THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 628/05
REPORTABLE

In the matter between

ERNST GOTTLIEB MARTIN GRÜTTER **Appellant**

and

CHRISTOFFEL ZANDSPRUIT LOMBARD **First Respondent**
ELIZABETH OOSTHUIZEN **Second Respondent**

Coram:	STREICHER, NAVSA, NUGENT, HEHER JJA & COMBRINCK AJA.
Heard:	22 NOVEMBER 2006
Delivered:	20 FEBRUARY 2007
Summary:	*Injuria* – appropriation of the name of another for personal advantage.
Neutral citation:	This judgment may be referred to as *Grütter v Lombard* [2007] SCA 2 (RSA).

JUDGMENT

NUGENT JA

NUGENT JA:

[1] Mr Grütter (the appellant) and Mr Lombard (the first respondent) are attorneys who practise in Pretoria. Grütter specializes in water and property law and Lombard is principally a conveyancer. In 1996 they agreed to practise from shared premises under the name 'Grütter and Lombard'. In 2004 they were joined by Ms Oosthuizen (the second respondent). The capacity in which she joined them is not entirely clear but that is not material.

[2] Early in 2005 Grütter terminated his agreement with Lombard and began practising in association with a certain Mr Grobbelaar under the name 'Grütter and Grobbelaar'. Meanwhile, Lombard and Oosthuizen continued practising together under the name 'Grütter and Lombard'. Grütter asked Lombard to desist from using the name 'Grütter' in the description of his practice but Lombard declined to do so and Grütter applied to the High Court at Pretoria for an order prohibiting him from doing so. Oosthuizen was subsequently joined in the proceedings on the insistence of Lombard and the prohibition that was sought was extended to encompass her. The court below (Mullins AJ) dismissed the application but granted Grütter leave to appeal to this court.

[3] There is no suggestion by Grütter that Lombard or Oosthuizen are committing the wrong of passing-off (which they clearly are not doing).[1] Nor does he claim an exclusive right to use the name 'Grütter' (which he clearly does not have). Grütter's case is simply that he is known to be the person named in the description of the practice and that he does not wish to be identified with the practice now that his association with it has come to an end.

[4] The nature of the relationship between Grütter and Lombard was hotly contested in the affidavits (with Lombard asserting that they practised in partnership and Grütter asserting that they did not) but in argument in the court below Grütter's counsel conceded that they practised in partnership. The learned judge held that the name 'Grütter and Lombard' was the property of the partnership, and held further that upon dissolution of the partnership each of the former partners became entitled to continue using the name of the former partnership, provided that it did not place the other former partner at risk of incurring liability, relying upon principles of English law to that effect.[2] Because there was no material risk that that would occur, the court went on to hold, Lombard was entitled to continue to use the name.

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[1] Cf *Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 478E-479F

[2] Esp *Gray v Smith* (1889) 43 Ch 208 (CA) at 220; *Burchell v Wilde* (1900) 1 Ch 551 (CA) at 562-3; *Lindley on the Law of Partnership* 14 ed pp 229-230; but see *Byford v Oliver* [2003] EWHC 295 (Ch).

[5] It is not necessary to consider whether that correctly states the consequences of the dissolution of a partnership in our law because in this court that concession was not made and the evidence establishes clearly that Grütter and Lombard were not in partnership. The essential features of a partnership were expressed in the following terms in *Joubert v Tarry & Co*:[3]

'These essentials are fourfold. First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is, that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract.'

But for the fourth feature, which is not peculiar to contracts of partnership,[4] those characteristics of a partnership have since been consistently endorsed by this court.[5] In *Pezzutto v Dreyer* they were summarised as follows:[6]

'In essence…a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit.'

[6] In the present case although there was an apparent dispute on the papers as to the nature of the relationship in truth the material facts are not in dispute

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[3] 1915 TPD 277 at 280-1.
[4] *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 784A.
[5] *Bester v Van Niekerk,* above; *Purdon v Muller* 1961 (2) SA 211 (A) at 218B-D; *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390A-C.
[6] Above, at 390D-E.

and they disclose none of the features of a partnership. Grütter and Lombard each pursued his own practice, independently of the other, each with his own clients, each bearing his own expenses that were peculiar to his own practice, and each reaping the rewards of his own endeavours to the exclusion of the other. They came together only to share premises and certain administrative facilities and the overhead expenses that that entailed. It is true that at times they both represented to others that they were partners, as pointed out by Lombard, but that is not material if in truth their association lacked the commonality of interest and reward that characterises a partnership. It is clear that it did lack that commonality and in the absence of a relationship of partnership the name under which they practised was not an asset that fell to be utilised and disposed of in accordance with partnership principles. What the evidence discloses is no more than an agreement between Grütter and Lombard to associate with one another for the limited purpose of sharing facilities and expenses and to pursue their respective practices under their joint names. That agreement having come to an end the question is whether Lombard is entitled to use Grütter's name in the description of his practice without his consent.

