

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

BRIAN BOSWELL CIRCUS (PROPRIETARY)
LIMITED 1st appellant
and BRIAN STANLEY BOSWELL 2nd appellant

versus

BOSWELL WILKIE CIRCUS (PROPRIETARY)
LIMITED respondent

Coram: Corbett, Miller, Van Heerden, JJA, Galgut et
Nicholas, AJJA.

Appeal heard: 14 May 1985

Date of judgment: 22 August 1985

J U D G M E N T

CORBETT JA:

This appeal concerns the right of a person to

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trade under his own name. The respondent operates a circus in South Africa under the name and style of "Boswell Wilkie Circus". First appellant, Brian Boswell Circus (Pty) Ltd, is the alter ego of second appellant, Brian Stanley Boswell, in that he is the sole director of and sole shareholder in that company. In November 1982 it was announced on behalf of first appellant that it proposed to commence business in Natal as a circus under the name "Brian Boswell Circus". Respondent thereupon brought an urgent application in the Natal Provincial Division claiming an order interdicting appellants from carrying on a circus business under a name containing the word "Boswell" or in any other way passing off its (or his) business as that of the respondent anywhere in the Republic of South Africa. The application, which was opposed, came initially before THIRION J, who granted an interim interdict pending the final determination of the application and gave leave to

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the parties to file supplementary affidavits. This was done and the application was finally heard by DIDCOTT J, who delivered a reserved judgment on 14 October 1983.

This judgment has been reported (see Boswell-Wilkie Circus (Pty) Ltd v Brian Boswell Circus (Pty) Ltd and Another

1984 (1) SA 734 (N)). DIDCOTT J granted the application and made an order in the following terms:

- "1. The respondents are, and each of them is, interdicted from operating the business of a circus, and from presenting or promoting any performance by one, under the name Boswell or any name of which Boswell is a part.
2. The interdict will last until it is lifted by this Court and, should that not happen, it will run indefinitely.
3. The respondents or either of them may apply to this Court, on fresh evidence which is tendered, for the discharge of the interdict or for the amendment of its terms.
4. Such application may be brought at any stage, after due notice to the applicant or to the owner or operator for the time being of the circus business / which.....

which the applicant now conducts.

5. The respondents are ordered jointly and severally to pay the costs of the present proceedings, including those the applicant has incurred by employing the services of two counsel, but not including any of which Mr Justice Thirion has disposed already."

On 2 December 1983 the Natal Provincial Division made an order granting appellants leave to appeal to this Court and at the same time directing that the order granted by DIDCOTT J be brought into effect immediately in terms of Rule of Court 49 (ii). Appellant's attorneys failed, however, to prosecute the appeal properly. The notice of appeal was defective and was not lodged timeously with the Registrar of this Court; nor were the two special powers of attorney authorising the prosecution of the appeal timeously filed. An application for the condonation of these irregularities was heard by us at the inception of the hearing of the appeal. Respondent did not oppose the application and it was granted at the hearing. Appellants must pay the costs of the application.

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The relevant background facts are common cause and may be thus stated. The Boswell Wilkie Circus, run by the respondent, is the product of an amalgamation in 1963 of two circus businesses called respectively "Boswell's Circus" and "Wilkie's Circus". Boswell's Circus has quite a long history. In about 1911 four Boswell brothers, Jim, Walter, Sidney and Alfred, the sons of James Boswell, a circus and menagerie proprietor in Britain, came to South Africa to work for the circus of a Madame Frank Fillis. When the Fillis circus broke up in 1913 the Boswell brothers started their own circus under the name and style of "Boswell Brothers Circus". This circus thereafter continued to operate in South Africa in association with the name Boswell. In 1948 a company, Boswell Brothers Circus (Pty) Limited, was incorporated to run what was then styled the "Boswell Circus" or, sometimes it would seem, "Boswell's Circus". This company was "owned" by the Boswell family. During 1953 African Consolidated Theatres (Pty) Limited

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acquired a controlling interest in Boswell Brothers Circus (Pty) Limited and by 1963 it owned the entire issued share capital in that company..

