

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

JENIFER MARY WILLIAMS

t/a JENIFER WILLIAMS & ASSOCIATES First Appellant

PROMENADE CONCERTS CC Second Appellant

and

LIFE LINE SOUTHERN TRANSVAAL Respondent

CORAM: Corbett CJ, E M Grosskopf, Howie, Marais et
Schutz JJA

DATE OF HEARING: 4 March 1996

DATE OF JUDGMENT: 29 March 1996

J U D G M E N T

CORBETT CJ: .

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In the Court a quo (the Witwatersrand Local Division) the respondent, Life Line Southern Transvaal ("Life Line"), instituted proceedings on notice of motion against first appellant, Jenifer Mary Williams, trading as Jenifer Williams & Associates ("Williams"), and second appellant, Promenade Concerts CC ("Promenade"), alleging passing-off, unlawful competition and breach of contract, and claiming certain interdicts. The appellants opposed the application. The matter came before Botha J and Life Line pressed for final orders without resort to oral evidence. The learned Judge held that the case based on breach of contract had not been established, but that passing-off and unlawful competition had; and he accordingly granted a final interdict in terms which I shall detail later and ordered the appellants to pay the costs of the application. With the leave of this Court, the appellants appeal against the judgment and order of the Court a quo based on passing-off and unlawful competition. There is no cross-

appeal and accordingly the issue of breach of contract falls away.

From the founding affidavit deposed to by Felicity Mary Tindle ("Tindle") it appears that Life Line is a voluntary, non-profit association, which provides training and counselling services of a welfare nature. It has its principal place of business in Norwood, Johannesburg. Williams conducts business as a public relations consultant, promoter and organizer. Promenade is a close corporation which carries on business as a presenter of orchestral concerts. It was first incorporated on 13 March 1992 under the name Orchestral Productions. On 3 June 1993 this name was changed to Promenade Concerts. Williams is its sole member.

The litigation between the parties has its origin in a series of fund-raising concerts which Williams organized for Life Line in the period 1991 to 1993 under the name and style, "Last Night of the Proms". Most of the relevant facts are common cause, but where they are not, I shall apply the Plascon-Evans principles.

The name, "Last Night of the Proms", is derived from the popular and colourful classical concerts which have been performed in London since 1895. They take the form of a series of promenade concerts played during the English summer in the Royal Albert Hall and are well-known throughout the western musical world. The last of these seasonal concerts, which has popularly become known as the "Last Night of the Proms", is particularly famous. It is one of Britain's best known and loved musical events and it draws a capacity audience each year. It has a traditional programme, with audience participation. The second half always includes time-honoured favourites such as Sir Henry Wood's Sea Songs, Rule Britannia, Jerusalem and Land of Hope and Glory. Streamers are thrown and there is generally a carnival atmosphere. This "Last Night of the Proms" concert is designed to have more popular appeal than the usual classical concerts.

A concert with the format of the "Last Night of the

Proms" was first performed in Durban in 1985 by the Durban City Orchestra under the baton of Mr Michael Hankinson ("Hankinson"). He not only acted as conductor of the concert but also was responsible for much of its promotion, publicity and presentation. The concert was in traditional form, with audience participation and streamer-throwing in the second half. It was a charity presentation, the beneficiary being the Hillcrest Round Table. Since then Hankinson has continued to conduct such concerts in Durban from time to time and at the time of these proceedings had done so on nine occasions.

In 1988 Hankinson conducted a "Last Night of the Proms" concert, in the traditional form in Cape Town. This was also a charity concert, this time in aid of the Wynberg Rotary Club. This was followed over the years by four other such concerts in that city. The circumstances which led to Williams organizing a series of concerts in the style of the "Last Night of the Proms" for Life

Line in Johannesburg are briefly as follows. Life Line, which is one of a large number of such organizations (which are all autonomous) throughout the world, and which provides its counselling and other services free of charge, is financially dependent on donations from the public and from corporations. At a certain stage it became necessary for its existing facilities in Johannesburg to be renovated and for a new training centre to be built. In January 1991 it was decided that funds be raised for these projects. The responsibility for doing this devolved upon Life Line's fund-raising committee, of which Tindle was a member.

