

GEARY & SON (PTY) LTD v GOVE 1964 (1) SA 434 (A)

Citation	1964 (1) SA 434 (A)
Court	Appellate Division
Judge	Steyn CJ, Van Blerk JA, Rumpff JA, Holmes JA and Williamson JA
Heard	November 12, 1963
Judgment	December 2, 1963
Annotations	<input type="checkbox"/>

Flynote : Sleutelwoorde

Trade and trade mark - Trade - Damages claimed for alleged wilful falsehood by a competitor - What plaintiff must allege and prove.

Headnote : Kopnota

Where a trader bases its claim for damages on a wilful falsehood, i.e. an intentional wrongful act on the part of its competitor, it must allege and prove that the competitor has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the competitor intended to cause the plaintiff that loss by the false representation.

The decision in the Durban and Coast Local Division in *Gove v Geary & Son (Pty.) Ltd.*, 1963 (4) SA 95, reversed.

Case Information

Appeal from a decision in the Durban and Coast Local Division (HENNING, J.). The facts appear from the judgment of STEYN, C.J.

D. J. Shaw, Q.C. (with him *M. H. Levy*), for the appellant: As to whether the conduct appellant relied on was a legal wrong (exceptions 1 and 2), the right to trade without wrongful interference is a right clearly recognised and protected by law; see *Patz v Greene & Co.*, 1906 T.S. at p. 436. Wrongful interference is an *injuria*; see *Matthews v. Young*, 1922 AD at pp. 503, 507. Falsely to advertise the possession of a quality which is an attraction to potential customers is a wrongful interference; see *Society of Incorporated Accountants and Auditors v Powell*, 1929 CPD at p. 459. Van den Heever, *Aquilian Damages* p. 36. This has been recognised in Scotland and America; see *John Henderson & Son, Ltd v Alexander Munro & Co.*, 13 Scots L.T. 57; *Montegut v. Hickson*, 178 New York Court of Appeals 94; *Marsh v Billings*, 7 Cushings Reports 322 (referred to in *Pollock Torts* (15th ed., pp. 230 - 1); *American Restatement* (vol. 4, para. 761). Respondent's conduct is therefore actionable. As to whether the advertisements relied on by appellant were capable of conveying the impression that respondent manufactured springs of the relevant type (exceptions 3, 4 and 5) the excipient must show the words were incapable of the meaning alleged. Even if they are ambiguous, the exception cannot be allowed; see *Helps v Natal Witness*, 1937 AD at p. 50; *Basner v Trigger*, 1945 AD at pp. 32 - 3. On the reading most favourable to respondent,

the words are ambiguous. The other exceptions which were dismissed, i.e. exceptions 7 - 10, must follow the decision on the first two exceptions, with regard to the question whether para. 10 of the declaration was so lacking in particularity that the declaration was excipiable (exception 6), the question at this stage is whether the declaration and further particulars in fact furnished, give sufficient information to enable respondent to plead; see *Osman v Jhavery*, 1938 NPD at p. 445; 1939 AD at p. 365; *Samuels v WM. Dunn & Co. (S.A.) (Pty.), Ltd.*, 1949 (1) SA at p. 1157; *White v Moffett Building & Contracting (Pty.), Ltd.*, 1952 (3) SA at p. 312; *Prinsloo v du*