In 1955 Whilma Howe Wilkie started operating a circus in South Africa under the name and style of "Wilkie Circus" or "Wilkie's Circus". The two circuses traded in opposition to one another. Then came the amalgamation agreement of 1963. In terms thereof Boswell Brothers Circus (Pty) Limited sold the assets of its circus business to the company under which Wilkie traded, viz. African Entertainments (Pty) Limited and a combined circus known as "Boswell Wilkie Circus" came into being. This circus has operated under that name ever since. The 1963 agreement provided that 50 per cent of the shares in African Entertainments (Pty) Limited were to be sold to African Consolidated Theatres (Pty) Limited, the other 50 per cent remaining with Wilkie. In 1978 the assets of African

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Entertainments (Pty) Limited were transferred to respondent; and at present 45 per cent of the shares in respondent are held by Wilkie, 45 per cent by SA Teater Belange (the successor to African Consolidated Theatres (Pty) Limited) and 5 per cent each by M. Carrè and T Cripsy, both directors of respondent.

Second appellant describes himself as "a fifth generation Boswell to be involved in the circus industry". He was born "in the circus" and spent the first few years of his life with his father, Stanley Boswell, in the circus. After leaving school in 1959 he joined the Boswell Circus professionally and remained with it until the amalgamation in 1963. In 1964 he joined a rival circus, the Chipperfield Circus, and was employed there as ring-master and lion-tamer until the end of 1967, when the circus closed down. From 1973 onwards the second appellant has managed a lion park

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and animal farm near Pietermaritzburg. And, as I have indicated, it was in November 1982 that second appellant announced his intention to operate, through first appellant, a circus under the name and style of "Brian Boswell Circus".

Respondent's claim to interdict the appellants from using the name Boswell in this way is based upon the averment that this would amount to a wrongful passing off by the appellants. The wrong known as passing off is constituted by a representation, express or implied, by one person that his business or merchandise, or both, are, or are connected with, those of another. In the present case we are concerned with businesses which provide entertainment to the public and which do not market merchandise. I shall, therefore, confine my further discussion of the legal principles involved to wrongful representations concerning the wrongdoer's business. Where they are implied, such representations are usually made by the

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wrongdoer adopting a name for his business which resembles that of the aggrieved party's business; and the test then is whether in all the circumstances the resemblance is such that there is a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the business of the alleged wrongdoer is that of the aggrieved party, or is connected therewith. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in the light of the particular circumstances of the case.

(See generally Policansky Bros Ltd v L & H Policansky

1935 AD 89, at pp 97, 98; Truck and Car Co Ltd v Kar-N-Truk

Auctions 1954 (4) SA 552 (A), at pp 557, 559; Capital

Estate and General Agencies (Pty) Ltd and Others v

Holiday Inns Inc and Others 1977 (2) SA 916 (A), at

p 929.) Passing off is a form of wrongful

competition. It is unlawful because it results,

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or at any rate is calculated to result, in the improper
filching of another's trade and an improper infringement
of his goodwill and/or because it may cause injury to
that other's trade reputation (Capital Estate case
supra at pp 930 H - 931 C).

In a passing off action factors of importance
are: (1) whether the defendant is engaged in the same
field of business activity as the plaintiff, and (2)
whether the plaintiff's trade or business name has acquired
a reputation, ie has become distinctive of, or in the minds
of the public is associated with, the business carried on
by the plaintiff. Engagement in the same field of busi-
ness activity is not a pre-requisite to success (Capital
Estate case, supra, at p 929 E - G), but clearly the
existence of this factor would tend to enhance the
likelihood of confusion or deception as far as the
general public is concerned. The importance

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of the acquisition by plaintiff of a reputation in the trade name is twofold. Firstly, whether the general public will be confused or deceived into thinking, because of identity or similarity of names, that the business of the defendant is that of the plaintiff, or is connected therewith, must, as a matter of logic, depend on the extent to which that name is associated in the minds of members of the public with the business carried on by the plaintiff, ie the extent to which plaintiff has acquired a reputation in that trade name. Secondly, as the rationale of the wrong of passing off is the protection of the plaintiff's trade and goodwill, a valid cause of action would seem to postulate the existence of a goodwill, ie reputation, attaching to that trade name. Whether reputation, in this sense, is always a sine qua non of a successful passing off action need not now be decided. (See discussion in this regard in Lorimar Productions Inc and

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Others v Sterling Clothing Manufacturers (Pty) Ltd 1981 (3)

SA 1129 (T), at pp 1139 E - 1140 A; 2 LAWSA § 505, pp 311-12;

Chowles and Webster, SA Law of Trade Marks, 2 ed, pp 302 - 4;

Van Heerden en Neethling, Onreëmatige Mededinging, pp 99-100.)

