces what may be termed the genuine products, and who thereby causes patrimonial loss to the plaintiff, commits the delict of unlawful competition, and is liable in damages to the plaintiff. It follows that the injured party is entitled to an interdict restraining such conduct where such patrimonial loss has occurred or is likely to be caused. Where all the above elements are present save that of fault (culpability), an interdict would still be justified.

Section 9*(b)* of the Trade Practices Act 76 of 1976, which provides that '(n)o person shall in connection with the sale . . . of goods, directly or indirectly make any statement or communication or give any description or indication which is false or misleading . . . in respect of the nature, properties, advantages or uses of such goods . . .', was enacted not only to protect members of the public from being misled, but also to protect traders or producers of goods from the actions of other traders who might mislead members of the public to purchase such latter traders' goods in preference to the former's goods. The former thus has *locus standi* to take action against an offending rival trader under this section.

The first respondent had recently commenced producing a product called 'Ben Nevis Scotch Whisky Liqueur', which was distributed by the second respondent and sold by retail to the public by, among others, the third respondent. The applicant, a company registered in the United Kingdom, which produced and exported Scotch whisky, sought an interdict restraining the respondents from selling any alcoholic product under the get-up and label used in respect of 'Ben Nevis Scotch Whisky Liqueur'; from using the name 'Ben Nevis' in relation to such product; from using the name 'Ben Nevis' as a trade mark or name for its product; from using the name 'Ben Nevis' in relation to any alcoholic product which had not been wholly manufactured or produced in Scotland; from passing off their product as a Scotch whisky; from trading in unlawful competition by representing through the get-up and label of the product that it was a Scotch whisky, and for other related relief.

The product in question was sold in a standard trade bottle, used for many brands of Scotch whisky, bearing a large label on the front of it. The applicant's main complaint was that the respondents had falsely represented to the public that their

product was a Scotch whisky. It was argued that such misrepresentation arose out of all the surrounding circumstances which bore upon the interpretation of the label and get-up. The most prominent words on the label were 'Ben Nevis' and 'Scotch Whisky Liqueur', sandwiching a picture of two figures in traditional Scottish Highland dress. Also appearing on the label were the words 'A Scotch Whisky Liqueur named after Scotland's Highest Peak' and, at the base of the label, the words 'Bottled in the Republic of South Africa. Alc/Vol 30%.' The label also disclosed that the Scotch whisky content had been distilled and matured in Scotland. The respondents accepted that their product was not a Scotch whisky, and denied that they had so represented it. Their submission was that they represented their product to be a drink to be drunk in the same manner as whisky, that their product was to a degree *sui generis* and that, although it was described as a Scotch whisky liqueur, it was in reality neither a whisky nor a liqueur.

'Whisky' is defined by s 8 of the Wine, Other Fermented Beverages and Spirits Act 25 of 1957 as 'a spirituous liquor of an alcoholic strength not lower than 43% of alcohol by volume . . .' and 'liqueur' is defined in s 8 as 'a beverage of an alcoholic strength not lower than 30% of alcohol by volume, and which contains not less than 30 grammes of sugar per litre, produced *(a)* by maceration in any class of spirit of an alcoholic strength of not less than 43% of alcohol by volume, of fresh or dried fruit or peels of aromatic plants, leaves, herbs, roots or seeds; *(b)* by adding to any class of spirits of an alcoholic strength referred to in para *(a)* real essence of aromatic plants, leaves, herbs, roots or seeds . . .'. The term 'liqueur' is defined by dictionaries as, *inter alia*, 'a strong alcoholic liquor sweetened and flavoured with aromatic substances'. The term is also used in a laudatory sense in South Africa to denote brandy, cognac and other spirits of superior quality. The respondents, in their opposing affidavits, described their product as a Scotch whisky-based alcoholic beverage of lower alcohol content than that prescribed for whisky, with a sweeter taste and being smoother than whisky. It was not intended to be a liqueur, but was to be drunk as whisky or any other spirit would be. The respondents stated that their aim had been to fill a gap in the market to appeal to those who wished to drink a spirit with a lower alcohol content than whisky or brandy, and who would appreciate a somewhat smoother spirit. The applicant's witness stated that the respondents' product essentially comprised a whisky spirit base which was diluted with water to reduce the alcoholic content from 43% to 30% and included a sweetener. This was not disputed by the respondents. Analysis did not show the presence of fresh or dried fruit or peels of aromatic plants, leaves, herbs, roots or seeds.

