



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 12130/2021

DELETE WHICHEVER IS NOT APPLICABLE	
<ul style="list-style-type: none"> • REPORTABLE: NO • OF INTEREST TO OTHER JUDGES: NO • REVISED 	
<p>12 November 2021 DATE</p>	<p>_____ SIGNATURE</p>

**Heard on: 11 August 2021
Delivered on: 12 November 2021**

In the matter between:

CLOVER S.A. (PTY) LTD

Applicant

and

SIQALO FOODS (PTY) LTD

Respondent

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 3 June 2021 Clover (Pty) Ltd (“the applicant”) filed its amended Notice of Motion in an application against Siqalo Foods (Pty) Ltd, (“the respondent”) seeking for an interdict founded in an alleged unlawful competition, by virtue of trade in contravention of certain statutory provisions.

[2] The order sought by the applicant is couched in the following terms:

“1. That the Respondent be interdicted and restrained from:-

1.1 competing unlawfully with the Applicant by using, selling, offering for sale, promoting, advertising, delivering, marketing and/or in any way distributing for the purpose of sale, modified butter products in a container and/or any other packaging and wrapping material having a label imprinted thereon:-

*1.1.1 as illustrated in the documents attached hereto as **Annexures CF 2.1 – 2.6;***

*1.1.2 that is similar to the labels illustrated in **Annexures CF 2.1 – 2.6;**
(both labels referred to herein below as “an offending label”)*

1.1.3 in which the word “butter” appears as a dominant aspect or feature;

2. *That the Respondent be interdicted and restrained from trading in contravention of section 3 and 6 of the Agricultural Product Standards Act, 119 of 1990, as read with Regulations 2, 3, 17, 18, 27 and 32 of the Regulations, GN R1510, published under that Act in Government Gazette 42850, dated 22 November 2019, by using, selling, offering for sale, promoting, advertising, delivering, marketing and/or in any way distributing for the purposes of sale, or offering for sale, modified butter products in a container and/or any other packaging and wrapping material having an offending label imprinted thereon;*

3. *An order directing the Respondent, within **7 (SEVEN) days** of this order, to: -*
 - 3.1. *remove an offending label from all modified butter packaging and wrapping material, and modified butter marketing and promotional material in their possession or under their control; and*
 - 3.2. *where an offending label is incapable of being removed from such material, to destroy the material;*

4. *Costs of this application, including the cost consequent upon the employment of two counsel;*

5. *Further and/or alternative relief.”*

FACTUAL BACKGROUND

[3] The following are the background facts in *casu*:

3.1. On 1 February 2021 the applicant sent a letter of demand titled “**URGENT LETTER OF DEMAND**” to the respondent’s attorneys of record, which letter preceded the former’s urgent application.

3.2. The letter of demand stated, *inter alia*, the following:

“Paragraph 2: “*Our client has been made aware of **your imminent launch of STORK BUTTER SPREAD as per the attached photograph and has also had sight of your launch presentation from which it is clear that the product is being marketed as a BUTTER with the primary largest lettering being the name BUTTER**”.*

Paragraph 7:

“*Thus, we are instructed to demand, as we hereby do, that:*

“*7.1. STORK BUTTER SPREAD as presented to the trade **does not enter the trade thereby unlawfully competing with our client.***

“*7.2. If any STORK BUTTER SPREAD has already been put into the trade that it be **immediately withdrawn** and all sales stopped; and*

7.3. That any modified butter spread sold by you complies with the above Agricultural Product Act and Regulations and does not unlawfully compete with our client’s product BUTRO.”

- 3.3. On 8 February 2021 the respondent's attorneys informed the applicant's that the respondent rejected the applicant's demands.
- 3.4. On 1 March 2021 the respondent commenced with the distribution and selling of the medium fat product which has the words "STORK BUTTER SPREAD" ("the product").
- 3.5. On 1 March 2021 the applicant's attorneys wrote to the respondent's stating, *inter alia*:
- "Our client's application to the High Court is being finalized. We intend to launch the application this week and I am writing to you regarding the issue of jurisdiction and acceptance of electronic service of documents.***
-
- I await your reply to the above proposal by the **close of business on Tuesday, 2 March 2021**. If we do not receive a reply or if you decline our proposal we will proceed to Serve the Application in the usual way on your client."*
- 3.6. On 2 March 2021 the applicant became aware of the distribution and sale of the product.
- 3.7. On 10 March 2021 the applicant issued and served an urgent application which application was subsequently struck off the roll for lack of urgency.

COMMON CAUSE FACTS

[4] The following are common cause facts:

- 4.1 That the Product ("Stork Butter Spread") is the respondent's.

- 4.2. That the “class designation” of stork butter spread is modified product and not “butter”.
- 4.3. That stock butter spread or butter is not a *registered trade mark of the respondent, and that stork butter spread or butter is not a trade name of the respondent, although the respondent has alleged in its supplementary answering affidavit that it is currently in the process of having it registered as trade name.*
- 4.4. The formatting of the label of the respondent’s product ‘container’ is as follows: three words, namely, “Stork”, “Butter” and “Spread”, appear in sequence on the face of the container. “Stork” is at the top and its only its “S” alphabet which is capitalized; Butter appears immediately below the word “Stork” and the entire word butter is in capital letters whose font is way bigger and accentuated in comparison to both “Stork” and the word “Spread” which is in capital letters and appears immediately below the word “BUTTER”. These three words, that is “Stork BUTTER SPREAD” are navy in colour. Immediately below the words stork butter spread are some black and white cows. Below the ± cows are the words “MEDIUM FAT MODIFIED BUTTER SPREAD”. These words are all in capital letters and imprinted in white. Their font way smaller in size as compared to the words stork butter spread.
- 4.5. At the top right of the product container is another imprint or script, whose background colour is navy, with the following four words, one after the other: “EASY TO” being at the top, “SPREAD” immediately below “EASY TO”, immediately below “SPREAD” follows the word” CONTAINS” and below

“CONTAINS” follows the word “BUTTER”. Noteworthy is that all these four words are imprinted in capital letters and the font size of the words “easy to”; “spread” and “butter” is the same, whereas the word “contains” is imprinted in a font relatively smaller compared to these other three. However, colour-wise, the words “easy to” and “spread” are imprinted in white whereas the words “contains” and “butter” are in yellow. Below the words “medium fat modified butter spread” are the words “WITH SUNFLOWER AND PALM OILS” which are imprinted in white and very small to very faint font-wise as compared to the words “medium fat modified butter spread”.