In the present case the name adopted by appellants for their circus business is second appellant's own name, Brian Boswell. Assuming for the moment that the adoption of this name is likely to cause deception and/or confusion, the question which arises is whether the second appellant and his alter ego, first appellant, are not entitled willy-nilly to trade under that name. Generally, the courts in this and other countries have shown a reluctance to prevent a man trading under his own name. In England this reluctance is evident in many of the decisions referred to by the Court a quo (see judgment pp 743 ff). In the United States of America the right of a man to do business under his own name as been described as "one of the sacred rights known

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to the law" and as "part of the natural and inalienable rights guaranteed by the very first clause of our Constitution" (see Callmann Unfair Competition, S 21.28, p 114).

And in Policansky's case, supra, WESSELS CJ stated it as a cardinal principle that (at p 101) -

"A person has a property right or a quasi property right to the use and enjoyment of his own family name as well in carrying on a business and selling his goods as he has to any other species of property..... Consequently every person has a prima facie right honestly to use his own name in his own business and to sell his goods under his own name, and any injury resulting therefrom is a damnum absque injuria."

Whether the right to use one's own name in business is properly to be regarded as a property right or a quasi property right may be open to some debate (see in this connection the comments in Van Heerden en Neethling, op. cit., p 105 n 2; and see Patlansky & Co Ltd v Patlansky Bros 1914 TPD 475, at p 491) but the right is nevertheless firmly entrenched in our law. Moreover, just as a person may

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use his own name where he alone conducts his business, so may he use his name in the name of a firm or company conducting the business (Policansky's case, supra, at p 102); and this principle would particularly apply where the company constituted his alter ego.

There are, however, limitations upon the right of a person to trade under his own name. These were stated by WESSELS CJ in the Policansky case as follows (at pp 103-4);

"(a) If he has contracted not to do so.

(b) If the business is started for the fraudulent purpose of imitating another's goods and so filching his trade (Holloway v Holloway, 13 Beav. 209, 51 E.R. 81; Croft v Day, 7 Beav 84, 49 E.R. 994; Sykes v Sykes 3 B & C 541, 107 E.R. 834).

(c) If the defendant has garnished the use of another's name by imitating the get-up of the latter's goods (Holloway v Holloway (supra) and Turton v Turton (supra), or by imitating his labels, etc., so as to deceive - (Melachrino v Melachrino Egyptian Cigarette Co. (4 R.P.C. 215).

/ (d).....

(d) If a person has previously through his advertisements and through the quality of his goods made his name valuable as a trade name so that his name has become distinctive both of his goods and of himself as the manufacturer of those goods, and if his goods have come to be universally known in the market by his name then his name is said to have obtained a secondary meaning. When this is the case another person cannot use that name in connection with a similar class of goods unless he makes it perfectly clear to the public that he is not selling the goods of the original manufacturer - 'for the plaintiff by the reputation he has acquired in the business has really come to denote the goods by his own personal name just as he might denote them by some fancy name that he might choose to use', per VAUGHAN WILLIAMS in Jamieson's case, 15 R.P.C. 169.

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(e) If it is manifest from the advertisements, the get-up of the articles, or other acts of the later manufacturer that he is representing that the goods are the goods of the earlier manufacturer, then it does not matter whether he is doing so with a deliberate intention to deceive or not. He must not carry on his business in such a way as to lead those who deal with him in that business to believe that they are buying goods of the earlier manufacturer of the same name, John Brinsmead & Sons v T E Brinsmead (13 T.L.R. 3); Teofani's case (supra)."

/Having.....

Having stated that the question whether there has been a passing off is one of fact to be decided on the particular facts of the case, the learned Chief Justice went on to say (at p 104) -

"In every case the Court will enquire whether the defendant has honestly carried on the business under his own name and whether he has sufficiently distinguished his goods by the manner he has affixed his name to the goods and by the get-up of his goods, so that an ordinary reasonably observant purchaser can see that there is sufficient distinction between the goods of the rival traders of the same name, John Brinsmead & Sons v S.W. Brinsmead (30 R.P.C. 137)."

