

192/91

Case No 324/90

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

UNION WINE LIMITED..... Appellant

and

E SNELL & CO LIMITED..... Respondent

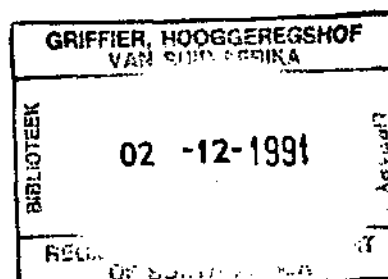
CORAM: CORBETT CJ, HEFER et NESTADT JJA, NICHOLAS et
HARMS AJJA.

DATE OF APPEAL: 8 November 1991

REASONS FOR ORDER HANDED IN ON: 29 November 1991

R E A S O N S

/ CORBETT CJ:.....



CORBETT CJ:

In the Court a quo, the Cape of Good Hope Provincial Division ("the CPD"), Union Wine Limited ("the applicant") instituted motion proceedings on 16 October 1989 against E Snell & Company Limited ("the respondent") claiming an interdict restraining the respondent from using the name "Johannisberger" in relation to any wine advertised, marketed, sold or distributed by it. In brief, the applicant's case was that the respondent's use of the name "Johannisberger" in respect of a wine marketed by it constituted unlawful competition vis-à-vis the applicant. The matter was heard on 14 and 15 November 1989 by Van Deventer AJ who dismissed the application with costs. His judgment, which was delivered on 29 November 1989, has been reported (see Union Wine Ltd v E Snell and Co Ltd 1990 (2) SA 189 (C)). As appears from the judgment, Van Deventer AJ upheld a defence based upon the exceptio rei judicatae

and dismissed the application on this ground. The defence of *res judicata* was founded on a judgment delivered by Didcott J in the Durban and Coast Local Division on 12 September 1989 in an application brought by applicant against respondent claiming the same relief in regard to the use by respondent of the name *Johannisberger*. This judgment has also been reported (see Union Wine Ltd v E Snell & Co Ltd 1990 (2) SA 180 (D)). In addition to upholding the defence of *res judicata* Van Deventer AJ considered the merits of the claim of unlawful competition and came to the conclusion that it was not well-founded.

With the leave of the Court *a quo* applicant appealed to this Court. At the hearing we heard argument on certain applications by the applicant for condonation of non-compliance with the Rules of the Appellate Division, the nature of which I shall detail later. At the conclusion of the argument this Court decided to dismiss the

applications and the following order was made:

"For reasons to be filed later, the applications for condonation are dismissed with costs, such costs to include the costs of two counsel. Accordingly, the appeal is struck off the roll with costs, such costs to include the costs of two counsel."

These reasons now follow.

As I have indicated, judgment in this matter was given by Van Deventer AJ on 29 November 1989. On 18 December 1989 applicant served upon respondent notice of its intention to apply for leave to appeal. The learned Judge heard and granted the application on 8 March 1990. He directed that the appeal be to the Appellate Division. In terms of AD Rule 5(1)(d), read with the definition of "business day" in AD Rule 1, applicant's notice of appeal should have been lodged with the registrar of this Court, the registrar of the CPD and the respondent by not later

than 9 April 1990. A proper notice of appeal was not lodged with the registrar of this Court until 24 July 1990. This notice is dated 17 July 1990 and was lodged with the registrar of the CPD and the respondent on 19 July 1990. (These facts emerge from the original notice in the court file.) The applicant was thus more than three months out of time with the lodging of its notice of appeal.

In terms of AD Rule 5(4)(b) the applicant was further obliged to lodge with the registrar of this Court and to deliver to the respondent the required number of copies of the appeal record (which runs to 187 pages) on or before 7 June 1990. The record was in fact not filed until 14 July 1990; and a copy thereof was received by respondent's Bloemfontein attorney only on 25 July 1990. This record was incomplete in that it did not include a copy of the application papers in the matter which came before Didcott J, which papers were placed before the Court a quo

and formed part of the record. A volume containing the papers in the Natal case was not lodged with the registrar of this Court until 28 June 1991.

