



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

REPORTABLE

CASE NO: 11031/12

In the matter between:

JORDAN WINERY (PTY) LTD

First Applicant

THE GARY JORDAN TRUST

Second Applicant

Represented by the following trustees for the time being,

GARY JORDAN N.O.

KATHRYN JORDAN N.O.

GRAHAM KEITH BROWN N.O.

and

SEYMOUR AURET PRITCHARD

Respondent

JUDGMENT: THURSDAY 19 DECEMBER 2013

GAMBLE, J:

INTRODUCTION

[1] The female name **Sophia** is derived from the Greek word for wisdom and along with its European counterpart **Sofia** has often been used to represent the personification of that human attribute. It is also said to be the name given to an early martyr in Christendom whose daughters were named Faith, Hope and Charity

¹. In this application **Sophia** is the name which two prominent winemakers from the Stellenbosch district have bestowed upon their most revered of blended red wines.

[2] The First Applicant, Jordan Winery (Pty) Ltd (“Jordan”) owns a family wine farm near Stellenbosch and has since 2003 produced and marketed what it claims to be a Bordeaux style red wine under the name **Sophia**. I say “*claims*” because, as I understand it, a classic Bordeaux blend usually comprises a predominance of cabernet sauvignon and merlot grapes with which is blended, in smaller quantities, cabernet franc, petit verdot and malbec². It is said (in the same source) that the premium Bordeaux blends from some of the most famous vineyards in that region of France contain a high percentage of cabernet sauvignon (70%) and equal amounts of merlot (15%) and cabernet franc (15% grapes). Jordan’s Sophia has, over the years, consisted of mainly cabernet sauvignon and merlot grapes with what it terms an occasional “*touch*” of cabernet franc. Be that all as it may, the Applicant’s red wine is regarded as a premium priced wine and currently sells at about R350.00 per bottle.

[3] The Respondent, Mr. Seymour Pritchard, is the sole proprietor of a nearby family vineyard called “**Clos Malverne**”, and which in 2010 marketed a red blend of cabernet sauvignon and merlot grapes, also under the name **Sophia**.

[4] Jordan’s beneficial owner, Mr. Gary Jordan, claimed that the marketing and sale by Clos Malverne of its Sophia infringed upon the unregistered trade mark of Jordan’s Sophia and asked Pritchard to cease doing so. Pritchard took umbrage

¹ [Wikipedia](#), Online Encyclopaedia s.v. “Sophia”

² [Wikipedia](#), Online Encyclopaedia s.v. “Bordeaux wine”.

at this demand which he considered unreasonable and insulting, pointing out that in 2010 Clos Malverne had celebrated 25 years in the wine industry. In honour of his wife, Sophia, an active participant in Clos Malverne's success over the years, he decided in 2008 to produce a special red blend to honour her contribution to the success of their vineyards. At a special celebratory gourmet dinner in August 2010, Clos Malverne's Sophia was released on a "*limited basis*" to the public. It sold at around R250.00 per bottle and was exclusively available at Clos Malverne's cellar.

[5] Given Pritchard's refusal to furnish Jordan with the requisite undertaking in relation to the use of the name Sophia, an application was launched in June 2012 to interdict Clos Malverne from passing off its Sophia as that of Jordan. The request for an interdict was accompanied by the usual prayers for the destruction of labels, marketing material and the like.

[6] At the hearing of the matter in May and June 2013, Jordan was represented by Adv. A.R. Sholto-Douglas SC and Clos Malverne by Adv. A.J. Nelson SC and J.L. van Dorsten. The Court is indebted to counsel for their comprehensive heads of argument and written notes, as well as their thorough arguments in Court.

THE GENESIS OF JORDAN'S SOPHIA

[7] Like the Clos Malverne wine, (to which I shall revert later) Jordan's Sophia has an interesting history. It first emerged in 2002 as part of Jordan's contribution to the annual auction of the Cape Winemakers Guild ("the CWG").

[8] The CWG is an exclusive association of some of the Western Cape's most successful winemakers (as opposed to wineries), who gather every year in the spring to celebrate their individual successes in the cellar over the past year. To that end, each winemaker produces a special release of wine (whether red, white or sparkling) which is offered for sale exclusively via public auction under the auspices of the CWG. That auction is customarily preceded by various tastings of the wines on offer.

[9] According to the CWG website, to which counsel referred, the annual auction is intended to "*showcase the finest and most exclusive wines produced by its talented members, produced in small volumes for this auction.*" And, as the CWG's manager, Ms. Katherine Jonker observed in her affidavit filed herein:

"2.1 *The CWG prides itself on encouraging innovation, and the sharing of knowledge as well as raising the standards of wine produced in South Africa. Amongst its aims therefore, are the exposure of the wines produced by its members. It is for this reason that the CWG auction has never been a closed auction, but has rather always been open to the public. In fact, prior to the auction itself, approximately six public tastings or "showcases" are hosted each year, in Cape Town and Johannesburg.*

2.2 *These events give potential bidders an opportunity to taste the wines they may be interesting in buying, but are also attended by wine-drinking members of the public that need not register as bidders beforehand. By way of example, the 2011 tastings were attended by 2140...people whereas, there were approximately 200...registered bidders for the 2011 auction. The showcases are accordingly an event of interest to wine drinkers generally.*

2.3 *The bidders at the auction itself include members of the public, in addition to trade buyers, who purchase wines for restaurants and on-sell them to the public through liquor outlets and wine boutiques. Amongst the trade buyers are large liquor retail outlets, including Macro, Checkers and Spar/Tops. The wines sold through the auction are accordingly available to the public year-round through these secondary sources.”*

[10] Each CWG winemaker’s offering is bottled with a distinctive label bearing only the logo of the CWG (an antique key to the lock of some notional historic cellar) and all labels are the same colour with similar typescript thereon. The label is intended to revere the winemaker rather than the winery and so the former’s name will appear on the label in conjunction with that of the winery. I have attached

colour copies of the front label of Jordan's 2007 vintage of their Sophia to illustrate the latest layout of the CWG label.

[11] It will be observed that there is a measure of simplicity in the label and that a consumer interested in it would have to read the information on the label to ascertain which winery's product was on offer. Furthermore, the current get-up of the label is to afford the winemaker prominence on the label. On the bottle containing the 2007 vintage the words "*Gary Jordan*" appear prominent and in large typeset above the word "*Winemaker*" in the middle of the label. Below that is the description of the wine with the vintage (2007) in smaller print, the name of the winery ("*Jordan*") in larger print and the name of the wine itself ("*Sophia*") in smaller print again.

