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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 14601/2024

In the matter between

DOCSEMUR CC

APPLICANT

ABDUL NASSER OMAR

SECOND APPLICANT

and

JIGSIMUR SA (PTY) LTD

FIRST RESPONDENT

PHEARIE STRYDOM

SECOND RESPONDENT

JUDGMENT

Date of hearing: 20 November 2024

Date of judgment: 09 December 2024

BHOOPCHAND AJ:

1. The First Applicant, Docsemur, is a close corporation registered in 2007. The Second Applicant, Abdul Nasser Omar, is a businessman and the sole member of the First Applicant. The Second Applicant deposed to the founding affidavit, but the relief sought concerns the First Applicant. The First Respondent is a private company, Jigsimur (Pty) Ltd. The Second Respondent, Phearie Strydom, is the First Respondent's sole director. The First Respondent was incorporated on 23 June 2023. The First Applicant and the First Respondent manufacture a health drink containing aloe ferox. They market it under the same name, Jigsimur (alternatively "the product"). The Second Applicant states that it is used to help treat various ailments.
2. The Second Applicant provided a historical account of the product, much of which is disputed by the Respondents. It is common cause that Deon Ungerer ("Ungerer") sourced the original formula in the nineteen eighties from an advert in a magazine of that era and commenced with its production. He approached the Second Applicant's father, Harron Omar ("Omar"), who operated a cold drink manufacturing plant towards the latter half of the nineteen nineties, to bottle the product. The Applicants and Ungerer initially and then Ungerer's wife, Rouxnel, produced the product simultaneously but from different sites after 2005.
3. Ungerer registered a trademark over the product in 2003. The trademark was not renewed and lapsed in October 2020. The Applicants provided proof that they hold the proprietary rights to the bottle's design and labelling. The Respondents, in turn, provided proof that Rouxnel holds the trademark over the name Jigsimur since 24 May 2023. The trademark was in the process of being assigned to the Respondents when this application was instituted. The Second Applicant, in turn, alleged that he applied for the trademark some years ago to vest in himself. As the Court foresees further litigation over the trademark and bottling design and for the view it takes of this application, it shall not delve further into or make findings on these disputes.

4. This application concerns material published by the Respondents on their website concerning Jigsimur. The application commenced as a two-part urgent application. On 10 July 2024, the parties took an order by agreement. The Respondents undertook to resist making statements for six weeks that the Applicant's product is counterfeit or fake. The Respondents had earlier undertaken to place their webpage in maintenance mode. The parties agreed to a timetable for filing further affidavits and written arguments. The undertaking was extended to 31 October 2024. The Court is asked to determine the relief sought in Part B of this application, i.e., an order declaring that the impugned content on the First Respondent's website is false, unlawful, and defamatory and for a final interdict prohibiting the Respondents from defaming the First Applicant.
5. The Applicants attached a screenshot of the Respondent's webpage ("the screenshot") to its notice of motion. The screenshot is headed "Fake Jigsimur products and fake factory video". It contains extracts of online advertisements from two large retailers operating in the South African marketplace, namely Takealot and Makro ("the adverts"). The adverts reflect a product with distinctive labelling and the title page of a video: "Welcome to the Jigsimur Factory". The Second Applicant alleged that the adverts are of the Jigsimur product they sell on Takealot, and the video is of their factory and the manufacturing and packaging process.
6. The Second Applicant reproduced the following statement from the Respondents' website:

"Original vs Fake

It has come to our attention that counterfeit versions of Jigsimur are being distributed by unauthorised sellers through various channels as well as some products originating from Nigeria. These counterfeit products not only lack the genuine benefits of Jigsimur but also pose potential risks to your health and well-being."

