

**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)**

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<b>Citation</b>	1972 (3) SA 152 (C)
<b>Court</b>	Cape Provincial Division
<b>Judge</b>	Diemont J
<b>Heard</b>	March 2, 1972; March 3, 1972
<b>Judgment</b>	April 21, 1972
<b>Annotations</b>	<a href="#">Link to Case Annotations</a>

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**Flynote : Sleutelwoorde**

Trade and trade-mark - Passing off - When Court will grant complainant relief - Nature of complainant's right in law - Complainant's goods not yet on market.

**Headnote : Kopnota**

The Court has power to interfere where there has been a calculated attempt to pass off goods as those of a competitor in trade, even though the latter's goods are not yet on the market.

A trader who filches information from a competitor, information which he knows to be secret and confidential, and which has been developed by the competitor's skill and industry, is acting unfairly and dishonestly if he uses the information for his own profit and to the detriment of his rival. His conduct amounts to deliberate misappropriating of a business asset which was acquired by another's skill and industry. This conduct does not differ in principle from the conduct of a man who steals goods from the shelves of a rival's shop. Both types of conduct constitute unlawful interference with the trade of another: both types of conduct are actionable and fall within the principles of the *Lex Aquilia*.

The applicants were about to market a new wine to be sold under a new label which had been designed by advertising agents and printed by printers in secret. Both the agents and the printers were bound to observe a strict confidence but this confidence was breached, the label came into the hands of respondent in a clandestine manner before applicants' wine was on the market. Respondent copied the label with all expedition and proceeded to market its own product under a label which was a close imitation of applicants' label.

*Hela*, that applicants were entitled to an interdict and ancillary relief.

**Case Information**

Applications for an interdict and ancillary relief. The facts appear from the reasons for judgment.

*H. Snitcher, Q.C.* (with him *G. Hofmeyr*), for the applicants in the first application and the respondents in the second application.

*J. van Z. Steyn, S.C. (with him G. D. van Schalkwyk), for the respondent in the first application and the applicant in the second application.*

*Cur. adv. vult.*

*Postea* (April 10th).

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## Judgment

DIEMONT, J.: There are two applicants before the Court - both for an interdict and ancillary relief.

The two applicants in the first case are the Stellenbosch Wine Trust Ltd., and the Stellenbosch Farmers' Winery Ltd. The Stellenbosch Wine Trust Ltd. is the holding company of a large number of subsidiary companies including the Stellenbosch Farmers' Winery Ltd., and is described in the papers before the Court as the largest wine-producing group in the Republic of South Africa.

Oude Meester Group Ltd. is the respondent in the first case and is also the holding company of a number of subsidiary companies which carry on the business of producing and selling wine in the Republic.

In the second case the rolls are reversed: the respondent is now the applicant and the two applicants are the first and second respondents respectively. Both applications were heard at the same time since the two disputes arose out of the same set of facts. In order to avoid confusion I shall follow the example of counsel and refer in this judgment to the Stellenbosch Wine Trust Group as the applicant and to the Oude Meester Group as the respondent.

The dispute in this case turns on the production and marketing of a wine known as Paarl Perlé. Perlé wine is a light wine charged with carbon dioxide which has in recent years attained great popularity among many sections of the community. It is claimed that this type of wine was first produced in about 1963 by a group of companies commonly known as the Moni's group. An amalgamation took place between the applicant and Moni's group in 1966 and thereafter Perlé wine was marketed by the applicant. In January, 1970, a subsidiary of the respondent commenced marketing a low-priced light Perlé wine under the name Paarl Perlé. Two months later in March, 1970, one of applicant's subsidiaries began to market a low priced Perlé wine under the name 'Moni's of Paarl Perlé'. It is not necessary to set out in detail the changes in names and labels which followed save to state that, inevitably, a dispute arose in regard to the use of the name 'Paarl Perlé'. This dispute culminated in proceedings in this Court in August, 1971, when Distillers Corporation (S.A.) Ltd. (a subsidiary of respondent) sought to interdict Moni's of Paarl Ltd. (a subsidiary of applicant) from marketing its product under the label 'Paarl Perlé'. These legal proceedings were terminated on 3rd September, 1971, when applicant and respondent entered into a written agreement of settlement which was

'intended to regulate the marketing and get-up of Paarl Perlé wines produced by the two groups'.

I shall refer to certain provisions in this agreement at a later stage in this judgment.