On 24 July 1990 applicant lodged with the registrar of this Court a petition for the condonation of its failure to lodge the notice of appeal within the period prescribed by the rules. And on 25 October 1990 applicant filed with this Court a similar application in respect of the late lodging of the record of appeal. Both applications were opposed by the respondent.

In accordance with AD Rule 5(3) bis (a) the applicant's attorney was obliged, within 21 days of the lodging of the notice of appeal, to lodge with the Registrar a power of attorney authorizing him to prosecute the appeal. This was not done. And in fact appellant and its legal advisers became aware of this non-compliance only on the eve of the hearing before this Court. Consequently at the

hearing applicant's counsel tendered such a power of attorney (dated 7 November 1991) from the bar, together with a petition of the same date for an order condoning the late filing of the power of attorney. This application was also opposed.

(I have referred to the relevant AD rules as they were before their amendment by government notice no R2408, published in the Government Gazette no 13558 on 30 September 1991, since those were the rules which had to be complied with at the time.)

This is indeed a woeful tale of non-compliance with the rules of this Court and one looks to see what explanation is tendered by the applicant.

The petition for condonation of the late filing of the notice of appeal is subscribed by a Mr C C Smit, who describes himself as a director of the applicant. In the

petition the general statement is made that "as a result of unavoidable and intervening circumstances" it was not possible to file the notice of appeal timeously. The petition proceeds:

"5 In order to consider the merits of the proposed appeal properly, advice and opinion of the legal advisers of your petitionary has been sought. From the opinion it was evident that it would take a considerable period of time before the appeal could be heard. This appeal is of considerable financial impact to your petitionary as the respondent may proceed marketing its product pending the outcome of the appeal.

6 Your petitionary conducts business on a nationwide scale, including neighbouring states. In order to establish the effect of the marketing action by the respondent upon the business of your petitionary a brief survey by the sales

personnel was requested for presentation to the Board of Directors to assist in the consideration whether to proceed with the appeal or not. This survey caused a delay.

7. In addition your petitionary appointed another chief executive on 1st March 1990 who needed time to acquaint himself with the background of this case. Your petitionary furthermore holds director's meetings only on a quarterly basis and at the time of the previous meeting in February 1990, the leave had not yet been granted.

8. As a result of several factors the decision to continue with the appeal was delayed to such an extent that the appeal could not be lodged timeously."

I find these explanations for the failure to file the notice of appeal vague, to a great extent irrelevant and completely unconvincing. As regards advice respecting the

merits of the appeal (see par 5 above), there is no indication as to when the opinion was sought. It appears from a replying affidavit filed on applicant's behalf and deposed to by Mr W D Terblanche, applicant's managing director, that this opinion was obtained from counsel. Before launching the application, so proceeds the explanation, counsel had advised that there were reasonable prospects of an interdict being granted as prayed, but after the dismissal of the application applicant considered it prudent to ask counsel to reconsider the decision and advise on applicant's prospects of success on appeal. This opinion was received on Monday, 2 May 1990.

Terblanche, too, does not say when counsel was briefed to give this opinion. The proper time to have briefed him would have been soon after the dismissal of the application on 29 November 1989. I cannot believe that, had counsel been briefed in good time, he would, in the

light of the urgency of the matter, have delayed giving his opinion until 2 May 1990. Indeed, if there had been undue delay on the part of counsel, the relevant facts should have been placed before this Court. Generally I am unconvinced that counsel's opinion had anything to do with the delays which occurred in complying with the Rules. After all applicant filed and pursued its application for leave to appeal without counsel's opinion. Moreover, nowhere in the affidavits is the unequivocal statement made that the notice of appeal was held back because applicant was awaiting counsel's opinion. Bearing in mind, too, the emphasis laid on the other excuses advanced by applicant, viz the need for a marketing survey, the assumption of office by a new chief executive, the monthly board meetings and the misplacing of a court file in the offices of the registrar of the CPD (with all of which I shall deal later), the matter of counsel's opinion appears to me to be a red herring.

