



SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 1003/2018

In the matter between:

MARION SMITH

APPELLANT

and

MOUNTAIN OAKS WINERY (PTY) LTD

FIRST RESPONDENT

EIKENBOSCH FARM (PTY) LTD

SECOND RESPONDENT

Neutral citation: *Marion Smith v Mountain Oaks Winery (Pty) Ltd & another* (1171/18) [2019] ZASCA 123 (26 September 2019)

Coram: Navsa, Swain, Zondi and Mokgohloa JJA and Dolamo AJ

Heard: 6 September 2019

Delivered: 26 September 2019

Summary: Interdict sought on the basis of injurious falsehood – elements not proved - appeal upheld

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Boqwana J sitting as a court of first instance)

1. The appeal is upheld with costs such costs to include costs of two counsel.
2. The order of the court a quo is set aside and replaced with the following:
‘The application is dismissed with costs’.

JUDGMENT

Mokgohloa JA (Navsa, Swain, Zondi JJA and Dolamo AJA concurring):

[1] The respondents brought an application in the Western Cape Division of the High Court seeking an order directing the appellant to retract a false statement published on a website created and controlled by the appellant, and to publish a statement setting out what the respondents claimed were the correct facts. The court a quo granted an order and reformulated the retraction sought by the respondents. This appeal is against that order with leave of the court a quo. The nature of what was published and argued is set out later. The background to the appeal is contained in the paragraphs that follow.

[2] The second respondent is the owner of Eikenbosch farm, which is an organic farming operation. Its wines are produced and distributed by the first respondent. The wines are bottled and labelled under the brand ‘Mountain Oaks’. Mark Stevens is the director in both respondents.

[3] The appellant is a businesswoman resident at Elgin Ridge Farm, Elgin. She is the creator and co-owner of the website <http://biodynamicorganicwine.co.za> registered on 9 March 2017. The website was launched and made available for

public access from 14 August 2017. Its purpose as stated on the appellant's home page is that:

'The Biodynamic and Organic Wines of South Africa is an association of certified Biodynamic and Organic wine producers. The association was created to form a platform for bringing together certified Biodynamic and Organic wine producers to help consumers and media to easily see which wine producers are certified Biodynamic and organic in South Africa.'

[4] On 11 September 2016, the first respondent sent an email to Stevens, explaining that she was interested in starting a register of organic and biodynamic wine producers. She enquired whether Mountain Oaks was a certified organic or biodynamic wine producer. Stevens responded by email dated 13 September 2016 and stated that:

'Eikenbosch farm is a certified organic farming operation and wine is one of our outputs. We have been certified organic since 2005 and, although not biodynamic, I am well connected with the biodynamic movement and use their concepts to solve organic farming issues. Our wine was marketed under the "Mountain Oaks" label, but this label was the creation of my ex-wife, as she was a wine maker with assistance from Ross Gower, and now that she has left the farm, the label will revert to "Eikenbosch".'

On the same day, the appellant sent another email in which she asked Stevens to identify their certification body so that it could be added to their register. Stevens told her that it was SGS/ LACON.

[5] On 15 August 2017, Stevens received a group email from SA Winery Industry Information & Systems NPC (SAWIS), which is an industry body set up for the purpose of disseminating topical information of interest to various stakeholders in the wine industry. The email read:

'The Biodynamic and Organic Wines of South Africa

The association was created to form a platform for bringing together certified Biodynamic and

Organic wine producers to help consumers and media to easily to see which wine producers are certified Biodynamic and organic in South Africa.

Click here to read more <<http://biodynamicorganicwine.co.za/>>’

[6] He followed the link which took him to the appellant’s website. The website contained a page entitled ‘Organic Wine Producers’. This page gave a brief explanation of what organic wine production entails and stated that ‘the wine producers on this site are all certified organic’. This was followed by a table prepared by the appellant which gave the certification status of various wine producers. This table had an entry for Mountain Oaks Winery and in the notes column, Stevens noted that the appellant had written the following words in bold and red ‘no *longer* organic’ (my emphasis). Following his demand, the website was subsequently altered and the entry relating to Mountain Oaks was removed entirely.

[7] The respondents alleged that the statement that Mountain Oaks Winery is no longer organic is entirely false because every vintage that Eikenbosch produced enjoyed full certification to the highest possible international standards for organic wine production. They contended that they were the first wineries in the Cape to be certified for organic wine production.

[8] The appellant conceded that she published the alleged statement on her website for 48 hours. She insisted that the statement was true because the respondents failed to provide any evidence that they were certified for organic wine production at the time when the publication was made. According to her, and from her investigations, the certificate from LACON only relates to wines made from organic grapes and not organic wines. Therefore the respondents were not certified to produce organic wine. The significance of the distinction alluded to will be apparent in due course.

[9] In their founding affidavit, the respondents relied on their clear right to have the reputation and goodwill of the brand 'Mountain Oaks' protected. They alleged that the right not to have one's reputation tarnished is well established and goodwill is a recognised asset having commercial value. On the injury committed or reasonably apprehended, the respondents stated that the entire South African wine industry community and observers are likely to have sight of the false statement published by the appellant. They stated further that the nature of the industry is such that, consumers rely on the reputation of an organic wine producer, as a high degree of trust is required to ensure that products that are marketed as 'organic' are actually organic.