The next development took place in November, 1971, when applicant decided to place on the market a Perlé wine which would sell under the name 'Selected Paarl Perlé'. Special new bottle labels (consisting of a neck and a main label) would be designed and

an extensive advertising campaign would be launched on 31st January, 1972, to mark the first appearance of this wine. The decision was taken in secrecy and the confidential nature of their assignments was firmly impressed on the printers, and the marketing and advertising agents. It was therefore with

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dismay that the applicant learned on 19th January, 1972, that the respondent was marketing a new wine, 'Grand White Paarl Perlé', and that there was

'such a remarkable resemblance between the respondent's labels and applicant's labels... that... it appeared... that the respondent must have procured samples of the applicant's labels whilst they were still in the course of printing and at a stage when the whole of the composition of and design of the applicant's labels were confidential and a closely guarded secret'.

Copies of the labels were annexed to the affidavit made by Lothar Barth, the managing director of applicant - annexures C and D - and it was submitted that respondent had deliberately imitated the composition and design of applicant's labels, and that the similarity could not have occurred by coincidence.

I am not surprised that applicant's managing director came to this conclusion. There is a striking resemblance between the two sets of labels; save the colour background they are as like as two peas in the proverbial pod. Regard being had to subsequent events it is not necessary for me to set out in detail the many points of resemblance between the two sets of labels.

Applicant claimed (I quote from Barth's founding affidavit) that:

- '32. (a) Respondent's use of the applicants' labels was wrongful and unlawful and constituted a deliberate invasion of applicants' rights.
  - (b) Applicants' secret and confidential information in the form of its label design, was appropriated and used by respondent with the deliberate intention of injuring applicants in their business and trade, and of gaining an unfair advantage as a competitor to which respondent was not in the circumstances entitled.
33. In acting as it did, respondent deliberately attempted to create a situation whereby the public would be confused by the similarity in appearance of the two products - applicants' and respondent's.'

Applicant contended that there were two further facts which were calculated to cause confusion in the minds of the public: the one was that respondent's product was being sold to the public at 32 cents per bottle which was the price at which applicant had intended to sell its product. The other fact was the use of the slogan 'The Champagne of Perlé Wines' on respondent's label. This was a slogan which was likely to be confused with the slogan on applicant's label - 'The Champagne of Paarl Perlés'.

Applicant alleged that when it became apparent that respondent was introducing a product under its label onto the market in an attempt to anticipate the applicant's product and to cause confusion in the minds of the public it became necessary for applicant to accelerate production and distribution. At the same time applicant's managing director, Barth, wrote a letter to the managing director of respondent group (annexure 'F', dated 20th January, 1972) drawing attention to the infringement of its rights and stating, *inter alia*:

'There can be no doubt from a comparison of the two labels that your Group has seen fit

deliberately to imitate the label which is to be placed on our product, with a view to confusing the public.

Your label is clearly an unlawful appropriation of our design and we call upon you to take immediate steps to withdraw your product under its present name.

Unless we have your assurance by 4 p.m. on Friday, 21st January, 1972, that this will be done, application will be made to the Supreme Court as a matter of urgency for an interdict to restrain you from continuing to market your product in its present form.'

The managing director of respondent, one P. G. Steyn, replied to this

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letter on 21st January, 1972, refusing to comply with this demand and stating that

'Neither the label nor the slogan 'The champagne of perlé wines' is likely to mislead the public in any way nor do they contain anything in which any company in your group holds proprietary rights.'

Applicant stated further that it had embarked on a substantial advertising and sales campaign in order to stimulate the sale of Selected Paarl Perlé and that it was committed to an expenditure of over R20 000 to cover the costs of producing advertising for various media. The confusion in the minds of the public previously referred to was likely to detract from the sale of applicant's wine and applicant was therefore entitled to the protection of the Court. Applicant stated that it intended instituting an action for damages against respondent but pending the institution of such action it sought *interim* relief in the form of an order:

'1. Restraining and interdicting the respondent -

- (a) from continuing to use, and/or market its Grand White Pearl Perlé wine under the labels or in the get up presently used by it for such purpose;
- (b) from selling and/or marketing its Grand White Pearl Perlé wine or any other wine under any other labels and/or in any get up so closely resembling that used by applicants for the marketing of their Selected Paarl Perlé wine as to be calculated to cause confusion or deceive the public;
- (c) from printing any further such labels;
- (d) from advertising its Grand White Pearl Perlé in any advertisement which contains any representation of the said labels;

pending the outcome of an action to be instituted by applicants against respondent for a permanent interdict of the nature specified in sub-paras. (a) and (b) and for ancillary relief;

- 2. Directing respondent to withdraw from all wholesale and retail dealers all stocks of its brand of Grand White Pearl Perlé wine where stocks are kept for sale under the aforesaid label and/or get up, pending the outcome of the said action.
- 3. Granting such further or alternative relief as this Court may deem necessary;
- 4. Directing the respondent to pay the costs of this application.'