Par 6 of the petition, quoted above, deals with the alleged delay caused by a need to establish by market survey the effect of respondent's actions on the applicant's business. In Terblanche's affidavit this point is further elaborated. It appears that applicant itself "conducted enquiries on a nation-wide scale". It also wished to have regard to a survey report on the liquor industry issued on a two-monthly basis by a firm of marketing research consultants known as IBIS in order to establish how well respondent's wine, marketed under the name Johannisberger, was selling. The IBIS report for the period December 1989/January 1990 was due to become available in March and that for the period February/March 1990 in May. When the former report came out it was discovered that respondent's Johannisberger was not yet separately listed therein. Terblanche does not say that applicant waited for the May report before filing its notice of appeal and that this caused delay. On the contrary, nothing is said which

explains the relevance of this IBIS report to the question of delay. The awaiting of the March report could not have delayed the filing of a notice in April. As to applicant's own investigations regarding the success of respondent's Johannesburg wine, there are no concrete statements as to when the survey was completed and whether it was a cause of the delay. Generally speaking, this whole question of market investigations strikes me as being a second red herring.

The third excuse or explanation for the delay proffered by the applicant is that set out in the first sentence of par 7 of the petition, quoted above, viz the appointment on 1 March 1990 of a new chief executive (Terblanche) "who needed time to acquaint himself with the background of this case". This point is also elaborated in Terblanche's replying affidavit in which he says that he had to familiarize himself with all the facts and

circumstances of the case in order "to make a contribution to the decision as to whether the appeal should be proceeded with or not". In order to explain why it was not possible for him to do this between the date when he commenced duties (on 5 March 1990) and the critical date when the notice of appeal had to be filed (9 April 1990) Terblanche states that there -

".... were many other crises to be dealt with and many other important routine functions which I had to attend to during the period March to May 1990."

He proceeds to emphasize what a large company the applicant is and to state that because of these circumstances the decision to proceed with the appeal was arrived at a few days before 8 May 1990.

This excuse is wholly unacceptable. I find it difficult to believe that there was not time for Terblanche

to give his attention to the question of pursuing the appeal prior to 9 April 1990; or that the other matters to which he did give attention were more pressing than the need to comply with the rules of this Court. Be that as it may, if a litigant decides to so arrange his priorities that compliance with appellate procedures takes second place to his ordinary business activities, then he must not complain if this Court decides to refuse him the indulgence of an order of condonation. In any event, Terblanche's excuses hardly explain how it came about that the notice of appeal was not filed until mid-July.

A "further problem" mentioned by Terblanche in his replying affidavit was the fact that applicant's national marketing manager, Mr S Burger, had to travel extensively during the months of March and April 1990. As Burger had been the official who primarily dealt with this matter when it was before the Court *a quo* and as Burger was intimately

1990 meeting leave to appeal had not yet been granted. This is, if anything, the lamest excuse of all; and, it is to be noted, it is not mentioned in Terblanche's affidavit. Again the averment in the petition is notable for its vagueness and nowhere is it stated that this factor caused a delay in the lodging of the notice of appeal. I should have thought that the board would have authorized the appeal prior to the application for leave to appeal. Alternatively, it could at its February meeting have given conditional authorization dependent on leave being granted. Or, if a board meeting was necessary to authorize the lodging of a notice of appeal after leave was granted, a special meeting of the board should have been called.