[12] The key logo appears vertically positioned on the left of the label while the three words "*Cape*", "*Winemakers*" and "*Guild*" are positioned at the top of the label, one above the other, in the largest typeset visible on the label.

[13] The evidence establishes that Jordan has played a prominent role with the CWG over the years and was at one time its chairperson. He and his wife, Ms. Kathryn Jordan, have lived on their family estate since 1993, having been trained in the art of winemaking in California. Jordan says that he first entered the CWG auction in 2003 and, save for 2010 and 2011, has sold annually of the order of about 150 cases containing 6 bottles of their Sophia.³ The wine is said to have

³ No wine was put on auction in 2010 and in 2011 only 80 cases were submitted.

acquired a measure of reputation and popularity at these auctions and, importantly, it is sold by Jordan Winery exclusively through the CWG auction.

[14] Accordingly, a keen wine buyer who has not bought on auction would only be able to access Jordan's Sophia through one of the specialist wine shops that may have bought a case or two on the auction or at one of the restaurants which has done likewise and offered it for consumption on its wine list. In either case, the wine is accessed by the consumer through a fairly exclusive point of sale. As the back label of the Jordan Sophia (a copy whereof is also attached to this judgment) demonstrates, there is some detail about the cultivars which make up the wine, the history of the name and the websites of both the CWG and Jordan Winery are furnished. I would stress, at the risk of repetition, that Jordan's Sophia is closely associated with the CWG and its auction.

[15] The founding affidavit in this matter is replete with a multitude of magazine articles and on-line reports extolling the virtues of Jordan's Sophia. It has regularly been credited with 4½ stars by Platter's South African Wine Guide, a general publication available in book stores which is regarded by many as the definitive wine guide in the country. According to Platter's rating system, this would mean that the wine is to be regarded as of "*outstanding*" quality.

[16] Jordan's claim that its Sophia has acquired extensive goodwill and reputation in the market place is not directly challenged by Pritchard. This is because the answering affidavit, to which I will refer more fully below, is drawn in general, narrative terms and does not purport to answer each of Jordan's allegations

seriatim. What Pritchard does attempt to show in the answering affidavit is that there is no magic in the use of the name “*Sophia*” and, in particular, that Jordan’s Sophia has not acquired a reputation in the absence of its association with the name of the winery, i.e. “*Sophia*” or “*The Sophia*” as opposed to “*Jordan Sophia*”.

THE EMERGENCE OF CLOS MALVERNE’S SOPHIA

[17] I have already given a short introduction to the production of Pritchard’s wine and now turn to the answering affidavit in some more detail. It commences with the following bold statement:

“6. *I do not intend to burden the papers by dealing on a line by line basis with each and every allegation made by the applicants as most of this comprises puffing to bolster a case that is without merit. To the extent that I do not specifically deny any allegations in the founding affidavit that are at variance with the facts to deposed to in this answering affidavit, such allegations are accordingly denied.*”

[18] Pritchard then goes on to give some historical detail about his family estate (bought in 1969) which has produced wine since 1986. He too proclaims the virtues of his wines and says that the estate has established “*an enviable reputation*” as a producer of “*wines of exceptional quality, acknowledged by many accolades.*”

[19] After stressing the immense effort which his wife has put into the development of their estate, Pritchard goes on to describe why, and how, he released the Clos Malverne Sophia:

“18. In 2010, Clos Malverne celebrated its 25th wine-making anniversary. In order to acknowledge and honour my wife’s massive contribution over the years, my winemaker and I decided, in 2008, to make a limited release blend of cabernet sauvignon and merlot wine to be named “Clos Malverne Sophia” as a tribute to her.

19. This wine had to be both barrel and bottle matured and produced in 2008 already in order to be ready for release in 2010 to coincide with the (sic) what I believe to be a not insignificant feat, namely our survival and success for a quarter of a century in the winemaking business.

20...

21. The label of the “Clos Malverne Sophia” had all of the above mentioned distinguishing features that are to be found on all of our other premium quality “Clos Malverne” wines and which have become distinguishing features of our products.

22. *The “Sophia Clos Malverne” wine was released at a gourmet function attended by approximately one hundred guests and four of our previous winemakers. As a surprise we released the “Clos Malverne Sophia” towards the end of the evening.*

23. *My wife who was blissfully unaware of the fact that we had been nurturing this wine for more than two years in her honour, was completely taken aback by the gesture. When I read the words on the back label, which were composed by myself as well as our current and previous winemakers, she became quite emotional.”*

[20] In regard to Jordan’s Sophia, Pritchard is brief in the founding affidavit:

“20. At the time I did not even give a thought to Jordan Sophia. Thinking back, I cannot even remember if I had heard about it at that time.”

and in relation to the dinner and after, he says:

“24. It bears emphasis that not a single one of the approximately 100 attendees, most of whom are food and wine lovers, even mentioned the fact that the name

“Sophia” also appears also (sic) on one of the Jordan wines.

25. Since then, not a single person has ever even mentioned such an association to me and the first and only occasion upon which this happened was when Jordan called me to complain about our use of the name “Sophia”,.

[21] It is apparent from the papers that Pritchard did not set out to copy Jordan’s Sophia. His claim to blissful ignorance thereof is supported in part by Mr. Jeremy Walker, currently the proprietor of the Grangehurst Winery – a small producer of top class red wines also in the Stellenbosch district. Walker was previously employed by Pritchard as his winemaker before he went off on his own. He is also an active member of the CWG and is a good friend of the Jordans.

[22] During the course of this litigation Jordan was in email correspondence with Walker regarding Pritchard’s use of the name “Sophia”. Walker, in light of his friendship with Jordan and Pritchard, ultimately directed correspondence to both in an email of 23 August 2012:

“Hi Gary and Seymour,

I am really sorry that a dispute has arisen between the two of you over the name “Sophia” for your respective wines. As I have stated to both of you, I consider both of you and your

families to be good friends of mine and I do not want to become involved in a case that could jeopardize my friendship with either party.

An account of my experience of the actual event – the releasing of the Clos Malverne Sophia – is as follows:

I attended the 25th anniversary of Clos Malverne. Towards the end of the evening Seymour revealed a wine that had been made as a tribute to his wife, Sophia. The wine was labelled as Clos Malverne Sophia and was a complete surprise to all the people (excluding the winemaker and perhaps one or two others involved in the wine). From Sophia's reaction to this announcement and the revealing of the wine, it appeared as if this was the first thing that she knew of Seymour's plan to bottle a wine in her honour.

