

**POST NEWSPAPERS (PTY) LTD v WORLD PRINTING & PUBLISHING CO LTD 1970
(1) SA 454 (W)**

1970 (1) SA p454

Citation	1970 (1) SA 454 (W)
Court	Witwatersrand Local Division
Judge	Nicholas J
Heard	September 28, 1969; September 29, 1969; September 30, 1969
Judgment	November 11, 1969
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Trade and trademark - Trade - Newspaper circulating report designed to filch advertising from a rival - Allegation that it constituted an injurious falsehood - Failure to prove - Allegation that it constituted unfair competition - Failure to prove.

Headnote : Kopnota

The proprietor and publisher of a newspaper *Post* applied for an interim interdict restraining the proprietor and publisher of another newspaper, *The World*, which competed with it for advertising, from continuing to circulate certain documents and a report designed to persuade the recipients to place advertising with the respondent's newspaper instead of that of the applicant, on the grounds that: (a) the documents misrepresented the relative merits of the rival newspapers; these misrepresentations were false to the knowledge of the respondent and were made maliciously; they were calculated to cause the applicant patrimonial loss; and consequently they constituted an injurious falsehood; (b) the respondents had published material based on *data* which they knew to be unreliable; that this would have the effect of filching advertising from the applicant; and that this conduct amounted to unfair competition.

Held, as the applicant had failed to show that any statement in the reports was false, that it had failed to make out a case on the first ground.

Held, further, as it did not constitute 'unlawful competition' merely for a seller to express opinions in advertising material which he did not honestly hold, that applicant had also failed to make out a case on the second ground.

Case Information

Application for an interim interdict. The facts appear from the reasons for judgment.

J. Browde, S.C. (with him *C. Kinghorn*), for the applicant.

S. W. Kentridge, S.C. (with him *D. N. Bensley*), for the first and second respondents.

S. A. Cilliers, for the third respondent.

Cur. adv. vult.

Postea (November 11th).

Copyright Juta & Company

Judgment

NICHOLAS, J.: This is an application for an interim interdict.

The applicant company is the proprietor and publisher of *Post*, a weekly newspaper. The first respondent is the proprietor and publisher of *The World*, a newspaper published daily from Monday to Friday of each week. These newspapers, which are designed mainly for non-white readers, are rivals, competing for advertising, the revenue from which constitutes the major source of income of the applicant and the first respondent respectively.

A Mr. Brennan is the marketing director of the first respondent. He is also the head of the marketing department of the second respondent. This is the holding company of the first respondent, and it supplies to the first respondent certain services, including the services of its marketing department.

In about July, 1969, Brennan, acting in the course of his employment

1970 (1) SA p455

NICHOLAS J

with the first and second respondents, caused to be prepared and sent to a number of advertising agents a report and covering letter (annexures 'B' and 'A', respectively, to the founding affidavit filed by the applicant. I shall refer to annexures 'A' and 'B' together as 'the Brennan documents'). Annexure 'B' was based on a survey report which had been prepared by the third respondent. Brennan's admitted object in circulating the Brennan documents was to persuade the recipients to place advertising in *The World* newspaper.

The applicant complains that the third respondent's survey was improperly conducted, and that the results obtained therefrom are unreliable; that the Brennan documents are

'false and misleading in many respects';

that they

'are false to the knowledge of the first and second respondents and that they have been published maliciously';

and that the continued circulation of these documents

'will undoubtedly cause the applicant substantial loss in advertising revenue'.

It now applies for an order interdicting the publication or dissemination of the Brennan documents and also of the report prepared by the third respondent, pending the decision of an action to be brought by the applicant for a final interdict.

It was argued that the applicant was entitled to relief on one of two grounds:

- (a) The Brennan documents misrepresented the relative merits of *The World* and *Post*; these misrepresentations were false to the knowledge of Brennan and were made maliciously; they were calculated to cause the applicant patrimonial loss; and consequently they constituted an 'injurious falsehood'.
- (b) The first and second respondents have published material based on *data* which they knew to be unreliable; that this will have the effect of 'filching advertising custom from the applicant'; and that this conduct amounts to 'unfair

competition'.

Now every man has a legal right to carry on his lawful business, trade or profession without wrongful interference from others. (*Patz v Greene & Co.*, 1907 T.S. 427 at p. 436; *Fichardt, Ltd v The Friend Newspapers, Ltd.*, 1916 AD 1 at p. 6; *Matthews and Others v Young*, 1922 AD 492 at p. 507). Difficult questions may arise as to what constitutes 'wrongful interference'. (See the discussion in *Dun and Bradstreet (Pty.) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty.) Ltd.*, 1968 (1) SA 208 (C) at pp. 216-222). But so far as the applicant's first ground is concerned, the legal principles are clear. The applicant's case is based upon wilful falsehood, and, to adapt to the facts of the present matter the statement of STEYN, C.J., in *Geary & Son (Pty.) Ltd v Gove*, 1964 (1) SA 434 (AD) at p. 441C-D:

'What the applicant has to allege and prove is that the respondents have, by word or conduct or both, made a false representation, that they knew the representations to be false, that the applicant has lost or will lose advertising, that the false representation is the cause thereof, and that the respondents intended to cause the applicant that loss by the false representation.'

It is to be observed, however, that under English law:

'If the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, even if the plaintiff is damnified by it.'

1970 (1) SA p456

NICHOLAS J

(*Per* LINDLEY, M.R., in *Hubbuck & Sons v Wilkinson, Heywood & Clark, Ltd.*, (1899) 1 Q.B. 86 (C.A.)). In *White v Mellin*, 1895 A.C. 154, Lord HERSCHELL, L.C., said at p. 164:

'But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans v Harlow*, 5 Q.B. 624, Lord DENMAN expressed himself thus: 'The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, but it is not by averring them to be 'false, scandalous, malicious and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action.' My Lords, those observations seem to me to be replete with good sense.'

