

IN THE SUPREME COURT OF NAMIBIA

In the matter between

GUIDO-DIRK GONSCHOREK

FIRST APPELLANT

PATRICK MARIA GEYSEN

SECOND APPELLANT

ASCO CAR SALES CC

**THIRD APPELLANT
FOURTH APPELLANT**

ASCO WORKSHOP CC

And

ARNDT ASMUS

FIRST RESPONDENT

CONSTANZE ASMUS

SECOND RESPONDENT

Coram: Shivute, C.J., Strydom, A.J.A., Chomba, A.J.A.

Heard on: 2007/10/10

Delivered on: 2008/04/15

APPEAL JUDGMENT

[1] **STRYDOM, AJA:** Some 15 years ago the two respondents started a business known as Asco Car Hire whereby 4 x 4 vehicles were rented out to people who wished

to travel in Namibia. It was mostly tourists who made use of the facilities provided by the business. This business soon branched off into two further entities namely Asco Panelbeaters and Asco Motors. The latter two businesses complimented Asco Car Hire in that they were engaged in the panel beating and spray painting and other related repairs to and in respect of motor vehicles and were engaged in the repair and service of motorvehicles as well as the sale of second hand motor vehicles.

[2] As such Asco Panelbeaters and Asco Motors were able to look after the fleet of vehicles of Asco Car Hire but, according to the respondents, both businesses also engaged in private work not only related to that of Asco Car Hire. Two further businesses, also bearing the "ASCO" name, were also founded by the respondents, namely Asco Properties CC and Asco Yacht Charter (Pty) Ltd.

[3] At the time second respondent was the owner of Asco Car Hire, which was described by the respondents as one of the leading car rental companies in Namibia.

[4] The above business entities conducted business in the form of partnerships or by way of companies or close corporations in which either or both of the respondents have or had an interest either in the form of sole proprietorships, partnerships, close corporations or companies.

[5] All these businesses bear the name "ASCO" as part of their names which, so it was alleged by the respondents, is an acronym consisting of the first two letters of their surname "(AS)MUS" and the first two letters of the second respondent's first name, namely "(CO)NSTANZE".

[6] However, during the latter half of 2000 an agreement of sale was concluded between the second respondent and the first and second appellants in terms whereof the second

respondent sold Asco Car Hire to the appellants as a going concern, and in terms whereof most of the assets of Asco Panelbeaters and Asco Motors were also sold by the respondents to the appellants.

[7] The agreement of sale, attached as Annexure "AAI", provided in clause 3.2.1, that the goodwill of the business, Asco Car Hire, would specifically include the name Asco Car Hire. In regard to the other two businesses the respondents pointed out that they were not sold as going concerns and that the sale of the assets did also not include the names of the businesses.

[8] First respondent alleged that both remaining businesses were still in existence. Asco Panelbeaters was dormant but it was envisaged that it would again re-commence its trading during 2006. It remained in existence in that it was then still registered for taxation and VAT purposes.

[9] Asco Motors, which was started some years ago, continued to do business, according to the first respondent, and has grown into a large and successful concern with its main activity the trading of second hand motor vehicles. It is alleged that its turnover for the financial year, ending February 2005, was some N\$ 1 million. No financial statements could be prepared as the bookkeeper, a Mr. Walters, had passed away before finalising the accounts.

[10] Towards the end of 2004 first respondent became aware that the appellants were conducting business under the name and style of Asco Car Sales and Asco Workshop. To this extent an advertisement appeared in the German daily newspaper, circulating in Namibia, the *Allgemeine Zeitung*, in which the business Asco Car Sales was advertised. See Annexure "AA3".

[11] Negotiations, during February 2005, between the first respondent and the first appellant to solve the dispute, were unsuccessful. First respondent stated that it was the stance of the first appellant that he not only bought the name Asco Car Hire but that he legally has the sole right to use the name ASCO.

[12] Correspondence between the legal practitioner of the respondents and the appellants, and their legal practitioner, was also not successful in solving the dispute.

[13] Early, i.e. during 2005 as later explained by first respondent, he became aware that two close corporations were registered by the first and second appellants in which they each held a 50% share. The names of these corporations were Asco Car Sales CC and Asco Workshop CC.

[14] In terms of sec 20(2)(a) of the Close Corporations Act, Act 26 of 1988, (the Act), the respondents then filed objections to the names with the Registrar of Close Corporations. This did not have the necessary effect and it was later established that the objections were defective as they did not comply with the provisions of the subsection.

[15] As a result the respondents then launched the present application in which they claimed an order:

"1. Directing third and fourth respondents to change their names in terms of section 20(2)(b) of the Close Corporations Act, Act No 26 of 1988 (as amended by section 12 of Act 8 of 1994) within a period of 30 (thirty) days from date of the order of the above Honourable Court, alternatively within such period as the above Honourable Court may direct.

2. Directing first and second respondents to give effect to the order set out in prayer 1 above.

3. Interdicting, prohibiting and restraining first, second, third and fourth respondents from:

3.1 Using, trading under, adopting or imitating the name "Asco" either as part of a business or trade

name or in any other manner, other than trading under the name and style of fifth respondent or the name and style of "Asco Car Hire".

3.2 Applying the name "Asco" to any business or product other than the business of fifth respondent or the business known as "Asco Car Hire", so as to prevent first to fourth respondents from passing off their businesses as that of applicants or to be connected in the course of trade with applicants or to infringe upon the copyright of applicants to and in respect of the name "Asco".