At some stage later that evening, I asked Seymour if he knew that there was a Jordan Sophia bottled and labelled for the CWG auction. I do not recall the exact wording of my question to Seymour, but he seemed surprised and did not seem to be aware of this other wine.

I hope that the two of you are able to resolve this dispute amicably. I believe that there is an opportunity to resolve this issue without going the legal route. As I have stated to both of you, I am prepared to be the messenger/go-between if need be but I do not want to be involved in any other way if this can be avoided.

Good luck guys – please try and sort this out!”

[23] Evidently, Walker was requested to confirm this correspondence under oath but was reluctant to depose to an affidavit, and so become embroiled in the litigation between his friends. However, during argument both parties accepted the accuracy of the allegations contained in the email which, in any event, Pritchard had dealt with in a further affidavit filed in these proceedings.

[24] Finally, by way of background, Pritchard said that Clos Malverne’s Sophia was a so-called “*limited release*” wine and that originally only 600 bottles (100 cases) had been produced. In the papers filed initially he said that there were about 500 bottles left for sale because, as he put it, the wine was “*a slow mover*”. He stressed that sales of their Sophia only took place from the cellar on Clos Malverne. The wine was unavailable at any other outlet, whether a restaurant or wine shop or the like. In a further affidavit filed on 22 May 2013, Pritchard said that there were “*no bottles of Clos Malverne Sophia available for sale to the public left and neither are there any in the making*”.

THE RELIEF SOUGHT BY JORDAN

[25] Jordan seeks a final interdict restraining the passing off of its product by Clos Malverne through use of the trade mark “Sophia”. That trade mark is unregistered and said to be defined in section 2(1) of the Trade Marks Act No. 194 of 1993 as follows:

“trade mark, other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.”

[26] Passing off is a delict that has at its core a misrepresentation by one trader that its goods are those of another trader, or are associated in the course of trade with that other trader’s goods. In Williams⁴ Corbett CJ explained the approach as follows:

“Passing-off is a species of wrongful competition in trade or business. In its classic form it usually consists in A [Clos Malverne] representing, either expressly or impliedly (but almost invariably by the latter means), that the goods or services marketed by him emanate in the course of business from B [Jordan] or that there is an association between such goods or

⁴ Williams t/a Jennifer Williams and Associates v Life Line Southern Transvaal 1996 (3) SA 408 (A) at 418D-H

services and the business conducted by B [Jordan]. Such conduct is treated by the law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation. Such a representation may be made impliedly by A [Clos Malverne] adopting a trade name or a get-up or mark for his goods which so resembles B's [Jordan's] name or get-up or mark as to lead the public to be confused or to be deceived into thinking that A's [Clos Malverne's] goods were services emanate from B [Jordan] or that there is the association between them referred to above. Thus, in order to succeed in a passing-off action based upon an implied representation it is generally incumbent upon the plaintiff to establish, inter alia: firstly, that the name, get-up or mark used by him has become distinctive of his goods or services, in the sense that the public associate the name, get-up or mark with the goods or services marketed by him (this is often referred to as the acquisition of reputation); and secondly, that the name, get-up or mark used by the defendant is such or is so used as to cause the public to be confused or deceived in the manner described above. These principles are trite and require no citation of authority."

[27] Jordan bears the onus of establishing the reputation (in the sense in which that word was used by Corbett CJ) of its Sophia. In Caterham⁵ Harms JA described the test as follows:

“[21] The nature of the reputation that a plaintiff has to establish was well stated by Lord Oliver in a judgment referred to at the outset of this judgment, namely Reckitt & Colman Products Ltd v Borden Inc and Others [1990] RPC 341 (HL) ([1990] 1 All ER 873) at 406 (RPC) and 880 g-h (All ER):

‘First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognized by the public as ‘distinctive specifically of the plaintiff’s goods or services’

(My emphasis.) See also Lord Jauncey at 417 (RPC). The words emphasized are pertinent and echo those of Nicholas J that ‘the plaintiff must

⁵ Caterham Car Sales and Coachwork Ltd v Birkin Cars (Pty) Ltd 1998 (3) SA 938 SCA at 950E

prove that the feature of his product on which he relies has acquired a meaning or significance, so that it indicates a single source for goods on which that feature is used.’

(Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W) at 437A-B). Put differently, reputation is dependent upon distinctiveness (cf Van Heerden and Neethling at 169)’.

THE ALLEGED REPUTATION OF JORDAN'S SOPHIA

[28] I agree with counsel for Jordan that the third leg of the so-called “classical trinity” referred to by Harms JA in Caterham can be readily disposed of. Our courts have accepted that proof of confusion resulting from a misrepresentation has as its ordinary consequence sufficient risk of damage to entitle the injured party to an action for passing off.⁶ The focus of the enquiry in this case turns firstly on the so-called reputation and, secondly, on misrepresentation, in the form of deception or confusion.

[29] Mr. Sholto-Douglas SC was quick to point out at the beginning of his argument that this case was not a “get-up” matter, and for obvious reasons. I have described above the label of Jordan’s Sophia. Copies of the Clos Malverne Sophia front and back labels are also attached to this judgment.

⁶ Volkskas Bpk v Barclays Bank, (D, C and O) 1952 (3) SA 343 (A) at 347; Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others 1977 (2) SA 916 (A) at 931D-932D.

[30] For the record it is a russet coloured label with the name **Clos Malverne** displayed prominently at the top. Beneath that appears the word “*Stellenbosch*” and a drawing of a stately residence. Then follows the word “*Sophia*” in a different typeface and then the words “*Limited Release*” with the vintage year “2008” beneath that. At the bottom of the label are the words “*Basket Pressed*”. There is also a separate circular gold sticker on the bottle with the words “*Limited Release*”. The back label is also entirely different to Jordan’s Sophia – it is a long, rectangular, black label with gold lettering giving extensive detail of the purpose of the limited release in honour of Ms. Sophia Pritchard.

[31] In regard to reputation (or goodwill), it is said that an applicant for interdictory relief must establish the existence of the requisite reputation such that its mark, sign or get-up has become distinctive in the minds of a substantial number of members of the general public. This requires Jordan to establish:

“...That his name [Sophia] has become distinctive, that is, that in the eyes of the public it has acquired a significance or meaning as indicating a particular origin of the goods...in respect of which the feature is used. This is called reputation”⁷.