During February 1991 Tindle met Williams, who expressed interest in working for Life Line as an organizer of fund-raising activities. Williams had studied music at university and had worked in the field of public relations and as a promoter for over 25 years. In the course of this work she had come into contact with senior decision-makers of a number of large South African

corporations. She had also been involved in fund-raising, in concert promotion and in the activities of several welfare organizations. Williams was in due course employed by Life Line as a fundraiser, with the particular responsibility of organizing two "Last Night of the Proms" concerts to be performed in the Johannesburg City Hall on 21 and 22 March 1992, in order to raise funds for Life Line. A formal contract of service between Life Line and Williams was signed on 4 June 1991. The contract provided that it was deemed to have commenced on 15 May 1991 and that it was to remain in force until the expiry of a period of three months after the concerts, i e until 22 June 1992, or for such extended period as the parties might determine by mutual agreement. Williams's duties under the contract included the raising of an overall sponsorship; the selling of corporate packages and boxes; the production of the official programme; the organization of sponsor, corporate and VIP entertainment at the City Hall; the issuing of invitations and complimentary tickets; media

publicity; liaison with various persons and bodies, including the National Orchestra, the conductor and the choirs; and the making of approaches to large South African corporations for specific donations.

As remuneration for the discharge of her duties Williams was to receive various specified commissions on sales and donations received.

It was in due course arranged that the concerts were to be performed by the Transvaal Philharmonic Orchestra, with Hankinson as conductor, and certain choirs. There is some dispute on the papers as to who first suggested that the concerts take the format associated with the "Last Night of the Proms" and as to who first approached Hankinson to act as conductor, but, in my view, nothing turns on this.

The planning and organization of the concerts went ahead.

Nedbank Limited ("Nedbank") agreed to become the main sponsor.

Corporate packages, which included a gala dinner and advertising, were sold. Various other ancillary functions were arranged. Media and other publicity was obtained.

9 The concerts were duly held on 21 and 22 March
1992.

They were a great success. About 2800 persons attended them. At each concert the chairman of Life Line made a speech and Life Line ladies acted as hostesses at the gala dinner and as ushers at the concerts. A net profit of approximately R110 000 was realised.

In view of this success and in response to popular demand Life Line decided to repeat the whole operation in 1993 and to present, this time, three concerts on 27 and 28 February and 5 March on the same pattern as those held in 1992. Life Line decided again to employ Williams to undertake the organization of these concerts and a second written service contract in terms similar to the first one was entered into on 23 June 1992. The concerts, again sponsored by Nedbank, were, if anything, more successful than in the previous year and yielded a net profit of R240 000.

I come now to Life Line's complaints about the conduct of Williams which have given rise to the present litigation. The first

of these is that in July 1992, and unbeknown to Life Line, Williams applied to the Registrar of Trade Marks to have a trade mark consisting of the words "Last Night at the Proms" registered in her name. This occurred despite the fact that Tindle, on behalf of Life Line, had asked Williams to investigate whether "Last Night of the Proms" was registrable as a trade mark in the name of Life Line. According to Tindle Williams reported to her that her (Williams's) attorney had advised that registration was not possible, but this is denied by Williams. Subsequently, in October 1992, the Wynberg Rotary Club, which had organized the concerts in Cape Town, also made application for the registration in its name of the trade mark "Last Night of the Proms". Thereafter discussions took place between attorneys representing Life Line and the Wynberg Rotary Club with a view to achieving the registration of this trade mark in the name of Life Line in the Transvaal and in the name of Wynberg Rotary Club in the Cape, thus giving recognition to the "proprietorship" of the mark

of each of these parties. Williams was asked to withdraw her application, but, it would seem, did not do so. Indeed in April 1993 she obtained from Hankinson a written assignment of all his right, title and interest in the mark "Last Night of the Proms".

Secondly, Tindle alleged that Williams had, without the knowledge of Life Line, entered into a separate agreement with Nedbank to supervise and promote productions of "Last Night of the Proms" concerts in Durban and Cape Town. These were to be sponsored by Nedbank, which would pay her for her work. This was said to have "emerged" at a meeting in the offices of Nedbank held on 30 November 1992. Williams admitted the agreement with Nedbank, but pointed out that Life Line had been aware of it since June 1992. At the time of the meeting of 30 November 1992 the concerts had already taken place.