7. The statement is not contained in the screenshot, but the Second Respondent accepts that the statement appeared on their website.¹ The Second Applicant alleged that a week before 27 June 2024, a client of the First Applicant informed the Second Applicant that the Respondent's website published that the Jigsimur product the First Applicant sold was fake. The Second Applicant asserted that the publication was false, unlawful, slanderous, prejudicial and defaming as it was the same original product that was manufactured by his father in 1997. The statements on the Respondent's website, the Second Applicant alleged, are not fair comments as they are not based on facts that could be proven.
8. The Second Applicant contended that it was clear that the Respondents published the content on its website to cause damage to the First Applicant's reputation. He alleged that existing and prospective customers would stop supporting their business if they believed the claim, which would cost the First Applicant much-needed business and profits. Any prejudice to the First Applicant would affect its employees and the Second Applicant as its owner. It would also negatively impact the sale of their other products, which include natural remedies for common ailments associated with the gastrointestinal tract.
9. The Second Applicant contended that any reasonable reader and browser would understand the content to mean that the First Applicant is selling fake products and that the First Respondent, albeit a year old, is selling the original product dating back to 1998. The Applicants assert that they did not make the video public and do not know how the Respondents obtained it. The Applicants did not give the Respondents permission to publish the video. The video poses a serious security risk to the First Applicant as the public would have visual access to its internal building and machinery. This would assist in break-ins and theft. The graphics falsely demonstrate that the products on Takealot are fake and pose serious economic and reputational harm. They will

¹ Paragraph 7.5 of the answering affidavit

lose out on Takealot sales, jeopardising their credibility with the online retailer. Takealot would not want to sell products that are seen as fake.

10. The labels on the bottles depicted in the adverts are blurred and indecipherable. An annexure to the founding affidavit provides a clearer view of the labels. The bottle has an upper and lower label. The upper oval label is in the form of a laurel with an aloe plant between the crests. The name 'Jigsimur' is printed in bold and occupies the centre of the laurel, followed by the words "Gesondheidsdrankie" and "Health Drink" on separate lines. The registered trademark symbol appears below the bow of the laurel. The lower rectangular label has the Jigsimur laurel on its left side rotated clockwise. The words on the lower label indicate that the product is "good for numerous ailments". The label lists ailments, summarises the health drink's effects, provides directions for use, lists its ingredients, and ends with the words "Bottled under Act". The words are repeated in Afrikaans. The label has a bar code and address on the right edge. The Applicants attached a memory stick to their first Replying Affidavit containing the video on the Respondent's website.
11. The Applicants state that the issue is not about who has the right to manufacture and sell Jigsimur but about whether or not the Respondent defamed the First Applicant through its publication on its website. The Applicant asserts the Respondents knew that the only other manufacturer of Jigsimur was the First Applicant. The Respondents refer to fake Jigsimur products and contend unconvincingly that the products sold by the reputed retailers could be counterfeit.

IDENTIFICATION OF A LINK OR CONNECTION IN DEFAMATORY CASES

12. The five elements of defamation are the wrongful and intentional publication of a defamatory statement concerning the Plaintiff.² However, the Applicant does

² Le Roux v Dey (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) (8 March 2011) at para 84 ("Le Roux/Dey") , Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 18

not have to establish every one of these elements to succeed, but identification is essential. **The Applicant has to prove at the outset that the publication of defamatory matter concerns them.**³

13. The statement must be false and defamatory, which would lower the Applicant's esteem in society. Once the Applicant has established that a defamatory statement was published, the law presumes that the publication was both wrongful and intentional.⁴ The defamatory statements often affect the offended person directly, and the identification element poses no problem. In a case like this, where the publication does not refer to the Applicants directly, difficulties arise. Litigants should be wary of omitting this requirement as the consequences are fatal to their cases.

14. The caselaw, which expresses the common law of defamation, invariably omits this requirement as there is usually a direct link between the defamatory material and the offended Applicant.⁵ The identification element refers to the link or association between the publication and the defamed person. The rationale for this requirement is that an Applicant cannot be defamed if the offensive publication does not concern them. The Constitutional Court has endorsed that it is one of the three essential requirements to prove defamation.⁶ An applicant can be identified directly by name, title, address, photograph or other means. Indirect identification requires links or connections to the Applicant, like cellphone numbers, caricatures, logos, innuendo, etc. If the Applicant is not named in these instances. The Applicant has to identify distinctive features contained in the offending material or particularise extrinsic facts demonstrating the connection. An applicant can affix affidavits of persons connecting the publication to the Applicant to support the indirect identification requirement. The Applicant has to discharge the onus to prove a connection between the offensive material and them on a balance of probabilities. The rule for determining disputes of fact in application

³ Le Roux/Dey at para 85

⁴ Le Roux/Dey *id*

⁵ The other sources of the common law are the old authorities and legal writings, although statutory, constitutional, customary and international law may contain elements of the common law.