The issue for decision was whether the label as a whole represented to the public that the product was a South African made liqueur, based on Scotch whisky distilled and matured in Scotland and therefore properly named a Scotch whisky liqueur, or whether it was perceived as a Scotch whisky. It was common cause that certain retailers had advertised 'Ben Nevis' as being a brand of Scotch whisky. It also appeared that the product had been exhibited and marketed amongst whiskies and had formed part of whisky displays at liquor outlets.

Held, that the get-up of the respondents' product projected an undoubted Scottish provenance for the product.

Held, further, that it was clear from the evidence that the 'Ben Nevis' bottle was remote from a liqueur bottle (liqueurs being sold in fancy bottles), but was quite at home among the majority of ordinary Scotch whisky bottles.

Held, further, that, as a result of the nature and get-up of the product, retailers had been placed in a position in which they could and had misrepresented the product as a Scotch whisky, as a result of which a substantial number of members of the public could be confused into believing that it was not a liqueur or any other drink, but a cheap brand of whisky.

Held, further, having due regard to all the surrounding circumstances, that the 'Ben Nevis' product had misrepresented itself as a Scotch whisky.

Held, further, that the respondents had attempted to disguise their attempt at misrepresentation and trading off the reputation of Scotch whisky through the use of the word 'liqueur'.

Held, further, that since 'Ben Nevis' was not a liqueur as understood by the public in its classic sense; since it did not appear to be a liqueur as defined by the Act; and since

it had not been intended to be a classical liqueur, the term 'liqueur' would of necessity therefore be read by a substantial number of members of the public as a laudatory epithet, as the word did not mean and never had meant the product described by the respondent (an alcoholic beverage with a lower alcoholic level than the named beverage in the product, being slightly sweeter than the parent beverage and somewhat smoother than it).

Held, accordingly, that the applicant, as a producer of Scotch whisky, would suffer some patrimonial loss in common with other producers of Scotch whisky if the respondents continued to diminish the market for Scotch whisky by misleading a substantial number of members of the public who would otherwise have bought Scotch whisky into buying and drinking the respondent's product.

The Court found, further, that the respondents had contravened s 9*(b)* of the Trade Practices Act; s 6*(e)* of the Merchandise Marks Act 17 of 1941; and s 23A of the Wine, Other Fermented Beverages and Spirits Act, and accordingly granted the interdicts sought.

Application for interdicts on the grounds of unlawful competition. The facts appear from the reasons for judgment.

W H R Schreiner SC (with him *A H Ashton*) for the applicant.

G D van Schalkwyk SC for the respondents.

Cur adv vult.

Postea (14 June 1989).

Booysen J: The applicant is a company registered in the United Kingdom. It is a producer of Scotch whisky which it exports and sells to various distributors throughout the world, including the Republic of South Africa. The Scotch whisky which the applicant produces is sold under 29 different brand names. Eleven of these are sold by its agents in this country. The applicant's Scotch whisky products account for more than 1% of the total Scotch whisky sales in this country amounting to several hundred thousand rands. These products are extensively advertised in this country. The advertising budget exceeds R100 000.

Scotch whisky has been sold to the public in South Africa since the 19th century. South Africa is the eighth largest importer of Scotch whisky in the world, only exceeded by the United States of America, France, Japan, Italy, Spain, West Germany and Australia. Scotch whisky is not the only whisky sold in South Africa. American Rye whisky (Bourbon), Japanese, Canadian, Irish and South African whisky are also sold, albeit in much smaller quantities. Indeed, Scotch whisky enjoys 95% of the market share.

The first respondent produces, since fairly recently, a product which is called Ben Nevis Scotch Whisky Liqueur. It distributes and sells this product throughout the Republic of South Africa to wholesale liquor outlets, including the second respondent. The second respondent is a distributor of liquor upon a large scale in this country. It distributes the product in question. It also distributes a number of other brands of Scotch whisky, including Bells Scotch Whisky, the market leader with a market share bordering on 20%, and Haig Scotch Whisky which ranks fifth in the market with a share of close on 3%.

The third respondent is a firm which conducts business as a retail bottle store which also sells Ben Nevis Scotch Whisky Liqueur.

The applicant also produces a whisky called Dew of Ben Nevis in Scotland, but has so far not exported it to this country.

The applicant seeks the following orders:

'1. Interdicting and restraining the respondents, their servants and agents from selling or offering in the course of trade any alcoholic product to which the get-up and label illustrated in annexure "LJ.6" to the affidavit of John Hooper is attached or in relation to which it is used.

2. Interdicting and restraining the respondents, their servants and agents from using the name Ben Nevis in the course of trade in relation to the first respondent's product described in the affidavit of John Hooper.

3. Interdicting and restraining the first respondent, its servants and agents from:

(i) using the name Ben Nevis as a trade mark or name for its alcoholic product described in the affidavit of John Hooper;

(ii) using in any manner or at all in the course of trade the name or mark Ben Nevis in relation to any alcoholic product which has not been wholly manufactured or produced in Scotland.