Annexed to the notice of motion and the founding affidavit was a further affidavit by Barth, dated 5th February, 1972, in which he alleged that at about 6 p.m. on 1st February, 1972, respondent delivered a letter to applicant (annexure 'H') in which Steyn,

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the managing director of respondent group, made the following statement:

'I have investigated the matter and have come to the conclusion that an error was made. Accordingly our 'Pearl Perlé' marketed under its present label is being withdrawn forthwith. This action is being taken without prejudice to the matters referred to hereinafter.'

The writer went on to state that the marketing of 'Selected Paarl Perlé' by applicant

'would be in clear breach of the terms of the agreement of settlement dated 3rd September, 1971'.

Applicant was requested to furnish a written undertaking within 48 hours that it would not proceed to market this product. Failing receipt of such an undertaking legal proceedings would be instituted by respondent.

Barth stated that by the time this letter was delivered notice of the application and supporting affidavits had already been filed with the Registrar and delivered to the Deputy-Sheriff for service on respondent. The application was served on the morning of 2nd February, 1972.

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On the following day applicant received a further letter (annexure 'I') from respondent's attorneys, the relevant portion of which reads as follows:

'As will be apparent to you from our clients' letter dated 1st February, 1972, they decided prior to the service of your clients' application to withdraw the product with immediate effect. However, it is clear that your clients' application was prepared prior to the communication of the decision to withdraw the product.

Accordingly, our clients are prepared to pay the costs of the application and hereby undertake accordingly.

In further implementation of the foregoing our clients undertake:

- (a) to withdraw the product as presently labelled forthwith and to ensure that it is not marketed;
- (b) to destroy the labels and labelling material in their possession and in the printers' possession and not to print further labels.

Needless to say the product as presently labelled, which to date has not been advertised, will not be advertised at all as presently labelled.'

In commenting on these letters Barth stated in his affidavit that 'respondent's conduct was reprehensible throughout'. He said that he had on several occasions told the respondent's managing director that he had information which showed that respondent had come into possession of applicant's labels by unauthorised means and that respondent had acted improperly and unlawfully in copying applicant's labels. Respondent had at no time offered any excuse or apology nor had it denied the truth of the allegations made by applicant. On the contrary it had persisted in the attitude that it had done no wrong. Barth stated further:

'The applicants are deeply perturbed because of possibility that some form of industrial espionage is being conducted by the respondent in order to obtain the applicants' trade secrets by improper means and to exploit them for its own advantage. Such a situation is intolerable in any commercial organisation, and in my respectful submission, cannot be countenanced.'

These facts, it was claimed, cause grave doubts on the *bona fides* of respondent, and applicant was therefore justified, in the circumstances, approaching the Court, despite the undertaking, for an order. Moreover applicant was entitled to an order as to costs, more particularly as counsel was briefed on 1st February, 1972, before any undertaking was received.

In the main opposing affidavit, Steyn, the respondent's managing director, set out what he described as 'the background' to the dispute. He alleged that a subsidiary company of respondent, Distillers Corporation (S.A.) Ltd., had first produced a low-priced light Perlé wine under the name 'Paarl Perlé' in January, 1970, and that the applicant had

'wrongfully, deliberately and by various stratagems, set out to pass off its product as that of respondent's subsidiary'.

Proceedings were instituted in Court in 1971, but these proceedings were settled by an agreement which

'was intended to regulate the marketing and get up of Paarl Perlé wines produced by the two groups'.

Steyn stated that in the latter half of December, 1971, an employee of SA Litho (Pty.) Ltd., handed a printers' copy of the label in question to an employee of respondent, who handed it to respondent's marketing director.