⁶ Le Roux/Dey at para 85

proceedings has no relevance to the onus of proof. If the publication does not specifically refer to the Applicants by name, their task to prove the link is more onerous. The connection in indirect cases is established if a reasonable person understands it to be about them.

15. The Second Applicant captured the offending publication in the screenshot. There is no reference to the Applicants by name in the publication. The Second Applicant asserts that the “pictures are of the Jigsimur product we sell on Takealot.” The Second Applicant asserts further that the video is of their factory and the manufacturing and packaging processes. The Second Applicant contends that any reasonable reader or browser would understand the content, meaning the First Applicant sells fake products. The Second Applicant provided no further elaboration of their complaint against the offensive content of the Respondents’ website. The Second Applicant’s allegations amount to bald averments that fall short of the standard of proof required to establish the connection.
16. The Respondents astutely remonstrated that the screenshot was blurred and did not refer to the Applicants by name. They contended that the screenshot depicts adverts from two well-known retailers of what appear to be bottles. The text is not legible. They allege that there is no evidence that the products depicted in the adverts are those of the Applicants or that any reasonable consumer would associate those adverts with the Applicants or the Applicant’s Jigsimur product. As for the video, the Respondents contended that the Applicants provided no corroborative evidence that the video relates to their factory.
17. The Respondents also contended that the “Original v Fake” statement⁷ is not a part of the screenshot. They assert that there is no evidence before the Court to corroborate the Applicant’s claim that the Respondents have ever made those statements. The latter allegation is incorrect as it contradicts the Respondents’ admission in paragraph 7.5 of the answering affidavit. The

⁷ Contained in paragraph 7.3 of the founding affidavit

Respondents allege that the Second Applicant complained about statements (they) placed on the website long before the Applicants alleged that they detected them. The Respondents made the latter allegation to support their contention that the application was not urgent. The Respondents asserted that the Applicants had not provided any evidence to indicate any defamatory or unlawful conduct by them against the Applicants contained on the screenshot or the Respondent's website.

18. In reply, the Second Applicant denied that the screenshot's contents and text are barely visible if viewed directly on the First Respondent's website. The Applicants submitted a memory stick with the adverts downloaded from the Respondents' website. They alleged that the graphics are crystal clear. The Second Applicant asserted that Makro and Takealot sell their products. The Second Applicant observed that the Respondents had not denied that the "Original v Fake" statement was on their website. The Second Applicant asserted that the statement was on the Respondent's website when he accessed it before instituting the urgent application. He contends that once the website is no longer under maintenance mode, the offensive statement and material will be viewable.⁸ The Applicant alleged that the contents are still live on the Respondent's website and urged the Court to visit the links provided or view the contents on the memory stick. The Second Applicant included the video on the memory stick.
19. The memory stick contained annexures to the Applicant's First Replying Affidavit. As the parties filed further affidavits and the Court did not consider the annexures to be new material but better qualities of annexures to the founding affidavit, the video and the extracts of the two products sold online were viewed. The bottles on the extracts from the two retailers are not "crystal clear", as the Second Applicant suggests, even on full enlargement, which

⁸ Annexure 'RAS' to the Replying Affidavit refers to the 'Original v Fake' statement in paragraph 7.3 of the founding affidavit. The Second Applicant contended that he viewed the material even when the Respondent's website was in maintenance mode. The Respondents provided an expert report that challenges the latter assertion. The Second Applicant referred to the Respondent's website in maintenance mode, where the frozen screen contained the offensive material. The header had been changed to "Unknown products and factory video." It is apparent that the Respondents were intent on pushing the boundaries of the 10 July 2024 court order.

further blurs it. The Makro extract has an image on the right edge of the bottle that could easily be mistaken for a face.