[7] The extent to which the features of a person's identity – for example his or her name or likeness – constitute interests that are capable of legal

protection has received little attention from our courts. In the United States the appropriation of a person's name or likeness for the benefit or advantage of another has come to be recognised as an independent tort during the course of the last century.[7] The English common law seems to have been more reticent in that regard.[8] In his illuminating dissertation on the subject[9] P.P.J. Coetser observes that in Germany 'wide protection has been afforded by the positive law to an individual's interest in identity' from which has emerged that 'it is unlawful to use certain aspects of personality for commercial purposes without consent.'[10]

[8] In this country it appears to be generally accepted academic opinion that features of personal identity are indeed capable (and deserving) of legal protection.[11] In his seminal work on personality rights, which draws in this respect upon Coetser's dissertation,[12] Professor Neethling expresses it as follows:[13]

'Onder identiteit as 'n persoonlikheidsbelang word verstaan daardie uniekheid of eieaardigheid van 'n persoon wat hom as 'n bepaalde individu identifiseer of individualiseer

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[7] William L. Prosser *Handbook of the Law of Torts* 4 ed para 117.
[8] Tim Frazer 'Appropriation of Personality – a New Tort?' 1983 (99) *LQR* 281.
[9] P.P.J. Coetser *Die Reg op Identiteit.* Unpublished dissertation for the degree magister legum at the University of South Africa.
[10] Above, p.67, (my translation)..
[11] J. Neethling *Persoonlikheidsreg* 4 ed pp 44-47, 307; Coetser, above, pp 269-270; Jonathan Burchell *Personality Rights and Freedom of Expression: The modern actio injuriarum* p 333; David McQuoid-Mason on 'Privacy' in Chaskalson et al *Constitutional Law of South Africa* p 38-9.
[12] Coetser's dissertation was written under the supervision of Professor Neethling.
[13] Neethling, above, pp 44-45.

en hom sodoende van andere onderskei. Identiteit manifesteer sigself in verskeie *indicia* waaraan die betrokke persoon herken kan word: dit wil sê, fasette van sy persoonlikheid wat kenmerkend van of eie aan hom is, soos sy lewensgeskiedenis, sy karakter, sy naam, sy kredietwaardigheid, sy stem, sy handskrif, sy gestaltebeeld en so meer. 'n Persoon het 'n besliste belang daarin dat die eieaard van sy wese en handelinge deur buitestanders gerespekteer moet word. Dienooreenkomstig word identiteit geskend indien *indicia* daarvan sonder magtiging gebruik word op 'n wyse wat nie met die ware beeld van die belanghebbende te versoen is nie.'

Professor McQuoid-Mason describes the appropriation of a person's image or likeness (the same must apply to other features of identity) as

'a violation of a person's right to decide for herself who should have access to her image and likeness – something that goes to the root of individual autonomy or privacy.'[14]

[9] In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*[15] Mostert J recognised that the interest that a person has in his or her identity is capable of delictual protection though his observations in that regard were obiter. Earlier, in *O'Keeffe v Argus Printing and Publishing Co Ltd,*[16] it was held that the *actio injuriarum* was capable of protecting a person against unauthorized publication of his or her name and likeness in an advertisement.

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[14] David McQuoid-Mason, above.
[15] 1977 (4) SA 376 (T) at 386G-387B.
[16] 1954 (3) SA 244 (C).

[10] The essential elements of an *injuria* were formulated as follows by Innes CJ in *R v Umfaan*[17] (a formulation that was later approved by this court in *R v Chipo*[18]*)*:

'If we look at the essentials of *injuria* we find – as pointed out by De Villiers in his *Law of Injuries*, which is a mine of information on this subject – that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy. Chief Justice De Villiers says (p.27): "With these ingredients to hand it will be found that there are three essential requisites to establish an action of injury. They are as follows – (1) an intention on the part of the offender to produce the effect of his act; (2) an overt act which the person doing it is not legally competent to do; and which at the same time is (3) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other."'