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Plooy, 1952 (4) SA at p. 221; *Coop v Motor Union Insur. Co., Ltd.*, 1959 (4) SA 273. A mass of detail not necessary to enable a defendant to plead, is to be avoided; see *Purdon v Muller*, 1961 (2) SA at p. 215; *Minister of the Interior v Lockhat*, 1961 (2) SA at p. 595; *Woodiwiss v Woodiwiss*, 1958 (3) SA at p. 617. Respondent could plead without embarrassment without the particulars requested. Although, as was pointed out in *Samuel's* case, 1949 (1) SA at p. 1157, and in *Rosen and Engelstein v Hawkins*, 1937 T.P.D. at p. 413, the English decisions are not a safe guide, similar considerations apply in England, and the one case ordering somewhat similar particulars, but for the purposes of trial, namely, *Humphries v Taylor Drug Co.* (1888) 39 Ch. 693, was not followed in *Wakefield v Board*, 45 R.P.C. 261. The later decision is more in accordance with the South African practice in patent cases; see *Perm Us (Pty.), Ltd v Maeder*, 1939 CPD 183. The claim is for a general loss of trade, not for the loss of particular customers. Such a claim is maintainable; see *I.T.C. (S.A.) Ltd v United Tobacco Co., Ltd.*, (1), 1955 (2) SA at p. 17. Appellant relies on a general mode of doing the relevant portion of its business by the respondent, not on particular instances; cf. *Duke & Sons v Wisden & Co.*, 77 L.T. 67. The furnishing of particulars would not serve any of the objects referred to in the cases cited *supra*, or in *Tahan v Griffiths*, 1950 (3) SA 899, or *Reid, N.O v Royal Insurance Co.*, 1951 (1) SA 713. As to the cases referred to by the Judge *a quo*, viz., *Honikman v Alexandra Palace Hotels (Pty.), Ltd.*, 1962 (2) SA 404; *van Biljoen v Botha*, 1952 (3) SA 494, the former is irrelevant and the latter is not supported by authority, nor, with respect, by logic. As to the order of costs in the Court *a quo*, the main attack on the declaration failed. Appellant should therefore have been awarded portion of its costs.

R. N. Leon, Q.C. (with him *J. M. Didcott*), for the respondent and cross-appellant: The appellant has sued in terms of the *Lex Aquilia* and in respect of *damnum injuria datum*. Its case is that respondent intentionally, not negligently, committed the conduct alleged in the declaration, and that the consequence thereof has been patrimonial loss. The cause of action would clearly not be viable if it were based upon the mere allegation that respondent caused appellant to sustain patrimonial loss. Our law ignores many harmful acts which may be committed with impunity. These are cases of *damnum sine injuria*; see McKerron *Delicts*, 4th ed., p. 15. English law is to the same effect; see Salmond *Torts*, 11th ed. at p. 16; *Herschel v Mrupe*, 1954 (3) SA at p. 485; *Union Government v Marais and Others*, 1920 AD at p. 247; *Mayor of Bradford v Pickles*, 1895 A.C. at p. 595; *Matthews and Others v Young*, 1922 AD at p. 507. The law of England and of the United States of America is the same as the law reflected in these decisions; see *Sorrell v Smith*, 1925 A.C. at pp. 718 - 9; Pollock *Torts*, 15th ed. at pp. 105 - 6; Salmond, *ibid*; U.S. *Restatement of the Law of Torts*, vol. 3, para. 708. It is incumbent upon the victim of conduct which occasions patrimonial loss, to demonstrate its inherent unlawfulness, divorced from any considerations of its causal

relationship with this loss; see *Matthews' case*, *ibid*; *Herschel's case*, *ibid*. This is also the