20. The video has three distinctive features. The first contains information printed on the sides of the boxes in bold black: a website address: www. J[...].com and an email address: j[...]. The second shows labels affixed to the bottles towards the end of the automated processing line. The labels look similar to the ones on the bottle appearing in the Makro extract. However, the image on the right upper edge of the lower label is unclear and could be mistaken for a face. The Third distinctive feature is the personnel appearing in the video. There is a male with a cellphone in hand who appears to be taking photographs of the processing line, and there are others, both male and female, who seem to be workers.
21. The Second Applicant failed to exploit any of the three distinctive features in the video to connect the video to them. Had the Second Applicant addressed any or all of them appropriately by either explaining the web and email addresses, the labelling affixed to the bottles, or the personnel appearing in the video with the necessary confirmatory affidavits, he may have linked it as a video of the First Applicant's warehouse. The video captures the external entrance to the building. No signboards with the First Applicant's name or exterior or interior features link the building to the one the Applicants operate in the Western Cape. The "Original vs Fake" statement lacks any particularity that indicates it was directed to the Applicants.
22. The Second Applicant floundered on the most important element of this application, i.e., identification. The Second Applicant had to prove that the statement referred directly or indirectly in a way that a reasonable person would understand it to be about the First Applicant. The alleged defamatory material on the website did not refer to the First or Second Applicants by name or contain their images. The Court interrogated this aspect with the Applicants' Counsel as it was evident from the founding affidavit that the Second Applicant had failed to prove the link between the material published on the Respondent's website and them. As the publication did not directly

reference the Applicants, they were obliged to establish the association or link between the website content and their business.

23. The Second Applicant failed to identify any distinctive feature of the products sold by the two retailers or in the video that linked them to the Applicants. Intriguingly, the Second Applicant failed to refer to the second retailer in the three paragraphs devoted to proving that the publication was defamatory and false. This is not a case where the proof of the association posed any difficulties. There were distinctive markers in the video and on the bottle labels. The Respondents' labels had the image of Ungerer on the right upper edge of the lower labels. The wording on the lower label was arranged longitudinally, with a distinct longitudinal divider between the English and Afrikaans parts of the label. The wording on the Applicants' label was arranged horizontally, with the divider between languages in a horizontal position. The copy of their label design did not have an image on the right upper edge of the lower label. The images of the bottles extracted from the retailer's webpage seemed to have no image in that position on the label. The Applicants would have had to explain the image appearing on the right edge of the lower labels in the bottle labels visible in the video. The Second Applicant alleged that a client of the First Applicant alerted them to the Respondent's webpage. Yet, the Applicants failed to secure a confirmatory affidavit from the client to indicate how the client linked the webpage to the Applicants.

CONCLUSION

24. The Applicants seek a declaratory order that the statement published on the Respondent's website is false, unlawful, and defamatory and a final interdict prohibiting the Respondents from defaming the First Applicant. The Applicants failed to prove a requirement essential to link the statement in the publication to them. The Court cannot consider or order declaratory or interdictory relief. This application ends here.

25. The Respondents submitted that if the Applicant could not connect the alleged defamatory statement with themselves, that is the end of the matter. The Court agrees. The Respondents sought the dismissal of the matter. The Court is not persuaded that the application should be dismissed. After considering all the circumstances, the court believes that a more appropriate order is to strike out the application with costs. The application has merit, and if it were not for the Applicant's failure to address a technical aspect of the claim they pursued and provide a connection with the defamatory statements, the Court might well have found in favour of the First Applicant. The Respondents should be wary about repeating the content on their website or any other portal.

26. The Respondents contended that the defence of this application required them to instruct Senior Counsel. The Court agrees that the services of Senior Counsel were required. The Respondents sought the costs of the hearing of 10 July 2024, 31 October 2024, and 11 November 2024. The matter was not allocated for hearing on 31 October 2024 due to a shortage of Judges. The Court is averse to granting costs against the Applicants for reasons not of their own making. It is unclear from the Court file whether the parties had reached an agreement about availing themselves of a hearing suggested for 11 November 2024. The matter was not set down for the latter date, and the Court is not inclined to grant the Respondents' costs for that date.

ORDER

1. The application is struck out with costs,

2. The costs are to include the costs relating to the Respondents Striking Out application

3. The costs are to include the costs and associated costs of the scheduled hearing of Part A of the application on 10 July 2024,

4. Respondents' Senior Counsel is entitled to recover her taxed or agreed fees on scale C,
5. The parties are to absorb their own costs occasioned by the hearing scheduled for 31 October 2024 and any costs relating to 11 November 2024.

Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail on 9 December 2024

Applicants Counsel: M Abduroaf
Instructed by Nicole Lawrence Inc.

Counsel for the Second Respondents: Adv I Joubert SC
Instructed by Spoor & Fisher