4. That the costs of this application be paid by first to fourth respondents jointly and severally, the one paying the other to be absolved on the scale as between attorney and client.
5. Costs against such other respondents only in the event of them opposing this application.
6. Further and/or alternative relief."

[16] When the application was filed the fifth and sixth respondents were Asco Car Hire CC and the Registrar of Close Corporations. However, no relief was claimed against them, save an order for costs, if they should oppose the application. Otherwise they were cited only for the interest they might have had in the outcome of the application. They

did not oppose the application and hence no order was made against them.

[17] The respondents were successful in the Court *a quo* and they obtained an order as prayed for in the Notice of Motion. First to fourth appellants were not satisfied with this outcome and they appealed against the whole Judgment and Orders handed down by the Court *a quo*. Dr. Henning, SC, with him Mr. Dicks, appeared on behalf of the appellants and Mr. Tötemeyer appeared on behalf of the respondents.

[18] Various applications for condonation were filed by both parties and also an application, on behalf of the appellants, to file further affidavits. This latter application was withdrawn and costs were tendered. It follows that the respondents are entitled to an order for costs up to the date when the matter was withdrawn. An application to condone the late filing of security in terms of Rule 8(3) was not opposed by the

respondents and was granted by this Court and the appellants were ordered to pay the costs of the application.

[19] The application for condonation by the respondents concerns a point taken by counsel for the appellants and of which notice was given in the Heads of Argument filed on behalf of the appellants. The issues raised in this regard were:

1. That the replying affidavit of first respondent in the Court *a quo* was not attested by a commissioner of oaths as prescribed by regulation GN R1258 of 21st July 1972; and
2. That the confirmatory affidavit of the second respondent in the Court *a quo* (see record, vol.1 p. 71) was undated. This constituted non-compliance with

regulation 4(1) of the abovementioned regulations which require that the date of taking the oath and declaration should be stated.

[20] It now seems that the confirmatory affidavit of the legal practitioner of the respondents was likewise not dated and consequently the Court was asked to also condone this omission.

[21] Affidavits to support the application for condonation were filed. In regard to the two affidavits which were not properly dated the deponents stated the date on which they appeared before the Commissioner of Oaths, who then completed the necessary declarations. In regard to the replying affidavit of the first respondent where the declaration by the Commissioner of Oaths did not contain the particulars as required by regulation 4(1), an affidavit was filed by the Commissioner from which it is clear that she is a legal practitioner and *ex officio* a Commissioner of Oaths.

[22] Dr. Henning contended that the Court could not receive the above evidence in view of the provisions of sec. 19(a) of the Supreme Court Act, Act No. 15 of 1990. That section provides as follows:

“The Supreme Court shall have power-

- (a) on the hearing of any appeal to receive further evidence, either orally or by deposition before a person appointed by the court.....”

[23] Counsel submitted that the application for condonation by the respondents was not covered by the above provision, which, so it was argued, is not meant to cure a defective application in another Court *ex tunc*. That Court, i.e. the Court *a quo*, heard the case and gave judgment under the illusion that non-existent facts were present.

[24] Mr. Töttemeyer pointed out that the point taken on appeal by Dr. Henning was now, on appeal, taken for the first time.

If the point was taken when the matter was heard in the High Court, the respondents could have placed evidence, by affidavit, before that Court and so cure any defects which may have existed in terms of the relevant regulations. To allow this point to be raised now would be unfair to the respondents and the Court should therefore decline to entertain this objection. Counsel referred the Court to various cases where, so it was alleged, this submission was supported. Only if this submission was not accepted by this Court would the respondents have relied on their application for condonation.

[25] From the authorities it is clear that non-compliance with the provisions of the relevant regulations, namely Government Notice R1258 of 21 July 1972, does not amount to a nullity as compliance with the regulations is directory and not peremptory. See in this regard *S v Munn*, 1973 (3) SA

734 (NCD) at 737E; *S v Msibi*, 1974 (4) SA 821 (TPA) at 829C; *Dawood v Mahomed*, 1979 (2) SA 361 (D&CLD) at 367A-E; *Cape Sheet Metal Works (Pty) Ltd v J.J. Calitz Builder (Pty) Ltd*, 1981(1) SA 697 (OPA) at 699B and *Standard Bank of South Africa Ltd And Another v Malefane and Another: In Re Malefane v Standard Bank of South Africa Ltd and Another*, 2007 (4) SA 461 (Tk) at 465A-D.

[26] A reading of the above cases shows that a Court has a discretion whether to accept or reject an affidavit not complying with the said regulations. The Court would generally accept the affidavit if it was of the opinion that there was substantial compliance with the provisions of the regulation or if evidence was placed before the Court that showed compliance with the regulations. In the latter instance the filing of further affidavits by the deponent and the Commissioner of Oaths, setting out that that which was

omitted in the first place was complied with, was allowed to cure any defect.

[27] Where a point is raised for the first time on appeal the Court will not allow it if its consideration involves unfairness to the party against whom it is directed. It would be unfair if the party against whom such point was taken, could have avoided it by e.g. amending his pleadings if the point had been taken timeously, or, where it was not clear that the point had been fully investigated, and further evidence might have been placed before the Court if the point had been taken timeously. (See Herbstein and Van Winsen: **The Civil Practice of The Supreme Court Of South Africa;** 4th Edition by van Winsen et al, page 912 -913).