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rule in England; see *Allen v Flood and Another*, 1898 A.C. at pp. 39 - 40; *Sorrel's case*, *ibid* at pp. 727 - 8. The declaration imputes no malicious or other particular motive to respondent, which must therefore be assumed to have been influenced by no consideration other than a legitimate ambition to enhance its own trade. Nor is it open to appellant to contend that any moral blameworthiness or commercial reprehensibility, which it may attribute to respondent's alleged conduct, supplies the ingredient of unlawfulness. The notions are not equitable with each other and our law does not necessarily take cognisance of that which may unanimously be considered to deserve moral censure; see *Herschel's case*, *supra* at pp. 484 - 5. Nor indeed does English law; see *Batty v Hill*, 71 E.R. at p. 117; *Mayor of Bradford v Pickles*, *supra* at pp. 594, 600 - 1; *Donoghue v Stevenson*, 1932 A.C. at p. 580. For 'unfair' competition to be actionable, it must be shown to have been unlawful upon some recognised legal grounds. It is not unlawful merely because it is unfair. One may with impunity ruin a trade rival, even by unfair competition; see *Mogul Steamship Co. Ltd v McGregor, Low & Co. and Others*, (1889) 23 Q.B. at pp. 615 - 6, 625 - 6; *McKerron*, *op. cit.* at pp. 15, 317. This approach is justified, not only by the principles already canvassed, but also by the view that, in the interests of practical convenience and, in the present context, of free commercial enterprise, justice is sometimes better served by the denial of a remedy than it would be by its grant; see *Union Government v Ocean Accident & Guarantee Corp. Ltd.*, 1956 (1) SA at p. 584. Unless an interest is legally protected and thereby converted into a right, its violation is not unlawful; Salmond, *Jurisprudence*, 10th ed. p. 209; *Rogers v Dutt and Others*, (1860) 13 Moore P.C. at p. 241. It is incumbent upon appellant to satisfy the Court that conduct such as that which it has attributed to respondent was unlawful in the sense that a right was thereby infringed which was recognised by law as pertaining to respondent; see *Matthews' case*, *supra* at p. 507; *Herschel's case*, *supra* at pp. 485, 490; van den Heever, *Aquilian Damages*, vol. 1 p. 3. It must be established that the conduct occasioning one's loss was unlawful *quoad* oneself, in that it infringed a vested right in oneself; see *McKerron*, *supra* at pp. 16, 21; *Rogers' case*, *ibid* at p. 241. If the foregoing submissions are correct, it is not *per se* unlawful to infringe upon appellant's right to conduct his trade free from 'unfair' competition or upon his right to enjoy an immunity from patrimonial loss; cf. *Herschel's case*, *supra* at p. 489. Conduct such as that attributed to respondent may be said to bear two facets. The first facet may be said to be that respondent claimed for itself a false reputation as a manufacturer of suspension coil springs, and that it thereby induced members of the public to deal with it. This is incapable of having infringed any right of appellant and is therefore not actionable; see *Halsbury's Laws of England*, 3rd ed. vol. 38 para. 1003; *Batty's case*, *supra* at p. 117; *King & Co v Gillard & Co.*, 1905 (2) Ch. at pp. 12 - 13. The second facet may be said to be that by falsely claiming the credit for having manufactured the particular suspension coil springs, respondent necessarily robbed appellant of the credit therefor and that it thereby induced the public to refrain from dealing with appellant. If it is assumed

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that the second facet of respondent's alleged conduct is capable of having infringed a right of appellant, one is confronted by the absence from the declaration of allegations to support such an assumption. There is no allegation that members of the public knew that appellant manufactured suspension coil springs or indeed that they had ever heard of it. Its reputation

is therefore not alleged to have been impaired. The cause of action relied on by appellant is not recognised by the law of the United States of America; see *U.S. Restatement of the Law of Torts*, vol. 4 pp. 25 and 29. The judgment *a quo* contained the expression of the view that a contractor enjoying an exclusive contractual privilege is protected against a fraudulent misrepresentation by a competitor claiming to enjoy the same privilege. This principle, if it be such, is inapplicable to the present problem. Appellant had claimed no such exclusive right. For the same reason the case of *Erasmus v Charles Bros.* (referred to in *Society of Incorporated Accountants and Auditors v Powell*, 1929 CPD at p. 459) and that referred to in Pollock on *Torts* are distinguishable from the present case. *Henderson & Son, Ltd v Munro*, 13 Scots L.T.R. 57, also relied on by the Court *a quo* is also distinguishable on the facts. Because appellant's declaration fails to disclose the unlawful infringement of a right, it discloses no cause of action.

As to the second exception: cross-appeal, in support of the contention that, if the declaration discloses a cause of action, it is vague and embarrassing because the nature and factual basis therefor are not discernible, respondent relies upon the argument advanced in justification of the first exception. An additional cause of vagueness and embarrassment is, however, the absence from the declaration of any allegation identifying or associating the readers of the alleged false advertisements with the purchasers of suspension coil springs from respondent.

As to the third, fourth and fifth exceptions: cross-appeal, the target of this attack was the allegation that respondent had published advertisements which had falsely proclaimed that it had, in fact, manufactured suspension coil springs. In the absence of surrounding circumstances suggesting any artificial or special construction, the meaning which a representation conveyed to the mind of the representee is deemed to have been that which would be conveyed by the primary and ordinary sense of the words used; see *Spencer Bower, Actionable Misrepresentation*, at pp. 4, 79; *Halsbury, ibid*, vol. 26 para. 1560. The determination of the correct primary sense of the words of a representation is an issue of law; see *Spencer Bower, ibid* pp. 5, 100. No surrounding circumstances have been alleged in the declaration which might affect the construction of the advertisements. They are susceptible to linguistic interpretation without any reference to the mere notional possibility that some conjectural evidence might be relevant. They may therefore be interpreted at the exception stage; see *Standard Building Society v Cartoulis*, 1939 AD at p. 516; *Davenport Corner Tea Room (Pty.), Ltd v Joubert*, 1962 (2) SA at p. 716. For the reasons advanced in the exceptions, the declaration discloses no cause of action or is alternatively vague and embarrassing.