And at p. 165, Lord HERSCHELL, said:

'Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to enquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure - whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans v Harlow*, 5 Q.B. 624, was decided in the year 1844, somewhat over a half a century ago, and the fact that no such action - unless it be *Western Counties Manure Co v Lawes Chemical Manure Co.*, L.R. 9 Ex. 218 - has ever been

maintained in the Courts of Justice is very strong indeed to show that it is not maintainable . . .'

In my respectful opinion, those are sound and cogent reasons for applying a similar principle to South Africa, where too, so far as I have been able to discover, no case has been reported which was based on a puffing advertisement.

There is in the English Law a qualification of the rule, which is stated as follows in *Gatley on Libel and Slander*, 6th ed., sec. 321:

'But where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior to his own, but makes some untrue statement of fact about his rival's goods - for example, states that they are rotten or contain deleterious ingredients - an action on the case will lie, on proof that such statement was published maliciously and (save in cases falling within the provisions of the Defamation Act 1952, sec. 3 (1)) that special damage has ensued.

'The general position in law is: comparison - yes; but disparagement - no.' (*per* HODSON, L.J., in *Cellactite & British Uralite v Robertson*, *The Times*, July 23rd, 1957 (C.A.).'

There can be no doubt, on the authority of *Fichardt's* case, and subsequent cases, that such statements would also be actionable in our law.

Annexure 'A', which was the letter sent by Brennan to advertising agents, reads as follows:

'As you know only too well there have been considerable changes in the Bantu publishing field, particularly in the Transvaal, since the last National Readership survey.

The circulation of *The World* has increased by just on 25 per cent; *Woman's World* was introduced as a regular supplement to the paper in October, 1967, and must have had an effect on the women's readership of the paper; and the introduction a year ago of *Week-end World*, and its rapid growth, has probably also had an effect on reading habits in general and the readership of other

1970 (1) SA p457

NICHOLAS J

weekly newspapers in particular - the A.B.C. circulation returns certainly point to this.

Media & Communication Research have just completed a large scale, comprehensive media study among Bantu in the Central Transvaal which gives the upto-date picture.

I am sending you herewith a summary and review of the survey which has been prepared by the Marketing Department of the Argus Company. We hope to be able to send you a copy of the full survey report soon, but I thought you would like to have this summary of the survey as soon as possible as you might want to use the information it contains in your current planning.'

Annexure 'B' was the 'summary and review of the survey' which was referred to in annexure 'A'. Its title page reads:

'Marketing to Bantu in the Central Transvaal.

A report on: their purchasing power; and a new, up-to-date survey of newspaper reading, radio listening and cinema viewing habits.'

The first page is in the following terms:

'In this report we will examine some of the more important characteristics of the market represented by the large Bantu population resident in the Soweto complex.

Copyright Juta & Company

We shall concern ourselves primarily with the problem of communicating effectively with this market through certain major media groups - daily newspapers, weekly newspapers, cinema and radio.

Our source of data concerning the impact of these media on the people of Soweto is a survey conducted in April 1969 by Media and Communications Research (Pty.) Ltd. This comprehensive survey of 500 adult residents of the South Western Townships was designed to measure, both quantitatively and qualitatively, the readerships of major daily and weekly newspapers and to gauge cinema attendance and radio listening habits as well.

We hope that this report will be of interest and value to all concerned in promoting goods and services in the vast potential market represented by the Bantu populations of the Republic.'

There follows a section which contains a description of 'Soweto and its people'. The report then turns to -

'... the results of a survey conducted in Soweto in April, 1969, by Media and Communications Research (Pty.) Ltd., which investigated the impact on and coverage of the population of Soweto afforded by various daily and weekly newspapers as well as cinemas and radio'.

In a table is set out

'coverage of the population of Soweto afforded by various (advertising) media: expressed as percentages of the total adult population and of various demographic segments reached by each medium'.

The media include daily newspapers (*World*, *Rand Daily Mail* and *Star*), weekly newspapers (*Post*, *Sunday Times*, *Sunday Express*), and the cinema and radio. In 'Notes' on this table, it is stated that:

'It is clear that *The World*, South Africa's fourth largest daily newspaper with a circulation currently in excess of 100,000 copies per day, affords greater coverage of the people of Soweto than any other medium.

The only other media which come close to *The World* in terms of coverage are the weekly newspaper *Post* and Radio Bantu. We should mention that *Weekend World*, a relatively new publication with a circulation now running to 85,000 copies, was not included in the survey we are examining.

It is worth noting that the bonus coverage afforded by *The World* compared with *Post* and Radio Bantu is greatest in the better educated segments of the population, a factor of importance to marketing men because these groups are naturally the most affluent.

The advantages to be derived from using *The World* to reach the people of Soweto become even more obvious when one takes advertising costs into consideration.

Post's Transvaal edition, at R6 p.s.c.i. is 50 per cent more expensive than *The World* (R4 p.s.c.i.). An advertiser can thus enjoy three insertions in *The World*, each reaching 53 per cent of the population for the same outlay as two insertions in *Post's* Transvaal edition, which will afford only 49 per cent cover per insertion.'

1970 (1) SA p458

NICHOLAS J

The last section of annexure 'B' deals with 'Duplication of Readership'. The relevant portions read as follows:

'Data covering duplication of readership, viewership and listenership are given in considerable detail in the survey report. The figures, as would be expected from the coverage and impact data outlined earlier in this report, show conclusively that *The World* is a vital element in any

Copyright Juta & Company

media plan designed to reach the people of Soweto. Some of the more important factors which emerge are:

- (i) *The World* has a large, loyal readership which cannot be as effectively reached through other media. This is conclusively proved by the following data:
 - (a) Only 40.2 per cent of *The World's* readers are primary (i.e. regular) readers of *Post* and 22.1 per cent of *The World's* readers never read *Post*.
 - (b) Turning to the other daily and weekly newspapers we find that the highest level of duplication with *The World* readers occurs amongst readers of the *Sunday Times*. However, the level of duplication here is so low (16.2 per cent of *The World's* readers are primary *Sunday Times* readers and 56.7 per cent never read it) that it is obviously essential to include *The World* on any newspaper schedule designed to reach the people of Soweto.