[32] Like the situation in Bress Designs, where the competing manufacturers of lounge furniture marketed products which had tags attached to them that clearly identified the source of the products, in this case it was suggested by Mr. Nelson SC that the Applicant’s prized Bordeaux blend was always referred to

⁷ Bress Designs (Pty) Ltd v G.Y. Lounge Suite Manufacturers (Pty) Ltd and Another 1991 (2) SA 455 (W) at 471D.

in the context of the winery which had made it – always “*Jordan Sophia*” and not just “*Sophia*” or “*The Sophia*”. It was said by Pritchard that in adopting the name of his wife to market the 2008 Limited Release, Clos Malverne had not adopted a description which was sufficiently unique to Jordan to entitle the latter to protection under a passing off application.

[33] In making this point, Pritchard accepted unequivocally that Jordan Sophia had a reputation associated with the Jordan Winery when he made the following snide remark in the answering affidavit:

“At best for the Applicants, the composite name ‘Jordan Sophia’ is linked to a very exclusive wine known only to an elitist and discerning group of wine buyers and purchasers.”

The irony in this remark is that by proclaiming his complete ignorance of Jordan’s Sophia, Pritchard effectively distanced himself from the designated class of wine consumers.

[34] As Pritchard then accepts, there does not seem to be any debate that Jordan’s Sophia has, amongst persons knowledgeable in wine and the like become known as a red wine of superior quality. This is undoubtedly the case amongst members of the CWG and patrons to its annual auction where the wine has been well received and has achieved good prices year after year. The argument, though, is what the extent of that reputation is.

[35] Counsel for Clos Malverne pointed out that this required the Court to consider the market in which the particular wine (as distinct from the general collection of Jordan wines) was sold. As I understand it (and as the affidavit of Jonker confirms) Jordan's Sophia is sold first on auction by the CWG. From there, limited quantities find their way to specialist wine stores, the shelves in larger wine stores reserved for the presentation of selected auction wines (including the CWG), or onto the wine list of a restaurant whose proprietor has bought it at either the CWG auction or at a liquor wholesaler or retailer which has acquired stock from the CWG auction. By way of example, it was said by Jordan that the owner of a popular Johannesburg up-market steakhouse known as "*The Butcher Shop and Grill*", Mr. Allan Pick, bought copious quantities of his Sophia on the CWG auction every year, and, with the by now customary 300% mark-up which restaurants seem to apply to wine, marketed it for around R1050.00 on his wine list.

[36] As Prof. Neethling ⁸ points out, determination of the requisite size of the group of persons which has become familiar with a contested product will vary from case to case, and it is not necessarily limiting of a reputation that it is only known to relatively few people. What is important in this regard with respect to Jordan's Sophia is that while the wine is aimed at an exclusive market, that market, by virtue of the tentacles of the internet to which I shall refer below, has limitless boundaries – both local and abroad. So, potential purchasers of Jordan's Sophia may read about it on any number of websites or blogs and will be able to order such wine for delivery to the very furthest corners of the globe.

⁸ Van Heerden-Neethling, Unlawful Competition (2nd ed) pp174-5

[37] At the end of the day, there can be little doubt then that Jordan's Sophia is likely to be sought after by a class of wine consumers – mostly fine diners and wine cognoscenti (or pretenders to that status) – who are likely to be attracted by its reputation as a CWG auction wine, and who have a wallet to match their expensive taste. But this limitation of class does not, in my view, mean that the members thereof are exempt from confusion by virtue of their knowledge of the wine market.

[38] In furtherance of his argument, Pritchard contends in the answering affidavit that the name “Sophia” has not yet acquired a so-called “*secondary meaning*” entitling Jordan to protection at common law:

” 39.2 *The name “Sophia” has not obtained a secondary meaning in the sense that it has become distinctive of either the First Applicant or of its wine;*

39.3 *The wine in question has by no means come to be universally known in the market by this name.”*

[39] As the papers and the many, many annexures thereto in this case demonstrate, the wine market in our country (no doubt following international market trends) has moved away from the description *simpliciter* of the winery followed by the cultivar (e.g. Jordan Cabernet Sauvignon; Clos Malverne Pinotage) to the use of descriptive names (properly called “*fancy names*”) which in some cases have become the customary name by which that particular cultivar or blend is known in

the market place. The example which immediately springs to mind (and which featured in the debates with counsel) is “*Rubicon*” – a well-known red blend from the Meerlust Estate near Stellenbosch. There can be no argument that a wine such as that has acquired a distinctive reputation such that if the general wine buyer or drinker were to be asked whether he/she had tasted “*the 2004 Rubicon*”, it is probable that there would be no doubt in that person’s mind that reference was being made to Meerlust’s flagship red blend.

[40] Further, were one to visit one of the well-known liquor outlets mentioned in the papers such as Makro, Spar or Ultra Liquors, one may encounter red blends with labels bearing descriptive names such as “*Chocolate Block*”, “*The Pepper Pot*”, “*Millenium*”, “*Tortoise Hill*”, “*Quinary*” and “*First Lady*”, either with or without the name of the winery featuring prominently on the label, and which are uniquely descriptive of the particular winery’s products.⁹ And as the papers herein show, for red wine buyers with considerably deeper pockets, there are names such as “*Gravel Hill*” and “*The Stork*” from the Hartenberg Estate, “*Rodanos*” from Neil Ellis Wines, “*Perspective*” from De Trafford Wines and “*Paul Sauer*” from the Kanonkop Estate.

[41] The argument put forward by Mr. Nelson SC was that in respect of these sorts of names, unless the particular wine was known generally in the market place by such name without reference to the name of the winery, such as “*Jordan Prospector Syrrah*” or “*Clos Malverne Auret*” (incidentally a tribute to the maiden

⁹ The estates in question are respectively Boekenhoutskloof, Edgebaston, La Motte, Glen Carlou, Raka and Warwick. I should hasten to add that the random selection which I have cited has no particular collective prominence other than judicial affordability.

name of Pritchard's mother), it has not acquired a so-called secondary meaning which was deserving of protection under the law relating to passing off.

[42] Mr. Sholto-Douglas SC argued that the concept of a “*secondary meaning*” is inapposite in the adoption of a common name in a trade mark (or in this case essentially a so-called “*fancy*” name serving as a secondary trade mark). In one of the earlier leading cases on the point (Sea Harvest¹⁰), an attempt was made by one fish processor to stop an opponent from using the term “*prime cut*” in relation to its frozen fish products. Aaron AJ refused to grant an interdict and held as follows at 360B:

“A long line of decisions in passing-off and trade mark cases has established that where descriptive words, as opposed to invented or fancy words, are used in a trade name or trade mark, the Court will not easily find that such words have become distinctive of the business or products of the person using them, and will not give what amounts to a monopoly in such words to one trader at the expense of others.” (Emphasis added)

This *dictum* was approved of by Heher JA in the Lotto case¹¹. I appreciate that there must be a measure of caution assessing such “*invented or fancy*” names because one does not know which of those wine labels to which counsel referred, or which are to be observed on liquor supermarket shelves, enjoy statutory trade mark protection or not.