[28] In *Cole v Government of the Union of South Africa*, 1910 AD 263, Innes, J, (as he then was) stated the principle as

follows on p 272:

“It does not appear, however, that plaintiff’s counsel either waived or agreed to abandon that point, he simply did not advance it, and it was not discussed. Under these circumstances, it has been suggested that the appellant should not be allowed to take advantage of the point on appeal...But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset.”

P.273:

“But where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then a Court of Appeal

will not allow the point to prevail. Because it would be manifestly unfair to the other litigant.”

[29] The principles set out in the above case were regularly followed afterwards. See *Marks Ltd v Laughton*, 1920 AD 12; *Applebee v Berkovitch*, 1951 (3) SA 236 (CPD); *Mörsner v Len*, 1992 (3) SA 626 (AA); *Greathead v SA Commercial Catering & Allied Workers Union*, 2001 (3) SA 464 (SCA) and *Carmichele v Minister of Safety and Security*, 2001(4) SA 938 (CC).

[30] Looking at all the circumstances I have no doubt that it would be manifestly unfair to allow the appellants to rely on the point now taken for the first time. This is an instance where, if the point was timeously taken, the respondents would have been able to put evidence before the Court *a quo* which would have regularised the whole situation. The point is also one which has no effect on the merits of the application and, if the Court should decline to allow it, would

not result in the perpetuating of a nullity or an illegality, and would not interfere with the duty of this Court, as an appellate tribunal “to ascertain whether the Court below came to a correct conclusion on the case submitted to it.” (Per Innes, J, in *Cole’s-case, supra*, p 272). In fact this may very well have been an instance where the Court *a quo* could have condoned non-compliance with the provisions of the regulation on the basis that there was substantial compliance. The omission of the dates on the two affidavits only concerns the specific day when the oath was administered. Both were administered in March 2006 and were in all other respects regular. Although the specific date may become relevant and important in certain circumstances in the present instance it ostensibly played no role in the adjudication of the disputes between the parties and nothing turns upon it.

[31] In regard to the non-compliance with regulation 4(2) a comparison shows that the affidavit of first respondent and that of Mr. Pfeifer, the legal practitioner of record, was sworn to before the same Commissioner of Oaths, namely Ms Bergh, on the same date and most probably on the same occasion. In the first instance she did not put her stamp, containing all the necessary particulars, on the affidavit. She did however do so on the affidavit of Mr. Pfeifer so that any person who wanted to know who the commissioner was and what her address was and in what capacity she signed as such, could gain that information from the affidavit of Mr. Pfeifer. Bearing in mind that the regulation is directory and that it could be rectified I can see no reason why a Court, in the present instance, could not use the information so obtained.

[32] Dr. Henning referred the Court to the case of *Paddock*

Motors (Pty) Ltd v Igesund, 1976 (3) SA 16 (AD), where on appeal, counsel for the appellant was allowed to argue a point abandoned in the Court below. In this case the Court *a quo* was called upon to adjudicate on a stated case and had to answer three questions of law. When the matter was argued in the Court of first instance, counsel for the plaintiff abandoned, as it transpired, incorrectly, the first question of law. On appeal counsel for appellant/plaintiff was allowed to argue the point because the facts on which the Court had to adjudicate were agreed and beyond dispute and it was found that the Court of Appeal was not bound by an order given by the Court *a quo* as a result of an abandonment of a legal contention flowing from a mistaken view of the law.

[33] It is in my opinion clear that the case of *Paddock* is distinguishable from the present case. One needs only draw attention to the fact that the stated case could not be altered

or be supplemented by further evidence so that this was clearly an instance where, had it been a new point of law, raised for the first time on appeal, the principles applied in the *Cole*–case, *supra*, would have bound the Court of Appeal to consider it and to adjudicate it. That, as I have tried to point out before, is not the position in the present case.

[34] I must point out that Dr. Henning did not appear in the Court *a quo* and how much this Court would want to reward such meticulous scrutiny of the Court documents to ensure that such documents comply with the tenets and standards that this Court requires from those practising before it, the fact of the matter is that to allow the appellants to take this point for the first time now would be manifestly unfair to the respondents and consequently the point is dismissed.

[35] A further point raised by Dr. Henning was the authority, or lack of authority, of the first respondent to act on behalf of

the second respondent. This is firstly based on the allegation by the first respondent that he was “duly authorised to depose to this affidavit, also on behalf of my wife,” Counsel referred to the South African case of *Marvanic Development (Pty) Ltd & Another v Minister of Safety and Security and Another*, 2007 (3) SA 159 (SCA) where the Court found that it was not proven nor alleged that the deponent to the affidavit was authorised to act on behalf of either appellants. See also *Ganes and Another v Telecom Namibia Ltd*, 2004 (3) SA 615 (SCA) ([2004] 2 All SA 609) where the majority of the Court concluded that authority to depose was meaningless and what should have been alleged was authority to institute the action and to prosecute it. See also *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration* 2005 NR 147 (HC).

[36] The present case can in my opinion be distinguished from the above cases. Both respondents act herein in their

personal capacity, which is different from the two mentioned cases where the legal representatives of the parties deposed to affidavits on their clients' behalf. What is more the second respondent filed a confirmatory affidavit in which she stated that she has read the affidavit of the first respondent and that she verified and confirmed the truth and correctness of the affidavit in so far as it referred to her.