4. Interdicting and restraining the respondents, their servants and agents from passing off the product described in the affidavit of John Hooper as a Scotch whisky by using the get-up and label illustrated on annexure "LJ.6" to the said affidavit.

5. Interdicting and restraining the respondents, their servants and agents from trading in unlawful and/or unfair competition by dealing in the course of trade in the alcoholic product described in the affidavit of John Hooper by representing through the get-up and label illustrated on annexure "LJ.6" to the said affidavit that the product is a Scotch whisky.

6. Interdicting and restraining the respondents, their servants and agents from trading in unlawful competition through contravening s 9 of the Trade Practices Act 76 of 1976 by using the get-up and label illustrated on annexure "LJ.6" to the affidavit of John Hooper in relation to an alcoholic product which is not a Scotch whisky.

7. Interdicting and restraining the respondents, their servants and agents from trading in unlawful competition through contravening s 8 of the Merchandise Marks Act 17 of 1941 by using the get-up and label illustrated on annexure "LJ.6" to the affidavit of John Hooper in relation to an alcoholic product which is not a Scotch whisky.

8. Interdicting and restraining the first respondent, its servants and agents from trading in unlawful competition through contravening s 23A of the Wine, Other Fermented Beverages and Spirits Act 25 of 1957 by using the get-up and label illustrated on annexure "LJ.6" to the affidavit of John Hooper in relation to an alcoholic product which is not a Scotch whisky.

9. Interdicting and restraining the respondents, their servants and agents from using the phrase Scotch Whisky and/or Scotch Whisky Liqueur as the name of the product or any phrase with a similar import in relation to any alcoholic product which is not a whisky or liqueur emanating from Scotland.

10. That the respondents pay the costs of the application jointly and severally, the one paying the other to be absolved.'

It is clear from the papers before me that applicant's main complaint is that the respondents are falsely representing to the public that the product Ben Nevis Scotch Whisky Liqueur is a Scotch whisky when it is not. It is equally clear from the papers that the respondents accept that the product is not Scotch whisky but deny that they have represented it to be Scotch whisky. They say in effect that they represent it to be a drink to be drunk in the same manner as whisky but which is to a degree *sui generis* and, although described as a Scotch whisky liqueur, they say that it is really neither a whisky nor a liqueur.

Counsel for the applicant submitted that the conduct of the respondents constituted either the wrong of passing off or the wrong of unlawful (or unfair) competition. Counsel for the respondents were inclined to the view that the latter would be the case if it were found that the respondents had indeed falsely represented its product to be Scotch whisky.

The question posed is thus: does the conduct of a person who falsely and culpably represents to the public that his products are products of a particular character or composition known by the public under a descriptive name which has gained a public reputation, but without representing them to be or passing them off as the product of a particular competitor, and thereby causes patrimonial loss to the producer or producers of what I shall call the genuine product, constitute the delict of passing off or the wider delict of unlawful competition in our law?

There seems little doubt that English law does not recognise an independent tort of unlawful or unfair competition. (*Shaw Bros (Hong Kong) Ltd v Golden Harvest (HK) Ltd* [1972] RPC 559; *Cadbury-Schweppes (Pty) Ltd v The Pub Squash Co Ltd* [1981] RPC 429 (PC) at 461–4, referred to in *Schultz v Butt* 1986 (3) SA 667 (A) at 681F.)

It seems clear, though, that our law does recognise the delict of unlawful competition as one of the many manifestations of Aquilian liability. (See *inter alia Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441A; *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 218; *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another* 1972 (3) SA 152 (C) at 161; *Stellenbosch Wine Trust Ltd and Others v Oude Meester Group Ltd and Others* 1977 (2) SA 221 (C) at 247F; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 178–86; *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1138E–F; *Schultz v Butt* 1986 (3) SA 667 (A) at 678–9.)

I should perhaps mention that in the second *Stellenbosch Wine Trust* case and in the *Schultz v Butt* case *supra*, the generic delict of unlawful competition (onregmatige mededinging) was called 'unfair competition'. This has evoked the following response from the learned authors of Webster and Page *South African Law of Trade Marks* 3rd ed at 400–1:

'It is apposite . . . to stress the necessity for avoiding the use of the term "unfair competition" to denote the delict of unlawful competition in our law not only because it is misleading but also because it has a recognised meaning in other legal systems which differ from ours. Regrettably, the Appellate Division has recently seen fit in the decision of *Schultz v Butt* to employ the term "unfair competition" to describe the delict in general and to reserve the term "unlawful competition" for cases where the delict is committed by means of an act which is *per se* illegal. It is to be hoped, with respect, that this semantic aberration will be corrected.'