The third complaint relates to a postcard which Williams caused to be inserted in the programme for the 1992 concerts, without

Life Line's knowledge or permission. The postcard in question (annexure "0" to the founding affidavit) invites the concert-goer, in order to ensure his or her "early notification" of booking for the "1993 PROMS", to complete the card (with name and address, number of tickets required, etc) and to mail it to Orchestral Productions CC at a named address. Life Line cited this as evidence of an intention on the part of Williams "to wrongfully take the goodwill acquired by Life Line for herself". Williams, in her answering affidavit, denied the existence of any such goodwill, admitted the insertion of the postcard, but claimed that this was done in good faith and with a view to enlarging the mailing list for any future productions of "Last Night of the Proms".

I come now to the fourth complaint. In about mid-1993 Life Line began to suspect that Williams might attempt to arrange concerts under the name "Last Night of the Proms" independently of Life Line. These suspicions were confirmed when advertisements

appeared in the Star newspaper from 10 to 13 August 1993 announcing that concerts, described as "The Original Last Night of the Proms", would be presented by Promenade, with the Transvaal Philharmonic Orchestra conducted by Hankinson, for the benefit of an Orchestral Trust for South African Musicians in the Benoni City Hall on 6 and 7 November 1993 and in the Johannesburg City Hall on 25, 26 and 27 February 1994. Subsequently similar advertisements relating to the Benoni concerts appeared. Life Line itself placed an advertisement in the Star newspaper, publicising "Life Line's Last Night of the Proms" to be presented in the Johannesburg City Hall on 18, 19 and 20 February 1994 by the National Symphony Orchestra conducted by Mr Richard Cock. The advertisement speaks of this as the "Official" Last Night of the Proms. It is not clear whether this preceded, or succeeded, the August advertisements placed by Williams. At about the same time Williams sent letters, all in similar terms, to a number of persons who had supported Life Line's 1992

concerts. The relevant portions of a sample letter (annexure "U" to the founding affidavit) read as follows:

"I am writing to clarify the situation of the LAST NIGHT OF THE PROMS concerts which will take place in the Johannesburg City Hall on 25, 26 and 27 February 1994.

As you know, Life Line (Southern Transvaal) has been the beneficiary of the LAST NIGHT OF THE PROMS concerts conceived in South Africa by Michael Hankinson in 1985 and promoted in Johannesburg by me in 1992 and 1993.

In less than two years, Life Line (Southern Transvaal) has received a very substantial amount (over R840,000) through the promotion of THE LAST NIGHT OF THE PROMS concerts and a "Life Line Building Fund" which was also initiated and organised by my company.

In 1994 the LAST NIGHT OF THE PROMS will have a new principal beneficiary - an ORCHESTRAL TRUST which has been formed to educate and assist musicians on a nationwide basis, particularly those who are disadvantaged."

[The letter gives some information relating to the Orchestral Trust and

then proceeds.]

"Promenade Concerts cc has already received confirmation for the 1994 PROMS from over 50% of the Corporate and Company supporters and block bookings of more than 1000. This is a specially pleasing mark of appreciation for all of the team who work so hard to make this outstanding event successful and thus to raise revenues for whichever charity is the year's chosen beneficiary.

THE LAST NIGHT OF THE PROMS concerts, with the Transvaal Philharmonic Orchestra conducted by Michael Hankinson, which you supported in 1992 and 1993 will be presented, as before on the dates mentioned at the beginning of this letter, in its delightful traditional format in the way which is now Michael Hankinson's own.

The LAST NIGHT OF THE PROMS boxes will be auctioned in October 1993 and I would appreciate it if you would complete the attached form and return it to Promenade Concerts cc."

The letter is signed by Williams who describes herself as "Last Night of the Proms Concert Organizer."

Upon the basis of these facts it is contended in the founding affidavit:-

(1) That Life Line enjoys a reputation in the Transvaal in relation to "Last Night of the Proms" in that this "name or trade mark" is associated in the minds of the public in this area with Life Line. In support of this Tindle attached affidavits from five persons attesting to this alleged reputation.

(2) That the use of this name or trade mark by any other persons would be likely to deceive and confuse people into believing that they are dealing with Life Line or that there is an association between such person and Life Line.

(3) That as a result of the unauthorized use of this name or trade mark and advertising by Williams and Promenade many people have in fact been confused into believing that the concerts planned and advertised by them under this name or trade mark

are being presented by or are associated with Life Line. In substantiation of this affidavits of five persons who have experienced confusion in various forms are attached.

