



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Siqalo Foods (Pty) Ltd v Clover SA (Pty) Ltd (425/2022) [2023] ZASCA 82 (31 May 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including those of two counsel, against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The appeal was concerned with the lawfulness of the names, words, expressions, marks, etc (the marks) depicted on the product container label (the product label) of the appellant, Siqalo Foods (Pty) Ltd's, STORK BUTTER SPREAD (the product).

The respondent, Clover SA (Pty) Ltd, manufactured and sold what was described as a modified butter product under its registered trade mark BUTRO, which has been in use since July 1985. The complaint of the respondent was that the appellant had commenced promoting, marketing, distributing and selling the product as a butter product, when it was in fact not such a product, but a modified butter product. The respondent objected to such trade by the appellant on the basis that the label on the product misrepresented the particular nature, substance, attributes, character and composition of the product, thereby misrepresenting modified butter as a butter product. The respondent's case was that the marks on the product label were proscribed in at least two respects by the Agricultural Product Standards Act 119 of 1990 (the Act) and the relevant regulations published thereunder (the Regulations). The first regulated and prescribed, amongst others, the size of the marks that may be imprinted on a product label or container; and, the second prohibition forbade the use of any mark that conveyed or created, or was likely to convey or create, a false or misleading impression as to the nature, class or identity of a product. The respondent, accordingly, applied to the Gauteng Division of the High Court, Pretoria (the high court) to interdict and restrain the appellant from competing unlawfully with the respondent and trading in contravention of the Act and the Regulations.

The SCA found that five questions arose for consideration: First, did the marks on the product label contravene the statutory labelling requirements? Second, did the appellant's product label misrepresent, or was it likely to misrepresent and create a misleading impression regarding the respondent's product as a product of another nature, class or identity? Third, if the appellant was found to trade in contravention of these statutory prohibitions, did that trade constitute unlawful competition? Fourth, did the respondent have an alternative remedy available to it in lieu of this application? Fifth, was the Minister of Agriculture, Land Reform

and Rural Development (the Minister) a necessary party and should she have been joined as a party to the suit?

As to the first, the SCA found that it was not in dispute that the class designation of the appellant's product was 'modified butter', not 'butter', and the words STORK BUTTER SPREAD and the words BUTTER SPREAD, individually or compositely, were not registered trade marks. Further, that the contention by the appellant that STORK BUTTER SPREAD was a trade name, not a registered trade mark, was not supported by the evidence.

As to the second, the SCA found that the evidence, such as it was, appeared to support the conclusion that the label would, or at the very least would be likely to, convey or create a false or misleading impression as to the nature, class or identity of the appellant's product. It also tended to support the suggestion that the label was designed so as to mislead the public into thinking that the product was a pure butter product. Further, that the word 'butter' was undeniably the dominant feature on the appellant's product label and the product class designation 'modified butter' in the phrase 'medium fat modified butter spread with sunflower and palm oils' was virtually invisible in the phrase (which itself was barely perceptible). It followed, the SCA found, that the conclusion that the label was likely to convey or create a false or misleading impression as to the nature or class of the appellant's product was inescapable – the peculiar get-up of the label would self-evidently (or at least be likely to) deceive or confuse the notional consumer into believing that the product was a butter product.

As to the third, the SCA found that the appellant appeared to have accepted that if it was found to trade in contravention of the statutory prohibitions, then the respondent had proven unlawful competition and that the high court was correct in so finding.

As to the fourth, the SCA found that the argument that the respondent should have approached the Minister to prohibit the sale of the product despite the grant of the label clearance, was untenable. Moreover, the Act and the Regulations appeared to make no provision for any such further approach. The SCA found further that, in any event, s 3 of the Act fell far short of affording the respondent the remedy sought in the application, namely to interdict and restrain the appellant's continuing unlawful conduct. Nothing, therefore, precluded the respondent from seeking the remedy of an interdict for alleged trade in transgression of a statutory provision and, therefore, unlawful competition in the high court.

As to the fifth, the SCA found that the relief sought by the respondent in the application affected and bound only the appellant and the respondent. It had no effect on, or consequence for the Minister. The Minister did not appear to have any further role to play in the matter in relation to any of the orders sought by the respondent. It followed, the SCA found, that the non-joinder point had to also fail.

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