

In racemes veritas

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While trade mark infringement cases are not unusual, there are few decisions in which the central issue, which required determination was whether the respective goods involved were so similar that it would give rise to a likelihood of deception or confusion. It is for this reason that the decision in *Mettenheimer & Another v Zonquasdrijf Vineyards CC & Others* ([2013] ZASCA 152) deserves consideration.

Mettenheimer, the first appellant, was the proprietor of the ZONQUASDRIFT trade mark, registered in class 33 in respect of alcoholic beverages, including wine. Importantly, the trade mark registration did not cover wine grapes, which, incidentally, falls in class 31.

The second appellant owned a farm called Zonquasdrijf. The appellants were not wine makers but were wine-grape producers and, on a more limited scale, wine exporters under the ZONQUASDRIFT trade mark. The wine exported under the ZONQUASDRIFT trade mark was made by Riebeek Cellars exclusively from grapes from the appellants' farm.

The respondent was a close corporation with the registered name Zonquasdrijf Vineyards CC, which conducted its farming business, growing wine grapes, on a farm situated about one kilometre from the appellants' farm, and which it sold under its registered name, Zonquasdrijf Vineyards. It never sold or made wines.

The appellants sought, *inter alia*, an interdict pursuant to s34(1)(b) of the Trade Marks Act 1993 on the basis that the respondent's sale of wine grapes under its registered name infringed its ZONQUASDRIFT trade mark. It is the court *a quo*'s dismissal of the appellants' application for the interdict that led to the appeal.

A claim for trade mark infringement pursuant to s34(1)(b) does not require that the impugned mark be used in relation to goods (or services) for which the trade mark has been registered. It requires the establishment of two interdependent elements: the use of a mark identical (or similar) to the registered trade mark and that such a mark be used in relation to goods, which are so similar to those for which it was registered that it gives rise to a likelihood of deception or confusion. There is an interdependence because the less the similarity between the respective goods of the parties, the greater will be the degree of resemblance required between the marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark and *vice versa*.

Given the fact that the deception or confusion must relate to the origin

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of the respective goods, the issue to be decided was whether there was a likelihood that the notional purchaser of either product (that is, appellants' wine or the respondent's wine grapes) may be confused to think that these goods had the same origin.

The two marks were held to be virtually identical. Though the respondent's mark contained the additional reference to 'Vineyards,' the 'Zonquasdrif' portion was the dominant feature of the mark, which would be the memorable portion to consumers. The difference in spelling of 'Zonquasdrif' - the absence of the final 't' in the respondent's mark - was considered to be insignificant. If the difference was noticed by consumers, they may have ascribed it to a misspelling of the appellants' mark.

Whether such confusion existed, therefore, depended on whether the mark was used in relation to goods, which were so similar to those for which it was registered that it gave rise to a likelihood of deception or confusion. In determining whether there was a likelihood of confusion, the following, non-exhaustive, factors may be used:

- The uses of the respective goods;
- The users of the respective goods;
- The physical nature of the goods; and
- The respective trade channels through which the goods reach the market.

On application of these considerations to wine grapes and wine, the court held that the likelihood of confusion was slight. Simply because wine is made from wine grapes did not mean that the two products were similar. The nature of the two products was entirely different. One is a fruit – albeit inedible – and the other an alcoholic beverage. There were differences as to their uses, users and the trade channels through which they were marketed. Wine grapes, not being suitable for consumption as fruit, are not sold to the public and, therefore, not found in retail outlets. Wine, on the other hand, is marketed, advertised and sold directly to the public in supermarkets, liquor stores and other retail outlets. There were no prospects of ZONQUASDRIFT wine and Zonquasdrif grapes being marketed or sold in close proximity.

Given the differences in the two products, it was necessary to consider the notional purchasers of each good. As wine grapes are suitable for winemaking only, they are exclusively sold to wine makers and wine co-operatives for that purpose.

These purchasers buy grapes based on a number of factors, such as the cultivar and the specific environmental conditions (terroir), but not with reference to the trade names of wine or the names of farms. Wineries and co-operative cellars employ specialists in the wine industry to buy their wine grapes from approved suppliers who comply with their own established quality control standards. The court held that there was no chance that these specialist purchasers of the respondent's wine grapes would think that those grapes were from the farm from which the appellants made their wine.

Furthermore, it held that there was no likelihood that purchasers of the appellants' ZONQUASDRIFT wine would believe that the wine originated from the same farm as the respondent's grapes. It could not be assumed that the notional wine purchaser would be aware of the respondent's grapes that were sold under its trade name, as the respondent did not sell its grapes in retail outlets or advertise them to the public. It is well known that many trade marks in the wine industry are not associated

with farms at all. Even if the notional wine purchaser knew of the farm Zonquasdrift, it would not necessarily have inferred that the farm and the trade name belong to the same proprietor. Moreover, even if such assumption was made, there was no reason for such purchaser to infer that the ZONQUASDRIFT wine was made of grapes grown on that farm.

In relation to wine (and as understood in the wine industry), a trade mark serves to guarantee the origin of the wine only, not the grapes from which the wine was made. The origin of the grapes from which a wine is made is provided by the wine of origin designation pursuant to the Liquor Products Act 1989.

Accordingly, the appellants' had not established a likelihood of confusion with regard to the origin of their ZONQUASDRIFT wine and the respondent's grapes.

While the case is factually interesting, it has not established new law. The decision does, however, assist in assessing whether two goods may be considered to be so similar, from the consumers' perspective, that it would give rise to a likelihood of deception or confusion. It emphasises the importance of not making snap judgements about whether goods are similar from a trade mark perspective without a proper consideration of the particular facts. Trade mark disputes tend to be fact-specific, requiring an application of the relevant legal principles to the particular facts.

In this particular case, the decisive factual finding was, arguably, that there was no likelihood that purchasers of appellants' ZONQUASDRIFT wine would believe that the wine originated from the same origin as the respondent's grapes. The basis for the finding appears to have been based on a possible peculiarity in the wine industry: consumers of wines do not assume that a trade-marked wine has any connection with a particular farm, or that a farm with the same (or similar) name as the wine belongs to the same proprietor. This, it is submitted, will not necessarily be the case where one product is the dominant ingredient of another product. Thus, the effect of the judgement may be quite limited due to the specific factual situation.

Interestingly, the case suggests that the decision may have been quite different if the appellants' goods were table grapes, rather than wine grapes. Given the fact that table grapes tend to be sold to the public via retail outlets, consumers may be likely to assume that table grapes sold under a particular mark have the same origin as a similar trade-marked wine. ♦

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