

UNLAWFUL COMPETITION

The roles of wrongfulness and dishonesty

By
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The law of unlawful competition (or unfair competition, as it is sometimes called) seeks to ensure that competition in business remains within fair and reasonable bounds and that no trader benefits at the expense of his rivals through the use of improper business methods. Unlawful competition is one of the fastest-developing areas of South African law, partly as the basis of a complementary or substitute remedy in the domain of intellectual-property law — the law of patents, trade marks, copyright and designs.

Claims for damages arising out of unlawful competition are consequently often brought in tandem with claims for infringement of copyright, patent or other rights of intellectual property. But unlawful competition has a far wider ambit, and its growth is manifesting itself in areas falling beyond the preserve of intellectual property, where uncertainty exists regarding its essential characteristics and the requirements that must be satisfied in order for a remedy to lie.

The law of unlawful competition really falls within the ambit of the law of delict — in particular, the Aquilian action. Derived from the *lex Aquilia* of ancient Roman law, the Aquilian action in its modern guise is a general remedy for wrongs to interests of substance and is available when the victim has suffered patrimonial (pecuniary) loss. Before conduct can constitute unlawful competition, therefore, the four requirements of Aquilian liability must be present:

- (a) A wrongful act or omission.
- (b) Fault, in the form of either intention (*dolus*) or negligence (*culpa*).
- (c) A causal link between the wrongdoer's behaviour and the loss sustained.
- (d) Patrimonial loss suffered by the victim.¹

The law of unlawful competition travelled a long road before it came to be recognized as a general remedy for loss caused by wrongful conduct in business, whatever form such behaviour took. At first, only particular types of commercial practice were proscribed. One of the earliest was passing-off, which occurs when a trader, in order to attract custom to himself by inducing in consumers the mistaken belief that they are patronizing his rival, unlawfully represents his product, service or business to be that of his trade rival or, at least, to be connected with it.²

Other examples of specific wrongs that attracted the opprobrium of the law are trading in contravention of a statute which provides for criminal sanctions,³ misappropriation and misuse of trade secrets of another⁴ and false representations calculated to cause a competitor patrimonial loss ('injurious falsehoods').⁵ It was not until⁶ the case of *Atlas Organic Fertilizers*

¹ P Q R Boberg *The Law of Delict I Aquilian Liability* (1984) 18 and 24–5.

² *Capital Estates & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 (2) SA 916 (A) at 929C–D. On passing-off generally, see Mervyn Dendy 'Pitfalls of Advertising — V: Passing-off' (1988) 17 *BML* 217.

³ See, for example, *Patz v Greene & Co* 1907 TS 427 and *Berman Brothers (Pty) Ltd v Sodastream Ltd* 1986 (3) SA 209 (A).

⁴ See, for example, *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T).

⁵ See, for example, *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W).

⁶ On the business practices regarded as wrongful prior to the recognition of a general delict of unlawful competition, see Mervyn Dendy 'Pitfalls of Advertising — VI: Unlawful Competition' (1988) 17 *BML* 237.

(Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others⁷ that proper recognition was given to a general delict of unlawful competition with an Aquilian basis, a position entrenched in the subsequent case of *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd et al*⁸ and given the imprimatur of the Appellate Division of the Supreme Court in *Schultz v Butt*.⁹

Following these developments, jurists realized that passing-off and the other delicts referred to above were all species of the genus unlawful competition. It followed that the species must in general exhibit the characteristics of the genus. What inhibited the identification and recognition of the existence of a general remedy for unlawful competition was the absence of a yardstick by which the conduct of trade rivals could be measured. As I have shown, one of the requirements for the existence of a claim under the Aquilian action is wrongfulness. When passing-off, trading in contravention of a statute and the other specific wrongs were committed, the element of wrongfulness was readily discernible or had achieved definition by means of evolution from English law. The specific remedies did not lay down a general standard of wrongfulness that could be universally applied. In *Schultz v Butt* and its predecessors, however, the sought-after general test for wrongfulness was at last formulated and adopted.