(4) That the conduct of Williams and Promenade is causing extensive and irreparable harm to Life Line, which has arranged to present Last Night of the Proms concerts on 18, 19 and 20 February 1994 in the Johannesburg City Hall. Nedbank is unwilling to sponsor Life Line's concerts while Williams and Promenade also use "Last Night of the Proms" for their concerts. Corporate supporters are confused; Computicket refused to sell Life Line's tickets because of present confusion; and the Mayor of Johannesburg has stated that he cannot give Life Line active support until the confusion has been resolved.

(5) That Life Line's goodwill, established by the use of "Last Night of the Proms", is constantly being eroded by the conduct of

Williams and Promenade.

- (6) That accordingly the conduct of Williams and Promenade constitutes unlawful competition and more particularly an unlawful act of passing-off.

The appellants' response to these contentions may be summed up as follows:-

- (a) They deny that Life Line has acquired any reputation in the Transvaal in the name "Last Night of the Proms" and aver that, if this name is associated with any person or entity, it is with Hankinson, the originator of the concept in South Africa. They attach a number of affidavits (annexures JMW 16 to JMW 22) by persons who attended the 1992 and/or 1993 concerts in Johannesburg. The deponents to these affidavits all associated these concerts with that presented annually at the Royal Albert Hall in London and regarded them as being faithful

reproductions of the London event. Most, if not all of them, were conscious of the fact that the concerts were sponsored by Nedbank and promoted by Williams; and the majority knew the identity of the orchestra and the conductor. Some knew the identity of the beneficiary of the proceeds of the concerts; others merely knew that it was "a chanty". One deponent said that his "secondary association" regarding the concert series in Johannesburg was with Williams as organizer and promoter. (b) They deny any likelihood of "relevant confusion" for the purposes of a cause of action based on passing-off and refer again to annexures JMW 16 to JMW 22, in which the deponents refer to the 1994 concerts to be presented by Williams. Some state that they knew who the beneficiary was to be; others state they did not. Some deny any confusion between the 1992 and 1993 concerts on the one hand and the 1994 concerts on the other.

(c) They deny that Life Line has any goodwill in the name "Last Night of the Proms", which is capable of being infringed or eroded.

(d) Generally they deny passing off and/or unlawful competition.

They say that what they have done has been done in pursuance of legitimate business activities.

In finding that the appellants had been guilty of passing-off the learned Judge a quo found that the organization and presentation of the 1992 and 1993 concerts by Life Line amounted to a business undertaking or activity capable of sustaining an action for passing-off; that the goodwill in the concerts under the name "Last Night of the Proms" had been acquired by Life Line; that the appellants' activities, particularly the sending of the letter (annexure "U"), the advertising relating to the 1994 concerts presented by Promenade, the choice of name for the concerts and the temporal proximity of the 1994 concerts arranged by the appellants and those

arranged by Life Line, amounted to a misrepresentation and was calculated to cause confusion; and that accordingly there had been passing-off.

In further holding that the appellant's conduct amounted also to unlawful competition, the Judge a quo stated ("first respondent" being Williams and "the applicant" being Life Line):

"The First Respondent had staged the 1992 and 1993 performances for the Applicant. She knew exactly how the tickets were marketed. She knew who the persons or corporations were in respect of which the Applicant's "werfkrug" would be operative. She engaged the same conductor and the same orchestra. She booked the concerts, which are traditionally held in summertime, during the same period when the applicant had had its concerts. She reserved the same venue. Then she created the impression that her production was the continuation of the previous two concerts. Her conduct amounts to nothing less than the filching of the musical event that the Applicant had introduced into the Transvaal and built up into a promising source of revenue. Judged by the boni mores and considerations of fair play and

honesty I do not think that it is conduct that could be described as lawful."

The interdict granted by the Court a quo (on 11 February 1994) was in the following terms:

"Interdicting and restraining the Respondents from committing acts of unlawful competition and passing-off against the Applicant by using the name or trade mark LAST NIGHT OF THE PROMS or any other name or trade mark confusingly similar thereto in relation to musical productions in the area of the Transvaal Province"

I shall deal first with the cause of action based upon passing-off. As my recital of the facts will have shown, this is an unusual claim of passing-off. Passing-off is a species of wrongful competition in trade or business. In its classic form it usually consists in A representing, either expressly or impliedly (but almost invariably by the latter means), that the goods or services marketed by him emanate in the course of business from B or that there is an

association between such goods or services and the business conducted by B. Such conduct is treated by the law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation. Such a representation may be made impliedly by A adopting a trade name or a get-up or mark for his goods which so resembles B's name or get-up or mark as to lead the public to be confused or to be deceived into thinking that A's goods or services emanate from B or that there is the association between them referred to above. Thus, in order to succeed in a passing-off action based upon an implied representation it is generally incumbent upon the plaintiff to establish, inter alia: firstly, that the name, get-up or mark used by him has become distinctive of his goods or services, in the sense that the public associate the name, get-up or mark with the goods or services marketed by him (this is often referred to as the acquisition of

reputation); and, secondly, that the name, get-up or mark used by the defendant is such or is so used as to cause the public to be confused or deceived in the manner described above. These principles are trite and require no citation of authority.