'Outraged at what he appreciated was another attempt by applicants to damage respondent by unlawful means, namely, an attempt to put applicant's Paarl Perlé on the market under a get-up in clear contravention of the provisions of the agreement of settlement, the latter took the decision which led to the marketing of respondent's product under a label of which annexure 'D' to applicants' founding affidavit is a copy. In acting as he did, respondent's

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marketing director acted in the *bona fide* belief that applicants' flagrant breach of the terms of the agreement of settlement justified this action. Respondent accepts, however, that this act of retaliation was not proper and for this reason the decision to withdraw the product under the label in question, which I will refer to in more detail later, was taken.'

Steyn went on to deal with the correspondence which passed between the parties and which has been referred to above, and stated that while the undertaking to withdraw the label was irrevocable and had already been implemented, respondent submitted that on its own papers applicant was not entitled to the relief claimed by it.

He submitted that in any event applicant was not entitled to market the product 'Selected Paarl Perlé' and in support of his submissions he said:

'In this connection I quote clauses 7 and 8 of agreement of settlement (annexure 'R'), which reads as follows:

7. OM will withdraw the use of the words DIE REGTE and both parties agree that they will not use words or phrases that suggest the other product is inferior.
8. SWT and OM agree not to change their respective Paarl Perlé labels in a manner that will bring it closer to that of the other and to avoid wording that could be linked by connotation to the Paarl Perlé of the other, e.g. 'improved' as against 'original' or 'more satisfying' as against 'it satisfies'.

Notwithstanding the foregoing agreement, applicants deliberately embarked on an advertising

campaign and marketed a product, which is clearly calculated and intended to suggest to the public that respondent's product is inferior to applicants' 'new' product. It is, I submit, clear that applicants are in breach of the agreement.'

Steyn submitted further that applicant had not come to Court with 'clean hands' since it had misled the public in describing its product as a 'selected' wine, and some of the advertisements contained misrepresentations.

In conclusion Steyn pointed out that respondent's tender of costs had not been accepted by applicant and was now accordingly withdrawn.

The allegations made by respondent's managing director were answered in great detail by Barth in applicant's replying affidavit. In particular he asked the Court to infer that respondent had deliberately elected to copy the label which it knew to be confidential and secret and applicant's property and to reject the explanation given by respondent's managing director, namely that an 'error was made'. He submitted that respondent

'had been guilty of clandestine and dishonourable conduct and had acted unlawfully',

and that applicant was accordingly entitled to regard this conduct in a serious light and to ask for a full and proper investigation by the Court. It followed that applicant was entitled to the order prayed for despite the undertaking already given by respondent.

Barth also referred to the background of the dispute and placed on record applicants' version as to how Perlé wine first came to be manufactured and marketed, and the circumstances which led up to the agreement of settlement in 1971. He denied that the agreement of settlement was intended to regulate the marketing and get-up of all Paarl Perlés which might in the future be produced by the two groups.

'The intention and purpose of the said agreement was to settle the dispute between the parties and to regulate the position with regard to the labelling of the Paarl Perlés then being marketed. It was never the intention to preclude either party from producing a different wine and marketing it under the description

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'Selected Paarl Perlé', and in relation to that product to use words of commendation.'

In answer to the allegation that applicant had come into Court with 'unclean hands' reference was made to advertisements respondent had placed in the Press and which contained alleged misrepresentations. However, regard being had to the course which the argument took, I do not deem it necessary to make reference to these advertisements.

Two further issues were raised in Barth's replying affidavit. He contended that, if the agreement of settlement must be interpreted as applying to Selected Paarl Perlé, it did not represent the true intention of the parties and applicant was accordingly entitled to rectification of the agreement so as to reflect the true intention of the parties. He contended further that respondent did not initially regard applicants' label as a breach of the agreement and its action in placing its Paarl Perlé on the market in the circumstances referred to amounted to an acquiescence and acceptance by it of any alleged breach of the agreement.

In addition to Barth's reply affidavit, an affidavit was filed by Melck, the production director, in which he explained how a 'selected' wine differed from a wine which was not



a selected wine, and in particular how the Selected Paarl Perlé came to be produced. He alleged that:

'The Selected Paarl Perlé which we produced, and to which these proceedings relate, was and is a selected wine of a quality which could be sold in a higher price range than 32 cents per bottle. It is not simply Paarl Perlé to which a comparative adjective such as 'superior' or 'improved' has been applied, but a distinctive wine standing on its own.'