Whilst perhaps not having quite as strong views on the subject, it does seem to me, with respect, that it would be better to describe the delict in general as 'unlawful competition' or 'onregmatige mededinging' as opposed to 'unfair competition', which would probably translate to 'onregverdige' or 'onbillike mededinging'.

The wrong of passing off has in our law consistently been described as a representation by one person that his business or merchandise or both are that of another, or that it is associated with that of another. *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 97 and 113; *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A) at 929C.

In doing so our Courts have followed the principles enunciated by the English Courts in, for example, *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1865) 11 HL Cas 523 at 528 (11 ER 1435 at 1438); *Reddaway v Banham* [1896] AC 199 (13 RPC 218 at 228); and *AG Spalding & Bros v AW Gamage Ltd* [1915] 32 RPC 273 (HL) at 284.

Faced with a series of cases in which defendants had not represented their goods to be that of the plaintiffs, ie passed them off as such, but had nevertheless falsely represented them to be goods of a particular character, composition or origin, known by the public under a descriptive name which had gained a public reputation, the English Courts extended the scope of the tort of passing off to include such conduct. See *Bollinger (J) and Others v Costa Brava Wine Co Ltd* (i) [1960] RPC 16 and (ii) [1961] RPC 116 (the 'Champagne' case); *Vine Products Ltd and Others v Mackenzie and Co Ltd and Others* [1965] 3 All ER 58 (Ch) ([1969] RPC 1) (the 'Sherry' case); *John Walker and Sons Ltd and Others v Henry Ost and Co Ltd and Another* [1970] RPC 489 ([1970] 2 All ER 106 (Ch)) (the 'Scotch Whisky' case); *Erven Warnink BV and Another v J Townend and Sons (Hull) Ltd and Another* [1980] RPC 1 (Ch) at 59 (CA), at 85 (HL) (the 'Advocaat' case).

The learned authors of *South African Law of Trade Marks* say at 410 and 411:

'The important question posed by these developments as far as South Africa is concerned, is whether they will be received into our law as part of the delict of passing off as we know it. There are certain considerations which, it is submitted, militate against such a step.

The first is that there is no necessity for doing so. As emerges from the preceding discussion, the English law does not recognise a tort of unfair or unlawful competition as such, and it became necessary, as a matter of legal policy, to broaden the scope of the existing passing off action to cater for situations not covered by the classic formulation but which cried out for equitable relief. In South Africa, on the other hand, this type of situation will fall within the ambit of the general action for unlawful competition.

The second consideration is that the logical basis of the extension in English law is, with the greatest respect, of doubtful validity. What purports to be an extension of the application of the tort is in reality a transformation of the tort itself. The reasoning by which this result was achieved is, in essence, that because passing off comprises a misrepresentation which injures the goodwill of another, therefore a representation which injures the goodwill of another is passing off. The illogicality of this reasoning was undoubtedly appreciated; indeed, it is expressly mentioned by Lord Diplock in the *Advocaat* case where he warned against the logical fallacy of the undistributed middle, but sought to limit its operation by having recourse to public policy.

The effect of this transformation on the body of established law relating to the passing off is, as yet, problematical. There can be no doubt that the rules governing the tort in English law were, until this latest development, formulated with reference to the tort in its classic form. Although the decisions extending the scope of the tort purported to find authority for so doing in certain earlier *dicta*, it is clear that the tort was not at that time seen as it has now been formulated. The adaptation of this body of established rules to the modern formulation will in all probability give rise to many problems and inconsistencies which it will require great ingenuity (if not illogicality) to overcome, and it seems highly desirable that our law should not be obliged to participate in this tortuous process when there is no necessity for its doing so.

That is not to say that our Courts should not make use of English authority save in relation to the classic form of passing off. On the contrary, the rules worked out by the English Courts in relation to the extended tort of passing off will be of great assistance in the development of the corresponding forms of unlawful competition in our law, provided the basic difference in the legal systems is always borne in mind.'

In the *Lorimar* case *supra* at 1138F, Van Dijkhorst J said in this regard:

'In our law, the much wider delict of unlawful competition would adequately cater for this type of case and an extension to the definition of passing off quoted by me from the *Holiday Inns* case would in my view be unnecessary.'

I agree with respect with these remarks.

