

SOUTH AFRICA / JUDGMENT

**Reckitt & Colman SA (Pty) Ltd v S C
Johnson & Son SA (Pty) Ltd (203/90)
[1991] ZASCA 181; 1993 (2) SA 307 (AD);
[1993] 1 All SA 27 (A) (28 November 1991)
[1991] ZASCA 181**

COURT

Supreme Court of Appeal

BEFORE

Corbett, Nestadt, Vivier, Goldstone, Harms

CASE / FILE NUMBER

203/90

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

CASE NUMBER: 203/90 In the appeal of:

RECKITT & COLMAN SA (PTY) LTD APPELLANT and S C JOHNSON & SON SA (PTY) LTD
RESPONDENT

Coram: CORBETT CJ, NESTADT, VIVIER, GOLDSTONE JJA et HARMS AJA.

Date heard: 1 November 1991 Date delivered: 28 November 1991

2 JUDGMENT

HARMS AJA:

Brasso, a metal polish manufactured and marketed by the appellant, is a product known in practically every household in this country. "To Brasso" forms part of the vocabulary of every soldier, national serviceman and domestic servant. Brasso is sold under a distinctive get-up in metal containers of three sizes namely 125, 250 and 500 ml and until March 1987 monopolised the market for metal polishes. Brillo is also a well-known trade mark which has been used since about 1948 in connection with scouring pads. In order to capitalise on the reputation of the Brillo brand name the respondent, during the latter half of the 1980's, began to extend the Brillo product range. It introduced a floor cleaner and an oven cleaner. But when it began to market a Brillo brass polish the appellant perceived a threat to Brasso. The appellant was especially irked by the fact that the respondent consciously adopted the identical type of container used by the appellant not only for Brasso but also for its Silvo (a silver polish) and Zebo (a stove polish).

The upshot was that the appellant applied to the Transvaal Provincial Division, on notice of motion, for a final interdict restraining the marketing of the Brillo brass polish in the then current get-up on three grounds:

- (a) Passing off, in that it alleged that the respondent had entered the metal polish market with the deliberate intention of passing off its Brillo product as that of the appellant's Brasso;

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- (b) a contravention of the provisions of sections 6 and 7 of the Merchandise Marks Act no 17 of 1941. The allegation was that the respondent's use of the trade mark Brillo was without the assent of the trade mark owner; it therefore, allegedly, falsely applied a third party's trade mark to its goods; (c) a contravention of the provisions of section 9(a) and (b) of the Trade Practices Act no 76 of 1976. Its case was that a legend "Working Hard 75 Years" on the Brillo container was in a material respect false.

The court a quo (per Heyns J) dismissed the application with costs but subsequently granted leave to appeal to this Court. It is common cause that as far as factual disputes are concerned, the case has to be decided according to the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁵ [1984] ZASCA 51; 1984 (3) SA 623 (A) 634 E - 635 D.

Brasso was introduced to the South African market during 1904 and the name has been registered as a trade mark since 1926. Although it is a relatively slow selling product, over the years 1985 - 6, approximately 2 000 000 tins were sold annually. As indicated, it held a virtual monopoly in the metal polish field. It may be mentioned in passing that it is sold in 70 countries and that South Africa is its third largest market. The trade mark Brasso has always been used in conjunction with what will be referred to as a "sun-ray" device, ie broad rays expanding from a central point. The sun-ray device was modernised from time to time but it retained its essential features. During 1973 a new trade mark was registered consisting of the word mark Brasso and, thereunder, in combination, a sun-ray device consisting of twelve emitting rays which end in a rectangular shape. It was registered in connection with substances and preparations for cleaning and polishing. The mark appears⁶ in the following form on the trade marks register: See Original Judgement Image

Since then this trade mark has formed the basis of the

appellant's get-up. It appears twice on every Brasso tin, each instance covering approximately one third of the circumference of the container. The trade mark registration is not limited as to colour but the colours used are red for the name and also for the right hand half of the sun-ray device. The other half of the device is blue and everything is set against a white background. The name and the sun-ray device are separated by a description of the contents of the container viz "metal polish" or "metaalpolitoer", also in blue. A small Reckitt trade mark, consisting of an R in a distinctive script and the name Reckitt, appears in blue above the last letter of the name Brasso. Below the sun-ray⁷ device there is written in red "BRINGS OUT THE TRUE BEAUTY OF COPPER AND BRASS" or "BRING DIE WARE PRAG VAN KOPER NA VORE". Between the two Brasso trade

marks there is, in blue, descriptive matter such as directions for use, the name and address of the manufacturer as well as a bar code.