It is on this basis that our law seeks to reconcile the competing interests of prior and subsequent users in business of a family name.

I return to the facts of the present case. In the founding affidavit it was stated :-

"12. The name 'Boswell' has since about 1913 up till now, i.e. for a period of about 70 years, been closely associated with circus / activities.....

activities in South Africa. In fact, when the 1963 Agreement was entered into, consideration was paid to African Consolidated Theatres (Pty) Limited for the goodwill which had over the years been attached in the circus world in South Africa to the name 'Boswell'. In this connection I refer to clause 4 of annexure 'B'. I respectfully submit that over the years the name 'Boswell' in association with the word 'circus' has clearly obtained a 'secondary meaning' throughout the Republic of South Africa and has become distinctive and universally known in South Africa as the name of the circus run by the Applicant.

13. The association of the names 'Boswell' and 'Wilkie' in the name 'Boswell Wilkie Circus' in South Africa was so important to me that although I was one of the purchasers of the Boswell Circus and although I still had my own circus operating under my own name, I nevertheless thought it prudent from a marketing point of view to use the name 'Boswell' before the name 'Wilkie' in the new 'Boswell Wilkie Circus' trading name. I decided on such use as I realised the value of the Boswell name in the circus world in South Africa. We in fact paid goodwill for the use of the name Boswell."

In his opposing affidavit second appellant responded that he had no knowledge of, but did not deny the contents of par. 12 of the founding affidavit. This

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admission would cover, inter alia, the averment in par. 12 that over the years the name "Boswell", in association with the word "circus", had clearly obtained a secondary meaning throughout the Republic of South Africa and had become distinctive and universally known in South Africa as the name of the circus run by respondent. As regards par. 13, second appellant stated that he had no knowledge of the reason why the name "Boswell" appeared before the name "Wilkie" and consequently could not admit the allegations contained therein. Appellants took this issue no further. In my view, this response does not raise a real dispute of fact and the Court may proceed on the basis that the allegations in par. 13 are correct (cf. Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A), at pp 634-5). In a further affidavit, filed after the granting of the temporary interdict by THIRION J, second appellant sought to withdraw the admission relating to the name Boswell having acquired a secondary meaning and to

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change his response to a denial of respondent's averment in this regard. He attributed his failure initially to deny this averment relating to a secondary meaning to inadvertence due to the haste with which his opposing affidavit was prepared.

DIDCOTT J found that the name Boswell had indeed gathered a secondary meaning which linked it peculiarly with the circus owned by respondent (see judgment a quo at pp. 737 H - 738 A). He came to this conclusion after a full review of the evidence (see judgment p. 738) and taking full account of second appellant's belated denial. This finding was challenged on appeal. Appellants' counsel stressed that there was a difference between proving the necessary reputation "which is a pre-requisite to a successful passing off action" (I quote from his heads of argument) and establishing a secondary meaning. He also criticized DIDCOTT J's reliance on the invoices, receipts, delivery

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notes, etc. as confirmation of his belief that the Boswell element in the Boswell Wilkie name was the one "which tends to catch the eye or ear and lodge itself in the mind" (see judgment p. 738 G - H) and referred in this connection to Policansky's case, supra, at pp. 90 - 1.

I agree with the Court a quo's finding as to a secondary meaning. It may well be, as argued by appellants' counsel, that there is a difference between establishing reputation and proving a secondary meaning, though the latter would seem to include the former. Nevertheless, if one adapts the definition of secondary meaning given in Policansky's case, at p. 103 (quoted above) to the case of a business name (as distinct from merchandise), it seems to me that the evidence does establish as a matter of probability that the name Boswell has become distinctive of the circus run by respondent and the circus run by respondent has become universally known to circus-goers as "Boswell's Circus". It is not necessary for me to canvass

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the facts in great detail. I would merely refer in particular to the evidence that the circus and its predecessor have been associated for more than seventy years with the name Boswell; that this name has always featured prominently in relation to the circus even after the Boswell family ceased to be connected with the circus; and that at the time of the amalgamation a substantial sum was paid for the goodwill attaching to the name Boswell and the Boswell name was deliberately given priority to Wilkie in the combined name. In addition, there is evidence from individuals, such as Buitendag, Buitenbos and Palmer, who had business dealings with respondent and deposed to having always associated the name Boswell with the circus run by respondent.