4.6. The class designation is “a dairy product”.

SUBMISSIONS ON BEHALF OF THE APPLICANT BY MR BESTER

[5] Mr Bester submits that the primary concern is the respondent’s product label, namely ‘stork butter spread’ and that the applicant’s entire application rests on this. He submits that the issue, *inter alia*, arises from what is prescribed in the Act and the Regulations as to what may or may not appear in respect of a label or format. He argues that the expression on the respondent’s product label is misleading and misrepresent the actual product in that it speaks of “butter” whereas in fact it is “modified butter”. This, he submits, results in the contravention of, *inter alia*, section 3 and Regulation 26(7)(a), of the Act. He argues that on the label, the word “BUTTER” is overaccentuated over the words “stork” and “spread” in a bid to denote “butter” as if it was in consonant with the Act’s definition of what butter means, whereas it is not the case. He argues that the respondent’s product is “*anything but butter*” and that the created impression does not accord with the section or

Regulation definition of the word “butter’ which defines pure butter as butter that is purely manufactured from milk.

[6] Mr Bester thus argues against the respondent’s label for two reasons, namely:

- 6.1 the label misrepresents the particular nature, substance, attributes, character and composition of the product as “butter” in contravention of section 6 of the Act and Regulations 32(3)(a) and (4);
- 6.2 the label contravenes the label marking and product content requirements of section 3 of the Act, as read with Regulations 2(1)(a) and (d), 3, 17 and 26(7)(a).

[7] He argues that in light of his above submissions, what the court needs to consider, *inter alia*, is the question whether the words “stork butter spread” represent this product as butter or anything else. He argues that what supports the applicant’s complaint is the script under the words “stork butter spread” which state that the product is modified butter, which script is in very small to invisible and not even in bold letters, decrying that the words stork butter spread are even bigger than the class designation which is modified butter. He argues that in terms of the Act, the words stork butter spread can only be bigger than the class designation in an instance where the former is the registered trade mark or a trade name and that considering that the words are neither, then the label is contravention of the Act.

[8] He thus submits that this faint to invisible script, in comparison to what he terms the impugned overaccentuated words, is exactly what constitutes a contravention of the Act (section 3 and 6) and Regulation 26(7)(a), amongst others as they appear in the paragraph 2 of the applicant's amended Notice of Motion. He further argues that this format was deliberately designed to mislead the consumer to think that the product is "butter" rather than "modified butter", thereby giving rise to confusion, or the likelihood of confusion. By contrast, Mr Bester argues, "modified butter" merely corresponds to butter in respect of general appearance, presentation and intended use. However, medium fat modified butter product such as the respondent's product could contain as much as a 70% content comprising fat, protein fat, protein and/ or carbohydrate obtained from a source other than milk. In other words, medium fat "modified medium" is manufactured by blending, for example, 70% plant, animal and/ or marine fat with a mere 30% butter fat. The respondent's product comprises 62% plant oils and other ingredients with only 38% butter – it is anything but a product derived from, or manufactured *solely from milk*.

[9] Whereas in its answering affidavit, the respondent alleges that STORK BUTTER SPREAD is a "trade mark", the applicant accepts that the respondent is in the process of having its label registered as a trade name as it has alleged in its supplementary answering affidavit of June 2021. He however still questions if the label, on the basis of the pending registration, can now be considered as a trade name as contended for by the respondent in its answering affidavit to the latter's exoneration. He rejects the respondent's about-turn in its current characterization of its label, namely from a trade mark to a now trade name. He argues that stock butter spread or butter is neither a *registered trade mark of the respondent*, and that *stork butter spread or butter is nor its trade name*, further arguing that

the mere fact that the respondent may have applied for a trade mark is irrelevant, as Regulation 26(7)(a) requires it to be a registered trade mark.

[10] Further to the above, the applicant argues that before that acquisition, the respondent cannot claim to have a trade name that entitles it to the benefit of Regulation 26(7)(a) which Regulation accords proprietors of a *registered trade mark* and a *distinctive trade name* the advantage of using a word or expression that is bigger than the class designation. As was held in **Discovery Holdings Ltd v Santam Ltd and Others 2014 BIP 210 (WCC) para 67**, the applicant further argues that the respondent has to show, in order to claim that advantage under Regulation 26(7)(a), an existing goodwill or reputation that attaches to its alleged stork butter spread trade name in the mind of the purchasing public because the latter has come to associate that name under which the respondent's particular product is sold, as distinctive specifically of the respondent's goods.

The applicant thus implores that the court adopts the approach in the **Cowbell** decision below.

[11] In regard to the four instruments employed by the respondent to countermand the applicant's argument that the nature and class of its product label, at worst, conveys and/or create a false; misleading or confusion impression, Mr Bester argues, *inter alia*, particularly the VAS analysis when read together with the conclusions and recommendations in the design concept, the applicant argues that it is impossible to avoid the reasonable conclusion that the design of the label was crafted in order to focus the attention of the consumer on the word BUTTER. This, together with the belief that BUTTER SPREAD is

pure butter would, on any conceivable interpretation, warrant the conclusion that the label was designed to mislead the notional consumer in a notional marketplace would believe that the respondent's modified butter was in fact pure butter due to the confusion.