In Webster and Page, South African Law of Trade Marks. 3 ed, at 414-16, the authors discuss the question as to whether it is necessary that a plaintiff in a passing-off action should have been carrying on a trade or business in order to succeed. They appear to approve authorities which have given a wide meaning to the concept of "business" in this context, but take the view that there is no warrant for extending the remedy for passing-off to persons who do not conduct any commercial activity whatsoever. In the present case I shall assume, in favour of Life Line, that its activities in regard to the "Last Night of the Proms" concerts put on by it amounted to the carrying on of a trade or business in this extended sense.

I proceed to consider whether Life Line has established

that it enjoyed reputation in the name "Last Night of the Proms" in regard to the series of concerts put on by it. The name, "Last Night of the Proms", is descriptive of a particular type of classical concert which originated in London. Its essential features relate to the type of music presented (including certain time-honoured musical pieces) and to the audience participation and carnival atmosphere prevailing at the concert. This is well-known to concert-goers and music-lovers and, on the evidence, they would tend to associate the name with this type of concert, particularly with the one presented annually in London. "Last Night of the Proms" concerts have, of course, been presented in South Africa by different bodies: in Durban as from 1985 at the instance of the Round table and in Cape Town as from 1988 at the instance of a Rotary Club. In this context Life Line, with its 1992 and 1993 concerts, was a late-comer in the field. Recognising this, Life Line has sought to place territorial limits (the area of the Transvaal Province) on the interdict claimed by it. I shall further

assume in favour of Life Line that this is legally permissible (Cf Deans Man Shop (Pty) Ltd v Momberg 1975 (1) SA 841 (W), at 842 H).

It seems to me, however, that the principal difficulty confronting Life Line is that a charity concert of this nature is quite different from a commodity such as a packet of cigarettes or hotel accommodation provided by a corporate group or a circus giving entertainment to the public. In each of these examples there would normally be a single provenance, both in fact and in the eyes of members of the consuming public. And any reputation in a trade name would vest in that provider, whoever he might be. This would not be so in the case of a charity concert of the type under consideration which is the combined product of the charity (which is both the initiator and the beneficiary of the proceeds), of the organizers (in this case Williams and Promenade), of the concert performers (the orchestra, the choirs and, most importantly, the

conductor) and, from the financial point of view, of the main sponsor (Nedbank). On the evidence and as a matter of common experience, it seems very doubtful whether the ordinary member of the public would single out the charity, in this case Life Line, as sole provider of the concert, and in the circumstances I do not see how Life Line can claim reputation in the name "Last Night of the Proms". In this connection I have had regard not only to the evidence contained in the affidavits (annexures JMW 16 to JMW 22), but also the advertising and pre-concert press publicity in respect of the concerts, the tickets, the concert programmes and the subsequent reviews. If any individual person or body emerges prominently from this documentary evidence, it is Nedbank. For instance, certain pre-concert publicity in the "Star" newspaper of 7 February 1992 describes the concert as a "Nedbank presentation"; the tickets for the concerts that year contain the words "Nedbank presents Last Night of the Proms"; and the 1992 programme speaks in several places of "Nedbank's Last Night

of the Proms" (in a mayoral message, in a message from Nedbank's managing director and in an article about the Soweto String Quartet). Similar prominence is given to Nedbank in the 1993 programme. Considerable prominence is also given in some of this documentary material to Hankinson, described in one article as "The Man Behind the Proms".

In my opinion, Life Line failed to establish reputation in the name "Last Night of the Proms" and for that reason alone the passing-off claim ought to have failed in the Court a quo. I might add that I am doubtful whether Life Line established the second leg of its cause of action, viz that Williams's use of the name "Last Night of the Proms" for the concerts organized by her in aid of the Orchestral Trust (I shall call these "the rival concerts") caused, or was calculated to cause, the public to be confused or deceived, but it is not necessary to decide this issue.