The Brillo brass polish is not only sold in containers of identical shape but also identical sizes. The tins are in fact supplied by the same manufacturer. It was introduced to the market during March 1987 and is somewhat lower priced than Brasso. As part of the respondent's market strategy it requested retailers (especially supermarkets) to allocate to Brillo equal shelf space in the immediate proximity of Brasso. On the Brillo tin the additional trade mark Johnson appears in red and, thereunder, at an angle, the name Brillo: its "i" and "o" are in red and the other letters in blue. As in the case of Brasso, the background is white. A yellow oval "hat" caps the "B" of Brillo and contains the legend "Working Hard 75 Years". Below the trade mark Brillo the words "brass polish" appear in blue capitals. The lower half contains a shooting star which has a large whitish round centre with a yellow rim. Its rays are asymmetrical and change from yellow to red. In the star the words "for a brilliant lasting shine" appear in fairly bold blue type. This get-up covers one half of the circumference of the tin and the other half contains, in red and blue, directions, a guarantee and warning as well as a bar code.

In order to assist in understanding the description of the respective get-ups, a photograph of the Brasso and Brillo tins is annexed to this

judgment.

PASSING OFF

The essential issue on the question of passing off in the present case is whether the respondent, by using the Brillo get-up in relation to a brass polish, is representing to the public that Brillo is the appellant's product (ie a deception as to trade source) or that it is connected in the course of trade with the appellant's business (ie a deception as to business connection). In both cases it must be established that the Brillo get-up was calculated to deceive. *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W) 437-438; *Cambridge Plan AG and Another v Moore and Others* 1987

- (4) SA 821 (D) 838 B. That means that there was a reasonable likelihood that members of the public would so be deceived by the representation. *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A) 929 C - D; *Brian Boswell Circus (Pty) Ltd and Another v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) 478.

In considering whether there was an imitation of the distinctive Brasso. get-up, it should be remembered that the likelihood of confusion or deception is a matter for the court and that the judgment of the court must not be surrendered to any witness. *Payton and Co Ltd v Snelling* 10 *Lampard and Co Ltd* [1900] 17 RPC 628, 635; *AG Spalding & Bros v A W Gamage Ltd* [1915] 32 RPC 273, 286-8; *Parker-Knoll Ltd v Knoll International Ltd* [1962] RPC 265 (HL) 291-2. The evidence of the psychologists and linguistic experts tendered in this regard was singularly unhelpful, if not inadmissible, because as is so often the case, in the final analysis it tended to disguise opinion as a statement of scientific principle or fact and attempted subtly to displace the court's value

judgment with that of the witness.

A rule of long standing requires that the class of persons who are likely to be the purchasers of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception. In *American Chewing Products Corp v American Chicle Co* 1948 (2) SA 736 (A) 743-4 regard was had to the fact that addicts of the gum chewing habit included a large number of children and illiterates and in *William Edge and Sons Ltd v William Niccolls and Sons*

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Ltd [1911] 28 RPC 582 (HL) 593 the probability of confusion

amongst illiterate washerwomen, who were said to be the main purchasers, was considered. It is not surprising that the racial and cultural diversity to be found in this country has been referred to in the evidence. It was pointed out that blacks and whites present different customer profiles and that there are many members of the public who are, in differing degrees, illiterate. One of the greatest problems facing illiterate persons is their inability to cope as consumers. It was, in effect, submitted that in the light of these facts and the fact that illiterates purchase metal polishes, a court should demand of a competitor such as the respondent that it takes additional steps to attain a higher level of distinctiveness in order to prevent the possibility of confusion or deception than would otherwise have been necessary.