[12] In regard to the respondent's a survey which it submits is in accordance with "*international market research practice*" which survey allegedly concluded that customers will not "interpret" the STORK BUTTER SPREAD product to be "pure butter", the applicant, *inter alia*, submits that by the respondent is assailable in light of the outcome of the design concept in terms of which consumer belief was such that the product is "butter" or "pure butter". The applicant further argues that the survey is hearsay and further to that that the methodology for the purpose of its commissioning, evidently falls far short of what the survey had to determine and how it had to go about doing so.

[13] In regard to the alleged assignee approval or "label clearance", the applicant contends that same is a red herring, arguing that the correspondence allegedly in respect of the issue at hand appears to be between NejahMogul and a company "RCL Food (Pty) Ltd" and not NejahMogul and the respondent, which discrepancy the applicant argues was never clarified in the answering affidavit. The applicant further argues that this court is not bound by such label clearance since the label is statutorily non-compliant and thus unlawful and that no "label clearance" can change that fact. He argues that this label clearance is be *ultra vires*, unlawful and invalid and thus stands to be inadmissible and further that the respondent's aforesaid instruments cannot be the answers to the question under section 3 of the Act as read with Regulations 2(1)(e) and (d), and 26(7)(a).

[14] In regard to the issue of adequate alternative remedy as argued by the respondent, the applicant submits that the very short statutory time periods make it practically impossible for it to could have invoked same. This therefore left it with no any other alternative but to approach the court for an interdict and further that in any event the Act does not exclude the jurisdiction of this court.

[15] In regard to the apprehension of harm, the applicant refers to the SCA's recent decision in **Milestone Beverage CC and Others** *supra* where the issue of an application for an interdict in the context of unlawful competition in the form of the contravention of a statutory provision and the misrepresentation of the true nature of (or own performance) a product was considered. The issue was whether the appellant's trade was likely to mislead the public. The court held that there was indeed such a likelihood.

[16] In regard to the respondent's non-joinder argument, the applicant argues the respondent's argument stands to be rejected given that neither the Minister nor the State have any interest in the issue nor are affected by the relief and/or the order sought in the application.

SUBMISSIONS BY MR MICHAU ON BEHALF OF THE RESPONDENT

[17] Mr Michau submits that there is no dispute in relation to the nature of the STORK BUTTER SPREAD that it is a modified butter by class designation and also a trade name and that as a trade name, therefore, the product label does not offend Regulation 26(7)(a).

He submits given his submission it follows that the product label STORK BUTTER SPREAD passes the regulatory muster because it is utilized as a trade name.

[18] He argues that considering that neither the Act nor the Regulations give a definition of a “trade name”, that an ordinary meaning should be afforded to “trade name”. He outlines the dictionary meaning to the word appears below herein:

18.1. Merriam- Webster Online Dictionary defines trade name as:

181.1. *“the name used for an article among traders”;*

18.1.2 *“Brand name”;*

18.1.3. *“the name or style under which a concern does business”:* and

18.1.4 Brand name is in turn defined as *“of or relating to a brand name”;* and
“having a well-known and usually highly regarded or marketable name”.

18.2. In Cambridge Online dictionary, trade name is defined as:

“a name used by a company in dealing with customers, which may not be the same as the one it uses for legal purposes”.

18.3. In Collins Online dictionary, it is defined as:

“A trade name is the name which manufacturers give to a product or to a range of products”.

[19] He further argues that whether or not stork butter spread is a registered trade mark or even a common law trade mark with a vested reputation is thus wholly irrelevant. The use of that ‘trade name’ in a font bigger to that of the class description passes regulatory

muster, arguing further that it cannot be disputed that stork butter spread is a name given to distinguish the respondent's products from its competitors. It is common cause that the applicant argues that a trade name is limited to "*a name or designation used by companies to identify themselves and distinguish their businesses from others in the same field*".

[20] It is common cause that the Regulations do not define "trade name" and to that end the respondent submits that it had to rely upon various dictionary definitions for the ordinary meaning of the word. In regard to the meaning to be attached to the word "trade name" as it appears in Regulation 26(7)(a) of the Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products intended for sale in the Republic of South Africa, GN R1510 ("the Regulations"), the respondent argues that the correct approach is that Regulation 26(7) contemplates two distinct defences to **a class designation being depicted smaller than a word** or expression on the label. The first is if that word or expression is a **registered trade mark** and the second is if that word or expression is a **trade name**. He however concedes that to the extent that a product does not pass the regulatory muster, its sale may be prohibited and that this remedy is akin to an interdict or "civil" remedy.

[21] Mr Michau submits that the applicant has an alternative remedy in the form of an objection to the respondent's alleged non-compliance with APSA and the Regulations, which submission the applicant agrees with in its founding affidavit. He further argues that that alternative remedy is a specific purpose-built mechanism in the legislation which remedy is exactly what the applicant seeks this court to enforce for the enforcement of such legislation, reference being made to the recent Supreme Court of Appeal matter in

Bertie van Zyl (PTY) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others (549/2020) [2021] ZASCA 101 (14 JULY 2021) supra. He argues that this mechanism is to be preferred and exhausted first and that it is impermissible for the applicant to bypass it simply because the applicant does not trust that process, arguing further that to the extent that the Minister and his assignee/s fail to fulfil their functions, all would not be lost since the applicant may still approach the court to review that decision.

[22] In its March 2021 urgent application, the applicant alleged that unless this matter is heard on an urgent basis but in the ordinary course, *“the delay in resolving this dispute would be akin to ‘closing the gate once the horse has bolted’ considering that the respondent’s product would remain in commerce on sale for the duration and, as a result, the applicant will continue to suffer financial harm and the general public as consumers would suffer financial harm as a result of being misled into buying an unlawful product”*. In light of the above, Mr Michau thus argues that in light of the applicant’s above allegation and given that its urgent application was struck off the roll for lack of urgency, these proceedings have thus become moot and purely academic.

