

The South African wine consumer does not translate, that much.

In a recent decision of the South African High Court, the court was faced with the question whether the mark LOVANE used by the respondent Lovane Wine Estate was so similar to the complainant Jordan Winery's registered CHAMELEON trade mark that confusion or deception was likely to arise.

One may no doubt wonder why a case involving such seemingly different trade marks came to court. In a multilingual country such as South Africa the "idea" conveyed by a trade mark may carry considerable weight when comparing word marks appearing in different languages and where the one may be a translation or near translation of the other. South African case law has given some recognition to the doctrine of language equivalents in the past, but this was largely confined to the English and Afrikaans languages. For example the (Dutch) words "De Gewel" (meaning "The Gable") were refused registration in the face of an existing registration for "White Gable".

In the CHAMELEON / LOVANE case the court had to decide whether the doctrine of language equivalents fits the facts of the case. The mark LOVANE, it was commonly accepted, was derived from one of the Xhosa names for a chameleon, 'ulovane'. Lovane Winery had also used a chameleon device in conjunction with its LOVANE mark, but in the course of the legal proceedings was prepared to sacrifice the chameleon device on its wine labels, to its credit (Jordan Winery had also used and registered a chameleon device in respect of wines).

With no real issue with the chameleon device remaining, the only question was then whether the average consumer, member of the 'class of potential purchasers' of wine in a multilingual country was likely to recognize LOVANE as being derived from the Xhosa 'ulovane' and was likely to establish a connection between LOVANE and CHAMELEON to an extent that she was likely to be confused as to whether the products may have the same origin.

The court took into account that Xhosa speaking persons were amongst the class of potential consumers (of wine) to which it must look, but that they were a relatively small proportion of the population. It came to the conclusion that the average member of the wine drinking population (which is a relatively small part of a total population of which again Xhosa-speaking people make up only 17.5%) was not likely to draw a connection between LOVANE and CHAMELEON.

The judgment is unlikely to go down in history as a leading trade mark case. But it serves as a reminder to trade mark proprietors whose consumers make up different sections of a multilingual population (and to trade mark attorneys) that trade marks in multilingual jurisdictions should be registered in as many languages as may be necessary, and appropriate.

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