It follows from what I have said that a person who falsely and culpably represents to the public that his products are products of a particular character, composition or origin known by the public under a descriptive name which has gained a public reputation, without passing them off as the product of the plaintiff, who produces what may be termed the genuine products, and who thereby causes patrimonial loss to the plaintiff, commits the delict of unlawful competition, and is liable in damages to the plaintiff. It follows also that the injured party is entitled to an interdict restraining such conduct where such patrimonial loss has occurred or is likely to be caused. Perhaps I should add that I take the view that where all the above elements are present save that of fault (or culpability), an interdict would still be justified. (Cf *Dunlop (South Africa) Ltd v Metal and Allied Workers Union and Another* 1985 (1) SA 177 (D) at 188G–H.)

In order to determine whether a product is represented to be whisky, it is as well to determine first what the word means to the South African public. It seems to be common cause on these papers that whisky is a spirit as defined in s 8 of the Wine, Other Fermented Beverages and Spirits Act 25 of 1957, ie

'spirituous liquor of an alcoholic strength not lower than 43% of alcohol by volume, derived from grain by fermentation and distillation, and whereof the volatile constituents other than water are derived solely from grain'.

It is of interest to note that the requirement of an alcoholic strength of not less than 43% of alcohol by volume is one that also forms part of the definition of 'brandy', 'cane spirit', 'compounded gin', 'gin', 'grape brandy', 'grape spirit', 'mixed spirits', 'rectified spirit', 'rum', 'vodka', 'wine brandy (cognac type)', and 'wine spirit'.

In contrast s 8 provides that

' "liqueur" means a beverage of an alcoholic strength not lower than 30% of alcohol by volume, and which contains not less than 30 grammes of sugar per litre, produced—

(a) by maceration in any class of spirits of an alcoholic strength not less than 43% of alcohol by volume, of fresh or dried fruit or peels of aromatic plants, leaves, herbs, roots or seeds;

(b) by adding to any class of spirits of an alcoholic strength referred to in para *(a)*, real essence of aromatic plants, leaves, herbs, roots or seeds; or

(c) by redistillation of a product prepared as described in para *(a)* or *(b)*,

and by subsequently adding thereto a syrup made of pure cane sugar or honey and, where applicable, a colouring matter.

"Spirit aperitif" means rectified spirit or brandy to which herbs or any natural extract of herbs has been added, with or without the addition of any other natural aromatic flavouring substances or of cane sugar, and which has an alcoholic strength not lower than 24% of alcohol by volume and the taste, aroma and other qualities which are generally characteristic of spirit aperitif.

"Spirit cocktail" means rectified spirit or brandy to which egg and any natural aromatic flavouring substances have been added, with or without the addition of milk or of cane sugar, and which has an alcoholic strength not lower than 24% of alcohol by volume and the taste, aroma and other qualities which are generally characteristic of egg cocktail.'

Although 'blended whisky' and 'malt whisky' are separately defined, they are by virtue of being defined as whisky with certain qualities clearly also subject to the requirement of 43% alcoholic strength. Wines are defined in s 2 of the Act with no requirement as to alcoholic strength.

Section 12 of the Act provides as follows:

'Alcoholic strength of certain potable spirits, and prohibition of certain descriptions for spirits

(1) No person shall sell for drinking purposes any spirits not defined in s 8 of which the alcoholic strength is lower than 43% of alcohol by volume.

(2) No person shall sell any spirits not defined in s 8, under a name or reference consisting wholly or partly of any expression defined in s 2 or s 8.

(3) No person shall sell any spirits defined in s 8 under a name (other than the appropriate name therefor in the said section) consisting wholly or partly of an expression defined in s 2.

(4) No person shall sell any spirit aperitif or spirit cocktail under a name consisting wholly or partly of an expression (other than the appropriate expression therefor) defined in s 2 or s 8.

Section 14 of the Act provides as follows:

'Labelling of brandy, whisky, rum, etc

(1) No person shall sell brandy, whisky, rum, gin, liqueur, spirit aperitif, spirit cocktail or vodka of any description in a receptacle of a capacity of 25 litres or less, unless there is affixed to such a receptacle a label showing in such letters

and in such manner as may be prescribed by regulation, in the case of brandy, whether it is brandy, wine brandy (cognac type) or grape brandy, or, in the case of whisky, whether it is whisky, blended whisky or malt whisky, or, in the case of rum, whether it is rum or blended rum, or, in the case of gin, liqueur, spirit aperitif, spirit cocktail or vodka, that it is gin, liqueur, spirit aperitif, spirit cocktail or vodka.

(2) If in the manufacture of liqueur any other spirits mentioned in ss (1) was used, the name or names of such other spirits may not be used on the relevant label contemplated in ss (1) in other letters or in any other manner than prescribed by regulation.'

Against the admitted reputation of the term Scotch whisky, the meaning of that term to the South African public and its use on over 150 different brands of Scotch whisky each with different label get-up, the first and second respondents have introduced the product with the label in annexure 'LJ.6' on to the market. A copy is annexed hereto.