[23] In regard to the issue of final relief being sought by the applicant, the respondent submits that given what the requirements for final relief are, namely; a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy; and that in so far as the clear right is concerned, it should therefore follow that the absence of consumers being misled negates any clear right as pleaded by the applicant. He further argues that in regard to an injury actually committed or reasonably apprehended, the applicant’s contentions are not compelling given that the

applicant argues that whereas the parties' respective products, despite not being on equal footing, yet they are not subject to the same "stringent legal requirements", which harm includes damages and perhaps even a significant loss of sales. He thus submits that given that both parties' products are modified butters, they are both subject to the same statutory and regulatory requirements. The respondent argues therefore that this dispels the argument by applicant that there is a "*very real likelihood that the applicant will suffer damages*" or "*perhaps even a significant loss of sales*" under these circumstances.

[24] In regard to non-joinder, the respondent argues that the Minister of Agriculture, as the designated functionary in terms of the Act, should have been joined in these proceedings. It argues that in light of the fact that section 3 of the Act provides only for the Minister to can prohibit the sale of a prescribed product, that the failure to join the Minister is fatal to the granting of the relief sought by the applicant. It further argues that the Minister has a legal direct and substantial interest in the subject matter. Absent a joinder of the Minister, the respondent argues, no relief may be competently granted in terms of the Act and the Regulations.

[25] Furthermore, Mr Michau submits that he fails to comprehend the basis on which Mr Bester relies on (Section) Regulation 3 given that since The STORK BUTTER SPREAD product is classified as a modified butter and that however misleading its name might be as argued by the applicant, that still does not change its class designation. He submits that Regulation 17 has no bearing in this dispute as it deals with "*standards for butter and cultured butter with or without added foodstuff*". He argues that the STORK BUTTER SPREAD product is not butter or cultured butter but modified butter. Mr Michau further

argues that Regulation 18 has no bearing in this matter since it deals with the specifications, manufacture and designation of modified butters, the first two aspects of which have no bearing *in casu*, arguing thus that the applicant has failed to make out a case on non-compliance in regard to Regulation 18.

[26] In regard to the applicant's prayer no. 2 in its Amended Notice of Motion, in terms of which it asks:

"That the Respondent be interdicted and restrained from trading in contravention of section and 6 of the Agricultural Product Standards Act, 119 of 1990, as read with Regulations 2, 3, 17, 18, 27 and 32 of the Regulations, GN R1510, published under that Act in Government Gazette 42850, dated 22 November 2019, by using, selling, offering for sale, promoting, advertising, delivering, marketing and/or in any way distributing for the purposes of sale, or offering for sale, modified butter products in a container and/or any other packaging and wrapping material having an offending label imprinted thereon",

Mr Michau argues that the applicant has not made out a case in respect of Regulations 2, 3, 17, 18 and 27 and 32.

[27] To controvert the applicant's gainsaying the 'instruments' or measured undertaken by the respondent to disprove the applicant's contention that the expression on the respondent's product label conveys, and in regard to the consumer research it conducted, the respondent argues that it undertook qualitative consumer research on the consumers' understanding of the product segment of the stork butter spread. It further submits that it

was the consumers who indicated that they would prefer the words butter spread to be bolder so as to differentiate this product from other stork products.

[28] In regard to **the label clearance by NejahMogul**, the respondent argues that 'the department's assignee' assessed the label and found that stork butter spread label passes regulatory muster, save for the font size requirements. In regard to **the VAS analysis**, the respondent submits that this is a web-based software tool that analyses designs and photos and predicts 5 visual elements proven to attract human attention in the first 3-5 seconds of viewing. The respondent submits that the analysis revealed that the logo stork and product name "butter spread" attracted 83% visual fixation. In regard to the Market survey where the respondent submits that consumers were shown a various range of (pure) butter and modified butter products and asked to categorize each one as either and survey the applicant criticizes for, *inter alia*, being "*minute*" and "*unrepresentative of South African consumers*", the respondent argues that 88% of consumers identified the product for what it actually is and were thus not confused.

[29] Contrary to the applicant's argument regarding the lacklusterness of the survey conducted by the respondent, the respondent argues that its survey was conducted in accordance with "*international market research practice*". It argues that this survey concluded that customers will not "interpret" the STORK BUTTER SPREAD product to be "pure butter". The applicant disputes this conclusion this assertion as appears above in its submission. The applicant argues that the survey the respondent refers to falls short of internationally accepted standards since it was an Internet or online respondent survey and

not the notional consumer in notional market type of a survey. It argues that the court does not admit this survey document as a survey nor the NejahMogul's label clearance.

[30] Lastly the respondent asks for the dismissal of the application with costs, including costs consequent upon the employment of two counsel.

LEGAL PRINCIPLES

[31] Section 3 of the Agricultural Product Act 119 of 1990 ("the Act") provides that:

"3 Control over sale of products. – (1) The Minister may—

(a) prohibit the sale of a prescribed product-

- (i) unless that product is sold according to the prescribed class or grade;*
- (ii) unless that product complies with the prescribed standards regarding the quality thereof, or a class or grade thereof;*
- (iii) unless the prescribed requirements in connection with the management control system, packing, marking and labelling of that product are complied with;*
- (iv) if that product contains a prescribed prohibited substance or does contain a prescribed substance; and*
- (v) unless that product is packed, marked and labelled in the prescribed manner or with the prescribed particulars; ...".*

[32] **Section 6 of the Act** provides that:

"Prohibition of false or misleading description for products

6. *No person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a*

product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality or other properties, or the class or grade, origin, identity, or manner or place of production, of that product”.