Finally an affidavit was filed by one Alan Thompson, a director of Cape Western Printing Co. (Pty.) Ltd., in which he denied an allegation in the correspondence that he had delivered a printer's copy of the label in dispute to a person in the employ of the respondent. He stated that he had at all times treated the label as secret and confidential.

In the second application, which as I have said, was consolidated with and heard at the same time as the first application, the respondent (now the applicant) sought an order:

- '(a) Restraining second respondent from continuing to use, and/or market, its 'Selected Paarl Perlé' wine under the labels or in the get-up presently used by it for such purpose;
- (b) Restraining respondents from marketing their 'Paarl Perlé' wines under any other label and/or any other get-up calculated to infringe the provisions of the agreement of settlement dated 3rd September, 1971.'

In support of this application, Steyn, the managing director of the Oude Meester Group, filed an affidavit in which he set out further details in regard to the marketing of low priced Perlé wines. He submitted that a comparison of the labels lead to the conclusion that

'first respondent (applicant), whilst attempting to sail as close to the wind as possible without incurring legal liability, embarked upon a campaign which was designed and calculated to pass off its products as those of applicant's (respondent's) subsidiary, thereby seeking to reap the advantage of the latter company's reputation'.

He then proceeded to explain once more how the agreement was entered into on 3rd September, 1971, and submitted that the marketing of 'Selected Paarl Perlé' constituted a breach of the agreement for the following reasons:

- '(a) The word 'Selected' is commonly used in the wine industry to denote a wine of a superior grade or quality of a given type of wine. The use of such word in conjunction with the words 'Paarl Perlé' serves to indicate that other Paarl Perlé wines are inferior.

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- (b) The phrase 'The Champagne of Paarl Perlé' also indicates that the particular wine is of a superior quality and that other Paarl Perlés are inferior. (c) The phrases 'tastes better' and 'something better', in the context of the said advertisements and brochure, convey that other Paarl Perlé wines do not taste as good and are inferior.'

He submitted in conclusion that the alleged breach of contract would cause his company financial loss the extent of which it was not possible to determine, and the Court should accordingly grant an order restraining applicant from continuing to use or market its 'Selected Paarl Perlé' wine.

In his opposing affidavit Barth denied the allegations made by Steyn, and in particular that his company had attempted to pass off its products as those of the respondent or that it had been guilty of any breach of contract. He submitted that the balance of



convenience was against granting respondent temporary relief.

Respondent filed voluminous replying affidavits setting out in great detail how the agreement of settlement should be interpreted and why the claim for rectification was without substance. It was submitted that the exact manner in which the respondent came into possession of the Selected Paarl Perlé label was immaterial but, since the issue had been raised, the circumstances under which the label was acquired from Thompson, a director of Cape Western Printing Co. (Pty.) Ltd., were deposed to by one Schickerling, an employee of the respondent.

A number of issues were raised during the course of the hearing; some were not persisted in, one was abandoned, but three were fully argued and must now be considered. They were the following:

1. Was the applicant in law entitled to the relief claimed or any other relief? In short did the law provide any remedy in this situation?
2. If it did, had the applicant breached the agreement between the parties thereby precluding itself from seeking relief from the Court?
3. If not, should an order of Court be granted in view of the undertaking given by the respondent to withdraw its product from the market.

Mr. *van Zyl Steyn*, who appeared for the respondent, concentrated much of his argument on the question whether the applicant was entitled to an interdict as a matter of law. He contended that *ex facie* applicants' affidavits it appeared that applicant relied upon:

- (a) a passing off of respondent's product as that of applicants'; or
- (b) an infringement of a property right; or
- (c) an alleged wrong relating to confidential information.

As to the first contention, (a), he argued that no passing off action could be sustained since applicants' product had at the relevant time not yet been marketed and had acquired no reputation. It seems to me that the answer to that contention is to enquire what is the nature of the action which applicant seeks to sustain - does he ask for damages or is he seeking to protect a product which he is about to market. If the latter, I find it difficult to appreciate why in these circumstances he should not be entitled to seek the Court's protection. Let us have regard to the facts. Applicant is about to market a new wine. The wine is to

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be sold under a new label which has been designed by advertising agents and printed by printers in secret. Both the agents and the printers are bound to observe a strict confidence but this confidence is breached, the label comes into the hands of respondent in a clandestine manner before applicants' wine is on the market. Respondent copies the label with all expedition and proceeds to market its own product under a label which is a close imitation of applicants' label. These are facts which are not specifically denied on the affidavits and which in the course of argument were accepted as correct. I think it would be strange if counsel's contention were correct that the Court was powerless to act in these circumstances.