[37] The first respondent needed no authority to act on his own behalf and by her affidavit the second respondent associated herself with the proceedings instituted and the prosecution thereof. If that was not so she would certainly have said so and to suggest otherwise in these circumstances would be pedantic in the extreme.

[38] Because the confirmatory affidavit of the second respondent was not properly dated Dr. Henning further submitted that it should have been ignored by the Court *a quo*

and if that is so then what was alleged by the first respondent would not have constituted proper authority to institute and prosecute the proceedings also on behalf of the second respondent. It seems on the strength of the above quoted cases that could very well have been so. However also in this regard there was no challenge to the authority of the first respondent, when the matter came before the Court *a quo*, to act for and on behalf of the second respondent. I have however dealt with this issue previously and have rejected counsel's argument concerning the alleged irregularity of the affidavit and the competence to take this point for the first time on appeal. Consequently the point cannot succeed.

[39] This brings me to the merits of the appeal. The answering affidavit of the appellants was deposed to by the first appellant who stated that he was duly authorised by the second to fourth appellants to make the statement on their

behalf.

[40] The appellants stated that they always considered the businesses Asco Car Hire, Asco Panelbeaters and Asco Motors as one business, more so because the principal business of Asco Car Hire CC, a close corporation registered by the respondents, was described as “car rental, trading in motor vehicles and accessories, spare parts, camping equipment and related matters” which was wide enough to include the trade of the other two ASCO businesses. What is more it was alleged that this change in the principal business of the CC was done by the respondents after the contract of sale was signed. Appellants therefore alleged that by the sale of the Asco Car Hire the respondents forfeited exclusive use of the name ASCO as well as their entitlement to do business under the name ASCO.

[41] Flowing from this the appellants stated that they caused

the name ASCO to be registered as a trade mark in their favour and they attached the necessary documents evidencing such application and alleged confirmation of the registration by the Registrar of Trade Marks dated 30 November 2005.

[42] Appellants alleged that in any event the business done by Asco Motors, subsequent to the conclusion of the sale agreement, was limited to a few vehicles during the financial year 2005 and was managed from the home address of the respondents. They also complained that the VAT registration and business statements, supporting the business done by Asco Motors, were not attached. They also pointed out that they bought all the assets of Asco Panelbeaters which included the tools and machinery and that they bought the workshop tools and machines of Asco Motors. The telephone and fax numbers of Asco Panelbeaters were also

transferred to them.

[43] Appellants also pointed out that the close corporation Asco Properties CC was a property holding company with property in the Republic of South Africa and that Asco Yacht Charter (Pty) Ltd possessed two sailing boats, one in the Seychelles and the other in the Caribbean. It was therefore denied that the respondents had any company or business in Namibia with relevant reputation or goodwill and the appellants alleged that the changed description of the principal business of Asco Car Hire CC was done to give effect to the common intention of the parties when the sale agreement was concluded. Appellants therefore alleged that they had acquired a general right to use the name Asco in the motor trade and related matters.

[44] On the strength of these allegations the appellants stated that if the respondents should again commence to

trade actively under the name Asco Motors, Asco Panelbeaters or Asco Car Hire they would be met with appropriate action as the name ASCO belonged to appellants and was protected.

[45] In a replying affidavit the first respondent reiterated that the businesses were separate entities with separate books and assets and that as far as the name ASCO was concerned it was only sold in regard to Asco Car Hire. The first respondent explained why the Asco Car Hire CC was established and why the close corporation, for all intents and purposes, remained dormant.

[46] First respondent further explained that he, during the sale negotiations, mentioned the existence of this close corporation and offered it to the appellants and did not intend to ask any purchase price for it. The respondents also denied that they authorised, or brought about, any extension

or amendment of the description of the principal business of the close corporation. None of the relevant documents bore the signatures of the respondents. First respondent alleged that as the statement was changed after the sale agreement it could only have been done on the authority of one of the appellants. It was further pointed out that the claim that the name ASCO was now registered as a trade mark in their favour was misleading and untrue. First respondent stated that there was no proof that any of the steps provided for in sec. 37 of the Trade Marks in South West Africa Act, Act 48 of 1973, were complied with, such as advertising the application and inviting objections thereto. An inspection of the relevant documents in the office of the Registrar of Trade Marks proved that this was the case. It was also clear that no registration or certificate to that effect was issued by the Registrar.

[47] First respondent reiterated that Asco Motors was a running business with a turnover of N\$1,259,353.00 in 2004 and N\$1,425,262.00 in 2005. Certain invoices were also attached which showed work done, during June 2006, to the motor vehicle of a customer.

[48] The respondent now also provided the VAT registration number of Asco Motors and reference was made to Annexure "L" which was a copy of an import licence for the importation of motor vehicles to the value of N\$500.000.00 in favour of Asco Motors.

[49] It seems to me that as far as general principles, applicable to passing off, were concerned, counsel were more or less in agreement. It was in respect of the application of those principles that counsel differed and more particularly whether the sale of most of the assets and equipment of Asco Motors and Asco Panelbeaters and the sale of the name Asco

Car Hire afforded the appellants a right to the use of the name ASCO. Furthermore it was argued that after such sale nothing much remained in the way of a reputation and goodwill which needed protection and that the appellants were therefore entitled to use the name ASCO.

