

IPSP02Y - Essential Competition Law

Assignment 1 - Unique Number: 701001

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NOTE

Please note that footnotes will be denoted as ¹ and will appear at the bottom of the page. References will be denoted by [1] and will appear at the end of the document.

¹This is a footnote.

1 Can Dry Company take legal action against Frost Company? [10]

In the arguments that follow, the principles of the Roman-Dutch law relating to the law of delict will be applied to establish whether Frost Company has acted unlawfully. Moreover, given that South Africa is a member of both the World Trade Organization and the Paris Union, the international instruments to be utilized in the following arguments are the Paris Convention for the Protection of Industrial Property [1], the Model Provisions on Protection Against Unfair Competition [2] and Agreement on Trade-Related Aspects of Intellectual Property Rights [3].

1.1 Is Dry Company entitled to institute legal action?

Dry Company will be entitled to institute legal action against Frost Company for their acts of **unfair competition**, as per [article 10^{bis}(3)(3)][1] and [article 4(1)][2]. Dry Company could allege that Frost Company has unlawfully mislead the public as to:

- ‘*the manufacturing process*’ - MOON DELIGHT products are not manufactured according to traditional methods. (*See also* [article 4(2)(i)][2]).
- ‘*the characteristics*’ - It is patently untrue that MOON DELIGHT products contain 50% less calories than ordinary whisky. (*See also* [article 4(2)(iii)][2]).
- ‘*the suitability for their purpose*’ - MOON DELIGHT products are of no more benefit in the pursuit of a healthier lifestyle, as compared to ordinary whisky. (*See also* [article 4(2)(ii)][2]).
- ‘*the nature*’ - Frost Company’s MOON DELIGHT products are **not** manufactured in Scotland. (*See also* [article 4(2)(iv)][2]).
 - Moreover as per [article 10(1)][1], as a result of **false indication of source** consignments of MOON DELIGHT products should be subject to seizure on importation into Paris Union member states.
 - Additionally as per [article 10(2)][1], any producer, manufacturer, or merchant involved in the production of, manufacture of or trade in such goods, may be deemed an ‘*interested party*’.
 - Finally, members of the World Trade Organization are obliged to protect geographic indications against unfair² use, particularly those which may cause confusion, as per [article 22(2)][3].

Given that Dry Company and Frost Company are both whisky producers, it can be easily established that ‘competition’ between the two legal entities exists, satisfying the requirement necessary when implementing, or making use of, [1].

1.2 How is the Goodwill of Dry Company affected?

Dry Company may allege that Frost Company has damaged the goodwill of Dry Company, by misleading the public through a number of false claims. Specifically, on account of Dry Company having allegedly lost sales due to health conscious members of their customer base, opting to purchase MOON DELIGHT products and basing this decision on these false claims, as discussed in Section 1.1. As per [article 10^{bis}(3)(1)][1], Frost Company unlawful misleading of the public has result in the confusion of Dry Companies goods, implying that it is an inferior product, and as per [article 3(1)] [2], this constitutes an act of unfair competition.

²As unfair competition is described in [1]

1.3 Can Dry Company Seek an Interdict?

It was demonstrated in section 1.1, how Frost Company engaged in acts deemed to be *unfair competition*, by misleading the public.

1.3.1 An act of conduct / Wrongfulness

It follows therefore that Dry Company may seek an interdict compelling Frost Company to rescind the false claims regarding the MOON DELIGHT products and cessation to the manufacture of, production of or trade in MOON DELIGHT products bearing the false claims.

1.4 Can Dry Company Claim Damages?

Dry Company may claim damages from Frost Company should it be able to prove *fault* on the part of Frost Company, from which Dry Company is suffering financial loss due to this conduct.

1.4.1 Liability for unfair competition in SA law

For Frost Company to incur liability for their unfair competitive actions in terms of the Aquilian action, *all* of the elements of a delict should be established.

1.4.2 Fault

In addition to the arguments of Section 1.3, it should be trivial for Dry Company to prove either intent or negligence on the part of Frost Company in the unfair competitive actions.

1.4.3 Causation

It should be noted that it would be more difficult to demonstrate that Frost Company's unfair competition was indeed the sole cause of Dry Company's loss in revenue. However Dry Company must argue that it was Frost Companies conduct that was the cause of the damage suffered. (*See Geary Son (Pty) Ltd v Gove*) [4].

1.4.4 Damages

Finally, damages may be difficult to ascertain quantitatively and the courts must, to the best of their ability, estimate a value (*See International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1)*) [5]. Moreover the onus lies with Dry Company to show that it has suffered patrimonial loss and its extent.

References

- [1] Paris Convention for the Protection of Industrial Property, 1883. [Online]. Available: http://www.wipo.int/treaties/en/text.jsp?file_id=288514.
- [2] Model Provisions on Protection Against Unfair Competition, 1996.
- [3] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.
- [4] *Geary Son (Pty) Ltd v Gove*, 1964 (1) SA 434 (A).
- [5] *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1)*, 1955 (2) SA 1 (W).