¹⁰ Sea Harvest Corporation (Pty) Ltd v Irvin and Johnson Ltd 1985 (2) SA 355 (C)

¹¹ On-line Lottery Services (Pty) Ltd v National Lotteries Board [2009] 4 All SA 470 (SCA) at 480b-c

[43] Prof. Neethling ¹² is of the view that:

“..[t] does not make sense to require actual proof of reputation if the plaintiff uses a ‘fancy name’ as trade name or trade mark, the reason being that the connection of such a name or mark with an undertaking, goods or services can only serve to individualise them. This point of view is by necessary implication indeed apparent from a decision of the Appellate Division, Truck and Car Co Ltd v Kar-N-Truck Auctions, [1954 (4) SA 552 (A) at 557] where Greenberg JA simply accepted in an obiter dictum that an ‘invented or fancy’ name is in itself already distinctive. Reputation was therefore not set as an additional requirement for individualization in these cases.”

The learned author goes on to point out ¹³ that where a person has invented a name under which to sell his/her goods and, importantly, the name is in no way descriptive of the product (e.g. *“Cape Red Blend”*), that person has exercised a measure of imagination in finding a name, and is therefore entitled to appropriate it with the necessary degree of exclusivity. And, says the author, where a rival starts to use an identical *“fancy”* name, the ineluctable inference is one of passing off ¹⁴. In that situation the likelihood of confusion in the market place is enhanced:

“The idea underlying all this would appear to be that where a person invents a name under which to sell his goods or carry on

¹² Op cit 168

¹³ Op cit 168 fn 171 and 172

¹⁴ Truck and Car Co Ltd v Hirschmann 1954 (2) SA 117 (E) at 121A-B

his business and this name is in no way descriptive of, or has no direct relation to the nature of his goods or business, then he has exercised his ingenuity or imagination in finding that name and can appropriate it to himself. If another uses that name it is regarded as almost impossible to believe that in the wide circle of imagination or ingenuity he hit on that name by accident and without intention to deceive.”

[44] On appeal in that matter ¹⁵ Greenberg JA dealt with the consequences of competing with the use of a “*fancy name*” as follows:

“(T)he question is whether the use by the respondents of the name ‘Kar-N-Truk Auctions’ is likely so to deceive the public. The answer to this question does not solely depend on whether the appellant’s is an invented or ‘fancy’ name, on the one hand, or whether it is merely descriptive of its class of business, nor on the extent to which the appellant’s name has become associated in the mind of the public with the business it carries on. These are factors no doubt of great importance, in deciding whether there is the likelihood of deception; if the appellant’s name is an invented or ‘fancy’ name. The public is more likely to confuse with it a name of somewhat similar sound or appearance than if its name is merely descriptive and the extent of association by the public of the appellant’s name with its

¹⁵ 1954 (4) SA 552 (A) at 557D-H

business may also have an important bearing on the question of the likelihood of deception. But these factors should not be considered without reference to the nature and circumstances of the respondent's conduct.... Thus Trader A [Jordan] who could claim neither that his trade name [Sophia] was distinctive because it was invented or 'fancy' nor that there was association by the public of his name with his business might have a well-founded claim for protection against Trader B [Clos Malverne] whose conduct was of such a nature as to create a likelihood that members of the public would be deceived into thinking that B's business [Clos Malverne's Sophia] was the business of A [Jordan's Sophia], and that this might cause damage to A [Jordan]."

[45] The choice of such an *"invented or fancy name"* in relation to a particular type of wine may be based on an occurrence or event or person associated with the particular winery, as the choice of *"Sophia"* by both Jordan and Clos Malverne demonstrates. And, in deciding to give a particular cultivar (or blend of cultivars) a name other than its ordinary descriptive meaning (e.g. *"merlot"*, *"chardonnay"* or *"shiraz/pinotage blend"*), the winemaker (or more correctly, probably the marketing adviser) has sought out a name which it is hoped will lead to prominence and distinction in the wine market. It is precisely that attempt at distinction through the use of an *"an invented or fancy name"* which in my view leads to that name acquiring a reputation as a secondary trade mark which is worthy of protection.

[46] Two further examples will suffice. Mr. Sholto-Douglas SC referred to “*The Stork*”, an expensive shiraz from Hartenberg Estate. The estate’s website reveals that the wine was named after a previous owner of the farm who was given this name during the Second World War by his air force colleagues because of his spindly, stork-like legs. The name of the wine seeks to pay homage to one of the estate’s forefathers. Finally, I need go no further on this point than to refer to Clos Malverne’s pinotage creatively called “*Le Café*” after the coffee flavor with which the wine apparently presents on the palate.

[47] What the papers before me demonstrate unequivocally is that the Applicant’s wine has been referred to either as “*Jordan Sophia*” or “*Sophia*” or “*The Sophia*”, the latter references being less frequent than the former. In my view, whether used conjunctively or disjunctively in relation to Jordan, the papers show that in any event since 2003 the name Sophia has acquired a reputation as a premium Bordeaux type blend wine from the Stellenbosch area which distinguishes it from similar blends of other wine producers. That reputation has been recognized repeatedly at CWG auctions over the years, by numerous wine writers and by those who are prepared to spend a significant amount of money to place that bottle of wine on the shelf at their liquor stores or to list it on their restaurant menus.

[48] It cannot be fair that a wine maker who has carefully thought out such a “*fancy name*” to describe a particular wine, a name which is not otherwise distinctive of the wine, should have to put up with another winemaker who fortuitously latches onto the same name and puts that name to beneficial marketing use. That is the

very essence of filching to which Corbett CJ referred in Williams. I am therefore satisfied that “*Sophia*” in regard to both Jordan and Clos Malverne has been used as a secondary trade mark, has not acquired a secondary meaning as contended for by Mr. Nelson SC and that the necessary reputation has been established by Jordan.

CONFUSION AND/OR DECEPTION

[49] I move on then to the last leg of the enquiry: has Jordan shown that there has been confusion or deception in the market place, or is there likely to be any in the future should Clos Malverne decide to market more of its Sophia?