.....

- (ii) We have thus firmly established the need to include *The World* on any media schedule. To establish whether there is any need to use *Post* as well we need look only at one set of figures which show us that, even if one employs a relatively modest schedule for Transvaal coverage, e.g. *The Star* and *The World*, the additional cover of Soweto's adult population afforded by *Post* amounts to only 3.4 per cent. In other words only 3.4 per cent of the population of Soweto read *Post* and not *The World* or *The Star*.
- (iii) *The World* is thus clearly a more effective and less wasteful method of reaching the people of Soweto than *Post*.

It is equally clear that advertisers using *The World* and only one other major White newspaper (or Radio Bantu) achieve an acceptably high coverage of the market, (for example, *The World* and *The Star* combined produce 75 per cent cover of the Bantu market) and the addition of *Post* brings no worthwhile additional coverage.'

The document concludes with a summary, which contains the following paragraphs:

- '4. In fact, we have established clearly that advertising in *The World* presents the only effective, economic method of communicating with this market.
- 5. We conclude that *The World* should be the number one media choice for the advertising of products and services wishing to penetrate the huge potential market afforded by the people of Soweto.'

In the affidavit of Miss Woessner, the managing director of the third respondent, she describes the circumstances under which the survey was prepared and the circumstances under which a copy of it came into the possession of the first respondent:

- '(b) (i) During January to April 1969, the third respondent did a survey of *inter alia* reading patterns of various daily and weekly newspapers of Bantu people in the South Western Townships of Johannesburg.
- (ii) The primary object of this survey was to test whether a particular method of measuring reading patterns which had been used in regard to European readers would also be a reliable method of testing patterns of reading among Bantu people. If the survey proved the particular method used therein to be reliable, as it had been among European people, the third respondent would have achieved its objects of being able to use this particular method to carry out future assignments from clients to test reading patterns among Bantu people.

It was not the object of the third respondent to use the results of this survey for any particular purpose other than the aforesaid testing of a method and in particular the third respondent did not before the completion of the survey envisage selling or

making available the survey to any other person.'

In a later paragraph, Miss Woessner says:

'I state that the said survey conducted by the third respondent was limited in respect of both *Post* and *The World* to readership in Soweto. This survey does not directly draw a comparison between readership of *The World* and *Post* but,

1970 (1) SA p459

NICHOLAS J

by extracting *data* from different parts of the survey, such a comparison could be made. Any comparison drawn from the data in the report can only apply in respect of Bantu people in Soweto. I submit that, having regard to the methods which appear *ex facie* the survey, comparisons in respect of Bantu people in Soweto can be drawn from the survey and, if self-imposed limits of the survey are regarded, there is no reason why such comparisons could not be satisfactory.'

In the applicant's founding affidavit, the deponent, Mr. Hine, states that:

'to the knowledge of all the respondents no satisfactory comparison can be made between the readership of *Post* and the readership of *The World* with reference only to Soweto',

and gives his reason for this assertion. He goes on to say baldly that the contents of the Brennan documents are false and misleading in many respects. Later, he alleges that the survey was not properly conducted and that its results are fallacious. He then sets out certain alleged errors in the survey. These errors, broadly stated, are possible confusion among persons questioned in the course of the survey between *The World* and *Week-end World*; and the alleged impossibility of comparisons being made between daily and weekly publications, having regard to the method by which the results were obtained by the third respondent. The respondents in their affidavits dispute Hine's contentions. In the applicant's replying affidavit, Hine amplifies at some length his criticisms of the methods adopted by the third respondent. In my view, however, it is unnecessary for the purposes of this judgment to deal with the details of Hine's criticisms, since, even assuming them to be well founded, the applicant has not, in my opinion, made out a case for the relief which it seeks.

The essence of Hine's complaints appears in para. 17 of his affidavit, where he says:

'It follows from the foregoing that the conclusions drawn in annexure 'B' are entirely lacking in foundation and that there is no support for the statements contained in annexure 'B' to the effect that -

(a) there is little point in an advertiser advertising in *Post* . . .

(b) *The World* is the only effective economic method of communicating with the market.'

To the extent that the statements complained of involve merely a comparison of *The World* and *Post*, they are not actionable. There are, however, statements in annexure 'B' which amount to a disparagement of *Post* as an advertising medium. Thus, it is said that,

'only 3.4 per cent of the population of Soweto read *Post* and not *The World* or *The Star*',

and that,

'the addition of *Post* brings no worthwhile additional coverage'.

If these statements were shown *prima facie* to be untrue, the applicant would be entitled

to relief. (Cf. *Lyne v Nicholls*, (1906) 23 T.L.R. 86 (Ch.)).

Hine does not, however, say that these statements are untrue, nor is there any evidence that they are untrue. The highest at which Hine can put it, is that the third respondent's survey report does not support the conclusions. But even if Hine's criticisms are well founded (on which, as I say, I express no opinion), it does not follow that the conclusions are false. It is an error to say that false premises must logically lead to propositions that are false: it is plain that a good cause may have bad reasons offered in its behalf.

In Hine's replying affidavit, and in the course of the argument on

1970 (1) SA p460

NICHOLAS J

behalf of the applicant, it was contended that other statements in the Brennan documents were false.