Earlier, in *Atlas Organic Fertilizers*, Van Dijkhorst J said:¹⁰

'What is needed is a legal standard firm enough to afford guidance to the court, yet flexible enough to permit the influence of an inherent sense of fair play.

I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the boni mores, manifested in public opinion.

Doodgaan sonder dokter

'In die reël is 'n dader se handeling wat 'n [feitlike oorsaak] van die slagoffer se dood is, te ver verwyderd van die gevolg om tot strafregtelike aanspreeklikheid daarvoor te lei indien (i) 'n versuim van die slagoffer om mediese of soortgelyke advies in te win, behandeling te ondergaan of instruksies na te kom die onmiddellike oorsaak van sy dood was; (ii) die verwonding nie in sigself lewensgevaarlik was nie of dit nie meer op die tersaaklike tydstip was nie, en (iii) die versuim relatief onredelik was, dws onredelik ook met inagneming van eienskappe, oortuigings ens van die slagoffer.'

— per Van Heerden *AR in S v Mokgethi* 1990 (1) SA 32 (A) op 461–47B.

'In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist in vacuo, the morals of the market-place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.

'Public policy as criterion for unlawfulness in delict is well known in our law; it has the stamp of approval of our highest court.'

This viewpoint was endorsed and adopted by Nicholas AJA in *Schultz*. He said that, in a determination whether competition is unlawful and in judging of the fairness and honesty of conduct, 'regard is had to boni mores and to the general sense of justice of the community', the legal beliefs of society in this regard being those of the legal policy-makers of the community, such as legislator and judge.¹¹ Since at least 1986 there has been general acceptance by jurists that there is a remedy of unlawful competition which has a number of recognized species, but that there is no closed number of forms or manifestations of specific applications of the general remedy.

Any conduct that meets the requirements of the general remedy for unlawful competition will be actionable, no matter what the nature or form of the business practice objected to. It would therefore be incorrect to take the elements of a particular species of unlawful competition, such as passing-off, and to expect all forms of unlawful competition to meet those requirements; conversely, competition cannot be regarded as lawful merely because it does not fall within the ambit of one of the crystallized species of improper trade practice. This fact, however, has eluded some litigants.

*Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd (1)*¹² is a case in point. The parties were manufacturers of toothpaste. Both commenced advertising campaigns in mid-1986, claiming that their respective products inhibited the formation of tartar. Colgate maintained that Elida Gibbs had acted falsely and misleadingly in advertising that its toothpaste, Mentadent P, was particularly effective in fighting tartar owing to the presence in Mentadent P of zinc citrate. This conduct, Colgate alleged, was wrongful because it interfered with Colgate's right to exploit legitimate claims for its own product free of the influence of spurious statements by competitors, and because it contravened various statutes prohibit-

⁷ 1981 (2) SA 173 (T). On this case and others like it, see Mark Stranex 'Unlawful Competition' (1988) 18 *BML* 62.

⁸ 1981 (3) SA 1129 (T).

⁹ 1986 (3) SA 667 (A). On the recognition and development of a general delict of unlawful competition, see Mervyn Dendy 'Pitfalls of Advertising — VII: More About Unlawful Competition' (1988) 18 *BML* 19.

¹⁰ 1981 (2) SA at 188H–189A.

¹¹ 1986 (3) SA at 679C–E. Corbett, Hoexter and Boshoff JJA and Nestadt AJA concurred.

¹² 1988 (2) SA 350 (W).

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'Commercial warfare is not proscribed'

ing the making of misleading claims about one's wares. Colgate averred that its goodwill was being impaired by the allegedly false claims made by Elida Gibbs for Mentadent P and sought an interdict restraining Elida Gibbs from displaying, publishing or otherwise distributing the advertising material complained of.

Elida Gibbs replied that Colgate had failed to allege facts which, if proved, would establish the element of wrongfulness necessary to sustain a claim of unlawful competition. This, it was argued, was because Colgate did not allege that Elida Gibbs had acted fraudulently and deliberately in making the statements that it did. Because the conduct objected to did not fall within an established category of unlawful competition such as passing-off, the argument went, it could constitute unlawful competition only if it was coupled with a dishonest intention, *dolus*; it was not sufficient that the conduct of Elida Gibbs had been alleged to be *contra bonos mores*, or contrary to the sense of justice of the community.