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Sixth exception. A pleader is obliged to plead the facts upon which he relies, clearly and exactly, and with the requisite particularity; see *Carter v Carter*, 1913 T.P.D. at p. 105; *Benson and Another v Robinson*, 1917 W.L.D. at pp. 130, 133; *Erasmus v Erasmus*, 1923 T.P.D. at p. 262; *Rosen and Another v Hawkins*, 1937 T.P.D. at pp. 413 - 5; *Margau v King*, 1948 (1) SA at p. 130; *van Biljoen v Botha*, 1952 (3) SA at pp. 498, 499; *Honikman v Alexandra Palace Hotels (Pty.), Ltd.*, 1962 (2) SA at p. 407. If a pleading is to escape the charge that it is vague and embarrassing, it is essential that it contain such particulars as are set out in *Horwitz v Hendricks*, 1928 AD at p. 395; *Natal Building Society v Estate Bell*, 30 N.L.R. at p. 333; *Leathern v Trecoux*, 1911 NPD at p. 352; *Bayat v Mahomed*, 1918 NPD at p. 367; *Sim v Francis & Sons and Another*, 28 N.L.R. at p. 336; *Natal Building Society*

case, *ibid* at pp. 333 - 4; *Ruto Flour Mills (Pty.), Ltd. v. Moriates and Another*, 1957 (3) SA at p. 116; *Liquidators of Wapejo Shipping Co., Ltd v Lurie Bros.*, 1924 AD at p. 74; *Mathi v Mia*, 1935 T.P.D. at pp. 338, 339; *Seele v Seele*, 1939 T.P.D. at pp. 383 - 5; *Eybers v South British Insurance Co., Ltd.*, 1949 (3) SA at pp. 1206 - 7; *Woodiwis v Woodiwis*, 1958 (3) SA at p. 614; *Lieberthal and Another v South British Insurance Co., Ltd.*, 1959 (3) SA at p. 83. The mere fact that it would be possible for a bold denial to be pleaded to allegations lacking in sufficient particularity, neither justifies the withholding of further detail nor cures any vagueness and embarrassment thereby occasioned. See *Rosen's case*, *supra* at p. 413; *Margau's case*, *supra* at p. 130; *Eybers' case*, *supra* at pp. 104 - 5; *van Biljoen's case*, *supra* at p. 498; *Woodiwis' case*, *supra* at p. 613. For the pleader's opponent may thereby be prevented from pleading, not merely a bold denial, but a special defence or a confession and avoidance; see *Carter's case*, *supra* at p. 105. Appellant ought, *prima facie* to have elicited the necessary information from the witnesses upon whom it relies and from whom it presumably obtained statements before instituting action; see *Erasmus' case*, *supra* at p. 263; *Seele's case*, *supra* at p. 283. If one institutes action in the absence of the information relevant to the material allegations upon which it depends, one may not rely upon the hope that, when one's opponent's documents are discerned, one will be able to ascertain such information, see *Lieberthal's case*, *supra* at p. 84. At the least, appellant ought to have disclosed the reasons for its alleged inability to have pleaded its case with sufficient particularity; see *van Biljoen's case*, *supra* at p. 497; *Woodiwis' case*, *supra* at p. 614. In any event, the inability to furnish particulars cannot cure any defect occasioned by their absence, nor convert a vague and embarrassing pleading into a good one. One whose cause of action is inexplicable is in the same position as he who has none; see *Getz v Pahlavi*, 1943 W.L.D. at p. 145; *van Biljoen's case*, *supra* at p. 498; *Woodiwis' case*, *supra* at p. 613. Embarrassing vagueness in a pleading justifies an exception thereto; see *Liquidators, Wapejo Shipping Co., Ltd v Lurie Bros.*, 1924 AD at p. 74. This is so, irrespective of whether, in Natal in any event, no request for particulars has been made, or whether such a request has been made and complied with, but the pleading as amplified nevertheless remains vague

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and embarrassing; see *Osman v Jhavery and Others*, 1939 AD at pp. 365 - 6. After a pleader has stated that he is unable to furnish particulars, it is purposeless to apply for an order compelling him to do what he says he cannot. The proper course in such circumstances is to except; see *Mathi's case*, *supra* at p. 339; *Cumes v Estate Cumes and Others*, 1950 (2) SA at p. 23; *van Biljoen's case*, *supra* at p. 498.