[10] Dealing with these facts, the court a quo found that the statement by the appellant was a misrepresentation, the publication of which would have been injurious to the reputation and goodwill of the respondents who had traded and marketed their wines as organic since 2005. It found further that the appellant was the respondents' competitor and that there was no reason why the respondents should not succeed on the basis of unlawful competitive trading.

[11] On defamation, the court held that the appellant has not been able to show that her conduct was not wrongful, or that it was justified in any respect. The court found that she had no reason to publish a statement that Mountain Oaks Winery was no longer organic particularly because that was not the purpose of the website. The court rejected the appellant's version that she had no intention to injure and found that that was not supported by the facts. It further found that there was no reason not to accept that the respondents, by virtue of the certification as producers of organic wine that they held since 2005, had built a reputation and goodwill over time which needed to be protected. The court then found that the respondents have succeeded in proving defamation and it granted an interdict.

[12] The appellant's counsel argued that the court a quo erred in its findings in that first, the respondents had failed to prove that the statement complained of is defamatory. Second, that the respondents claimed that they were entitled to the relief sought on the basis that they had made out a case for an interdict founded on unlawful competition and injurious falsehood when in fact the statement complained of was true. Before us, counsel for the respondents was constrained to limit the basis of justification to the interdict to injurious falsehood.

[13] That being the case, the issue is whether the respondents succeeded in proving the essential elements of injurious falsehood which are: (a) that the appellant by word or conduct, or both, made a false representation to others concerning the respondents; (b) the appellant knew that the representation was false; (c) the respondents suffered damages as a result of the presentation through for example, loss of business; and (d) the false representation was the cause of such loss¹.

[14] I deal with each of these requirements in turn.

Did the appellant make a false representation to others concerning the respondents?

[15] Stevens alleged in his founding affidavit that the first respondent produced organic wine annually from the 2005 vintage up to and including the 2012 vintage. He caused the 2011 and 2012 vintage to be destroyed in the presence of SARS officials. Since then, the first respondent has not produced wine and the youngest wine it produced is from the 2010 vintage.

[16] The complaint by Stevens in my view is contrived. In terms of the European Union Rules for Organic Wine Production, since 1991 and therefore

¹ *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441C to D

prior to August 2012 wines could be labelled as ‘made from organic grapes’, whatever the subsequent wine making process might have entailed because that was the acceptable standard set by the EU. However, after 1 August 2012 the EU standards and regulations changed and a new standard was set. In terms of these regulations, a wines producer was limited to the use of the label ‘wine from organic grapes’ and not ‘organic wine’ if the wine making process was not wholly organic for example chemicals were introduced or the wine was not otherwise wholly organically produced. It was for that reason that the website stated that the wine was no longer organic as there is no proof or acceptable certification to that effect. Therefore, the appellant’s statement that the respondents’ wine is no longer organic is not false. That should be the end of the matter. For completeness I however deal with the remaining requirements.

Did the respondents prove that the appellant knew that the representation was false?

[17] In disputing the falsity of the publication the appellant stated the following in her answering affidavit:

‘[44] As neither Mountain Oaks nor Eikenbosch has made wine since 2011, they have never produced a certified organic wine within the meaning of the EU standards and regulations for the production of organic wine

[62] As I have stated previously, before 1 August 2012 wine was certified as “wine made from organic grapes”. From 1 August 2012 organic wine per se had to be made under strict organic conditions and only those wines made under those conditions could be certified as organic.

. . . .

[67] At the risk of repeating myself, according to the EU standards and regulations for certification from 1 August 2012, Mountain Oaks or Eikenbosch did not produce organic wine.’

The respondents' reply to this was a bare denial. Nowhere in the papers did they allege specifically that the appellant knew that the publication was false. Furthermore, and based on the *Plascon Evans*' rule², I cannot find that the appellant's version is so farfetched or clearly untenable that it should be rejected. Knowledge of falsity must be alleged specifically.³ Furthermore, the respondents had to prove that the appellant had subjective knowledge that her statement was false. This, the respondents failed to prove.

Did the respondents suffer damages as a result of the representation?

[18] The respondents alleged that they are not in a position to quantify the damages that will be suffered as such damages will only become apparent as their reputation and business relationships are affected. This therefore means that the respondents could not prove that they suffered damages as a result of the representation.

[19] In the light of the conclusions made, it follows that the court a quo erred in granting the order as it did. Accordingly, such order falls to be set aside.

[20] In the result, the following order is made:

1. The appeal is upheld with costs such costs to include costs of two counsel.
2. The order of the court a quo is set aside and replaced with the following:
'The application is dismissed with costs'.

FE Mokgohloa
Judge of Appeal

² *Plascon – Evans Paints v Van Riebeeck Paints* 1984 (3) 620 (AD)

³ *Breedt v Elsie Motors (Edms.) Bpk* 1963(3) SA 525 (A) at 529B–529H.

APPEARANCES:

For Appellant: A Sholto Douglas

F Landman

Instructed by: Michael Ward Attorneys, Wynberg

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For Respondent: F J Gordon - Turner

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