The first was the statement in annexure 'A' that the third respondent had completed a study 'among Bantu in the Central Transvaal'. It is clear that the third respondent's study was limited to Soweto. The Brennan documents must, however, be read as a whole, and, so read, there could be no doubt in the mind of the reader of the scope of the third respondent's survey. Thus, annexure 'B' refers to it as

'this omprehensive survey of 500 residents of the South Western Townships';

there is a section devoted to 'Soweto and its people'; there is a further reference to

'the results of a survey conduted in Soweto in April, 1969 . . .';

and Table III sets out *data* regarding

'coverage of the population of Soweto'.

Then it is contended that the survey was wrongly stated in annexure 'B' as being 'designed to measure, both quantitatively and qualitatively, the readership of major daily and weekly newspapers and to gauge cinema attendance and radio listening habits as well'. The basis for this contention was Miss Woessner's statement that the primary object of the survey was to test whether a particular method of testing used in regard to European readers' reading patterns would be a reliable method of testing patterns of reading among Bantu people. In my view there is no real inconsistency between the two statements. The survey was designed to meaure reading patterns; it was carried out in order to ascertain whether the method was reliable. If it proved to be so, (and Miss Woessner says it did), then the design of measuring reading patterns was accomplished.

In my judgment, therefore, it has not been shown that any statement in the Brennan documents is false, and consequently, the applicant has failed to make out a case on the first ground.

So far as the applicant's second ground is concerned, it was submitted that the publication of the Brennan documents constituted 'unlawful competition' within the broad concept discussed by CORBETT, J., in *Dun & Bràdstreet (Pty.) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty.) Ltd*, *supra* at pp. 216-222. It was contended that it was dishonest and unfair for the first and second respondents to rely on the third respondent's survey report for their claim to the superiority of *The World* and the inferiority of *Post* as advertising media, since, so it was alleged, that report was, to the

knowledge of the respondents, unreliable, and the inferences drawn therefrom could not fairly and properly be drawn.

A similar argument was advanced in the case of *Hubbuck & Sons v Wilkinson, Heywood & Clark, Ltd.*, (1899) 1 K.B. 86 (C.A.). This was an action for damages and a perpetual injunction. The plaintiffs and the defendants were both manufacturers of white zinc. The defendants had issued a circular which included a report on experiments conducted on samples of the white zinc produced by the plaintiff and the defendant respectively. It concluded as follows:

'Exactly nine pounds of paint were used in each case, and each coat took the same quantity of paint. Judging the finished work, it is quite evident that W.G. & Co.'s zinc has a slight advantage over Hubbucks', but for all practical purposes they can be regarded as being in every respect equal.'

1970 (1) SA p461

NICHOLAS J

One of the allegations in the statement of claim was that:

'5. The said report was untrue, and each statement thereof was untrue, and the alleged trials had not been made or not fairly made, or made with the alleged results.'

The defendant took out a summons to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action. In the Court of Appeal, LINDLEY, M.R., said at pp. 92-93:

'... (The) case is indistinguishable from *Evans v Harlow*, 5 Q.B. 624, and *Young v Macrae*, 3 B. & S. 264, where malice, falsehood and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decision in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals was not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in *White v Mellin*, 1895 A.C. 154. The defendants in this case give the results of some experiments with the two sorts of paint, and in para. 5 of the statement of claim the plaintiffs say that the report of the experiment is untrue, and that the trials were not fairly made. But, supposing this to be the case, the result is not altered. Para. 5 merely states more particularly what has been stated before in para. 3, where the general charge of falsehood is made. Even if each particular charge of falsehood is established, it will only come to this - that it is untrue that the defendants' paint is better than or equal to that of the plaintiffs, for saying which no action lies. The particular reasons for making that statement are immaterial if the statement itself is not actionable ...'

I am in respectful agreement with the sentence which I have underlined. It is, however, unnecessary for present purposes to consider whether there may not be circumstances in which the fact that a claim in an advertisement is based on false statements of fact set out therein may not constitute unfair competition. In the present matter, the applicant has not established any false statement of fact. The third respondent's survey was made; it was not suggested that the result reflected in the survey report were not the results obtained in the course of the survey; and it was not contended that the relevant portions of the Brennan documents were not based on those results. What was contended was that the result were unreliable, and that the inferences drawn from the results by Brennan were not valid inferences, and that Brennan, as an experienced marketing man, knew it. In other words, what the applicant's complaint really amounts to is that Brennan did not honestly believe that his conclusions were supported by the survey report.

In my view, it cannot be the law that it constitutes 'unlawful competition' merely for a

seller to express opinions in advertising material which he does not honestly hold. As Wessels points out, *Law of Contract in South Africa*, 2nd ed., vol. I, p. 310, sec. 1004:

'It is a matter of universal experience, and everyone is expected to know that persons who have goods for sale are in the habit of extolling the virtues of their wares, of exaggerating their good qualities and of either suppressing or making little of their defects. On the other hand, the purchaser often exaggerates the defects and even finds in goods offered to him for sale, faults which do not exist. Hence, there is always a duel between the plausibility of the seller and the circumspection of the buyer. The highest form of morality would no doubt require both parties to be frank and truthful, but the law has never reached such a standard.'

It is commonly accepted that an advertiser frequently paints what he has to offer in glowing and exaggerated colours and with extravagantly laudatory phraseology. He is like the writer of an epitaph who, Dr. Johnson said,

'... should not be considered as saying nothing but what is strictly true. Allowance must be made for some degree of exaggerated praise. In lapidary inscriptions a man is not upon oath'.

1970 (1) SA p462

NICHOLAS J

In my judgment, therefore, the applicant has failed to make out a case on the second ground.

The application is, accordingly, refused and the applicant is ordered to pay the costs of the three respondents, including, in the case of the first and second respondents, the reasonable fees of two counsel.

Applicant's Attorneys: *Bell, Dewar & Hall*. Attorneys for the First and Second Respondents: *van Hulsteyn, Feltham & Ford*. Attorneys for the Third Respondent: *Cliffe, Dekker & Todd*.