As to the evidence consisting of invoices, receipts, delivery notes, etc, this was adduced in substantiation of the averment by Whilma Wilkie, in his replying

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affidavit, that the public commonly refer to respondent's circus as "Boswell's Circus". An application to strike out these documents was not proceeded with in the Court below (judgment p 738 H). I am not sure that Policansky's case, where the state of mind of the persons who wrote the letters was important on the issue as to confusion, is necessarily relevant authority in the present case where the documents are put in merely to substantiate Wilkie's averment that respondent's business is commonly called "Boswell's Circus", whatever the reasons for that may be, but I shall accept in appellants' favour that the Judge a quo ought not to have had regard to this evidence. Nevertheless, it is clear from the concluding sentence on p 738 of the judgment that DIDCOTT J would have come to the same conclusion without this evidence. And, in my opinion, having regard to the remaining evidence, he would have been justified in so doing. Appellant's argument in

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regard to secondary meaning must accordingly fail.

The next question is whether appellants' use of the name "Brian Boswell Circus" is reasonably likely to confuse or deceive ordinary members of the public, or a substantial section thereof, into believing that appellants' circus is that of the respondent, or is connected with respondent's circus. DIDCOTT J went fully into the matter and answered this question in the affirmative (see judgment p 739 A - 741 H). Appellants' counsel argued that he ought to have answered the question in the negative. I cannot agree. I do not propose to deal in detail with this issue. Were I to do so I would, to a large extent, simply be repeating what was said by DIDCOTT J. I would merely emphasize (i) that respondent's circus is popularly known as Boswell's Circus, (ii) that a circus associated with this name (which has indeed acquired a secondary meaning) has been operating in South Africa

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for about 70 years, and (iii) that appellants' circus will operate in areas which are normally visited by respondent's circus. It is true that appellants have not called their circus "Boswell's Circus". Had they done so, the issue of deception and/or confusion would have been unarguable from appellants' point of view. But I do not think that the prefixing of the first name "Brian" sufficiently distinguishes appellants' circus from respondent so as to prevent deception and/or confusion. The dominant feature of the name adopted by appellants is the word "Boswell" and I agree with DIDCOTT J (see judgment, p 739 G-H) that colloquially appellants' circus is likely to become known to at least a substantial segment of the circus-going public as "Boswell's Circus", if it is permitted to carry on business under its present name. In support of respondent's case on this aspect of the matter Wilkie referred in the founding affidavit to confusion that had already taken place between respondent's circus and the

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lion park and animal farm run by second appellant under his own name. (And supporting affidavits were filed in substantiation of this.) In his opposing affidavit second appellant stated, with reference to allegations relating to confusion, the following:

"..... I am unable to comment on these other than to say that it may be possible that some confusion may take place but that I believe that this is not a sufficient ground to prevent me from trading under my own name, particularly where care has been taken to present different images of the two circuses."

This statement goes a long way towards admitting the reasonable likelihood of confusion; and it is significant that second appellant does not suggest that the prefixing of the name "Brian" will clearly distinguish the two circuses. In my opinion the respondent established the reasonable likelihood of deception and/or confusion.

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It was submitted by appellants' counsel that, in the event of there being a likelihood of deception and/or confusion, all that the law requires appellants to do is to take reasonable steps to avoid such deception and/or confusion — no matter whether such steps are successful or not — and that appellants have taken such reasonable steps. Apart from the difference in name (discussed above), the steps which second appellant says have been taken are (i) the use of different colour combinations for appellants' circus vehicles and circus tent and (ii) the practice of announcing at circus performances that appellants' circus is in no way connected with "any other circus which is currently touring South Africa".

I agree with DIDCOTT J (see judgment p. 741 C-E) that these measures are not likely to have much effect. I am not convinced that the ordinary member of the public would be so conversant with colour schemes as to notice the difference; nor do I see why he should not merely conclude that respondent had changed the colours of

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its vehicles and circus tent. The announcement seems to me to be somewhat ambiguous, but in any event, as DIDCOTT J rightly comments, by that stage the spectators have bought their tickets and are seated - their custom has been diverted.