[50] The case of the respondents was firstly based on the provisions of sec. 20(2)(b) of the Close Corporation Act, Act No. 26 of 1988 (the Act), as further amended by Act No. 8 of 1994, and interdictory relief based on passing off.

[51] The relevant section in the Act provides as follows:

“20(2) Any interested person may –

(a)...

(b) within a period of two years after the registration of a founding statement apply to a Court for an order directing the corporation to change its name on the ground of undesirability or that such name is calculated to cause damage to the applicant, and the Court may on

such application make such order as it deems fit.”

(The words ‘calculated to cause damage’ were inserted by Act 8 of 1994.)

[52] Although at the root of both sec. 20(2)(b) and passing off lies the likelihood of confusion between the names, as was argued by Dr. Henning with reference to "calculated to cause damage", a reading of the authorities shows that the enquiry in terms of sec 20(2)(b) is much wider and that an applicant would be successful if it can show either undesirability or that the name was calculated to cause damage. (See *Peregrine Group (Pty) Ltd and Others v Peregrine Holdings Ltd and Others*, 2001 (3) SA 1268 (SCA) at 1274 A – E and *Azisa (Pty) Ltd v Azisa Media CC and Another*, 2002 (4) SA 377 (CPA) at 391 E – F.)

[53] However, it seems to me that the defence by the appellants, namely that they have a right to the name ASCO,

and even registered a trade mark in that name, must be dealt with first. If it is so that the appellants acquired a right to the name ASCO, which goes wider than Asco Car Hire, which was bought in terms of the sale agreement, then the respondents claim to the name ASCO cannot be upheld and that would be the end of the matter.

[54] At the outset I must mention that neither party showed much respect for the principles contained in the 'parole evidence rule' and both freely tried to prove negotiations and what the intention of the parties was over and above what was stated in the agreement itself. This would only be permissible if the wording of the agreement of sale was ambiguous and needed to be cleared up by further evidence. (See in this regard *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd*, 1980 (3) SA 1 (AA).)

[55] However, before coming to the agreement three ancillary

issues can immediately be dealt with. The first is the so-called registration of a trade mark by the appellants. In my opinion the replying affidavit of the first respondent made short shrift with this claim and showed that the allegation was incorrect and, at best for the appellants, irresponsibly made. None of the steps, prescribed by the provisions of sec. 37 of Act 48 of 1973, have yet been taken and Dr. Henning, correctly, also did not place any reliance on this allegation.

[56] The second issue raised by the appellants was that the three businesses were one entity and were also treated as such by the respondents. This was no more than a bold allegation by the appellants which could not in anyway refute the evidence by the first respondent that the businesses were three different entities which were established at different times, with separate books of account. This was supported by the agreement of sale where the assets of each of the

businesses were separately listed and separately sold.

[57] The third issue concerned the statement of principal business of Asco Car Hire CC, the fifth respondent in the Court *a quo*, which was amended after the sale agreement was concluded. The respondents denied these allegations in a replying affidavit. This was a further bold allegation made by the appellants without any evidence to support their claim and which was, correctly, also not relied upon by Dr. Henning. (See in this regard Annexure “B2”.)

[58] The agreement of sale was entered into between C. Asmus, the second respondent who was the owner of Asco Car Hire, and the appellants. The relevant part of the agreement, as far as Asco Car Hire was concerned, reads as follows:

“WHEREAS:

- (1) the Seller is presently carrying on business at 10 Diehl Street, Windhoek as car and camping equipment rental under the name and style of Asco Car Hire
- (2) The seller has agreed to sell and the purchasers have agreed to purchase parts of the said business **as a going concern;**

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

- 1 **Sale and purchase.** The seller hereby sells to the Purchasers who hereby purchase at the price and upon the terms and conditions hereinafter mentioned **the business as a going concern.**
- 2 **Effective date...**
- 3 **Assets** The assets of the said business shall comprise:
 - 3.1 all stationery relating to the said business
 - 3.2 the goodwill of the said business including
 - 3.2.1 the name Asco Car Hire
 - 3.2.2 the benefit of all subsisting contracts and orders
 - 3.2.3 the postal, fax and e-mail address
 - 3.2.4 all other assets of the said business except as hereinafter provided
 - 3.3 the assets of Asco Panelbeaters as per **Annex**

“**A**” hereto

3.4 the assets of Asco Motors as per **Annex “B”** hereto

3.5 the office equipment as per **Annex “C”** hereto; and

3.6. the vehicles and camping equipment of the seller as per **Annex “D”** hereto.”

[59] The agreement continued to separately deal with the assets which were bought and stated separate prices therefore according to the lists which were attached to the agreement. In my opinion there is no ambiguity as to what was bought by the appellants. In regard to Asco Car Hire the name was bought as part of the goodwill of the business. In regard to Asco Motors and Asco Panelbeaters what was sold and bought by the appellants were the goods set out in Annexures “A” and “B”. These did not include the names of the two businesses. If it was the intention to buy the name ASCO it would have been an easy matter to state so in the agreement of sale. However, the agreement of sale clearly

stated that what was bought was the name Asco Car Hire. It is also in regard to Asco Car Hire that a restraint of trade was agreed to between the parties. See the agreement, clause 10.1.