The problem in this case is, however, that it is not possible to classify the consumers of these products because¹² they are purchased by members of all sectors of the population irrespective of race, or level of literacy or sophistication. The notional consumer is therefore as elusive as the reasonable man and it is unlikely that he will be found on any suburban bus. The fact of the matter remains that at least some members of the purchasing public are illiterate and that fact cannot be ignored. But, as was pointed out by counsel for the respondent, the fact that a person is illiterate does not mean that he lacks cognitive powers. It may be that the typical illiterate purchaser is a more careful purchaser because he has adapted to his social disability and cannot afford to err. There is evidence that tends to affirm this. However, we do not know from the evidence how illiterate people distinguish between goods with different names (assuming all other things to be equal). In *Greenblatt v Hirschson* 1958 (4) SA 371 (A) 375 B - C it was said by Schreiner ACJ that

"[i]f a person is not able to read he could hardly be deceived by the facts that each [of the trade marks in

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question] starts with the letter R and that there are other letters in common. For an illiterate man would not ordinarily regard words as pictures and buy his goods by the shape of the words on their labels, and we are not here concerned with words printed in an unusual type."

Whether that statement was based upon the evidence presented in that case or upon the learned Judge's own assessment of how illiterates cope, is not clear. Speaking for myself, I am unable to state whether an illiterate person does or does not ordinarily regard a word as a picture. I also do not know whether for him there would be an obvious difference in appearance between the words Brasso and Brillo. Professor Lass, a professor of linguistics, stated in his affidavit on behalf of the appellant that, given the names Brillo and Brasso in their entirety, he was of the opinion that the likelihood of confusion between the respective brand names is fairly small unless the shopper were totally illiterate and non-observant. [My emphasis]. The evidence in any event does not establish that the totally illiterate form a substantial portion of the purchasers of this product.

In the Greenblatt case at 376 A - B it was also said that the ordinary illiterate buyer must be taken to be a person who at least knows that articles have different names and that when he wants an article with a particular name he should ask for it by that name with such clearness of diction that he can command to prevent him purchasing the incorrect article. The problem unfortunately is that under present-day conditions, these articles are normally purchased in a supermarket where there is little occasion for a purchaser to request the product he wishes to purchase. The buyer, unassisted, must make his own choice. But assuming that the illiterate would have regard to pictures on labels (as was the case in *R Johnston and Co v Archibald Orr Ewing and Co* [1882] 7 App Cas 219 (HL) 225-6) he would probably have regard to the sun-ray device on the one hand and, on the other, the shooting star device in order to assist him in distinguishing the two products.¹⁵ They bear no resemblance to each other. In any event, I do not believe that a court should, in this context, be left to speculate. Evidence of actual confusion would have been of especial value. In this case the appellant did have the opportunity to present such evidence (if it existed) in view of the fact that Brillo brass polish had been introduced some 21 months before the launch of the present proceedings and nearly two years and seven months before the filing of the last affidavit therein. See Webster and Page, *South African Law of Trade Marks* 3 ed p 437-8; Wadlow, *The Law of Passing-Off* p462. Such evidence as is on record, on the contrary, does show that approximately two percent only of a sample of consumers representative of the black community was unable to distinguish Brasso from Brillo. White consumers did slightly better. This would, at least prima facie, show that the ability to distinguish Brasso and Brillo has little, if anything, to do with race or literacy.

In assessing whether there is a likelihood of deception or¹⁶ confusion it is necessary to consider the whole get-up of the appellant and the whole get-up of the respondent (*Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 240 D; Webster and Page, *op cit*, 431-2; *Schweppes Ltd v Gibbens* [1905] 22 RPC 601 (HL) 607) but it is difficult to do this exercise without having regard to its individual parts.