As to costs of the appeal, if the judgment *a quo* remains intact with regard to the fate of all the exceptions, the order for costs *a quo* ought not to be disturbed. This Court will not interfere with the decision of the Court *a quo* as to costs, unless it is clear that the Court *a quo* failed to exercise its discretion properly or that it overlooked some important consideration or circumstance; see *Penny v Walker*, 1936 AD at p. 260; *Molteno Bros v S.A.R. & H.*, 1936 AD at p. 417. The fact that, if it had been in the position of the Court *a quo*, this Court would have awarded costs differently, affords no grounds for interference with the decision *a quo*; see *Penny's case*, *supra* at p. 260. Respondent was substantially successful in the Court *a quo* in the sense that, even although it claimed more than it was held to have been entitled to, its success was not inconsequential or merely technical, but

on the contrary of substantial consequence; see *Estate von Dorp v Scott*, 1915 CPD at p. 746; *The Treasury v Gundelfinger and Another*, 1919 T.P.D. at p. 335; *Osman's case*, *supra* at p. 371. The costs occasioned by the successful exception cannot readily or realistically be severed from those occasioned by the others; see *Union Share Agency & Investment Ltd v Green*, 1926 CPD at p. 141.

Shaw, Q.C., in reply.

Cur. adv. vult.

Postea (December 2nd).

Judgment

STEYN, C.J.: In the Court below the appellant (to whom I shall refer as the plaintiff) brought an action against the respondent (to whom I shall refer as the defendant) for damages arising from alleged false representations and deceitful conduct by which the defendant obtained an undue and improper advantage in carrying on his business in competition with the plaintiff, and an interdict restraining the defendant from making such representations and indulging in such conduct. The defendant excepted under ten different heads to the declaration as amplified by further particulars, on the grounds that it discloses no cause of action and that it is bad in law as being vague and embarrassing. The Court below dismissed the exceptions under all heads except the sixth. The plaintiff appeals against the allowance of the exception under the sixth head, and the defendant, although leave to appeal was granted in respect of all the exceptions dismissed, appeals against the disallowance of his exceptions under the first five heads only.

The declaration contains, amongst others, the following averments:

- '3. At all times material hereto the plaintiff manufactured suspension coil springs for motor vehicles.**
- 4. The defendant has at all times material hereto carried on business in competition with the plaintiff.**

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- 5. At no material time has the defendant manufactured suspension coil springs.**
- 6. Throughout the period since the beginning of the year 1958 the defendant has habitually published to the public of Durban advertisements that the defendant manufactures all types of springs.**
- 7. The said advertisements meant and were intended by the defendant and understood by persons reading the same to mean that the defendant manufactured, *inter alia*, suspension coil springs.**
- 8. In the premises the said advertisements were false.**
- 9. The said advertisements were false as aforesaid to the knowledge of the**

defendant.

10. During the said period the defendant has on divers occasions of which the plaintiff is unable to give particulars utilised and sold as being of the defendant's own manufacture suspension coil springs manufactured by the plaintiff.
11. By publishing the said advertisements and acting as set forth in para. 10 the defendant has obtained an undue and improper advantage in carrying on the defendant's business in competition with the plaintiff.
12. By reason of the defendant's having obtained the said advantage the plaintiff has suffered loss and damage.

Particulars: Estimated profit lost by the plaintiff during the said period:

average of three cars per working day at an average profit of

£5 per car R23,400.'

In reply to a request for particulars, the plaintiff stated that the defendant had competed with it in dealing in and repairing motor vehicle springs and by holding itself out as a manufacturer of suspension coil springs, that the defendant had at no material time manufactured any suspension coil springs and that the manufacture of such springs had not been part of its ordinary business activities. In regard to the alleged advertisements the plaintiff referred to advertisements in two telephone directories and in a cinema, displaying in the case of the first-mentioned advertisements representations of a coil spring and a leaf spring, and in the case of the advertisements in the cinema, a representation of a coil spring. The advertisements carried the defendant's name and address, with the following words below the name:

'General springsmiths

All types of car springs repaired, set up and reinforced. Springs manufactured to exact factory specifications.'