Let us assume in respondent's favour that it did not obtain possession of the label on the Selected Paarl Perlé bottle in an unlawful or improper manner but that the label was copied only after the bottle was on the shelves of the bottle store. If respondent had then proceeded to market its Paarl Perlé under this label it would have been guilty of 'passing off' its product as that of applicants'. No man is allowed to pass off his goods as those of another and if he does so he commits a delictual wrong which the Courts will restrain: *Policansky Bros. Ltd. v L. & H. Policansky*, 1935 AD 89 at p. 97.

Can respondent be in a better position when as a result of its own wrong in appropriating applicant's confidential and secret design its wine appears on the market a week before applicant's is due to appear? If we are to have regard to the equitable principle that a man cannot take advantage of his own wrong to the detriment of another - *nemo ex suo delicto meliorem suam conditionem facere potest* - respondent cannot be in a better position than if he had delayed and obtained possession of the label lawfully.

I am accordingly of the opinion that counsel's first contention must be dismissed and that the Court has power to interfere where, as in this case, there has been a calculated attempt to pass off goods as those of a competitor in trade, even though the latter's goods are not yet on the market.

But even if I have erred in so extending this principle, there is another ground on which applicant can seek relief.

There is a right of action for breach of confidence or trust in the English law which is available to a plaintiff where confidential ideas or information have been obtained, directly or indirectly, from the plaintiff by the defendant and the defendant knowingly and without the plaintiff's consent, proceeds to use such ideas or information to the detriment of the plaintiff. This action does not depend on any contract between the parties; it depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. *Seager v Copydex Ltd.*, (1967) 2 All E.R. 415 at p. 417. This remedy has been applied both in the case where the defendant obtained the confidential information directly from the plaintiff and where, as in this case, the defendant has obtained it indirectly, for example, where the plaintiff has given it to a third party and the defendant has succeeded in some way in obtaining it from such third party.

It was contended by Mr. *van Zyl Steyn* that this equitable remedy

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was not part of our law but Mr. *Snitcher*, who appeared for the applicant, argued that the equivalent remedy was to be found in the form of a delictual liability referred to in our law as 'unlawful interference with trade or business'. In advancing this argument Mr. *Snitcher* placed great reliance on the judgment of CORBETT, J., in *Dun and Bradstreet (Pty.) Ltd. v S.A. Merchants Combined Credit Bureau (Cape) (Pty.) Ltd.*, 1968 (1) SA 209 (C). This was a case in which the Court was called upon to consider whether a trader who has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. upon the basis that the information should not be disclosed to others) can claim damages against a rival trader who is not a client, but has in some manner obtained this information, and well knowing its true nature and the basis on which it was distributed, uses it in his competing

business and thereby injures the first mentioned trader in his business.

It is firmly established in our common law that every man has the right to carry on his trade or calling without wrongful interference from others, including competitors. In the words of DE VILLIERS, J.A., (in *Matthews and Others v Young*, 1922 AD 492 at p. 507):

'In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *injuria* for which an action under the *Lex Aquilia* lies if it has directly resulted in loss.'

As was pointed out by CORBETT, J., in *Dun and Bradstreet (Pty.) Ltd. v S.A. Merchants Combined Credit Bureau (Cape) (Pty.) Ltd.*, *supra*, the problem in this branch of law was to draw the line between lawful and unlawful interference with the trade of another. In considering this problem CORBETT, J., drew attention to two aspects of the problem: In the first place the basis of the action in our law was *Aquilian* - the fact that there was no direct precedent was not in itself fatal provided the requirements of *Aquilian* liability were satisfied. And in the second place, regard being had to what had been said in *Geary and Son (Pty.) Ltd. v Gove*, 1964 (1) SA 434 (AD) at p. 440, emphasis must be placed in such cases upon criteria such as fairness and honesty in competition.

It must be conceded that these phrases, fairness in competition and honesty in trade, have an old-fashioned ring about them which may cause the cynic in business to smile, but it is right that the Courts should have regard to and emphasise these virtues. Moreover the phrases are somewhat elastic, as difficult to apply in some cases as the concept of the reasonable man is difficult to apply. Nevertheless, if our law is to develop and is to offer the commercial man protection from unlawful interference in his business, the Courts will not disregard the words fairness and honesty.