Although the appellant does not claim any monopoly in the containers used, it was repeatedly stressed during argument that the fact that Brillo is sold in the same containers as Brasso would inevitably lead to confusion and deception. It was said that in the mind of the public the contents of such shaped containers are linked to the appellant. This submission was based on the fact that

as at the date when Brillo brass polish was introduced in the market place, these tins were being used exclusively by the appellant for its Brasso, Silvo and Zebo. In view of the fact that the get-up of these three products respectively differ¹⁷ substantially from each other, it is not surprising that no evidence was produced to the effect that in the public mind they have a common source. Cf Adcock-Ingram Products case, *supra*, 438 E - F. It was also not suggested that the notional purchaser identified Brasso with reference only to the shape of the container. It is a fact that purchasers of ordinary household goods know that similar goods having different origins often have similar containers. Classic examples are toothpaste tubes and shoe or floor polishes. The appellant's case is therefore clearly distinguishable from a case such as F Hoffman-la Roche and Co AG and Another v DDSA Pharmaceuticals Ltd 1969 FSR 410 (CA). That case was concerned with the passing off of capsules. The applicant's capsules had two distinctive colours but the name of the product was hardly legible on the capsules. It was found that the shape and colours of the capsules were so distinctive that the notional customer would not have had regard to the name of the product but to the colour and shape only. See also Reckitt and Colman Products Ltd v18 IBorden Inc 1987 F5R 505 (Ch D)[1990] UKHL 12; ; 1988 FSR 601 (CA); 1990 RPC 341 (HL);

[1990] 1 All ER 873 (HL); Adcock Ingram Products case, *supra*, 437 C - E. The notional purchaser, in the present case, might have ended up with a stove or silver polish had he been careless enough to attempt to buy Brasso with reference to the shape of the container only. I am therefore of the view that, in considering the question in issue, the fact that the two products are sold in identical containers is of little significance.

Some reliance was also placed on the descriptive matter which appears on the respective containers and comparisons were drawn. I am of the view that the notional purchaser when selecting his product would not have any regard to such matter because it is not distinctive.

Reliance was also placed on the respondent's expressed intention to compete head-on with Brasso and its conscious choice of the Brasso-type tins. It was submitted that the

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respondent had entered the market with the deliberate intention of passing off its product as Brasso and that a court, under those circumstances, should not be astute to find that the respondent had not achieved its object. Cf Greenblatt case, *supra*, at 376 D - E. Whether this reasoning begs the question need not now be decided. See John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd 1977 (3) SA 144 (T) 157 H - 158 A; Parker-Knoll Ltd case *supra*, 290; Webster and Page, *op cit*, p437; Wadlow, *op cit*, p156. The respondent's intention in this case was to compete and an intention to compete must not be confused with an intention to deceive. The choice of the Brasso-type containers, in the light of the belief of the respondent that these containers had become generic and that the public had come to expect metal polish to be sold in containers of that general shape, was not fraudulent.

That brings me to the real issue and that is the essence of the appellant's get-up. I am of the view that what does

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catch the eye and what is imprinted on the mind is the white colour of the container, the Brasso name in red, and the sun-ray device in blue and red. The essence of the Brillo get-up is the Brillo name in blue and red, the shooting star with yellow as its dominant colour, all against a white background. It is not without significance to note that the appellant does not rely on trade mark infringement. It accepts that the word marks Brillo and Brasso are not confusingly similar. It is also not the appellant's case that the 1973 Brasso trade mark has been infringed. In other words, it is not said that the Brillo name in conjunction with the star device is confusingly similar to the Brasso name in conjunction with the sun-ray motif. In view of the fact that in 1973 the Brasso trade mark formed the dominant feature of the appellant's get-up, it is difficult to conceive how, on the facts of this case, the appellant can nevertheless allege passing off. The white background, in my view, cannot be a cause of confusion. It must be pointed out that the Brillo colours and the Brillo21 script on the white background has formed part of respondent's reputation in the field of household cleaners since that general get-up had been used, prior to the introduction of the brass polish, on other Brillo products.