[33] In regard to “**Restrictions on the sale of dairy products and limitation dairy products**”,

Regulation 2 provides that:

“2(1) *No person shall sell a dairy product or an imitation dairy product in the Republic of South Africa –*

(a) unless such product is classified and presented for sale according to the class referred to in regulations 3 and 23;

(b) unless such product complies with the relevant standards specified in regulations 4 to 22 and 24;

(c) unless such product is packed in a container and/or outer container and in a manner so prescribed by regulation 25;

(d) unless a container and outer container in which such product is packed, is marked with particulars and in a manner set out in regulations 26 to 31;

(e) if such product is marked with any restricted particulars or in a manner which is prohibited in terms of regulation 32; and

(f) if such product contains a substance so prescribed as a substance which it may not contain.

(2)....”.

[34] In regard to “**Classes of dairy products**”, **Regulation 3** provides that:

“3 (1) *Dairy products shall be classified in accordance with the classes specified in column 2 or the alternate class designated (where applicable) as*

specified in column 3 of Tables 1 to 21 for the type of dairy product concerned.

- (2) *In the case of the named variety cheeses in Table 11 where no provision has been made for “low fat” and “fat free” classes, Table 10 shall be used to classify the named variety cheese concerned falling within such classes.”*

[35] **Regulation 18** provides the following:

“Standards for modified butter and cultured modified butter with or without added foodstuff

18. (1) *Modified butter and cultured modified butter with or without added foodstuff shall be manufactured by blending butter fat with plant fat, animal fat and/or marine fat.*
- (2) *Cultured modified butter with or without added foodstuff shall have been inoculated with a suitable bacterial culture to an extent that the final product has a pH of less than 6.3 after fermentation.*
- (3) *The word “spread” may form part of the class designation in the case where the modified butter and cultured modified butter with or without added foodstuff are specifically manufactured for such purpose.*
- (4) *In the case of modified butter and cultured modified butter with added foodstuff, the following total fat content shall apply for the classes concerned:*
- (i) *Full fat modified butter/ Full fat cultured modified butter: at least 75 per cent (m/m).*
 - (ii) *Medium fat modified butter / Medium fat cultured butter: 50-70 per cent (m/m).”*

[36] In regard to the marking requirements in respect of contains and outers containers, **Regulation 26(7)(a)** provides that:

“(7) *No word or expression may be bigger than the class designation unless it is*
-

(a) *a registered trade mark or trade name;*

(b).....”.

[37] In regard to the indication of class designation, **Regulation 27** provides that:

“27 (1)(a) *The class designation of a dairy product or an imitation dairy product shall be –*

(i) *the applicable class designation or the alternate class designation as specified in regulation 3 and 23; or*

(ii) *.....”.*

[38] In **Discovery Holdings Ltd v Santam Ltd and Others 2014 BIP 210 (WCC) para 67**, the Court held that the respondent, in order to claim that advantage under Regulation 26(7)(a), had to show an existing goodwill or reputation that attaches to its alleged stork butter spread trade name in the mind of the purchasing public because the latter has come to associate that name under which the respondent’s particular product is sold, as distinctive specifically of the respondent’s goods.

[39] In regard to the approach to be adopted in deciding upon the likelihood of potential confusion or deception, in **Cowbell AG v ICS Holdings Ltd 2001 (3) SA 941 (SCA) para**

10, the Court held that the question is a matter of fact to be determined in light of the particular circumstances of each individual case, and calls for value judgment to be made in regard to a mark's essential function, namely, to indicate the origin of the goods in connection with which it is used.

[40] In **Bertie van Zyl (PTY) Ltd t/a ZZ2 and Pthers v Minister of Agriculture, Forestry and Fisheries and Others (549/2020) [2021] ZASCA 101 (14 JULY 2021)** at para 2, the SCA described the duties of assignees and designated persons as follows:

“The Act controls the sale, export and import of certain agricultural products. The first respondent (the Minister) may prohibit the sale of a prescribed product unless it complies with prescribed classifications and standards. In terms of s2(1) of the Act, the Minister may designate a person in the employ of the Department of Agriculture (the Department) as the executive officer to exercise the powers and perform the duties conferred under the Act. The Minister may also, in terms of s2(3)(a), designate a person, with regards to a particular product, for the purposes of the application of the Act. A person so designated is styled an ‘assignee’ in respect of that particular product. The Act permits the execution officer and an ‘assignee’ in respect of that particular product. The Act permits the executive officer and an assignee to conduct inspections aimed at ensuring that certain agricultural products meet the prescribed classifications and standards.”

[41] In **William Grant & Sons Ltd and Another v Cape Wine & DistillersLtd and Others 1990 (3) SA 897 (C) at 912 to 913B**, it was held that:

“It seems to me that this matter can be satisfactorily resolved without having regard to Professor Overton’s evidence, and thus without having to consider the validity of Mr Puckrin’s objection to its admissibility. In the first place plaintiffs have – as will become apparent later – made out a case entitling them to the

relief claimed without taking Professor Overton's evidence into account; in the second place the Court need go no further than take a commonsensical approach to the language on the labels and on the advertising material and to the visual impressions created by them in order to resolve (with the admissible evidence before it) the particular issue between parties which Professor Overton addressed, without expert assistance;".

[42] In **Puma AG Rudolf Dassier Sport v Global Warming (Pty) Ltd 2009 BIP 192 (SCA); 2010 (2) SA 600 (SCA) para 9**, the Court that:

"The question of the likelihood of confusion or deception is often a matter of first impression and does not require one to peer to closely at the registered mark and the alleged infringement to find similarities and differences".

[43] In **Orange Brand Services Ltd v Account Works Software (Pty) Ltd 2013 BIP 313 (SCA) para 13**, it was held that the confusion created by the offending article need not be lasting – it needs to last only for a "fraction of time", sufficient to attract initial interest, albeit that the confusion may later be cleared up.