[50] That issue calls for a determination by the Court on an assessment of all the relevant factors before it. In regard to deception it is said that:

*“The Judge must consider the evidence adduced and use his own common sense and his own opinion as to the likelihood of deception ... ultimately, the question is one for the Court not for the witnesses. It follows that if the Judge’s own opinion is that the case is marginal, one where he cannot be sure whether there is a likelihood of deception, the case will fail in the absence of enough evidence of the likelihood of deception.”*¹⁶

[51] Quite obviously there can be no visual confusion on the part of a buyer as to whose wine is whose, since the two labels are as distinct as a chardonnay and a merlot. Rather, argued Mr. Sholto-Douglas SC, the room for confusion lay in the

¹⁶ Neutrogena Corporation and Another v Golden Ltd and Another [1996] RPC 473 at 482

use on the label of the same “*fancy*” name which was descriptive of the wine itself, in circumstances where both wineries produced a so-called Bordeaux blend of cabernet sauvignon and merlot from estates located near Stellenbosch. The essence of the case on this point is whether the secondary trade mark, Sophia, was likely to result in deception or confusion in the market place, with particular focus on the possibility of aural confusion.

[52] As I have attempted to show above, the wine industry has developed a practice which recognizes primary and secondary trade marks. In the case of Rubicon, for example, this is the secondary mark in relation to Meerlust. In the case of the Applicant, Jordan is the primary mark and Sophia is the secondary mark, and in respect of Pritchard’s wines, Clos Malverne is the primary mark and Sophia (or Aurret or Le Café) the secondary mark. As the plethora of documents that make up this application demonstrate, the tendency to use such primary and secondary marks has led to wine commentators, customers and other interested parties referring to wines by both their primary and secondary trade marks conjointly, as well as simply by their secondary marks. Hence, for example, “*Meerlust Rubicon*” or just “*Rubicon*”, “*Raka Quinary*” or just “*Quinary*” and “*Kanonkop Paul Sauer*” or simply “*the Paul Sauer*”.

[53] Manifestly, no wine purchaser or gastronome wishing to compliment a gourmet meal will be misled by the get-up, bottling or style of the two competing Sophia wines. The type of alleged confusion in regard to “*Johannisberger*” with which Didcott J had to deal in Union Wine¹⁷, does not enter the debate here.

¹⁷ Union Wine Ltd v E.Snell and Co. Ltd 1990 (2) SA 180 (D)

[54] Rather, the question of prospective confusion falls more into the category of trade names considered by the same Judge in his judgment *a quo* in the Boswell-Wilkie case ¹⁸ at 738H:

“They confirm the belief I would have held even had I never learnt of them, my belief that the Boswell element in the Boswell-Wilkie name is the one which tends to catch the eye or ear and to lodge itself in the mind...” (Emphasis added)

And at 739F-740A:

“The situation is thus one lending itself readily to confusion between the two circuses, if the names of such look and sound alike. They certainly do, in my estimation at any rate. Neither name, to be sure, is Boswell’s Circus, plainly and simply. Yet that is what the Boswell-Wilkie Circus gets called colloquially, as one has seen already. The same is bound to happen to Brian Boswell’s Circus, it is safe to suppose, on some occasions at least, on quite a number in all probability. And the only Boswell’s Circus of which many people have ever heard is the one that is now the Boswell-Wilkie Circus, a factor broadening the margin of error. True, the advertising material of each circus reflects its full name, for the information of those who take notice of suchlike.

¹⁸ Boswell-Wilkie Circus (Pty) Ltd v Brian Boswell Circus (Pty) Ltd and Another 1984 (1) SA 734 (N), confirmed on appeal in Brian Boswell Circus (Pty) Ltd and Another v Boswell-Wilkie Circus (Pty) Ltd 1985 (4) SA 466 (A)

But the one's advertisements will rarely be displayed or published simultaneously with the other's when comparisons are both natural and easy. The difference between the names is, in any event, a detail scarcely striking the average person with the force their similarity generates. That Boswell's Circus has come to town is what the public is likely to think when all is said and done. What it is likely to say, what it is likely to hear, whichever of the two has actually arrived.

No doubt the really careful observer will not be misled. He seldom is in such cases. Few of them would succeed were his perceptions of the test. They are not, however, what count. The reason is the average person's lack of them. The point was made in Henry Hemmings Ltd v George Hemmings Ltd (1951) 68 RPC 47, a dispute between two building contractors with those names. An injunction was granted against the one company at the instance of the other, restraining it from doing business under its name. Roxburgh J decried its choice of such, complaining (at 50):

'[T]his was bound to lead to widespread deception and confusion...It must do so. It is all very well to say that careful people noticed the difference between George and Henry, but who is careful in these days? It is a matter of common knowledge that the standard of care

adopted by the public is not high enough to enable the average member of the public to distinguish between Henry Hemmings Ltd and George Hemmings Ltd, if they are carrying on the same business in the same locality.'

It would be tedious to go through the many additional cases in which the resemblance between business names has been considered with an eye to passing off. Each turned in the end on its own facts."

[55] For that reason the long list of cases so painstakingly referred to by Mr. Nelson SC in an attempt to seek comparative assistance does not help. The approach to be adopted in cases such as these was set out by Didcott J in his masterful collection and analysis of English and South African authorities on the point of the entitlement to use one's own name in describing one's business and the likelihood of deception or confusion arising therefrom. At 737D Didcott J postulated the following:

"The question posed by the present proceedings, or the initial and fundamental one at any rate, is therefore this. Is the respondents' use of the Boswell name likely, in all the circumstances of the matter, to lead the public into believing that their circus is the applicant's circus or some circus connected with the applicant's circus? If it is, it amounts to a representation that such is the case and, since it is not, to a misrepresentation.

The class whose belief counts consists of “the ordinary run of persons”, as Lord Langdale MR describes them in Croft v Day (1843) 49 ER 994 (at 996).”

[56] The reasoning applied by Didcott J is compelling. And so each case must, therefore, be determined on its own facts, to be evaluated however against one simple legal principle: *“a defendant may not falsely represent that his business is the business of the plaintiff”*¹⁹. While the use of one’s family name is not in issue in the instant case, Jordan and Clos Malverne each having its own distinctive primary trade mark as such, it is the description of the respective blends of wine in each individually labelled bottle as *“Sophia”*, and the marketing thereof, that must be considered to determine whether deception or confusion may arise in the market place.