To conclude this aspect of the case: I am of the view that there is not a reasonable likelihood of confusion between the Brasso and Brillo polishes because each container is clearly marked with the respective trademarks which are not deceptively or confusingly similar and, in addition, the prominent design marks are not only distinctly different in shape but also in colour.

The appellant did not, however, limit its case to an imitation of its get-up but it relied, presumably in the alternative, on a submission that the public is being deceived into believing that there is some or other business connection between the two products. In order to understand

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this submission, it is convenient to refer to the survey evidence which was tendered in support thereof. The appellant commissioned a marketing research firm, Markinor (Pty) Ltd, to conduct a market survey in order (as was stated in the founding papers) to "ascertain whether there is a likelihood of confusion between Brasso metal polish and Brillo brass polish from the viewpoint of a prospective purchaser in the market place." In reply, however, the same deponent, Green, stated that the "purpose of the survey was to establish whether or not the interviewees consider that both products emanate or are associated or are connected with the same manufacturer." According to the appellant, the survey did in fact establish that a considerable proportion of the public does have a belief that the two products are associated with the same manufacturer.

The market survey was conducted by means of a questionnaire put to 300 interviewees at major retail outlets in the Pretoria-Witwatersrand-Vereeniging area. The following

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questions were put:

- (1) "Please tell me which brand/s of metal polish you have bought in the past 12 months?" (2)
 "The last time you bought metal polish which brand did
 you buy?"
- (3) (Pointing to Brillo and Brasso 250 ml tins) "Please show me which of these brands of polish,
 if any, you bought the last time you bought metal polish?"
- (4) "Do you think that these metal polishes are made by the same company or by different
 companies?" or
- (5) "Do you think these metal polishes are made by different companies or by the same
 company?"
- (6) "Why do you say that?"

Of the 160 white persons questioned, 38 answered questions numbers 4 and 5 by saying that they thought that they were made by the same company, 88 thought that they were made by different companies and 34 did not know or were not sure.²⁴ Of the 140 black persons, 62 answered the same company, 78 answered different companies and there were no doubtfuls. It should immediately be noted that a substantial number of those who said the same company gave spurious answers to the last question such as that both names start with a capital B or that they are from the same company "because they are from the same company". That indicates immediately that there was something wrong with the questions. It is unfortunate that the deponent, who conducted the survey, did not heed the warning of *Nicholas AJA in Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (In liquidation)* and Another 1987 (2) SA 600 (A) 617-620 where the learned Judge dealt with another survey conducted by the same firm. More particularly, it was there stated that the questions should be fair and should be so formulated that they preclude a weighted or conditioned response. *Whitford J in Imperial Group PLC and Another v Philip Morris Ltd and Another*

[1984] RPC 293 (ChD) 303 stated that survey evidence may be admissible provided inter alia the questions are not

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leading questions and, in addition, they should not lead the person answering into a field of speculation he would never have embarked upon had the question not been put. Questions 4, 5 and 6 fall foul of this requirement. There is nothing to suggest that the interviewees, prior to the questions being put to them, ever considered the issue. Once the question was put, they began to speculate and their speculation led, as said, in a substantial number of instances, to nonsensical answers. It is also common knowledge that if a question is put to any given number of persons, and answers are suggested, one of which is ridiculous, a substantial number will choose that answer -it may be on the supposition that truth is often stranger than fiction. That misconceptions as to origin do exist without any passing off appears from the evidence that a large percentage of consumers have, in another survey, described Rondo as a kind of Rama

margarine and have said that Aquafresh is Colgate toothpaste. The law of passing off is not designed to provide protection against such

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misconceptions or the tendency to elevate certain brand names to generics, ie to name a product by the trade mark of the first of its kind. Cf Hoechst case at 619 D - F; Morcom, Survey Evidence in Trade Mark Proceedings, 1984 European Intellectual Property Review, p6.