**POST NEWSPAPERS (PTY) LTD v WORLD PRINTING & PUBLISHING CO LTD 1970
(1) SA 454 (W)**

1970 (1) SA p454

Citation	1970 (1) SA 454 (W)
Court	Witwatersrand Local Division
Judge	Nicholas J
Heard	September 28, 1969; September 29, 1969; September 30, 1969
Judgment	November 11, 1969
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Trade and trademark - Trade - Newspaper circulating report designed to filch advertising from a rival - Allegation that it constituted an injurious falsehood - Failure to prove - Allegation that it constituted unfair competition - Failure to prove.

Headnote : Kopnota

The proprietor and publisher of a newspaper *Post* applied for an interim interdict restraining the proprietor and publisher of another newspaper, *The World*, which competed with it for advertising, from continuing to circulate certain documents and a report designed to persuade the recipients to place advertising with the respondent's newspaper instead of that of the applicant, on the grounds that: (a) the documents misrepresented the relative merits of the rival newspapers; these misrepresentations were false to the knowledge of the respondent and were made maliciously; they were calculated to cause the applicant patrimonial loss; and consequently they constituted an injurious falsehood; (b) the respondents had published material based on *data* which they knew to be unreliable; that this would have the effect of filching advertising from the applicant; and that this conduct amounted to unfair competition.

Held, as the applicant had failed to show that any statement in the reports was false, that it had failed to make out a case on the first ground.

Held, further, as it did not constitute 'unlawful competition' merely for a seller to express opinions in advertising material which he did not honestly hold, that applicant had also failed to make out a case on the second ground.

Case Information

Application for an interim interdict. The facts appear from the reasons for judgment.

J. Browde, S.C. (with him *C. Kinghorn*), for the applicant.

S. W. Kentridge, S.C. (with him *D. N. Bensley*), for the first and second respondents.

S. A. Cilliers, for the third respondent.

Cur. adv. vult.

Postea (November 11th).

Copyright Juta & Company

Judgment

NICHOLAS, J.: This is an application for an interim interdict.

The applicant company is the proprietor and publisher of *Post*, a weekly newspaper. The first respondent is the proprietor and publisher of *The World*, a newspaper published daily from Monday to Friday of each week. These newspapers, which are designed mainly for non-white readers, are rivals, competing for advertising, the revenue from which constitutes the major source of income of the applicant and the first respondent respectively.

A Mr. Brennan is the marketing director of the first respondent. He is also the head of the marketing department of the second respondent. This is the holding company of the first respondent, and it supplies to the first respondent certain services, including the services of its marketing department.

In about July, 1969, Brennan, acting in the course of his employment

1970 (1) SA p455

NICHOLAS J

with the first and second respondents, caused to be prepared and sent to a number of advertising agents a report and covering letter (annexures 'B' and 'A', respectively, to the founding affidavit filed by the applicant. I shall refer to annexures 'A' and 'B' together as 'the Brennan documents'). Annexure 'B' was based on a survey report which had been prepared by the third respondent. Brennan's admitted object in circulating the Brennan documents was to persuade the recipients to place advertising in *The World* newspaper.

The applicant complains that the third respondent's survey was improperly conducted, and that the results obtained therefrom are unreliable; that the Brennan documents are

'false and misleading in many respects';

that they

'are false to the knowledge of the first and second respondents and that they have been published maliciously';

and that the continued circulation of these documents

'will undoubtedly cause the applicant substantial loss in advertising revenue'.

It now applies for an order interdicting the publication or dissemination of the Brennan documents and also of the report prepared by the third respondent, pending the decision of an action to be brought by the applicant for a final interdict.

It was argued that the applicant was entitled to relief on one of two grounds:

- (a) The Brennan documents misrepresented the relative merits of *The World* and *Post*; these misrepresentations were false to the knowledge of Brennan and were made maliciously; they were calculated to cause the applicant patrimonial loss; and consequently they constituted an 'injurious falsehood'.
- (b) The first and second respondents have published material based on *data* which they knew to be unreliable; that this will have the effect of 'filching advertising custom from the applicant'; and that this conduct amounts to 'unfair

competition'.

Now every man has a legal right to carry on his lawful business, trade or profession without wrongful interference from others. (*Patz v Greene & Co.*, 1907 T.S. 427 at p. 436; *Fichardt, Ltd v The Friend Newspapers, Ltd.*, 1916 AD 1 at p. 6; *Matthews and Others v Young*, 1922 AD 492 at p. 507). Difficult questions may arise as to what constitutes 'wrongful interference'. (See the discussion in *Dun and Bradstreet (Pty.) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty.) Ltd.*, 1968 (1) SA 208 (C) at pp. 216-222). But so far as the applicant's first ground is concerned, the legal principles are clear. The applicant's case is based upon wilful falsehood, and, to adapt to the facts of the present matter the statement of STEYN, C.J., in *Geary & Son (Pty.) Ltd v Gove*, 1964 (1) SA 434 (AD) at p. 441C-D:

'What the applicant has to allege and prove is that the respondents have, by word or conduct or both, made a false representation, that they knew the representations to be false, that the applicant has lost or will lose advertising, that the false representation is the cause thereof, and that the respondents intended to cause the applicant that loss by the false representation.'

It is to be observed, however, that under English law:

'If the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, even if the plaintiff is damaged by it.'

1970 (1) SA p456

NICHOLAS J

(*Per* LINDLEY, M.R., in *Hubbuck & Sons v Wilkinson, Heywood & Clark, Ltd.*, (1899) 1 Q.B. 86 (C.A.)). In *White v Mellin*, 1895 A.C. 154, Lord HERSCHELL, L.C., said at p. 164:

'But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans v Harlow*, 5 Q.B. 624, Lord DENMAN expressed himself thus: 'The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, but it is not by averring them to be 'false, scandalous, malicious and defamatory 'that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action.' My Lords, those observations seem to me to be replete with good sense.'