[11] In *O'Keefe* (which was decided on exception to the claim) it was held that the non-consensual publication of a person's likeness and name for advertising purposes was capable of constituting an impairment of his or her dignity and thus an *injuria.* Rejecting a submission that in order to constitute a violation of dignity for purposes of the *actio injuriarum* there must necessarily be an element of insult (relying for the rejection of that submission

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[17] 1908 TS 62 at 66-7.
[18] 1953 (4) SA 573 (A) at 576A-B.

on what was said by this court in *Foulds v Smith*[19]) Watermeyer J went on to say the following:[20]

'It seems to me that to use a person's photograph and name, without his consent, for advertising purposes may reasonably constitute offensive conduct on the part of the user. In the well known English case of *Tolley v J.S. Fry and Sons Ltd.,* 1930 (1) K.B. 467; 1931 A.C. 333, a defamation case, and so not wholly *in pari materia* with the present case, Greer, L.J., in the Court of Appeal expressed the view that in publishing a caricature of the plaintiff without his consent as an advertisement for the defendants' chocolate, the defendants had acted

"in a manner inconsistent with the decencies of life and in so doing they were guilty of an act for which there ought to be a legal remedy."

Similarly in the United States of America the legal principle is well established that the unauthorised publication of a person's photograph for advertising purposes is actionable. The principle there in force goes much further, and strikes at all invasions of privacy which can reasonably be considered offensive to persons of ordinary sensibilities, and the unauthorised use of a person's photograph for advertisement purposes is merely one of such instances (see *Restatement of the Law, Torts* para. 867 and the article of Prof. Winfield in the *Law Quarterly Review,* p.33).

It seems to me that under our law similar considerations must apply. The unauthorised publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's *dignitas.* It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the

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[19] 1950 (1) SA 1 (AD) at 11. See, too, Burchell, above, pp 331-2.
[20] 249A-E.

personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like. All that I need decide at this, the exception, stage of the action is whether the publication of the advertisement in question is capable of constituting an *injuria.* In my opinion it is.'

[12] While the intrusion in that case seems to have been characterised as one that went to privacy it was said by O'Regan J in *Khumalo v Holomisa*[21] that privacy is but one of 'a variety of personal rights' that are included in the concept of *dignitas* in the context of the *actio injuriarum.* The interest that a person has in preserving his or her identity against unauthorised exploitation seems to me to be qualitatively indistinguishable and equally encompassed by that protectable 'variety of personal rights'. Any doubt in that regard is removed by the protection that is now afforded to human dignity in s 10 of the Bill of Rights,[22] for as O'Regan went on to say in *Khumalo*:[23]

'In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values

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[21] 2002 (5) SA 401 (CC) para 27.

[22] 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[23] Para 27. See, too, *S v Makwanyane* 1995 (3) SA 391 (CC) paras 328 and 329; *Ferreira v Levin NO, Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) paras 47-49; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28.

both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution.'

[13] But as appears from the formulation of the elements of an *injuria* in *R v Umfaan* that I have quoted earlier in this judgment, not every intrusion upon those protectable rights of personality will necessarily constitute an *injuria*. Whether a particular act constitutes a wrongful (or unlawful) violation, and thus an *injuria*, must necessarily be determined by considerations of legal policy as in the case of any civil wrong.[24] For an individual who chooses to live in a community cannot expect always to be shrouded in anonymity. One can envisage various circumstances in which considerations of public policy will justify conduct that impinges upon features of a person's identity. But it is not necessary to consider what those circumstances might be because I can see no such considerations that justify the unauthorized use by the respondents of Grütter's name for their own commercial advantage. What is conveyed to the outside world by the use of Grütter's name is that he is in some way

[24] Neethling, above, p 308 ; Burchell, above, p 414.

professionally associated with the respondents, or at least that he is willing to have himself portrayed as being associated with them, which, as pointed out by Professor Neethling,[25] is a misrepresentation of the true state of affairs for which there can be no justification. It was submitted on behalf of the respondents that in fact the respondents do not intend to mislead and have ensured that all enquiries that are made in relation to Grütter are always re-directed to him. That does not seem to me to meet the objection. In my view Grütter is entitled to insist that there should be no potential for error in the first place and was entitled to the order that he claimed. The parties were agreed that if this were to be our finding the respondents should be allowed a period of thirty days to rectify the matter.

[14] The appeal is upheld with costs which are to be paid by the respondents jointly and severally. The order of the court below is set aside and substituted with the following order. Paragraph (a) of the substituted order is to come into effect thirty days from the date that this order is made:

> '(a) The respondents are prohibited from using the name 'Grütter' in the description of their practice or their respective practices; are prohibited from representing in any way that the applicant is associated with their practice or practices; and are ordered to

[25] Above, p 308.

remove the name ‘Grütter’ from the description of their practice or practices on any nameboard, letterhead or other material.

(b) The respondents are ordered to pay the costs of the application jointly and severally.’

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R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

STREICHER JA)
NAVSA JA)
HEHER JA)
COMBRINCK AJA)