The vital question in these proceedings is how a substantial number of the public would perceive the product. The applicant's case is that the product Ben Nevis misrepresents itself as Scotch whisky. This misrepresentation, it says, arises out of all the surrounding circumstances which bear upon the interpretation of the label and get-up. The get-up of the product projects an undoubted Scottish provenance for the product. This is achieved in the following way. By naming the product Ben Nevis. The label specifically states that Ben Nevis is Scotland's highest peak. In conjunction with the identification of the product's name with a Scottish mount, the product is described as 'a Scotch Whisky Liqueur'. The device of two figures in Highland dress add to the Scottish provenance. The dominant features of the label consist of the name Ben Nevis, the Highland figure device and the product description 'Scotch Whisky Liqueur'.

On further close examination of the label, it appears that the Scotch whisky content is distilled and matured in Scotland and that the product is bottled in the Republic of South Africa. Does the label as a whole represent to the public that the product is a South African made liqueur, based on Scotch whisky and in particular whisky distilled and matured in Scotland and therefore properly named a Scotch whisky liqueur, or is it perceived as a Scotch whisky? The product is described by Hughes, one of those persons whose affidavit forms part of the opposing papers, as follows:

'Ben Nevis Scotch Whisky Liqueur, being a Scotch whisky-based alcoholic beverage of lower alcohol content than that prescribed for whisky by South African law, fills (and was intended to fill) a gap in the spirituous beverage market. Being lower in alcohol level and with a sweeter taste than whisky, it is drunk not necessarily by drinkers of conventional whisky but by people who wish to drink a spirit with a lower alcohol level than whisky or brandy, and who would appreciate a somewhat smoother spirit than whisky or brandy.'

If Hughes' description is correct, then the word 'liqueur' must connote and mean to the public an alcoholic beverage with a lower alcoholic level than the named beverage in the product (either brandy or whisky), being slightly sweeter than the parent beverage and somewhat smoother than it.

This cannot be so. In its ordinary dictionary meaning, 'liqueur' is defined as follows in *Webster's Third New International Dictionary* vol 2 at 1319 col 2:

'liqueur: 1: An alcoholic beverage often used as an after-dinner drink and as a cocktail ingredient, flavoured with various aromatic substances and usually sweetened, and made chiefly by steeping and distilling the flavouring substances in spirit—compare Cordial. 2: A solution of sugar and aged wine used to induce second fermentation in the production of champagne.'

The Shorter Oxford English Dictionary 3rd ed (1973) vol 1 at 1221 col 1:

'liqueur. 1. A strong alcoholic liquor sweetened and flavoured with aromatic substances. *b*. A mixture (of sugar and certain wines or alcohol) used to sweeten and flavour champagne. 2. Short for *liqueur-glass*.
Comb 1. Brandy, a brandy of special bouquet, consumed in small quantities as l;—glass, a very small drinking glass used for liqueurs;—wine, one of the strong and delicate-flavoured wines that have the character of liqueurs. Hence liqueur *v* to flavour (champagne) with a l.'

The technical meanings in the *South African Licensees Guardian* (1987) are set out in the affidavit of Fridjohn in these papers.

'Liqueur: The name has several applications, including (i) sweetened and aromatised spirit, with or without flavouring matter; (ii) as an adjective used in combination with a spirit name—eg liqueur brandy—meaning a spirit of excellent quality, aged and matured and intended to be consumed neat; (iii) a mixture of spirituous sugar syrup and spirit caramel employed for sweetening and colouring brandies; (iv) a grape concentrate or sugar syrup used for addition to various wines.'

The word 'liqueur' is also used in a laudatory sense in South Africa to denote brandy, cognac and other spirits of superior quality.

The respondents have said in reply that the term 'liqueur' is not necessarily used in South Africa to denote a superior quality product. This is an admission of this use in an appropriate case. The deponent Hughes emphatically denies that the product is a liqueur in the classical sense or its understood dictionary meaning. In this regard he has said:

'What Fridjohn does not seem to understand is what second respondent is in fact attempting to achieve by producing and marketing Ben Nevis Scotch Whisky Liqueur. In no sense is it intended or proposed that the product be drunk after a meal with coffee as a liqueur in the sense, for instance, that a "Drambuie" would be so drunk. A new product has been introduced. It conforms with the definition of a liqueur but is effectively a spirit product with a Scotch whisky base and a low alcohol level. It has a slightly sweeter or softer flavour, and is intended to be drunk with a mixer or with ice and water in the same way that a person may drink a brandy and a mixer, a gin and a mixer, a vodka and a mixer or a whisky and a mixer, etc. The reason why a general trade bottle is used is that the bottle itself is a major cost factor in the production of any liquor. The "fancy" bottles of certain of the imported liqueurs, such as "Drambuie", are very expensive. The idea behind Ben Nevis Scotch Whisky Liqueur was and is, *inter alia*, to produce a cheaper spirit. To put this in a "fancy" bottle would have defeated this object, in both marketing and cost-effectiveness.'