And at p. 165, Lord HERSCHELL, said:

'Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to enquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure - whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans v Harlow*, 5 Q.B. 624, was decided in the year 1844, somewhat over a half a century ago, and the fact that no such action - unless it be *Western Counties Manure Co v Lawes Chemical Manure Co.*, L.R. 9 Ex. 218 - has ever been

maintained in the Courts of Justice is very strong indeed to show that it is not maintainable . . .'

In my respectful opinion, those are sound and cogent reasons for applying a similar principle to South Africa, where too, so far as I have been able to discover, no case has been reported which was based on a puffing advertisement.

There is in the English Law a qualification of the rule, which is stated as follows in Gatlley on *Libel and Slander*, 6th ed., sec. 321:

'But where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior to his own, but makes some untrue statement of fact about his rival's goods - for example, states that they are rotten or contain deleterious ingredients - an action on the case will lie, on proof that such statement was published maliciously and (save in cases falling within the provisions of the Defamation Act 1952, sec. 3 (1)) that special damage has ensued.

'The general position in law is: comparison - yes; but disparagement - no.' (*per* HODSON, L.J., in *Cellactite & British Uralite v Robertson*, *The Times*, July 23rd, 1957 (C.A.).'

There can be no doubt, on the authority of *Fichardt's* case, and subsequent cases, that such statements would also be actionable in our law.

Annexure 'A', which was the letter sent by Brennan to advertising agents, reads as follows:

'As you know only too well there have been considerable changes in the Bantu publishing field, particularly in the Transvaal, since the last National Readership survey.

The circulation of *The World* has increased by just on 25 per cent; *Woman's World* was introduced as a regular supplement to the paper in October, 1967, and must have had an effect on the women's readership of the paper; and the introduction a year ago of *Week-end World*, and its rapid growth, has probably also had an effect on reading habits in general and the readership of other

1970 (1) SA p457

NICHOLAS J

weekly newspapers in particular - the A.B.C. circulation returns certainly point to this.

Media & Communication Research have just completed a large scale, comprehensive media study among Bantu in the Central Transvaal which gives the upto-date picture.

I am sending you herewith a summary and review of the survey which has been prepared by the Marketing Department of the Argus Company. We hope to be able to send you a copy of the full survey report soon, but I thought you would like to have this summary of the survey as soon as possible as you might want to use the information it contains in your current planning.'

Annexure 'B' was the 'summary and review of the survey' which was referred to in annexure 'A'. Its title page reads:

'Marketing to Bantu in the Central Transvaal.

A report on: their purchasing power; and a new, up-to-date survey of newspaper reading, radio listening and cinema viewing habits.'

The first page is in the following terms:

'In this report we will examine some of the more important characteristics of the market represented by the large Bantu population resident in the Soweto complex.

We shall concern ourselves primarily with the problem of communicating effectively with this market through certain major media groups - daily newspapers, weekly newspapers, cinema and radio.

Our source of data concerning the impact of these media on the people of Soweto is a survey conducted in April 1969 by Media and Communications Research (Pty.) Ltd. This comprehensive survey of 500 adult residents of the South Western Townships was designed to measure, both quantitatively and qualitatively, the readerships of major daily and weekly newspapers and to gauge cinema attendance and radio listening habits as well.

We hope that this report will be of interest and value to all concerned in promoting goods and services in the vast potential market represented by the Bantu populations of the Republic.'

There follows a section which contains a description of 'Soweto and its people'. The report then turns to -

'... the results of a survey conducted in Soweto in April, 1969, by Media and Communications Research (Pty.) Ltd., which investigated the impact on and coverage of the population of Soweto afforded by various daily and weekly newspapers as well as cinemas and radio'.

In a table is set out

'coverage of the population of Soweto afforded by various (advertising) media: expressed as percentages of the total adult population and of various demographic segments reached by each medium'.

The media include daily newspapers (*World*, *Rand Daily Mail* and *Star*), weekly newspapers (*Post*, *Sunday Times*, *Sunday Express*), and the cinema and radio. In 'Notes' on this table, it is stated that:

'It is clear that *The World*, South Africa's fourth largest daily newspaper with a circulation currently in excess of 100,000 copies per day, affords greater coverage of the people of Soweto than any other medium.

The only other media which come close to *The World* in terms of coverage are the weekly newspaper *Post* and Radio Bantu. We should mention that *Weekend World*, a relatively new publication with a circulation now running to 85,000 copies, was not included in the survey we are examining.

It is worth noting that the bonus coverage afforded by *The World* compared with *Post* and Radio Bantu is greatest in the better educated segments of the population, a factor of importance to marketing men because these groups are naturally the most affluent.

The advantages to be derived from using *The World* to reach the people of Soweto become even more obvious when one takes advertising costs into consideration.

Post's Transvaal edition, at R6 p.s.c.i. is 50 per cent more expensive than *The World* (R4 p.s.c.i.). An advertiser can thus enjoy three insertions in *The World*, each reaching 53 per cent of the population for the same outlay as two insertions in *Post's* Transvaal edition, which will afford only 49 per cent cover per insertion.'

1970 (1) SA p458

NICHOLAS J

The last section of annexure 'B' deals with 'Duplication of Readership'. The relevant portions read as follows:

'Data covering duplication of readership, viewership and listenership are given in considerable detail in the survey report. The figures, as would be expected from the coverage and impact data outlined earlier in this report, show conclusively that *The World* is a vital element in any

Copyright Juta & Company

media plan designed to reach the people of Soweto. Some of the more important factors which emerge are:

- (i) *The World* has a large, loyal readership which cannot be as effectively reached through other media. This is conclusively proved by the following data:
 - (a) Only 40.2 per cent of *The World's* readers are primary (i.e. regular) readers of *Post* and 22.1 per cent of *The World's* readers never read *Post*.
 - (b) Turning to the other daily and weekly newspapers we find that the highest level of duplication with *The World* readers occurs amongst readers of the *Sunday Times*. However, the level of duplication here is so low (16.2 per cent of *The World's* readers are primary *Sunday Times* readers and 56.7 per cent never read it) that it is obviously essential to include *The World* on any newspaper schedule designed to reach the people of Soweto.