The submission that in circumstances such as these all that the appellants need do is to take reasonable steps to obviate deception and/or confusion - irrespective of the success of these steps - is in my opinion without substance. In Policansky's case, supra, at pp 103 in fine (quoted above) WESSELS CJ stated that where a business name has acquired a secondary meaning another person "cannot use that name in connection with a similar class of goods unless he makes it perfectly clear to the public that he is not selling the goods of the original manufacturer" (my italics). Translated to the facts of this case, this means that appellants cannot use the name Boswell in / connection.....

connection with its circus business unless they make it perfectly clear to the circus-going public that their circus is not that of the respondent and is not connected with respondent's circus. In my opinion, any disclaimer or other steps taken to thus enlighten the public must be sufficient to eliminate the likelihood of deception or confusion. In England the approach is, I believe, the same. The usual formula used in qualified injunctions is that the defendant is forbidden from using the disputed name or mark "without clearly distinguishing" his merchandise or business from that of the plaintiff (see eg. Reddaway v Banham 1896 AC 199, at p 222; F Reddaway & Co Ltd v Ahlers (1902) RPC 12, 16; F Reddaway & Co Ltd v Frictionless Engine Packing Company Ltd (1902) 19 RPC 505; Daniel and Arter v Whitehouse and Everall (1898) 16 RPC 71, 75-6; Parker-Knoll Ltd v Knoll International Ltd (1902) RPC 243, at pp. 247, 248, 258). In the United States

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of America it is established that a personal or family name may, by usage, acquire a secondary or trade meaning denoting the goods or business of a particular individual so as to entitle the user to protection against any unfair or piratical use thereof by another; and where a family name has been adopted and become established as a trade name, a later use of the same or a similar name must use "such means or precautions as are necessary" in order to distinguish his goods or business from those of the former (see 74 American Jurisprudence pp. 775-6 and supplement pp.95-6).

For these reasons I am not satisfied that the steps hitherto taken by appellants to avoid deception and/or confusion are likely to be effective. They, therefore, do not absolve appellants from legal liability.

Finally, appellants' counsel criticized paragraphs 2, 3 and 4 of the order of the Court a quo and submitted

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that the Court ought simply to have given a qualified interdict, using the formula "without clearly distinguishing". I think that there is substance in this criticism. In terms of the order of the Court a quo appellants are interdicted in absolute terms from using the name Boswell in relation to their circus business. Should they hit upon a form of disclaimer or other precaution which would effectively distinguish their circus from that of the respondent they will not be entitled to resume the use of the name Boswell without a further application to Court. This seems to me to place an undue burden on the appellants. In such circumstances they should be free to act without a fresh court order. Naturally, if they do proceed to use the name Boswell, they run the risk that the disclaimer or other precaution will prove, in law, to be ineffective; but that is their concern. They should at least have the freedom to devise what they can so that second appellant can trade under his own name with impunity.

/ I accordingly.....

I accordingly think that a qualified interdict would be the appropriate order. (Cf. the form of order granted in the English cases referred to above.) This alteration to the order of the Court a quo should not affect the costs of the appeal. This much was conceded by appellants' counsel.

It is accordingly ordered as follows:

- (1) Subject to the alteration to the Order of the Court a quo set forth in par. (2) of this order, the appeal is dismissed.
- (2) The Order of the Court a quo is altered to read:

"1. The respondents are, and each of them is, interdicted from operating the business of a circus, and from presenting or promoting any circus performance, under the name Boswell or any name of which Boswell is a part, without clearly distinguishing their circus or performance from the circus of the applicant.

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2. The respondents are ordered jointly and severally to pay the costs of the present proceedings, including those the applicant has incurred by employing the services of two counsel, but not including any of which Mr Justice Thirion has disposed already."
- (3) Appellants shall pay the costs of the appeal, including the costs of two counsel.
- (4) It is recorded that the application by appellants for condonation has been granted. Appellants (applicants) shall pay the costs of this application.

M M Corbett.

MILLER	JA)	
VAN HEERDEN	JA)	
GALGUT	AJA)	CONCUR.
NICHOLAS	AJA)	