The respondents have not thought it desirable to inform the Court as to the exact contents of their beverage. Fridjohn says that it essentially comprises a whisky spirit base which is diluted with water to reduce the alcoholic content from 43% to 30% and further includes a sweetener. This is not disputed by the respondents.

Analysis did not show the presence of fresh or dried fruit or peels of aromatic plants, leaves, herbs, roots or seeds and fructose and sucrose were not detailed. The respondents, after the analysis by Cochrane, altered the sugar content of the product, but it is not suggested that the admitted contents were otherwise altered. Hughes is, however, insistent on the importance of the word 'liqueur' in the product designation and states:

'The words "Scotch whisky" are no more prominent on the label than the word "Liqueur". Furthermore, the words "Scotch whisky" do not appear by themselves but only in conjunction with the word "Liqueur". An objective viewer of the get-up will, it is submitted, read as one the term "Scotch Whisky Liqueur".'

In the aforegoing context what is of particular significance is that Hughes, as a professed expert in the liquor market, declines to state that the public will indeed perceive the product to be that which Hughes says it is in the face of the public's exposure to the word 'liqueur' as denoting the classical liqueur or the word as being laudatory of the described product. All Hughes contents himself with is the lame statement that the 'objective viewer' will read the product as 'Scotch Whisky Liqueur' with no explanation as to what that term would signify.

Turning to other objective criteria, the following is relevant. Liqueurs in the classic sense are sold in fancy bottles. The Ben Nevis bottle, when seen in the context of the fancy liqueur bottles, is clearly out of place because it belongs more properly with the ordinary Scotch whiskies. Fridjohn points to the fact that Ben Nevis is bottled in a 'Bells' bottle which is used for many brands of Scotch whisky. Hughes quibbles at the name 'Bells' bottle but states that it is a 'general trade bottle'. The point which Fridjohn makes is supported by annexure 'MF.1', and when annexure 'MF.1' is compared to annexure 'MF.4', it is clear that the Ben Nevis bottle is remote from a liqueur bottle but is quite at home amongst the majority of ordinary Scotch whisky bottles. The Ben Nevis product has also been exhibited and marketed amongst whiskies and has formed part of whisky displays at liquor outlets.

While the respondents do not challenge the evidence to this effect, they say that displays change and they deny the contention that Ben Nevis is 'almost without exception marketed in this manner'. It would appear that some event had occurred which caused certain retail outlets to adjust the arrangement of their products. However, the adjustment had not been universal.

In regard to the advertisements, Hughes' plea is that the second respondent is not responsible for the advertisements of retailers and therefore not responsible for any representations that Ben Nevis is a Scotch whisky.

It is, to say the least, surprising that the respondents are unable to exercise control over the manner in which products are advertised.

It is common cause that certain retailers have advertised Ben Nevis as being a brand of Scotch whisky. Hughes' plea, in this regard, is that the second respondent is not responsible for the advertisements of retailers and therefore not responsible for the representations that Ben Nevis is a Scotch whisky. I find it difficult to believe that the first and second respondents are unable to exercise control over the manner in which this

product is advertised, but that is not the most significant feature of this aspect of the matter. What is most significant is that retailers have indeed as a result of the nature and get-up of the product been placed in a position in which they could and did misrepresent the product as Scotch whisky. I do not find this surprising, as it seems to me that the product has been so presented to the public that there should indeed be a substantial number of the public who would be confused into believing that it was not a liqueur or any other drink but a cheap brand of Scotch whisky.

Having due regard to all the surrounding circumstances, the Ben Nevis product misrepresents itself as a Scotch whisky. Having regard to all those circumstances the conclusions of the expert Fridjohn are well founded. The respondents have attempted to disguise their attempt at misrepresentation and trading off the reputation of Scotch whisky through the use of the word 'liqueur'. The first and second respondents find themselves in the dilemma of their own making.

Ben Nevis is not a liqueur as understood by the public in its classical sense. (Nor, indeed, does it appear to be a liqueur in terms of the definition in the Act.) The product is not intended as a classical liqueur. The term liqueur would of necessity therefore be read by a substantial number of members of the public as a laudatory epithet (albeit as puffery) as it does not mean and has never meant the product described by Hughes and Naughton.