.....

- (ii) We have thus firmly established the need to include *The World* on any media schedule. To establish whether there is any need to use *Post* as well we need look only at one set of figures which show us that, even if one employs a relatively modest schedule for Transvaal coverage, e.g. *The Star* and *The World*, the additional cover of Soweto's adult population afforded by *Post* amounts to only 3.4 per cent. In other words only 3.4 per cent of the population of Soweto read *Post* and not *The World* or *The Star*.
- (iii) *The World* is thus clearly a more effective and less wasteful method of reaching the people of Soweto than *Post*.

It is equally clear that advertisers using *The World* and only one other major White newspaper (or Radio Bantu) achieve an acceptably high coverage of the market, (for example, *The World* and *The Star* combined produce 75 per cent cover of the Bantu market) and the addition of *Post* brings no worthwhile additional coverage.'

The document concludes with a summary, which contains the following paragraphs:

- '4. In fact, we have established clearly that advertising in *The World* presents the only effective, economic method of communicating with this market.
- 5. We conclude that *The World* should be the number one media choice for the advertising of products and services wishing to penetrate the huge potential market afforded by the people of Soweto.'

In the affidavit of Miss Woessner, the managing director of the third respondent, she describes the circumstances under which the survey was prepared and the circumstances under which a copy of it came into the possession of the first respondent:

- '(b) (i) During January to April 1969, the third respondent did a survey of *inter alia* reading patterns of various daily and weekly newspapers of Bantu people in the South Western Townships of Johannesburg.
- (ii) The primary object of this survey was to test whether a particular method of measuring reading patterns which had been used in regard to European readers would also be a reliable method of testing patterns of reading among Bantu people. If the survey proved the particular method used therein to be reliable, as it had been among European people, the third respondent would have achieved its objects of being able to use this particular method to carry out future assignments from clients to test reading patterns among Bantu people.

It was not the object of the third respondent to use the results of this survey for any particular purpose other than the aforesaid testing of a method and in particular the third respondent did not before the completion of the survey envisage selling or

making available the survey to any other person.'

In a later paragraph, Miss Woessner says:

'I state that the said survey conducted by the third respondent was limited in respect of both *Post* and *The World* to readership in Soweto. This survey does not directly draw a comparison between readership of *The World* and *Post* but,

1970 (1) SA p459

NICHOLAS J

by extracting *data* from different parts of the survey, such a comparison could be made. Any comparison drawn from the data in the report can only apply in respect of Bantu people in Soweto. I submit that, having regard to the methods which appear *ex facie* the survey, comparisons in respect of Bantu people in Soweto can be drawn from the survey and, if self-imposed limits of the survey are regarded, there is no reason why such comparisons could not be satisfactory.'

In the applicant's founding affidavit, the deponent, Mr. Hine, states that:

'to the knowledge of all the respondents no satisfactory comparison can be made between the readership of *Post* and the readership of *The World* with reference only to Soweto',

and gives his reason for this assertion. He goes on to say baldly that the contents of the Brennan documents are false and misleading in many respects. Later, he alleges that the survey was not properly conducted and that its results are fallacious. He then sets out certain alleged errors in the survey. These errors, broadly stated, are possible confusion among persons questioned in the course of the survey between *The World* and *Week-end World*; and the alleged impossibility of comparisons being made between daily and weekly publications, having regard to the method by which the results were obtained by the third respondent. The respondents in their affidavits dispute Hine's contentions. In the applicant's replying affidavit, Hine amplifies at some length his criticisms of the methods adopted by the third respondent. In my view, however, it is unnecessary for the purposes of this judgment to deal with the details of Hine's criticisms, since, even assuming them to be well founded, the applicant has not, in my opinion, made out a case for the relief which it seeks.

The essence of Hine's complaints appears in para. 17 of his affidavit, where he says:

'It follows from the foregoing that the conclusions drawn in annexure 'B' are entirely lacking in foundation and that there is no support for the statements contained in annexure 'B' to the effect that -

(a) there is little point in an advertiser advertising in *Post* . . .

(b) *The World* is the only effective economic method of communicating with the market.'

To the extent that the statements complained of involve merely a comparison of *The World* and *Post*, they are not actionable. There are, however, statements in annexure 'B' which amount to a disparagement of *Post* as an advertising medium. Thus, it is said that,

'only 3.4 per cent of the population of Soweto read *Post* and not *The World* or *The Star*',

and that,

'the addition of *Post* brings no worthwhile additional coverage'.

If these statements were shown *prima facie* to be untrue, the applicant would be entitled

to relief. (Cf. *Lyne v Nicholls*, (1906) 23 T.L.R. 86 (Ch.)).

Hine does not, however, say that these statements are untrue, nor is there any evidence that they are untrue. The highest at which Hine can put it, is that the third respondent's survey report does not support the conclusions. But even if Hine's criticisms are well founded (on which, as I say, I express no opinion), it does not follow that the conclusions are false. It is an error to say that false premises must logically lead to propositions that are false: it is plain that a good cause may have bad reasons offered in its behalf.

In Hine's replying affidavit, and in the course of the argument on

1970 (1) SA p460

NICHOLAS J

behalf of the applicant, it was contended that other statements in the Brennan documents were false.