A trader who makes fraudulent misrepresentations about his own business to the detriment of his rivals' business is guilty of unlawful interference. So also a trader who passes off his goods as being those of a

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competitor, or makes injurious false statements concerning his competitors' business. In each case the interference is unlawful and actionable; and in each case the conduct is unfair or dishonest. I have no doubt that the trader who filches information from a competitor, information which he knows to be secret and confidential, and which has been developed by the competitor's skill and industry, is acting unfairly and dishonestly if he uses the information for his own profit and to the detriment of his rival. His conduct amounts to deliberate misappropriating of a business asset which was acquired by another's skill and industry. It is difficult to appreciate how this conduct differs in principle from the conduct of a man who steals goods from the shelves of a rival's shop. Both types of conduct constitute unlawful interference with the trade of another; both types of conduct are in my view actionable, and fall within the principles of the *Lex Aquilia*.

I have accordingly come to the conclusion that the applicant is in law entitled to the

relief claimed.

The next issue turns on the meaning to be given to the agreement signed by the parties on 3rd September, 1971. Respondent cited clauses 7 and 8 of the agreement, both on the affidavits and in argument, and averred that applicant was in breach of the agreement. Although clause 8 was cited it is not clear to me in what manner this clause was alleged to have been breached. It is ungrammatical and appears to throw little light on the dispute now before the Court. It may be, as Mr. *van Zyl Steyn* argued, that the second part of this clause is of general import and refers both to labelling and to advertising as well, but that takes the matter no further. I shall therefore turn to clause 7 upon which both counsel concentrated. This clause reads as follows:

'OM (respondent) will withdraw the use of the words DIE REGTE and both parties agree that they will not use words or phrases that suggest the other product is inferior.'

Mr. *van Zyl Steyn* described it as a strange agreement with a two-fold purpose: it was intended to eliminate confusion (clause 5) and to stop unfair advertising and labelling (clause 7). He said we were here concerned only with clause 7 and this clause imposed a restraint, freely adopted by both parties, which compelled each party to avoid the use of words or phrases which might suggest that the product of the other party was inferior. He submitted that the general manager of respondent group, Steyn, was justified in stating in his affidavit that applicant had breached this clause in the agreement in several respects:

1. The product was to be known as 'Selected Paarl Perlé'.
2. The slogan, 'The Champagne of Paarl Perlé' appeared both on the neck label on the bottle and in advertisements.
3. The advertisements and brochure stated that the product 'tastes better' and the brochure implied that it was 'something better'.

I do not find any merit in these submissions.

It is common cause that there is no exclusive right to the use of the words 'Paarl Perlé'. These words appear to be in the same category as 'Worcester Hock' or 'Constantia Muscadel'. Once this is conceded I fail to appreciate how either party can be precluded by the agreement from marketing a new product under the name 'Selected Paarl Perlé'

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or any other appropriate title. Affidavits by Melck and Winshaw filed on behalf of applicant, state that the 'Selected Paarl Perlé' is a different wine from Moni's Paarl Perlé. The former wine is a wine distinctive in character, bouquet and aroma made from a special selection of wines. These allegations are not specifically denied by respondent. Why, in these circumstances, should the applicant not be entitled to give the new wine an appropriate new name? It does not seem to me that this name reflects on respondent's wine any more adversely than if applicant had not used the word 'Selected' but had stated on the label: 'This Paarl Perlé is made from choice grapes', or 'This Paarl Perlé is made from selected wines'. In describing its own product applicant is not degenerating respondent's product or infringing the terms of clause 7 of the agreement. That clause was intended to discourage one party from disparaging the other's product; it was never intended to restrain either party from commending its own product or

extolling its virtues, or giving an appropriate name to a new wine.

Nor does it seem to me that there is any substance in the two other complaints. To describe a wine as 'The Champagne of Paarl Perlés' may be extravagant language but no more extravagant than the words 'Pearl of the Boland Wines'. The use of this type of flowery language by one party does not suggest that the other party's products are inferior.

The words 'tastes better' are also innocuous. We are not told what it tastes better than; the comparison may be with the wine previously made by the applicant or even with non-alcoholic beverages.

I have accordingly come to the conclusion that respondent has failed to establish any breach of the agreement. That being so it is not necessary to give consideration to the arguments relating to rectification and acquiescence.