[60] In the result I have come to the conclusion that the claim by the appellants that they acquired a right to the use of the name ASCO on the basis of the contract of sale was not substantiated.

[61] Although, as I have stated, that confusion also lies at the root of a finding that a name is undesirable I agree with Mr. Tötemeyer that a name can also be undesirable for many other reasons, e.g. where it has a racial or discriminatory meaning or where the name itself carries a meaning which is in bad taste. In these instances it is obvious that confusion would not play a role. The ambit of the section would therefore be much wider than passing off. (See e.g. *Azisa*

(Pty) Ltd v Azisa Media CC and Another, 2002 (4) SA 377 (CPA) at p. 391C).

[62] In the *Azisa*-case, *supra*, various factors were listed by the Court which would render a name undesirable. At p. 396 the Court considered, *inter alia*, factors such as the fact that the parties did not compete in the same commercial environment or market place, that the names registered "Azisa (Pty) Ltd" and "Azisa Media" share the word "Azisa" but were not identical or very similar, but that the abbreviation "Azisa" used by the first respondent is identical or at least very similar to the name of the applicant and would therefore not have been capable of registration.

[63] In my opinion the following factors are relevant in deciding whether the use of the name ASCO by the third and fourth appellants is undesirable in terms of sec 20(2)(b) of the Act:

- (i) It is common cause between the parties that the respondents traded under the name ASCO for many years;
- (ii) it is also common cause that the name ASCO is an acronym consisting of the first two letters of the respondents surname and the first two letters of the second respondent's Christian name;
- (iii) as such the name ASCO was personally associated with the respondents;
- (iv) I have already found that the appellants did not acquire a general right to the name ASCO in terms of the sale agreement but only a limited right of the use of the word in conjunction with the car hire and camping equipment rental;

- (v) the two foreign businesses, Asco Properties, doing business in South Africa, and Asco Yacht Charter (Pty) Ltd., also doing business abroad, at least support the allegation by the respondents that the name ASCO was used by them to indicate businesses associated and connected with them;
- (vi) both third and fourth appellants are involved in the motor trade or businesses associated with that trade. So are Asco Motors and would the now dormant Asco Panelbeaters be if it is revived by the respondents as alleged by them. Not only are they involved in the same trade but the businesses are active in the same geographical area, namely Windhoek and Namibia.
- (vii) there is evidence of confusion between the

respective businesses which is not denied by the appellants. In fact appellants accused the respondents for causing this confusion.

[64] All the above factors are found in the affidavits filed by the parties and I do not agree with Dr. Henning that the relief claimed by the respondents in terms of sec. 20(2)(b) of the Act was only based on the element of confusion. In my opinion it would therefore be undesirable, in terms of the Act, to allow the registration of the two close corporations of the appellants containing the name ASCO.

[65] The respondents also claim relief based on passing off. Referring to the requirements for granting an interdict (See *Setlogelo v Setlogelo*, 1914 AD 221) Dr. Henning submitted that the respondents had an adequate remedy under the provisions of the Act and that they were therefore not entitled to this relief. However, in my opinion there is a fallacy in this

argument, as was pointed out by Mr. Tötemeyer, in that the protection afforded by the Act only extends to the registration of the names of Close Corporations and the undesirability caused in that regard with other business names, CC's or companies. It affords no protection against the use of the name ASCO where the name is used in other respects, e.g. as the name of a firm. If the respondents succeed in proving passing off they would in my opinion be entitled to a final interdict.

[66] In dealing with passing off, Corbett, JA, as he then was, stated as follows in *Brian Boswell Circus (Pty) Ltd and Another v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (AD) at 478 F-I:

“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.....Where they are implied, such representations (concerning the wrongdoer's business) are

usually made by the wrongdoer adopting a name for his business which resembles that of the aggrieved party's business; and the test 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 is a question of fact to be determined in the light of the particular circumstances of each case."

(See further: *Policansky Bros. Ltd v L. & H. Policansky*, 1935 AD 89; *Horseshoe Caterers (Greenpoint) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd*, 1975 (2) SA 189 (CPD); *Truck and Car Co. Ltd. v Kar-N-Truk Auctions*, 1954 (4) SA 552 (AD); *Bress Designs (Pty) Ltd v G Y Lounge Suite MFGS (Pty) Ltd*, 1991 (2) SA 455 (WLD); *Royal Beech-Nut (Pty) Ltd, v United Tobacco Co. Ltd*, 1992 (4) SA 118 (AD); *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd*, 1993 (2) SA 307 (AD); *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd*, 1998 (3) SA 938 (SCA) and *Premier Trading Co (Pty) Ltd and Another v Sporttopia (Pty) Ltd*, 2000

(3) SA 259 (SCA)).

[67] The essence of what is protected by the Courts is the reputation of a business. In the *Bress Designs*-case, *supra*, at p 471 D-E, van Dijkhorst, J, stated as follows:

“In every passing off case two propositions have to be established by a plaintiff before he can succeed. The first is that his name, mark, sign or get-up 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 (business, services) in respect of which that feature is used. This is called reputation. The second is that the use of the feature concerned was likely to deceive and thus cause confusion and injury, actual or probable, to the goodwill of the plaintiff’s business.”