The plaintiff further stated that these advertisements meant and were intended and understood to mean that the defendant did in fact manufacture or had manufactured suspension coil springs, and manufactured all types of springs in the normal course of its business. As to the alleged use made by the defendant of suspension coil springs manufactured by the plaintiff, as being springs manufactured by the defendant, the plaintiff stated that they had been used by fitting or adapting them in the course of the defendant's business, that in the absence of a representation that they had been manufactured by the defendant, and of any other improper dealing therewith such as the removal or defacement of the plaintiff's trade mark, the alleged use would not have been unlawful, and that it does not contend that it has suffered damages as a result of the alleged use of its coil springs, independently and irrespective of the publication of the advertisements.

The plaintiff's action is Aquilian. It sues in delict. What it apparently seeks to allege is the wrongful interference by a competitor with its rights as a trader. Although there is no clear statement to that effect in the declaration as amplified, the right upon which the plaintiff may

be presumed to rely is its right to attract custom. The interference alleged

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would, on that basis, appear to be a wilful misrepresentation and dishonest conduct on the part of the plaintiff's competitor by which customers or potential customers have been or will be induced to deal with the competitor rather than with itself. I do not propose to attempt a definition of the limits set to competition in trade by Aquilian liability, but whatever those limits are, it seems clear that interference of the nature indicated is recognised as an infringement of a trader's rights and therefore as a delict in our law. As stated by DE VILLIERS, C.J., in *Combrinck v de Kock*, 5 S.C. 405 at p. 409:

'Fair and honest competition, however active, is open to everyone, but no one has the right to take an undue and improper advantage by means of falsehoods, the effect of which is to benefit himself at the expense of another.'

According to BUCHANAN, J., in the same case (at p. 415) the underlying principle is that

'no one is permitted to carry on trade by fraudulent misrepresentation to the injury of another.'

The plaintiff does not base its case upon a misrepresentation negligently made, but upon wilful falsehood, i.e. an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation.

I shall deal first with the exception under the second head. It is the following:

'The allegations which are contained in the declaration are bad in law, inasmuch as:

- (a) such allegations are so lacking in particularity that it is impossible to ascertain therefrom:**
 - (i) the nature of the cause of action upon which the plaintiff relies;**
 - (ii) the factual basis therefor;**
 - (iii) the circumstances by reason of which the defendant's alleged conduct, in any of the said respects independently or in any or all of them cumulatively, is alleged to have constituted a delict or delicts or any other actionable wrong or wrongs *quoad* the plaintiff;**
- (b) such allegations are therefore vague and embarrassing.'**

The conduct referred to in para. (a) (iii) is the defendant's alleged conduct in knowingly publishing a false advertisement that it manufactured suspension coil springs, in selling and utilising, as being of its own manufacture, suspension coil springs manufactured by the plaintiff and in thereby obtaining the alleged undue and improper advantage over the plaintiff while competing with it.

The question here is, of course, not whether the declaration as amplified, contains the allegations necessary to disclose the delict, but whether the necessary allegations have been made with clarity sufficient to enable the defendant to know what the case is to which it has to plead.

The false representation which the declaration places in the forefront, is that contained in the advertisements. The allegation here is that by these advertisements the defendant held itself out to be a manufacturer of all types of springs, including suspension coil springs, in the normal course of its business, that it has at no material time manufactured such springs, and that the advertisements were false to the defendant's

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knowledge. The relevant words in the advertisements, in the context in which they appear, are capable of more than one meaning, each of which would be consistent with manufacture in the normal course of business. The result is that the first-mentioned allegation is by no means unambiguous. The advertisements could mean that the defendant manufactures springs to order according to exact factory specifications. The falsity 'in the premises' (para. 8 of the declaration) of any other meaning would be demonstrated by non-manufacture at any relevant time. But if the allegation is that the defendant held itself out as a manufacturer to order in the normal course of business, the fact that it at no material time manufactured any springs at all, would only render the statement in the advertisements false if the defendant had in fact received an order and did not carry it out and at no relevant time had the intention of doing so. The plaintiff makes no allegation to that effect. It may be inferred from this that it does not rely on this possible meaning of the advertisements. But I am unable to say that that is a necessary inference. I refer to this uncertainty of the allegation mentioned, not as being in itself a fatal defect, but as part of the context of other features of the declaration to which I shall refer.