[57] As unlikely as it may sound, that is, that an established Stellenbosch winemaker of a quarter of a century ‘s standing who farms just a couple of kilometers away from another prominent winemaker has never before heard of Jordan Sophia, the parties accepted Walker’s assertion in his email to them jointly that Pritchard *“did not seem to be aware of”* the other Sophia when he paid tribute to his wife in 2010. I would observe in passing that the allegation by Walker is not unequivocal, (*“seem”*), nor is Pritchard’s intended put down in the answering affidavit to which reference has been made in para 20 above. (*“cannot remember if I had heard about it”*)

¹⁹ Durban Gift Shop (Pty) Ltd v The Gift Box (Pty) Ltd 1952 (4) SA 493 (N) at 496F

[58] It is conceivable, I would think, that Pritchard, as a winemaker who has not been invited to join the CWG, does not busy himself with the affairs of that group of winemakers. If that is so, his alleged ignorance of the CWG-labelled Jordan Sophia is understandable. Just as likely, however, is the fact that he may have heard of Jordan's Sophia but did not consider that his wine "*falsely represented*" that of Jordan because of the fact that it was distinguished by his ordinary cellar label (his primary trade mark) and produced in a small quantity as a celebratory limited release.

[59] Be that all as it may, counsel for Jordan accepted that Pritchard did not set out to pass off Jordan's wine when he bottled and labelled limited his release. But in the law relating to passing off proof of intention in the form of deception is not a *sine qua non* to interdictory relief: it is sufficient if the applicant has established the likelihood of deception ²⁰.

[60] I revert again to Didcott J again in the Boswell-Wilkie case at 761F-762D:

"To distinguish confusion from deception, it goes without saying, is to postulate two separate ideas. What these are, and how they differ, are questions basic to the distinction's evaluation.

The words have colloquial connotations which do not match, exactly at any rate. In the first place, according to these,

²⁰ Durban Gift Shop case *supra* at 496H-497A.

deception is usually deliberate, whereas confusion can be accidental and often is. This particular difference in nuance is not audible in the patois of passing off, however, since its vocabulary encompasses unintentional deception. Then there is a second difference, lying not so much in the states of mind the words attribute to the persons who are to blame as in the results they suggest. A man is deceived when he is led to believe that which is false. He is confused, by comparison, when he does not know what to believe, just as he is when he thinks he does but mistakes one thing for another. It may be accepted that the prospect of confusion in this sense of bewilderment will not suffice to support a complaint of passing off, that nothing less will do than the likelihood of outright deception. The cause of action calls for proof that people will probably be misled, after all, and such is not the case as long as they seem likely to remain in doubt and conscious of it. The notional significance of this second difference nevertheless strikes me as greater than its practical importance. I shall explain why I say that. Passing off does not depend on a result actually achieved, on a consequence accordingly measurable. It rests on what appears likely to happen. Once that is the enquiry, once the Court must gaze into its crystal ball, I cannot realistically imagine it seeing a public unable to tell two businesses apart, a public uncertain whether they are one and the same business or not, yet catching sight of nobody with the positive though mistaken

impression that they are. The quandary of many about what to believe is usually accompanied or followed by a false belief on the part of some. In the context of passing off, one thus notices, the words tend to be employed synonymously, interchangeably. Any number of examples can be found in the various judgments from which I have quoted and, for that matter, in this judgment of mine too, rare situations may arise perhaps, in which the one thing does not lead to the other. Whether a given case provides an instance of such is always, however, a question of fact. It is part and parcel of the investigation into the larger issue whether the representation concerned is likely indeed to mislead the public, or enough of them to count. The question may present itself, what is more, in passing off matters of any kind. There is no reason to view it as a problem peculiar to the use of one/s (sic) own name, or to seek a solution appropriate to that sort of case alone.” (Emphasis added)

[61] In summing up the fruits of his labour, Didcott J concluded at 765H-766A:

“I find the law which governs this case to be plain and straightforward. The following, it seems to me, is the position. You may not call your business [wine] by any name which is likely to mislead the ordinary run of persons into the belief that it

is or has connections with the business [wine] of somebody else. Such is the rule. It is subject to no qualification.”

[62] There is no allegation in the papers before me (and, might I regretfully add, papers which evince a level of unnecessary animosity on both sides) of any confusion that has arisen in the past regarding either of the party’s Sophia’s. And given that Clos Malverne’s “*Limited Release*” stocks have been entirely depleted, there is no likelihood of such confusion arising as things presently stand.

[63] What bothers Jordan, however, is the fact that Pritchard applied to register a trade mark in respect of Sophia after this matter was brought to his attention and has offered no undertakings whatsoever in relation the future release of Clos Malvern Sophia, for example, by suggesting that he will limit the sale thereof to his cellar where the room for confusion would be attenuated accordingly, or even limiting the release thereof to a family celebration similar to that which occurred in 2010. Importantly, Pritchard was not prepared to give an undertaking that in future no further production of Clos Malverne’s Sophia would take place. His assertion is that there are any number of future celebratory events that may warrant the use by Clos Malverne of Ms Pritchard’s first name. Perhaps to celebrate future decades of success in the wine trade, or some family anniversary or other family event such as the birth of a granddaughter or the like? The prospects seem limitless.

[64] Jordan therefore became suspicious of Pritchard’s refusal to give an undertaking regarding future use by Clos Malverne of the name “*Sophia*” and asked the Court to assume that there was indeed such a prospect and one which

warranted the grant of interdictory relief. And, the fact that Pritchard applied to register a trademark in respect of Clos Malverne's Sophia, some four months after he received the letter of demand from Jordan's attorneys, only added force to that suspicion.

[65] Further, it is suggested that Pritchard, having now been fully informed as to the reputation of Jordan's Sophia, will seek in future, once he has full trade mark protection, to ride on the back of Jordan's success. Finally, one cannot lose sight of the fact that Walker, himself a CWG member, was sufficiently concerned about possible confusion in the market place that his immediate retort to Pritchard at the 25th anniversary celebration was to enquire whether Pritchard had not heard of Jordan's Sophia.

[66] It is indeed regrettable that the essence and etymology of the name in question has not prevailed in this matter and that the zealous defenders of their respective labels were not able to conclude a mutually beneficial arrangement regarding the future use of the allegedly offending name by exhibiting some faith and charity. But in the result, the Court must determine what is to be done in regard to the potential for future deception or confusion.²¹

[67] The Court is required to adopt a common sense approach to the assessment of the potential for confusion in the future. In the approach suggested by Colman J in the Oude Meester case ²², the Court must notionally transport itself

²¹ Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W).

²² Oude Meester Groep Bpk and Another v S.A. Breweries Ltd 1973 (4) SA 145 (T) at 161C-E. See also John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd 1977 (3) SA 144 (T) at 153G; Arsenal Football Club P.L.C. v Reed [2001] RPC 922 at 931

from the court room to the particular market place and stand in the shoes or sit in the chairs of those who might be expected to make use of the goods offered by the two trade rivals. In so doing the Court will have regard to the idiosyncracies that may or may not be associated with such consumers.