Applicant's attorney, Mr Feenstra, made a brief affidavit in support of the application and a longer one in reply. He submits that there was no undue delay in filing the relevant documents with this Court, including the notice

of appeal. As an excuse for the lateness of the lodging of the notice of appeal he cites the fact that his Cape Town correspondent experienced difficulty in obtaining a certified copy of the order granting leave to appeal, which in terms of AD Rule 5(1) had to be attached to the notice of appeal. His correspondent "approached" the Registrar of the CPD to obtain such a certified copy on 2 April 1990, but from 2 April to 24 April 1990 "some delay" was caused by the fact that the Court file could not be found in the Registrar's office. This explanation is subject to a number of criticisms. Feenstra does not explain why he left it until 2 April 1990 before seeking to obtain a copy of the court order. It seems to me to be unlikely that a court file could have disappeared for three weeks, especially if a determined effort to obtain the order were made by applicant's attorneys. And in any event, there is no explanation for the further delay, from 24 April to mid-

July in the lodging of the notice of appeal.

I turn now to the late lodging of the record of appeal. Here it must be pointed out that in terms of AD Rule 5(4)(c) the normal period for the lodging of the record may be extended if the respondent agrees thereto in writing. In his replying affidavit Mr Feenstra appears to be under the impression that in terms of the Rule applicant had until 25 June 1990 to lodge the record. As I have indicated, this is not so. The record had to be lodged by 7 June 1990. Mr Feenstra further avers that it was not possible for the record to be lodged timeously as the firm Snellers, which was attending to the preparation of the record, was not able to "complete the record in time"; and that this caused "a further delay". Again one is struck by the vagueness of the explanation. Mr Feenstra does not say when the record was ordered; and when it was received. As respondent's counsel pointed out, the transcriber's

certificate shows that the record was completed on 8 June 1990 and checked and corrected by 13 June 1990. In the circumstances it was incumbent on Mr Feenstra to explain why there was a further delay of more than a month before the record was lodged; and in any event why he (apparently) did not approach the respondent with a view to obtaining the latter's consent to an extension of the time for the lodging of the record. The omission from the record of the Durban papers and the long delay before they were lodged (in June 1991) is also not explained.

The failure, until the date of the hearing, to file a power of attorney is ascribed by applicant's attorney to "an oversight". It is difficult to understand how an attorney, charged with the duty of taking the procedural steps laid down by the Rules for the prosecution of an appeal, could overlook so obvious and essential a requirement. To do so amounted, in my opinion, to gross

negligence.

It has been laid down frequently by this Court that an application for condonation is required to be made as soon as the party concerned realises that the Rules have not been complied with (see Ferreira v Ntshingila 1990 (4) SA 271 (A), at 281 D and the cases there cited). Applicant's attorney was alerted by respondent's attorney on or about 11 April 1990 that applicant was out of time with the lodging of its notice of appeal and that it was necessary to apply for condonation. Yet the application for condonation was filed only towards the end of July 1990. Mr Feenstra says that he was advised to complete the appeal record before submitting the petition for the late filing of the notice of appeal. Furthermore the original petition was drafted in Afrikaans and, on the advice of his Bloemfontein correspondent, Mr Feenstra redrew it in

English. Mr Feenstra does not say who advised him to delay filing the application for condonation until the record was ready for filing. In any event it was bad advice. The redrafting of the petition in English does not appear to have materially affected the position. There is no explanation on the papers for the further delay, until October 1990, in the lodging of the petition for condonation of the late filing of the appeal record.

The principles which are applicable to applications of this kind were recently restated in the matter of Ferreira v Ntshingila, *supra*, at 281C - 282 A. In all the circumstances this Court came to the conclusion that the non-observance of the Rules in the present case had been so flagrant and gross that irrespective of the merits of the appeal the applications for condonation should be refused. The above-quoted order was accordingly made. I would merely add that, as I explained in court, the second

costs order is intended to include the costs of appeal.



M M CORBETT

HEFER JA)
NESTADT JA) CONCUR
NICHOLAS AJA)
HARMS AJA)