[44] In **John Craig (Pty) Ltd v Dupa Clothing Industries 1977 (3) SA 144 (T) at 151C**, it was held, regarding the issue of consumer confusion, that if consumers merely wonder whether the respondent's product is butter or not, the label is one which is likely to cause confusion.

[45] In **Laboratories Lachartre SA v Armour-Dial Inc 1976 (2) SA 744 (T) at 746D**, it was held that when assessing such likelihood of confusion, it is necessary for a court to transport itself notionally, from the court-room or the study, to the market place, to try to look at the products as they will be seen there; not only side by side, but also separately, and then to consider whether the average customer would be likely to be deceived or confused.

[46] In **Blue Lion Manufacturing (Pty) Ltd 2001 (3) SA 884 (SCA) para 3**, the Court held that a consumer will not necessarily be alerted to fine points of distinction or definition on the label in order to clear up the confusion.

[47] In **Johannesburg City Council v Knoetze and Sons 1969 (2) SA 148 (W)**, which was an application for an interdict to restrain conduct that amounts to a statutory offence, the court held that *".....the purpose of an interdict is to restrain future or continuing breaches of a statute, whereas the statutory remedy of prosecuting and punishing an offender relates to past breaches. Different considerations must therefore inevitably apply. For, while the statutory remedies might be adequate to deal with past breaches, the civil remedy of an interdict might be the only effective means of coping with future or continuing breaches"*.

[48] In **Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd 1990 (4) SA 136 (D)**, the court held the following: *".....the object of the legislature in enacting the legislation was to protect members of the public against being misled, accordingly, so the argument went, 'any member of the public who has been misled may approach the Court,*

but not a rival trader who is... not misled". The learned judge held" "[I]t seems to me that the object of the Legislature was also to protect traders or producers of goods from the actions of other traders who might mislead members of the public to purchase their goods in preference to theirs. I thus reject the submission that the applicant has for this reason no locus standi."

THE ISSUES FOR DETERMINATION

[49] The following are issues for determination:

49.1 Whether the labelling of the respondent's product):-

49.1.1. contravenes section 3 and 6 of the Agricultural Product Standards Act, 119 of 1990 ("the Act"), as read with Regulations 2(1)(e) and (d), 26(7)(a), 32(3)(a) and 32(4) of the Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products intended for sale in the Republic of South Africa GN R1510, published in GG 42850, dated 22 November 2019, and with a commencement date of 22 August 2020 ("the Regulations");

49.1.2. misrepresent "modified butter product" as a "butter" product in the sense that it would be likely to lead a significant section of the public to think that the product sold under that label has some attribute or attributes which it does not possess, thereby giving rise to confusion, or the likelihood of confusion, in the minds of the public.

- 49.2. Whether there is consumer confusion regarding the product or put differently, whether the respondent has advanced evidence of the absence of such by way of a market survey.
- 49.3 Whether, without advancing an expert of its own, the applicant can take issue with the evidence from the market survey.
- 49.4 Whether the respondent's "supplementary answering affidavit" without prior leave of the court and thereafter supplementary Heads of Argument is permissible and/or relevant and should thus, in the interest of justice, be admitted or refused? Coupled with this is the question whether the applicant's further answering affidavit to the respondent's "supplementary answering affidavit" should be admitted also?
- 49.5. The admissibility and weight of the respondent's market survey is also an issue for determination by this court.

ANALYSIS

[50] In regard to the alleged contravention of the statutory provisions by the respondent, the applicant relies, *inter alia*, on two prohibitions in the Act and the Regulations for the relief it seeks in this application:

- 50.1 The first prohibition forbids the use of any name, word, expression, mark, etc., that conveys or creates, or is likely to convey or create, a false or misleading impression as to the nature, class and identity of a product (Section 6 of the Act and Regulations 32(3)(a) and 32(4)). Section 9 of the Act provides that "*no person shall use any name, word, expression, reference, particulars or*

indication in any manner, either by itself or in conjunction Regulation 32(4) which provides that “no registered trade mark or brand name which may possibly, directly or by implication, be misleading or create a false impression of the contents of a container or outer container containing a dairy product, shall appear on such a container.”

50.2 The second prohibition regulates and prescribe the content, nature and appearance of a name, word, expression, mark, etc., affixed to a product and / or imprinted on a product label and /or container (Section 3 of the Act and Regulations 2(1) and (d) and 26(7)(a).

[51] Further to the above, the nub of the application is the over-accentuation and the prominent use of the word “butter” on the respondent’s label for its “stork butter spread” product, which the applicant argues that it creates and/or has the likelihood to create false impression by misrepresenting that it is pure butter whereas it is in fact a modified butter product. The applicant further contends that this conduct by the respondent therefore constitutes unlawful competition.

[52] It is common cause that the respondent argues that stork butter spread is a trade name which thus endures itself to the regulatory muster and not a trade mark as submitted by the applicant. It must be remembered that in its answering affidavit it is in fact the respondent who stated that that stork butter spread is a trade mark.

[53] It is further common cause that the product's class designation is "modified butter" and that the product descriptor, namely "medium fat modified butter spread with sunflower and palm oils", is by comparison, virtually illegible on the label. As already stated above, the words "stork butter spread" is the dominant if not the main feature on the product's container. Of these three words, that is "stork butter spread", the font of word "butter" is overaccentuated in comparison to the other two words above and below it, namely stork and spread respectively. The applicant submits that it is in light of this distinctive script of the word butter, amongst other reasons, which persuades it to argue that the word "butter" is indeed the primary distinguishing word on the label, which imprint, it argues further, is in contravention of the section 3 and 6 of the Act and Regulation 26(7)(a), as read with the other relevant cited provisions. In regard to the applicant's observation regarding the formatting of the respondent's product label, I confirm at this stage that my observation is similar to that of the applicant. Bar the denial that the product label offends the cited statutory provisions, the respondent equally agrees with the label's description by the applicant.