The crisp issue thus raised was whether, in order to satisfy the requirement of wrongfulness in a claim based on unlawful competition, it is sufficient to allege that conduct is *contra bonos mores* or whether the claimant must go further and allege *dolus* on the part of his trade rival.

Injurious falsehood, as I have explained above, is a species of unlawful competition and requires a dishonest perversion of the truth. The underlying principle is that the dissemination of a wilful falsehood that causes damage to another is clearly *contra bonos mores*. But it does not follow that in all other instances of unlawful competition a statement must be *deliberately* false before it can give rise to legal liability. The test remains whether or not the conduct complained of is *contra bonos mores*, and it is perfectly possible for an untrue statement that is not dishonestly made nevertheless to be *contra bonos mores* and thus to constitute unlawful competition.

In advancing its argument, Elida Gibbs was in essence attempting to extend the criterion of wrongfulness applicable in instances of injurious falsehood to all forms of unlawful competition. The mere fact that in *Schultz v Butt* and many other cases of unlawful competition the defendants or respondents acted dishonestly does not mean that dishonesty is a *sine qua non* of unlawful competition: as the Appellate Division laid down in *Schultz*, the criterion of unlawful competition is not whether the conduct complained of is dishonest but whether it is *contra bonos mores*. The requirement of wrongfulness may therefore be met whether the conduct was honest or not; if competition must be adjudged wrongful on that criterion, the fact that the behaviour in question was dishonest is, strictly speaking, irrelevant. The test of wrongfulness is an objective one and is not necessarily influenced by the state of mind of the defendant or respondent.

Van Schalkwyk J held, with respect, correctly, that the standard of wrongfulness to be applied to the conduct of Elida Gibbs was that of the *boni mores*, and that it was not necessary for Colgate to prove, or even aver, that Elida Gibbs had acted dishonestly. In reaching this conclusion, he relied on the following statement of Van Dijkhorst J in *Atlas Organic Fertilizers*:¹³

'Can the criterion [of unlawful competition] be dishonesty? As appears from the cases to which I have referred, where relief was granted it was done on the basis of dishonest conduct. If dishonesty is the criterion the result in [*Post Newspapers (Pty) Ltd v World Printing & Publishing Co Ltd*¹⁴] would have been different. As appears from the judgment therein dishonest puffery in extolling one's own wares is sometimes countenanced by the law. It follows that honesty could not in all cases serve as a criterion for lawfulness in cases of interference with the trade of another. To regard as lawful all cases where a trader acted honestly would put the stamp of approval upon cases where it may well be regarded that there was "unfair" competition. I think of cases such as the truthful disparagement by one trader of the goods, character, race, nationality or religion of his competitor; or where a trade boycott is bona fide organized against a competitor.'

Van Schalkwyk J alluded in *Elida Gibbs* to dishonest 'puffery' — the expression by an advertiser of laudatory opinion of his product not genuinely held by him — as an example of dishonesty that does not constitute unlawful competition. In accepting and applying the standard of the *boni mores* as the test of unlawful competition, he stated:¹⁵

'Commercial warfare is not proscribed by our law. So long as the combatants confine themselves to those legitimate methods of competition which the business community and society recognize as inevitable consequences of participation in commercial enterprise the courts will refuse to interfere. However, there are certain forms of conduct which, when tested against the *boni mores* of the market-place, remain untenable. This is so, in my view, whether or not the conduct complained of is deliberate.'

The law of unlawful competition is a challenging and difficult subject. With its criterion of the general sense of justice of the community, it has the flexibility to regulate trade in a fair but competitive manner. A well-developed unlawful-competition jurisprudence can promote honesty, fairness and lawfulness in trade in South Africa, qualities that are essential ingredients of a successful free-enterprise economic system.

¹³ 1981 (2) SA at 187F-H, cited in *Elida Gibbs* at 356H-J.

¹⁴ 1970 (1) SA 454 (W).

¹⁵ At 358F-G.