It follows that (without making any findings as to admissibility) no weight can be attached to the answers given in the survey to questions 4, 5 and 6. In any event, I find it difficult to believe that anyone who knows he is not buying Brasso when buying Brillo, buys Brillo because of some belief, not induced by a misrepresentation, that the manufacturer of Brasso had decided to market the same polish under another trade mark or get up. It has been said that it is notorious that producers from time to time change the format of their get-ups while retaining their essential features. Cambridge Plan case, supra, 838 G. But that does not mean that there is any reason to presume that the same manufacturer would market the same product simultaneously²⁷ under different names or get-ups. Where parties are involved in the same activity and there is no product confusion (as has already been found) there can be little, if any room, as a matter of logic, for holding that business connection confusion is nevertheless possible. The typical case of business connection confusion is to be found where the same or a confusingly similar mark or get-up is used on different goods or services and not on the same goods or services. Wadlow, op cit, p 224-231; Holiday Inns case, supra, 931; Hollywood Curl (Pty) Ltd and Another v Twins Products (Pty) Ltd (1) 1989 (1) SA 236 (A) 251 G; Lego Systems AS v Lego M Lemelstrich Ltd (1983) FSR 155 (ChD).

It follows from the foregoing that I am of the view that the court a quo was correct in dismissing the claim based upon passing off.²⁸ MERCHANDISE MARKS ACT NO 17 OF 1941

Any-one who falsely applies a trade mark to goods or sells goods to which a trade mark is falsely applied commits an offence. Sections 6(b) and 7. A person is deemed falsely to apply a trade mark to goods if it is applied without the assent of the registered proprietor of that trade mark. Section 2(4).

It is common cause that when the present proceedings were launched the respondent was applying the registered trade mark Brillo to its goods; it sold such goods; the registered proprietor of the trade mark was Armour International Corporation of Phoenix, Arizona; and the respondent was not a registered user of the trade mark. From these facts the appellant, in its founding papers, concluded that the respondent was using the trade mark Brillo without the assent of the trade mark owner. That conclusion is an obvious non sequitur because the "assent" referred to

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in section 2(4) need not be by way of recordal in the trade marks office or in writing; it may even be by implication. In any event, the appellant applied for an interdict preventing the respondent from using the trade mark Brillo in contravention of the quoted statutory prohibition. During the course of the proceedings in the court a quo the respondent became a duly registered user of the trade mark. The right to an interdict accordingly fell away and the issue has been kept alive for purposes of costs only.

The appellant's locus standi to obtain relief on this leg of its case is in dispute because, it is said, the appellant is not the trade mark owner and the right to apply for an interdict under the present circumstances is reserved to the trade mark owner.

It has long been accepted that this Act was not only enacted for the protection of the general public but also of

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merchants and manufacturers. A merchant or manufacturer may have locus standi to prevent a contravention in accordance with the principles laid down in *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87, 94 namely that "where the Legislature prohibits the doing of an act in the interest of any person or class of persons, such person or any one of such class can obtain the intervention of the Court to enforce the prohibition without proof of special damage". *Sheffield Electro-Plating and Enamelling Works Ltd v Metal Signs and Nameplates (Pty) Ltd and Another* 1949

- (1) SA 1034 (W) 1037-8; *Tobler v Durban Confectionery Works (Pty) Ltd* 1965 (4) SA 497 (C); *Monis Wineries Ltd v Mouton* 1966 (2) SA 89 (SWA); *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd and Others* 1990 (4) SA 136 (D). These four cases dealt with contraventions of section 6(e) ie the application of a false trade description. In *Tobler's* case, at 500 G, Banks J stated that it was clear that it was not any merchant or manufacturer who could approach the court and he gave as an³¹ instance that a manufacturer of farming equipment could not prevent someone from applying a false trade description to chocolate unless he can prove special damages.

As far as false application of trade marks is concerned, Banks J proceeded to state (albeit obiter):

"If the present Act was passed, as I have held to be the case, in the interest of owners of trade marks, it would only be the owner of the trade mark in question who could take steps in the event of a breach."

Berman Brothers (Pty) Ltd v Sodastream Ltd and Another 1986

- (3) SA 209 (A) was such an instance. The quoted dictum of

Banks J appears to me to be logical but it is not necessary to decide the point.