The final issue is regard being had to the fact that respondent informed applicant that it was withdrawing its Grand White Paarl Perlé from the market, applicant should have persisted in asking for an order. Both counsel contended that in this situation the essential question was whether there was a risk of recurrence of the mischief. In order to succeed the applicant must show a well-grounded apprehension of a continued infringement of its rights - *Glenton and Mitchell v French Tea and Coffee Works Ltd.*, 1927 W.L.D. 272 at p. 276. In judging whether such apprehension exists one must in my view have regard to all the circumstances and facts of the case.

In its first letter of 20th January, 1972, applicant alleged that the respondent was in unlawful possession of its label and that respondent had deliberately copied the same. Respondent replied to this letter on the following day but did not answer those serious allegations; it merely recorded its refusal to withdraw its offending product from the market. Proceedings were then instituted and the application now before the Court was filed.

After the application had been filed, but before it was served on respondent, on 1st February, 1972, respondent advised applicant in

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writing that its product was being 'withdrawn forthwith' (annexure 'H'). This letter which was received on 2nd February, 1972, was followed by a further letter from respondent's attorneys on 3rd February, 1972, in which they gave undertakings in regard to the withdrawal of the product. It must be noted that at no stage did the respondents or its attorneys offer any explanation of their conduct, nor was there any admission or denial of the allegation that respondent had obtained unlawful possession of the label and deliberately copied it.

Turning to the application it is to be observed that in his founding affidavit, Barth repeated these allegations in great detail. He claimed that respondent's possession of the label was unlawful, that it well knew that the label constituted confidential matter and that no person had the right to use the label and that it nevertheless deliberately imitated the label. Mr. *Snitcher* contended with justification, that these allegations were not fully and frankly dealt with in the respondent's affidavits.

The explanation offered, namely that 'an error of judgment had been made' was not satisfactory and in any event did not accord with the statement that respondent had

been 'outraged' by what it regarded as an infringement of the agreement. It must be borne in mind that respondent had obtained possession of the label as early as 23rd December, 1971, and had therefore ample time to consider its legal position and, if so advised, take steps in Court rather than to resort to what respondents' managing director conceded on affidavit was 'an act of retaliation (which) was not proper'.

In all these circumstances it appears to me that applicant cannot be expected to be content with respondent's assurances, more particularly, if I accept, as I do, that respondent deliberately copied the design on applicants' label. The words of SCHREINER, J., (as he then was), in *Peter Jackson (Overseas) Ltd. v Rand Tobacco Co. (1936) Ltd.*, 1938 T.P.D. 450 at p. 453, are apposite:

'... where there has been a deliberate copying of the applicant's mark by the respondent the proper view seems to be that this in itself casts such doubt upon the *bona fides* of the respondent as to entitle the applicant to an order, whatever undertaking may be given.'

I am not surprised that counsel for the applicant castigated respondent's conduct in the strongest terms. It was reprehensible and the Court should not hesitate to mark its strong disapproval of such unprincipled commercial activity. It can best do so by coming to the assistance of the injured party and making an appropriate order both on the merits and on the costs.

Respondent withdrew its offer to pay costs at an early stage in the proceedings and applicant was in any event compelled to proceed in Court if it wished to recover its costs.

It is accordingly ordered that respondent -

- (1) be restrained and interdicted
  - (a) from continuing to use, and/or market its Grand White Pearl Perlé under the labels or in the get up presently used by it for such purpose;

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- (b) from selling and/or marketing its Grand White Pearl Perlé wine or any other wine under any other labels and/or in any get-up so closely resembling that used by applicants for the marketing of their Selected Paarl Perlé wine as to be calculated to cause confusion or deceive the public;
    - (c) from printing any further such labels;
    - (d) from advertising its Grand White Pearl Perlé in any advertisement which contains any representation of the said labels;
  - (2) directing respondent to withdraw from all wholesale and retail dealers all stocks of its brand of Grand White Pearl Perlé wine where stocks are kept for sale under the aforesaid label and/or get-up;
  - (3) pay the costs of the application.

So far as the second application is concerned, the claim for relief made by the Oude Meester Group fails for the reasons given in respect of the first application. The second application is accordingly dismissed and the Oude Meester Group is ordered to pay the costs of that application.

Applicants' Attorneys in first application and Respondents' in second application:  
*MacCallums*. Respondent's Attorneys in first application and Applicant's in second  
application: *Sonnenberg, Hoffmann & Galombik*.

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