[54] In regard to the issue whether the respondent's label conveys or create or is likely to create a false or misleading impression as to the nature, class and identity of the product and regard being had to section 6 of the Act and Regulations 32(3)(a) and 32(4), I am of the view that the respondent's label does indeed convey or create or is likely to create a false or misleading impression given the overamplified word "butter". When regard is had to the exaggerated imprint or script of the word "butter", both by the larger font and more glaring brighter colours, in both the three worded label (stork butter spread) and the four words at the top right of the product container (easy spread contains butter), parallels can

be drawn in that in both categories, the word “butter” unequivocally stands out. In the first three words, “butter” is overaccentuated by using a very big font in comparison to the other two words whereas in regard to the other four words, the word butter is overaccentuated by using the yellow colour in a font way bigger than the word “contains” which appears immediately above it.

[55] Another unmissable observation is how the first two words of the said four are imprinted in white colour which, arguably, appears to be less attractive and not-so inviting to your average consumer as compared to the yellowed “butter” word. In my view, the inescapable impression which is created or is likely to be created by the overaccentuated word butter is that the product, which is in fact “modified butter”, is pure butter or butter. This is clearly in contravention of regulation 26(7)(a) since unless the word is either the registered trade mark or trade name of the trader, same may not be bigger than the class designation, which is not the case herein as stated in the following lines below. The word butter is left, right and centre of the label, which description and impression I find to have been created to undoubtedly confuse and/or mislead or has the likelihood to achieve intention with a lesser vigilant and unsuspecting average consumer. In my further view, an average consumer’s first and dominant attraction will be the word “butter” and not the words “modified butter” which by comparison are way very light as they are imprinted in white colour and are almost near illegible.

[56] Further to the above, this false impression or confusion created by the respondent’s label should be denounced, primarily for the protection of the consumer not to be confused or misled and equally for traders who will unavoidably suffer financial harm due to this

unlawful competition. To mention just but one legal authority in this regard, in **Orange Brand Services Ltd** the Court held that even if that confusion lasts for just a “fraction of time”, it is enough to conclude that the Act has been contravened. I hold the same view *in casu*.

[57] Further to the above and as was held in **William Grant & sons Ltd and Another v Cape Wine & Distillers Ltd and Others**, I am of the view that the label dispute raised herein can be simply resolved by adopting a commonsensical approach to the language and formatting on the labels and on the advertising material and to the visual impressions created by them. I am therefore satisfied that there is therefore no need to import the market survey documents and other researches sourced and relied on by the respondent to consider the alleged contravention. It is therefore that following my adoption of a commonsensical approach, I find in the manner I do in the preceding paragraphs.

[58] It was also held in **Puma AG Rudolf Dassier Sport** *supra* that without peering too closely to the registered mark and the respondent’s label, “*the first impression the court gets would be what would most likely be the impression created to an average consumer*”. Even myself, at my first glance of the label, I was under the impression that the product is in fact butter or pure butter and not modified butter as it actually is. Simply put, the label both misled and confused me.

[59] Furthermore and as I have already briefly stated above, in respect of the design concept by the respondent meant to determine the consumer’s responses to stork butter

spread, I hold the same view as the applicant that if anything, the cumulative survey documents merely serve to underscore a likelihood of deception and/or confusion to an average consumer. What supports this view is based on how the consumers allegedly responded during the respondent's design concept, which responses appear below herein, namely:

59.1. "Butter spread" is a butter that is spreadable;

59.2. Butter spread is "a butter with oil/more cream/something added to make it";

59.3. Butter spread is definitely a type of butter";

59.4. When you ask consumers if these products are butter – they say yes, it is pure butter but with something added/removed to make it more spreadable".

[60] In my view, even on the basis of paragraphs 59.1 to 59.4, the fact that the consumer, when presented with the product label imprinted with the words stork butter spread, considered the product label as "butter" and "pure butter", is all the more indicative of the confusing and/or deceptive nature of the label. In my further view, this deepens the extent of the deception and/or confusion, ignorantly so or by design, experienced by the consumer. It is common cause that this consumer confusion exists, despite the fact that the design label carry the words "MEDIUM FAT MODIFIED BUTTER SPREAD".

[61] The respondent went to great lengths to expound on what the words modified butter; spread; butter; pure butter and stork butter spread is and what each denote. In my view, that is not the issue *in casu* since all of that is common cause. What is at issue, amongst

other things, is the question whether a likelihood exists that a notional consumer, on seeing the respondent's product label, can be deceived and thus get confused regarding its true nature and whether the respondent's product label contravenes the relevant statutory provisions. When regard is had to the label, it cannot be gainsaid that the words "stork butter spread" are left, right and centre of that product, printed in bold very distinct navy colour, whereas the words modified butter are faintly imprinted in a faint white colour, which colour and font size, relative to the "stork butter spread" words are near non-existent. This observation, in my view, does not require any reference by this court to some outsourced study and/or survey. Just a simple observation made by an average consumer suffices in this regard. Coupled to this is the fact that the respondent's product label is accordingly and, as already stated above, not in compliance with the Act and the Regulations since the capitalized and highly "bolded" words are not, *inter alia*, the respondent's trade mark. In this regard I am further satisfied that even the respondent's about-turn and argument that it is in the process of getting its 'trade name' "stork butter spread" registered does not change the fact that as things stand, its label is in contravention of sections 3 and 6 and the relevant Regulations.

[62] Even if one was to attach the dictionary meaning to the word 'trade name' as propagated by the respondent, in my view, that definition, when viewed corporately within the affected sections of the Act and the Regulations, would still come short to meet the regulatory muster in that it offends, *inter alia*, Regulation 26(7)(a). Important to note in this regard is the triteness of the supremacy of the rule of law over any other thing that seeks to contradict it. This approach will by extension and default have to equally affect and negatively impact the dictionary meaning, when considered holistically. Simply put,

anything contrary to a statutory provision stands to be rejected and accordingly the extended meaning of 'trade name' sought to be attached to it by the respondent is hereby rejected. Accordingly, I am satisfied that contrary to the respondent's argument, the words stork butter spread can never be said to pass the regulatory muster. In the result the respondent's further argument that stork butter spread is a trade name according to dictionary definition is thus rejected.