As far as the question of assent is concerned, I am in any event of the view that the appellant has not discharged its onus. As stated above, the appellant had no evidence of a lack of consent. It had to rely, in argument, on what the³² respondent had allegedly failed to say. The evidence presented by the respondent indicates that a licence agreement was entered into between the previous owner of the trade mark Brillo (Purex Corporation) and the parent company of the respondent (as licensee) on 20 March 1985. The agreement entitled the licensee to permit the use of the trade mark by any of its subsidiaries subject to certain formalities. According to the president and chief executive officer of the present trade mark owner, Armour International Company, the respondent's parent company "duly elected" to have the respondent use the Brillo marks and that Purex Corporation thereafter proceeded on the basis that the licence agreement applied to the use of the trade mark by the respondent. On 11 February 1987 the mark was assigned to Armour International Company and pursuant thereto it became the licensor and in its view the respondent had the right to use the mark. There can, therefore, be no doubt that on the respondent's version, the trade mark owner had assented, prior to the launching of the

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application, to the respondent's use of the Brillo trade mark. Any non-compliance with the terms of the licence agreement is a matter for the licensor and the licensee and cannot affect the question whether there was in fact, in the words of the statute, "assent of the registered proprietor". It follows, therefore, that the court a quo was correct in holding that, in view of the factual dispute, the appellant was not entitled to any relief on this issue.

THE TRADE PRACTICES ACT NO 76 OF 1976

As stated, the legend "Working Hard 75 Years" appears against a yellow oval background on the Brillo cans. The appellant alleges that it constitutes a false advertisement which is in conflict with the provisions of section 9 of this Act. It does fall under the definition of an "advertisement" in section 1 and the remaining issues are,³⁴ firstly, whether the appellant has, by virtue of the provisions of this Act, locus standi to apply for an interdict and, secondly, whether the advertisement is "false or misleading in material respects".

The Brillo company was originally formed in the USA during 1913 and the Brillo trade mark came into use during that year in the USA. (By the way, the original Johnson Company was formed in 1914 in the United Kingdom). The trade mark was, however, registered in South Africa for the first time during 1948 and has been in use in this country since that date. As I have said, its original application was in respect of scouring pads and it was only in 1987 that the respondent began to extend its use to brass or metal polishes. According to the respondent, it wished to emphasize the length of time for which the Brillo trade mark had been in existence and it intended to convey the true fact that the trade mark Brillo had been in existence for 75 years and the fact that it had been working hard during that

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period. There is nothing in these papers to gainsay that that was the respondent's actual

intention.

It was argued on behalf of the appellant that the legend is false in material respects because, if it refers to brass polish, the product has been on the market only since 1987; if the reference is to Brillo products in general, they have been on the South African market only for 40 years.

For purposes of this judgment I shall assume, without deciding, that the intention of the respondent is

irrelevant and that an objective test should be applied; furthermore, that for purposes of an interdict, it is not necessary to show mens rea even if the causa of the interdict is a contravention of a statutory penal provision; and, lastly, that the appellant does have locus standi. I am, however, of the view that the legend is, at best for the appellant, ambiguous. That was also the finding of the court a quo. It is capable of meaning that Brillo brass

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polish is a product that has been doing its work for the past 75 years: that would be a false statement. On the other hand, it is at least equally capable of meaning that Brillo products have been working hard for 75 years without any territorial limitation being implied. That statement, figuratively speaking, is true. This latter interpretation is not less probable than the former, especially if regard is had to the fact that the legend is part of the B of Brillo and in close proximity to the Johnson trade mark, is spatially divorced from the words "brass polish", does not purport to qualify them and that the hypothetical purchaser probably knows that there are other Brillo and Johnson household products on the market. It follows, therefore, that the appellant has failed to establish that, objectively speaking, the legend contravenes the provisions of this Act.

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ORDER

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

L T C HARMS AJA

CORBETT CJ)

NESTADT JA) CONCUR

VIVIER JA)

GOLDSTONE JA)See original Judgement Page

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