Counsel for the respondents have stressed that it would not be grammatically sound to read the word 'liqueur' as a laudatory epithet as it would have had to be named 'liqueur Scotch whisky'. I am afraid that this argument overlooks the fact that a substantial number of members of the public would not expect grammatical soundness on a label such as this and that an even greater number would not be sufficiently versed in English grammar to notice the difference.

The applicant, as a producer of Scotch whisky, will in my view suffer some patrimonial loss in common with other producers of Scotch whisky if respondents continue to diminish the market for Scotch whisky by misleading a substantial number of members of the public who would otherwise have bought Scotch whisky into buying and drinking this product.

I am satisfied that the applicant is entitled to the relief set out in prayers 1–5 and 9 of the notice of motion.

I turn now to consider the statutory causes of action.

The applicant contends that the respondents, in representing that their product is Scotch whisky, contravene s 9(*b*) of the Trade Practices Act 76 of 1976, which provides as follows:

'No person shall—

(*b*) in connection with the sale or leasing of goods, directly or indirectly make any statement or communication or give any description or indication which is false or misleading in material respects in respect of the nature, properties, advantages or uses of such goods or in respect of the manner in, conditions on or prices at which such goods may be purchased, leased or otherwise acquired.'

It seems to me that the label on the product in question does indeed contain an indication (or indications) which is false and misleading to the effect that the product is Scotch whisky.

Counsel for respondents has, however, submitted that the object of the Legislature in enacting s 9(*b*) was to protect members of the public against being misled. Accordingly, any member of the public who has been misled may approach the Court, but not a rival trader who is, it was submitted, not misled. It seems to me that the object of the Legislature was also to protect traders or producers of goods from the actions of other traders who might mislead members of the public to purchase their goods in preference to theirs.

I thus reject the submission that the applicant has for this reason no *locus standi*. No other reason was advanced.

Section 6(*e*) of the Merchandise Marks Act 17 of 1941 provides that a person who 'applies any false trade description to goods' is guilty of an offence unless the facts set out in subparas (i)–(iv) had existed. A 'false trade description' includes a trade description which 'is false in a material respect as regards the goods to which it is applied' and a 'trade description' means, *inter alia*, 'any description, statement or other indication, direct or indirect as to . . . the place or country in which any goods were made or produced . . . or as to the material of which any goods consist . . .'.

The label in this case contains a direct indication that the product was made or produced in Scotland when only part was.

Section 23A of the Wine, Other Fermented Beverages and Spirits Act prohibits persons from selling spirits under any name or reference which may, either because of the omission of parts therefrom or for any other reason, create a false or misleading impression as to the nature, substance, quality, composition or other properties . . . or place of production, preparation or manufacture thereof.

It seems to me that respondents' conduct is also unlawful in this respect.

The applicant does not claim that it is a producer of liqueur and indeed claims that the product is represented as being 'Scotch whisky' and not liqueur. It seems to me that it is not entitled to protection from a description of this product as a liqueur.

To sum up: I find on these papers that there is a reasonable likelihood that a substantial number of whisky drinkers will think that this product is a Scotch whisky and that the respondents have been guilty of the delict of unlawful competition by representing or passing off the product in question as a Scotch whisky, when it is not. I have no doubt that their conduct amounts to conduct which the legal convictions of the general public would not tolerate and that it is correct to brand it as unlawful.

I grant an order in terms of prayers 1–10 inclusive, the costs to include those incurred consequent upon the employment of two counsel.

Applicant's Attorneys: *D M Kisch Inc*, Johannesburg; *Goodrickes*, Durban. Respondents' Attorneys: *Leandy & Partners*.

S v A JUVENILE

ZIMBABWE SUPREME COURT

DUMBUTSHENA CJ, GUBBAY JA, McNALLY JA, MANYARARA JA and KORSAH JA

1989 March 22; June 29

Criminal procedure—Sentence—Whipping—Sentence of whipping of juvenile offenders in Zimbabwe held to be unconstitutional as in breach of s 15(1) of Constitution of Zimbabwe as it is a punishment which is inhuman and degrading.

The imposition of a sentence of a whipping or corporal punishment upon juveniles is an inhuman or degrading punishment or treatment which violates the prohibition against such punishment contained in s 15(1) of the Constitution of Zimbabwe. [*Per* Manyarara JA

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and those that still have corporal punishment, said at 721H–722D:

'I am firmly of the opinion, reached, I must confess, with little hesitation, that the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading. In coming to this conclusion I have had regard to: (i) the current trend of thinking amongst those distinguished jurists and leading academics to whom reference has been made; (ii) the abolition of whipping in very many countries of the world as being repugnant to the consciences of civilised