[63] In regard to the respondent's objection to the applicant's argument regarding further Regulations allegedly contravened by the latter, the respondent argues that in fact such Regulations and some sections are not even relevant for issues to be determined by this court. I am however satisfied that their reference by the applicant is relevant within the conspectus as defined by the applicant, to state it loosely, "when read with the affected sections of the Act and the Regulations". To my understanding, their relevance can only be viewed within this scope and/or context, which, in my view, is sensical. Accordingly, their relevance can therefore not be talked away.

[64] In regard to the apprehension of harm, I am satisfied that there is indeed such a likelihood when regard is had to my findings in the preceding paragraphs which justifies the applicant's resolve to approach this court for an interdict as it did, especially when further regard is had to the decision in **Knoetze and Sons** above. The argument that the applicant should have followed the SCA decision in **Bertie** above is assailable in light of what the Constitutional Court held in **Gcaba** above that the alternative remedy it would be 'preferable' but not mandatory. Noteworthy is the fact that the latter decision nor the Act ever barred nor suggested to bar the aggrieved party to approach the courts for review

purposes. Moreover, an unlawful competition cause of action and interdict relief falls outside the parameters of the Minister's powers as designated to her under the Act, and it would be contrary to the principle of the rule of law for her to exercise powers which do not accrue to her *ex lege*.

[65] Regarding the argument *re non-joinder* of the Minister and/or the State, I am satisfied that neither have a direct and substantial interest in any part of this application that will prejudicially be affected by the relief sought.

[66] From a commercial perspective and having considered the issues, I am satisfied that the respondent's trade is non-complaint with the statutory provisions. I am further satisfied that the respondent is being unduly advantaged at the applicant's expense whilst the consumer's deception and confusion continues unabated, unless and until the respondent is interdicted.

[67] In the result and for reasons already outlined above, I am satisfied:

- 67.1 that the labelling of the respondent's product contravenes section 3 and 6 of the Agricultural Product Standards Act, 119 of 1990 ("the Act"), as read with Regulations 2(1)(e) and (d), 26(7)(a), 32(3)(a) and 32(4) of the Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products intended for sale in the Republic of South Africa GN R1510, published in GG 42850, dated 22 November 2019, and with a commencement date of 22 August 2020 ("the Regulations");

- 67.2 that the labelling of the respondent's product further misrepresent "modified butter product" as a "butter" product in the sense that it would be likely to lead a significant section of the public to think that the product sold under that label has some attribute or attributes which it does not possess, thereby giving rise to confusion, or the likelihood of confusion, in the minds of the public.
- 67.3 that there is consumer confusion regarding the product or put differently, the respondent's advanced evidence of the absence of such by way of a market survey failed to disprove the contravention of section 6 of the Act.
- 67.4. that despite the applicant not having advanced an expert of its own, the applicant can as a matter of course competent to take issue with the evidence from the market survey.
- 67.5 that the respondent's "supplementary answering affidavit" without prior leave of the court and thereafter supplementary Heads of Argument is permissible and in the interest of justice, is admitted. Coupled with this is the fact that the applicant's further answering affidavit to the respondent's "supplementary answering affidavit" is also admitted.
- 67.6 that no weight is attached by the court to the respondent's market survey since same is, in my view, by far outweighed by the court's commonsensical observation akin to that of an average consumer.

[68] In the result I am satisfied that the applicant has made out a case that entitling it to the relief it seeks, including costs, considering the trite approach that follows should follow the result.

[69] In the premises I make the following Order:

ORDER

1. That the Respondent is interdicted and restrained from:-

1.1 competing unlawfully with the Applicant by using, selling, offering for sale, promoting, advertising, delivering, marketing and/or in any way distributing for the purpose of sale, modified butter products in a container and/or any other packaging and wrapping material having a label imprinted thereon:-

1.1.1 as illustrated in the documents attached hereto as **Annexures CF 2.1 – 2.6;**

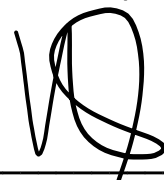
1.1.2 that is similar to the labels illustrated in **Annexures CF 2.1 – 2.6;**
(both labels referred to herein below as “an offending label”);

1.1.3 in which the word “butter” appears as a dominant aspect or feature.

2. That the Respondent is interdicted and restrained from trading in contravention of section 3 and 6 of the Agricultural Product Standards Act, 119 of 1990, as

read with Regulations 2, 3, 17, 18, 27 and 32 of the Regulations, GN R1510, published under that Act in Government Gazette 42850, dated 22 November 2019, by using, selling, offering for sale, promoting, advertising, delivering, marketing and/or in any way distributing for the purposes of sale, or offering for sale, modified butter products in a container and/or any other packaging and wrapping material having an offending label imprinted thereon.

3. The Respondent is ordered, within **7 (SEVEN) days** of this order, to: -
 - 3.1. remove an offending label from all modified butter packaging and wrapping material, and modified butter marketing and promotional material in their possession or under their control; and
 - 3.2. where an offending label is incapable of being removed from such material, to destroy the material.
4. Costs of this application, including the cost consequent upon the employment of two counsel are awarded to the applicant.



Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 11 August 2021
Judgment delivered: 12 November 2021

Appearances

For Applicant: Adv. A.J Bester SC

Assisted by Adv. P. Eilers

Instructed by: Hahn and Hahn Attorneys

For Respondent: Adv. R Michau SC

Assisted by: Adv. L. Harilal

Instructed by: Kisch Africa Inc.