Accepting falsity as a fact, the false statement here in question, whichever of the meanings indicated above is to be ascribed to it, would not in itself, naturally and in the ordinary course, result in a loss of custom by the plaintiff. A bald statement that it has caused such loss would, I think, clearly be inadequate. It would be necessary to augment such a statement. That is done in para. 10 of the declaration as amplified by the particulars. That paragraph is to the effect that the defendant used (i.e. fitted or adapted) and sold suspension coil springs manufactured by the plaintiff, as being of its own manufacture. The case made in the declaration as amplified, is that by this conduct, coupled with the advertisements, the defendant obtained an undue and improper advantage in carrying on its business in competition with the plaintiff (para. 11), and that by obtaining this advantage the defendant, as alleged in para. 12, caused damage to the plaintiff.

In the general context, I have difficulty in ascribing any clear meaning to the expression 'an undue and improper advantage' in para. 11. It is not apparent in what way any advantage to the defendant would arise from the facts stated, or what the advantage would be. It could arise in various ways. If the plaintiff's springs are of a special quality, the defendant might be said to have built up a false reputation for itself by using and selling them as springs manufactured by itself and that it thereby attracted to itself customers who would have gone to the plaintiff. If they are not of a special quality, it might be said that merely by falsely holding itself out as a manufacturer of springs, including suspension coil springs, it

enhanced its reputation as a springsmith who not only repairs, sets up and reinforces all types of springs, but also manufactures them, with resulting loss of custom to the plaintiff, by reason of such false representation. More particularly if the latter is the case, it would be relevant to note that the plaintiff does not allege that the defendant used and sold only suspension coil springs manufactured by the plaintiff, and no others. If he has, in the manner

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alleged or otherwise, sold and used springs manufactured by another, it might, perhaps, be inferred from the specific reference to springs manufactured by the plaintiff and the absence of any reference to springs manufactured by someone else, that the plaintiff does not rely on such sales or use. But that again, would not be a necessary inference. It may be that on the real case brought, the reference to springs manufactured by the plaintiff, has to be regarded as irrelevant. In any event, the declaration does not tell the defendant whether he has to defend himself against the imputation of a false reputation as a manufacturer of springs of high quality as the cause of an undue and improper advantage to himself and of loss to the plaintiff, or against the imputation of a false reputation as a springsmith as such cause. The declaration as it stands, moreover, does not exclude the possibility that the causal advantage alleged in para. 11 does not lie in any false reputation gained, but elsewhere. A request for particulars as to the nature of the alleged advantage met with the reply that the answer appears from the declaration, read with the particulars. I am unable to find it there, except by dubious inference.

In regard to para. 10, the defendant enquired, *inter alia*, as indicated above, whether the plaintiff intended to allege that the defendant's sale or use of suspension coil springs manufactured by the plaintiff would have been unlawful, even in the absence of any representation that they had been manufactured by the defendant. This question was obviously asked on the assumption that the phrase 'as being of the defendant's own manufacture' in this paragraph, suggested or implied that on the occasions of the alleged use or sale, the defendant represented to the customers that the springs sold, fitted or adapted had been manufactured by itself. The enquiry elicited the following reply:

'No, in the absence of any other improper dealing therewith, such as the removal or defacement of the plaintiff's trade mark.'

As it is nowhere mentioned in the declaration as amplified, that the defendant did remove or deface the plaintiff's trade mark on any occasion, the reason for the reference to such removal or defacement is somewhat obscure. The introduction of these saving words in the negative reply, could only serve to confuse the issue. The reply is not that the plaintiff does not intend to allege that any representations or any express representations were made on the occasions in question. In effect the reply clearly is that the alleged sale and use would not have been unlawful, had no such representations been made, as are referred to in the enquiry. That must imply that the defendant did, when it sold, fitted or adapted springs manufactured by the plaintiff, represent to its customers that the springs were of its own manufacture.