[68] From the *Caterham*-case, *supra*, the following principles can be extracted:

(i) That the only component of goodwill of a business that can be damaged by means of passing off is its

reputation;

(ii) reputation and goodwill are not synonymous;

(iii) in general a reputation must exist amongst a substantial number of persons who are either clients or potential clients of the business;

(iv) as far as the location of reputation is concerned it must subsist where the misrepresentation complained of causes actual or potential damage to the drawing power of the plaintiff's business;

(v) reputation is dependent upon distinctiveness;

(vi) the reputation relied upon must have been in existence at the time the defendant entered the market.

[69] In the *Premier Trading Co*–case, *supra*, at pages 266

and 267, Nienaber, JA, stated that passing off ".....is a wrong consisting of a false representation made by one trader (the defendant) to members of the purchasing public that the enterprise, goods or services of a rival trader (the plaintiff) either belong to him (the defendant) or are connected, in the course of trade, with his own enterprise, goods or services. The defendant's representation is a misrepresentation if it is likely to deceive or confuse a substantial number of members of the public as to the source or origin of his product. Passing-off, to be actionable, erodes the plaintiff's goodwill. Goodwill is the product of an accumulation of factors, the most important of which in the context of passing-off, is the plaintiff's reputation."

[70] Because nobody can lay claim to a monopoly in a family name, or a descriptive or generic word, the Courts would, in the first instance, protect the applicant if the name has

acquired a secondary meaning or if it is proved that the goods have acquired a reputation and that the defendant has led the public to believe that they are buying the goods of the plaintiff. (See *Policansky Bros.*, *supra*, at page 109). In the second instance the Courts will grant a plaintiff protection if there is proof of relevant reputation and/or that the name or get-up of the defendants goods are likely to confuse a substantial number of the public in believing that the goods of the defendant are those of the plaintiff. (See *Peregrine Group-case*, *supra*, at page 1275 ff.)

[71] The same principles would apply in regard to an inventive or fancy word forming part of a traders name but the cases show that in this instance the Courts would much more readily conclude distinctiveness in such a name than in the other instances mentioned in the preceding paragraph.

[72] In the *Policansky-case*, *supra*, at page 108, the following

was stated by Wessels, CJ, namely:

“From the fact that a person cannot readily get a monopoly for the use of his family name in connection with goods, it follows that it is more difficult for a family name to acquire a secondary meaning than for a descriptive or fancy word.”

[73] Similar sentiments were expressed by Greenberg, JA, in the *Truck and Car-case*, *supra*, at page 557 C-F, namely:

“The appellant bases its claim for relief on its right to prevent all other persons from using its name so as to deceive the public into thinking that the business carried on by such persons is its business, or is associated with its business. This right it undoubtedly has (*Halsbury*, 2nd ed., vol. 32 para. 920), and the question is whether the use by the respondent of the name “Kar-N-Truck Auctions” is likely so to deceive the public. The answer to this question does not solely depend on whether the appellant’s name 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 business may also have an important bearing on the question of the likelihood of deception."

[74] Further, p. 557 to 558, Greenberg, JA, referred with approval to what was stated by Lord Shand in the case of *Cellular Clothing Co. Ltd. v Maxton & Murray*, 1899 A.C. 326 at pp. 338 to 340, namely that the Courts would with greater readiness grant an injunction in the case of an invented or fancy name than where the name is only descriptive.

[75] In the case of *Van Der Watt v Humansdorp Marketing CC*, 1993 (4) SA 779 (SECLD), Zietsman, JP, at pp. 782 I to 783B, said the following in this regard:

"It is however not sufficient for the applicant merely to prove that the respondent has adopted a name for his business similar to the name used by the applicant. Where the applicant has used an invented or fancy name for his business it will more easily be found that the

respondent, if he uses the same or a similar name for his own business, is falsely representing his business as being that of, or being associated with, the business of the applicant. However, where an applicant uses his own name or mere descriptive words in naming his business, an interdict will not easily be granted unless the applicant can show that his name, or the descriptive words used by him, have acquired a secondary meaning and are associated in the minds of the public with the applicant's products or business, and with that of no one else. Some of the examples mentioned in various cases where names or descriptive words have been held to have acquired a 'secondary meaning' are Coleman's Mustard, Eno's Fruit Salts and Camel Hair Belting."

(See further *New Media Publishing (Pty) Ltd v Eating Out Web Services CC*, 2005 (5) SA 388 (CPD) at 402 C – 405D which clearly illustrates the approach of the Courts between names which are descriptive and those which are invented or fancy names).

[76] Regarding the effect of an invented name and how that is treated e.g. in English law would in my opinion also be relevant. Thus it was stated in the *Policansky*-case, *supra*, at p. 98:

“As our Roman-Dutch authorities do not deal with the various aspects of passing-off actions that modern conditions have evoked, we in South Africa have followed the principles enunciated by the English and American Courts where such principles are not in conflict with either our common law or our statute law.”

[77] Concerning English law the following is stated in Halsbury's *Laws of England*, Fourth Edition, Vol. 48; pa 164:

“Reputation as an element of establishing deception or confusion. Normally, the reputation required to be established by the plaintiff in an action for passing off is that the name, mark or other feature has by use come to be regarded as identifying goods or services from a particular source known or unknown; or where there is passing off of a product which has a character intrinsic to its descriptive name, as denoting goods or services of a particular composition, standard, quality or geographical origin. The fact that only the plaintiff has in the past made use of the name, mark or other feature concerned is not conclusive that it has come to be regarded as distinctive, but distinctiveness will readily be inferred when the name, mark or other feature is invented or fancy and has no direct relation to the character or quality of the goods.”