[68] The wine industry is an extensive and pervasive one and its marketing and advertising arms reach much further in 2013 than they did in 1989 when the Union Wine case *supra* was decided. South Africa is now part of the international trading community and online wine sales from around the globe, spurred on and informed by a multitude of websites, blogs and journal articles, are a part of everyday life. So too is the use of computer generated search engines where a single word is inserted and the internet is explored for reference thereto, often with extensive results.

[69] That is just what both parties to these proceedings demonstrated *ad nauseam* in the papers: how many Sophia's, Sofia's and Sophie's popped up around the globe in response to such searches. It is therefore not difficult to speculate that a wine buyer who remembers the name "*Sophia*" or "*Sofia*" (having been alerted thereto previously by reference to either the CWG or Jordan) is thereby directed to Clos Malverne or, vice-versa, for that matter.

[70] Weekend newspaper supplements and lifestyle or culinary magazines often have wine columns or suggested pairings with recipes, which recommend preferred wine tastings. Once again, the coincidence of names that sound alike can potentially lead to confusion in the wine buyer's mind: which winery was it now that

produced that red blend called Sophia that I read about in the Sunday Times wine column? Or, as debated with counsel during argument, Cape Town radio listeners who tune into their local classical music station may hear a brief wine talk in the car on their way home. Were either of Jordan's or Clos Malverne's Sophia be the topic of the day's discussion, and the driver later wish to follow up on the announcement, the likelihood for confusion could easily occur. And, one thinks finally of casual conversation across the dinner table where persons interested in wine exchange views about that which they enjoyed most with reference to, for example "*Sophia*". A person thereafter wanting to try something that was held out as being a wine of quality could similarly be confused as to whether the winery was Jordan or Clos Malverne.

[71] These examples are certainly not exhaustive, but serve to illustrate the array of circumstances under which a potential wine buyer in a liquor outlet or purchasing online, or a patron at a restaurant, may be confused as to whose product is being bought or ordered.

[72] I am therefore satisfied that the Applicant has shown the basis for potential confusion in the market place sufficient so as to warrant the risk of the diversion of its buyer to the Respondent. That risk, and the resultant potential loss of custom is, in my view, sufficient to sustain a claim for an interdict.

APPROPRIATE REMEDY

[73] As I have already observed, Pritchard has furnished no undertaking as to his future use of the name Sophia. Had he, for instance, offered to inform Jordan sufficiently in advance of Clos Malverne's intention to release further quantities of a

new vintage of Sophia into the market place, Jordan would have been hard-pressed to move for a final interdict. He has not done so and has left future bottling of his adored red as a distinct possibility. This, coupled with the assertiveness with which he has sought to justify his choice of secondary trade mark, and his pursuit of statutory trade mark protection, render a final interdict the most appropriate remedy in the circumstances.

COSTS

[74] Both parties raised the stakes in this application by asking for punitive costs order against each other. Jordan fired the first salvo in this part of the skirmish in his replying affidavit by deprecating the abusive and aggressive tone of the answering papers. This complaint was not without substance given that Pritchard had sought to categorize certain of the deponents to the supporting affidavits in the founding papers (including innocent third parties) as biased and dishonest. In addition, the manner in which he took umbrage at Jordan's complaint was overly sensitive.

[75] In further papers filed after the replying affidavit, Pritchard retaliated and sought to expose Jordan as a liar and a cheat in respect of what was referred to as the "*Castle email*". This he said warranted a punitive costs order against Jordan and the matter was taken so seriously by Respondent that Mr. Nelson SC spent all of a day arguing this point alone, all the while proclaiming his professed regret that he was required to go so far in executing his client's mandate. I shall deal with the point but briefly.

[76] After the answering papers had taken the point that Jordan had failed to establish that his Sophia had a reputation of its own and could not stand alone without incorporation of the winery's name, Jordan produced an email originating from a certain Professor Castle in Melbourne, Australia. This document was presented to the Court as an unsolicited enquiry to Jonker of the CWG about the availability of "*the Sophia*" and other prestigious South African wines (including Kanonkop) and a casual reference to Clos Malverne.

[77] The Respondent's junior counsel is evidently very adept with his computer and through a variety of searches (or what is commonly called "*trawling*" of the internet), he and his wife established that Jordan and Castle were old friends who had in their younger days been to a heavy metal rock concert in Barcelona. He also found mention of Castle's name in the Jordan Winery's so-called "*Harvesting Diary*", in which daily progress is recorded for interested online readers of harvesting and pressing activity during the summer months in Stellenbosch. Pritchard triumphantly proclaimed that the email was all a diabolical plot to augment a weak case on the part of his nemesis.

[78] Jordan offered an explanation which was less than convincing and the email had the appearance of a tacky attempt to bolster a point which was really of no particular moment in the greater context of the case. However, in my view, the matter was not capable of proper determination without the deponents to the affidavits being properly interrogated under cross-examination. Since this did not

occur, I am reluctant to decide the question of credibility on the papers alone because, as Shongwe JA cautioned in Buffalo Freight ²³:

“[20] A court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser’s shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open.”

[79] Given the way in which the Castle email was raised by Pritchard and the force and duration of the argument in regard to it, I was encouraged by Mr. Sholto-Douglas SC in reply to indeed make the costs order ultimately sought by the Applicant. In the result, however, I consider Buffalo Freight to be the preferred approach.

ORDER OF COURT

[80] In the circumstances an order is made:

- (1) Interdicting and restraining the Respondent from passing off his wine as being that of the Applicants, or as being associated with or endorsed by the Applicants, by making use of any name or mark consisting of or

²³ Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 (SCA) at 14D

incorporating the trademark **SOPHIA**, or any name or mark confusingly or deceptively similar thereto;

- (2) Directing the Respondent to pay the costs of this application, such costs to include the costs of senior counsel.

P.A.L. GAMBLE

GAMBLE, J: ORDER: 20 DECEMBER 2013

In the circumstances an order is made:

1. Interdicting and restraining the Respondent from passing off his wine as being that of the Applicants, or as being associated with or endorsed by the Applicants, by making use of any name or mark consisting of or incorporating the trade mark **SOPHIA**, or any name or mark confusingly or deceptively similar thereto;
2. Directing the Respondent to pay the costs of this application, such costs to include the costs of senior counsel.

L. VAN BILJON