The defendant also enquired what the dates were on which and who the persons were to whom it is alleged to have made such representations, in what manner and by the use of

what medium they are alleged to have been made, whether they are alleged to have been express or implied, and if implied, from what precise circumstances the plaintiff seeks to infer not only that they were made but also the terms thereof. The reply to these questions is the following: 'As appears from the declaration, the plaintiff is unable to give these particulars.' The explanatory introduction is presumably intended to draw attention

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to the phrase 'On divers occasions of which the plaintiff is unable to give particulars,' in para. 10. Here again, the effect of the reply is not to disavow reliance upon such representations, or upon express representations, but to convey to the defendant that, although the plaintiff is unable to supply the particulars desired, he does allege that such representations were made. Although this is not alleged, they must, in the premises, if they were made, of necessity have been as false as the alleged representation by the advertisements, and the defendant must likewise have known that they were false. In the absence of such a disavowal, the defendant was, I consider, entitled to a more informative reply as to the nature and purport of the representations and the manner in which they have been made.

But the matter does not end there. The case made upon the abovementioned allegations and particulars would appear to be that the plaintiff suffered damage as a result of the false representation in the advertisements, together with the defendant's deceitful conduct in selling fitting or adapting suspension coil springs manufactured by the plaintiff, and falsely representing at the time of the sale, fitting or adapting that the springs were of the defendant's own manufacture. There was, however, the following further enquiry:

'Does the plaintiff intend to allege that it has suffered damages as a result of the defendant's sale or 'utilisation' of suspension coil springs manufactured by the plaintiff as having been manufactured by the defendant, independently and irrespective of the defendant's publication of the said false advertisements?'

The reply was in the negative. If this reply means that in spite of the language used in para. 10 and of the other particulars supplied, the plaintiff does not rely on any false representation at the time of the sale, fitting or adapting of the plaintiff's springs by the defendant, the declaration as amplified would be self-contradictory. If it does not mean that, the defendant may well be at a loss to conjecture on what grounds the false representation in the advertisements, together with the deceitful conduct mentioned above, are said to have caused damage to the plaintiff. In terms of para. 10, the false representation at the time of the sale or use purports to be directly related to springs manufactured by the plaintiff. The sale or use, coupled with such representation, would be an apparent cause of the damage claimed. The representation, moreover, that the springs sold or used are of the defendant's manufacture, repeats, in effect, in relation to those springs, the statement in the advertisements that the defendant manufactures such springs. That statement in no way purports to be related to springs manufactured by the plaintiff, and the plaintiff does not claim that it is *per se* the cause of any advantage to the defendant, with resulting damages to itself. If this alleged conduct of the defendant at the time of the sale or use did not cause the plaintiff any damage, the cumulative causal operation thereof together with the misrepresentation in the advertisements, becomes, in these circumstances, difficult to understand, if not altogether incomprehensible.

For these reasons, the effect of paras. 10, 11 and 12 of the declaration as amplified is, in my view, to confuse rather than to enlighten the defendant as to the real issues raised, and to render the declaration as a whole vague and embarrassing. The exception under the

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second head should, in my opinion, have been allowed, and the declaration struck out as prayed. In the result it is unnecessary to deal with any of the other exceptions.

I may add that in dealing with the allegations as to the cause of the plaintiff's damages, I have not overlooked the fact that the defendant does not appeal against the disallowance of the exceptions under the eighth and tenth heads. Those exceptions particularise the general exception as to vagueness and embarrassment, in relation to the causal link between the defendant's alleged conduct and the plaintiff's alleged loss. They do not deal with the nature of the conduct which is said to have been the cause of the loss. The abandonment of the appeal in respect of those exceptions, moreover, does not, I consider, exclude the causal element from consideration in dealing with the general exception under the second head, which raises the same issue. Nor does the fact that the sixth exception was rightly upheld, in my opinion exclude para. 10 from consideration under the second head.

The cross-appeal against the dismissal of the second exception is allowed, with costs. It follows that the appeal against the allowance of the sixth exception is dismissed, with costs. The judgment of the Court below is altered to an order upholding the exception under the second head and striking out the declaration, with costs, with leave to the plaintiff to file a declaration on or before 31st December, 1963.

VAN BLERK, J.A., RUMPF, J.A., HOLMES, J.A. and WILLIAMSON, J.A., concurred.

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