The first was the statement in annexure 'A' that the third respondent had completed a study 'among Bantu in the Central Transvaal'. It is clear that the third respondent's study was limited to Soweto. The Brennan documents must, however, be read as a whole, and, so read, there could be no doubt in the mind of the reader of the scope of the third respondent's survey. Thus, annexure 'B' refers to it as

'this omprehensive survey of 500 residents of the South Western Townships';

there is a section devoted to 'Soweto and its people'; there is a further reference to

'the results of a survey conduted in Soweto in April, 1969 . . .';

and Table III sets out *data* regarding

'coverage of the population of Soweto'.

Then it is contended that the survey was wrongly stated in annexure 'B' as being 'designed to measure, both quantitatively and qualitatively, the readership of major daily and weekly newspapers and to gauge cinema attendance and radio listening habits as well'. The basis for this contention was Miss Woessner's statement that the primary object of the survey was to test whether a particular method of testing used in regard to European readers' reading patterns would be a reliable method of testing patterns of reading among Bantu people. In my view there is no real inconsistency between the two statements. The survey was designed to meaure reading patterns; it was carried out in order to ascertain whether the method was reliable. If it proved to be so, (and Miss Woessner says it did), then the design of measuring reading patterns was accomplished.

In my judgment, therefore, it has not been shown that any statement in the Brennan documents is false, and consequently, the applicant has failed to make out a case on the first ground.

So far as the applicant's second ground is concerned, it was submitted that the publication of the Brennan documents constituted 'unlawful competition' within the broad concept discussed by CORBETT, J., in *Dun & Bràdstreet (Pty.) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty.) Ltd.*, *supra* at pp. 216-222. It was contended that it was dishonest and unfair for the first and second respondents to rely on the third respondent's survey report for their claim to the superiority of *The World* and the inferiority of *Post* as advertising media, since, so it was alleged, that report was, to the

knowledge of the respondents, unreliable, and the inferences drawn therefrom could not fairly and properly be drawn.

A similar argument was advanced in the case of *Hubbuck & Sons v Wilkinson, Heywood & Clark, Ltd.*, (1899) 1 K.B. 86 (C.A.). This was an action for damages and a perpetual injunction. The plaintiffs and the defendants were both manufacturers of white zinc. The defendants had issued a circular which included a report on experiments conducted on samples of the white zinc produced by the plaintiff and the defendant respectively. It concluded as follows:

'Exactly nine pounds of paint were used in each case, and each coat took the same quantity of paint. Judging the finished work, it is quite evident that W.G. & Co.'s zinc has a slight advantage over Hubbucks', but for all practical purposes they can be regarded as being in every respect equal.'

1970 (1) SA p461

NICHOLAS J

One of the allegations in the statement of claim was that:

- '5. The said report was untrue, and each statement thereof was untrue, and the alleged trials had not been made or not fairly made, or made with the alleged results.'

The defendant took out a summons to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action. In the Court of Appeal, LINDLEY, M.R., said at pp. 92-93:

'... (The) case is indistinguishable from *Evans v Harlow*, 5 Q.B. 624, and *Young v Macrae*, 3 B. & S. 264, where malice, falsehood and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decision in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals was not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in *White v Mellin*, 1895 A.C. 154. The defendants in this case give the results of some experiments with the two sorts of paint, and in para. 5 of the statement of claim the plaintiffs say that the report of the experiment is untrue, and that the trials were not fairly made. But, supposing this to be the case, the result is not altered. Para. 5 merely states more particularly what has been stated before in para. 3, where the general charge of falsehood is made. Even if each particular charge of falsehood is established, it will only come to this - that it is untrue that the defendants' paint is better than or equal to that of the plaintiff's, for saying which no action lies. The particular reasons for making that statement are immaterial if the statement itself is not actionable ...'

I am in respectful agreement with the sentence which I have underlined. It is, however, unnecessary for present purposes to consider whether there may not be circumstances in which the fact that a claim in an advertisement is based on false statements of fact set out therein may not constitute unfair competition. In the present matter, the applicant has not established any false statement of fact. The third respondent's survey was made; it was not suggested that the result reflected in the survey report were not the results obtained in the course of the survey; and it was not contended that the relevant portions of the Brennan documents were not based on those results. What was contended was that the result were unreliable, and that the inferences drawn from the results by Brennan were not valid inferences, and that Brennan, as an experienced marketing man, knew it. In other words, what the applicant's complaint really amounts to is that Brennan did not honestly believe that his conclusions were supported by the survey report.

In my view, it cannot be the law that it constitutes 'unlawful competition' merely for a

seller to express opinions in advertising material which he does not honestly hold. As Wessels points out, *Law of Contract in South Africa*, 2nd ed., vol. I, p. 310, sec. 1004:

'It is a matter of universal experience, and everyone is expected to know that persons who have goods for sale are in the habit of extolling the virtues of their wares, of exaggerating their good qualities and of either suppressing or making little of their defects. On the other hand, the purchaser often exaggerates the defects and even finds in goods offered to him for sale, faults which do not exist. Hence, there is always a duel between the plausibility of the seller and the circumspection of the buyer. The highest form of morality would no doubt require both parties to be frank and truthful, but the law has never reached such a standard.'

It is commonly accepted that an advertiser frequently paints what he has to offer in glowing and exaggerated colours and with extravagantly laudatory phraseology. He is like the writer of an epitaph who, Dr. Johnson said,

'... should not be considered as saying nothing but what is strictly true. Allowance must be made for some degree of exaggerated praise. In lapidary inscriptions a man is not upon oath'.

1970 (1) SA p462

NICHOLAS J

In my judgment, therefore, the applicant has failed to make out a case on the second ground.

The application is, accordingly, refused and the applicant is ordered to pay the costs of the three respondents, including, in the case of the first and second respondents, the reasonable fees of two counsel.

Applicant's Attorneys: *Bell, Dewar & Hall*. Attorneys for the First and Second Respondents: *van Hulsteyn, Feltham & Ford*. Attorneys for the Third Respondent: *Cliffe, Dekker & Todd*.