[78] Bearing in mind the above authorities it seems to me

that the distinction drawn, between instances where the complaint concerns an invented name and the other instances where the complaint concerns a family or descriptive name, is justified. In the instance of the invented name it is a product of a person's imagination or intellectual application and in my opinion carries with it much more of an element of proprietorship than is the case in regard to family names and descriptive words, which no person can monopolise.

[79] It seems to me that in the case of an invented name the Courts would more easily accept distinctiveness in such a name and would also more readily accept the likelihood of deception or confusion. It would protect such name against invasion by any other trader or big conglomerate even if the evidence of reputation is not that of a substantial number of the public.

[80] In his founding affidavit the first respondent stated that the turnover of Asco Motors for the financial year ending February 2005 was some N\$1 million. This was not denied by the appellants. However the first appellant doubted the extent of the business. In reply the first respondent further elaborated on this issue and stated that during the financial year 2004 the turnover to Asco Motors was N\$1,259,353.00 and for the year 2005 an amount of N\$1,425,262.00.

[81] This income was generated over the relevant period when the appellants decided to launch their close corporation using the name ASCO. It is common cause that this happened towards December 2004. It is further clear that the appellants waited 4 years before they began to use the name ASCO in this regard.

[82] The first respondent alleged that the ASCO group of

businesses has, over the years, built up considerable goodwill and reputation in Namibia, more particularly in the motor industry. This allegation is boldly denied by the appellants. This denial must in my opinion be read together with the allegations of the first appellant that it was only Asco Car Hire which had built up a goodwill and reputation and must further be seen against the allegation of the appellant that the three businesses were in fact only one business.

[83] If the name ASCO, as it appears in the name Asco Car Hire, generated goodwill and a reputation, then surely some of that goodwill and reputation would also attach to other businesses bearing the name ASCO, as was alleged by the first respondent. The fact that the name ASCO was known to the public for a period of 15 years and the extent of the business still generated by Asco Motors during the relevant period 2004/2005 and the fact that there were various

businesses bearing the name ASCO proved that the allegation by the first respondent can be accepted, namely that the name ASCO was associated with the respondents and that it had become distinctive, in the sense that the use of the name in regard to businesses denoted that business to be one of the group of businesses run by the respondents. It is so that the Asco Car Hire name was sold to the appellants and in that respect they have a vested right to use it in that regard (see *Nino's* – case, *supra*, p. 668 pa. 36) but that is how far the appellants can use the name ASCO. That is what they bought in terms of the sale agreement, Annexure “AA1” and nothing more. As stated this is further a clear indication that they did not buy the name ASCO.

[84] I have already dealt with the allegation of the first appellant that the three businesses were really only one. This opinion expressed by the appellant is irrelevant unless

he could back it up with evidence, which he was not able to do. All the evidence points the other way. In this regard all the evidence points to the fact that the second respondent was the sole owner of the business Asco Car Hire whilst the other businesses were owned in partnership. That is also brought out by the fact that the sale agreement was concluded with the second respondent as the seller of the business.

[85] When considering whether there is a likelihood of deception or confusion and the likelihood of damages resulting therefrom it is important to note that the use of the name ASCO does not by itself denote what the standard or quality are of the goods sold or the services rendered. What it does denote is the source or origin of such goods or services and the use of the name ASCO as part of a business name therefore indicates and identifies a particular source

with which the public will associate those goods or services.

[86] Bearing this in mind the argument by Dr. Henning that there is a difference between the names Asco Motors and Asco Car Sales and Asco Panelbeaters and Asco Workshop to avoid any confusion, cannot be accepted. In any event the parties did not draw this distinction and they were clear that what was at stake was the use of the name ASCO. The reliance, in this regard, by counsel on the *Peregrine*-case, *supra*, and the case of *Moroka Swallows Football Club Ltd v The Birds Football Club and Others*, 1987(2) SA 511 (WLD) is misplaced. None of these cases dealt with an invented name and are therefore distinguishable. Neither of these cases, nor the case of *SAFA v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons*, 2003(3) SA 313 (SCA), referred to by Dr. Henning, are in the circumstances advancing the case of the appellants.

[87] It is correct, as was stated by Dr. Henning, and as is also clear from the above cases, that nobody has a monopoly to the use of a word or name. However, as I have tried to show, the Courts will more readily accept distinctiveness and the likelihood of deception or confusion in the case of an invented or fancy name than where the name contains descriptive words or a family name. The reason for that seems to me to be logical. Where we all share the use of descriptive words and family names, an invented name, and the use thereof, is unique to the person's business who created it. As a result less evidence would suffice to establish distinctiveness in the name or word and that the likelihood of its use by another would cause deception or confusion and damages. In my opinion these requirements were proven by the respondents on a balance of probabilities and the Court *a quo* was therefore correct in granting the relief as set out in their notice

of motion.

[88] In the result I have come to the conclusion that the respondents have made out a case for relief in terms of the interdict against passing off and consequently that the appeal must be dismissed.

[89] The following order is made:

The appeal is dismissed with costs.

STRYDOM, AJA

I agree.

SHIVUTE, CJ

I agree.

CHOMBA, AJA

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