29 I come now to unlawful competition as a cause of
action.

In this regard respondent's counsel advanced in argument the reasoning which found favour with the Court a quo. This was to the effect that Williams had used the know-how and information acquired by her in staging the 1992 and 1993 concerts (on behalf of Life Line) to organize the rival concerts for another charity, using the same venue and the same conductor and orchestra; that she had created the impression that her productions were the continuation of the previous two concerts; and that this amounted to the filching of the musical event which Life Line had introduced into the Transvaal. It is true that Williams did use for the rival concerts the model of the "Last Night of the Proms", including the conductor universally associated in South Africa with this type of concert and the orchestra which featured in the 1992 and 1993 concerts. But this model is not Life Line's exclusive property; on the contrary it is a model previously used elsewhere in South Africa. Moreover, it is recognized, and indeed

Ø emphasized, in the field of the law relating to unlawful competition

that in general business ideas which lack statutory protection may be imitated. As Van Heerden JA put it in Taylor & Home (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A) at 422 B-D:

"As far as I am aware, it has never been suggested that the exploitation of a market established by a competitor for a particular product, or type of product, is in itself a form of unlawful competition. On the contrary, it appears to be generally accepted that, in the absence of statutory protection, the published idea or concept of a trader on which his product is based, may be freely taken over by a competitor even if the trader has already through his efforts built up a demand for his product"

(See also Payen Components SA Ltd v Bovic CC and Others 1995 (4) SA 441 (A), at 453 C - E.) Accordingly the mere use of the "Last Night of the Proms" format for the rival concerts cannot cause the conduct of Williams and Promenade to be unlawful competition.

It is also true that during her employment by Life Line in terms of the two service contracts Williams gained information and know-how in regard to the organization of such concerts. At the same time it must be remembered that she brought considerable knowledge and experience in such matters to the job, as well as a web of contact with the corporate world. There is no suggestion on the part of Life Line that any information gained during the period of the service contracts was of a confidential nature; nor can it be said that the skills that Williams acquired during this period could not be exploited by her in other similar projects. Had Life Line wished to prevent this it could no doubt have tried to have inserted a restraint clause in the service contracts; but it did not do so. (Cf Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W), at 428 A - 432 D and the authorities there cited.)

It is true that some of the things done by Williams might cause raised eyebrows in certain quarters, but business competition can

2 be ruthless without being unlawful. Here I have in mind the attempted registration of the trade mark, but this is peripheral to the main complaint, which relates to the organization and holding of the rival concerts. Some play was also made in argument of the postcard inserted by Williams in the programme for the 1992 concerts. I am not able to find, on the papers, that this was done in bad faith; and again it does not appear to have any direct connection with the rival concerts. Certain aspects of the advertising in connection with the rival concerts, which might suggest some link with Life Line's 1992 and 1993 concerts, may be somewhat questionable, but the same advertisement makes it clear that the presenter is Promenade and the beneficiary the Orchestral Trust.

Taking an overall view of the facts of the matter I am not persuaded that what the appellants did amounted to unlawful competition.

The appeal is allowed with costs, including the costs of two counsel, and the order of the Court a quo is altered to read -

"Application dismissed with costs".

M M CORBETT

E M GROSSKOPF JA)
HOWIE JA) CONCUR
SCHUTZ JA)

Case No 495/94.

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

JENIFER MARY WILLIAMS
t/a JENIFER WILLIAMS & ASSOCIATES First Appellant

PROMENADE CONCERTS CC
Appellant

Second

and

LIFE LINE SOUTHERN TRANSVAAL

Respondent

CORAM: Corbett CJ, E M Grosskopf, Howie,
Marais

ef Schulz JJA

DATE HEARD: 4 March 1996

DATE DELIVERED: 29 March 1996

J U D G M E N T

MARAIS JA:

MARAIS JA:

While I agree with a great deal of what is said in the judgment of the learned Chief Justice, I differ with respect as to the outcome of the appeal. The points of divergence are these. The Chief Justice has not found it necessary to decide whether or not Life Line's fund raising activities entitle it to invoke the remedy which the law provides against passing-off. I consider that they do. In principle, I see no good reason why a charity which resorts to commercial activity in order to raise funds with which to achieve its principal charitable object should be defenceless against those who participate in the same kind of commercial activity and seek to profit by passing off themselves or the goods or services which they provide as being connected with the charity. The fact that the profits which a charity may generate are to be devoted to charitable purposes is hardly an

acceptable reason for depriving it of protection which is available to those whose profits are generated solely for their own personal enrichment. Today charities embark upon a wide range of commercial activities to raise funds. They sell goods manufactured both by themselves and by others. They provide services for reward. They stage entertainments. They run competitions and conduct sweepstakes. Indeed, precisely because they are charities, there is an advantage to be gained by a third party who falsely represents expressly or by implication that what he offers will, if bought, benefit a charity. They are for that reason specially vulnerable and there should be no hesitancy about acknowledging their entitlement to the protection which the remedy against passing-off provides. Cf. Old Apostolic Church of South Africa v Non-White Old Apostolic Church of Africa 1975 (2) SA 684 (C) at 687 D-E.

In this particular case I have no doubt that the annual staging of a concert such as this is a continuing commercial enterprise and amounts to the carrying on of a business. It was therefore open to respondent to invoke the remedies which the law provides against unlawful competition.

I agree with the learned Chief Justice that respondent failed to establish a proprietary interest in either the concept of such a concert or the name "Last Night of the Proms" sufficient to entitle it to prevent appellants or anyone else from replicating the concept or using the name "Last Night of the Proms". However, I consider that respondent did establish that the concerts which it staged in 1992 and 1993 in Johannesburg had been highly successful and that it had acquired in consequence a legitimate proprietary interest deserving of protection, not in order to prevent others from staging similar concerts

or from using the name "Last Night of the Proms", but in order to prevent others from suggesting that their concerts were a continuation of the concerts so successfully staged by respondent in 1992 and 1993 in Johannesburg. It matters not that those who attended and enjoyed, or were told about the enjoyment those concerts provided, might not have known that they were respondent's concerts. Nor does it matter that they might have mistakenly thought that they were Nedbank's concerts or even appellants' concerts. If, as a fact, they were respondent's concerts (and they plainly were), respondent is entitled to complain if a connection is suggested between its concerts and those which others seek to stage. The suggestion of such a connection would obviously be motivated by a desire to entice those who had attended and enjoyed respondent's concerts, or those who had heard about them, to attend the rival concerts in the expectation that they

would be of the same quality organizationally and musically.

I have no doubt that appellants deliberately sought to create the impression that the concerts which they intended to stage were, as the Court a quo put it, "the continuation of the previous two (series of) concerts". In the advertisement which respondents placed in the Star newspaper in August 1993 there are depicted three balloons upon each of which is written respectively, "1992", "1993" and "1994". This, coupled with the use of the word "original" in the title of the concert, is a blatant attempt to suggest that the 1994 Johannesburg concerts were sequels to the previous highly successful 1992 and 1993 concerts and that they emanated from the same source. The fact that a different charity was reflected as the beneficiary and that the 1994 concerts were stated to be presented by Promenade does not undo the mischief. The less explicit the publicity given at the time

of respondent's concerts in 1992 and 1993 to the fact that they were actually respondent's concerts, the less effective in dispelling any suggestion of a connection is disclosure in the advertisement of another charity as beneficiary and of Promenade as presenter. The letter (annexure "U" to the founding affidavit) written by Williams to persons who had supported Life Line's concerts is equally plainly a calculated attempt to create and foster the impression that the 1992 and 1993 concerts in Johannesburg were the first two in a series of concerts staged by Williams in aid of charities and that she was the controlling and autonomously functioning hand behind the concerts, with the power to designate what particular charity would benefit from them. That was a perversion of the truth and a deliberate attempt to capitalise on the success of respondent's 1992 and 1993 concerts by suggesting that those who were ultimately responsible for the 1992 and

1993 concerts would still be at the helm of the 1994 concerts. Nowhere is there any disclosure of the fact that Williams and her close corporation were no more than respondent's hired hands - important and vital hired hands to be sure - but hired hands for all that. On the contrary, respondent is portrayed as a passive and fortunate beneficiary of the 1992 and 1993 concerts for whom Williams had now done enough. There is no reason to think that the attempt at deception was calculated to fail.

In my view, what appellants did therefore amounted to a wrongful passing-off which entitled respondent to some relief. However it was not the principal relief which respondent sought, nor was it the relief which the Court a quo granted. It was open to the Court a quo to grant alternative relief and, but for the fact that this is a minority judgment, I would have formulated an appropriate order in

substitution for that granted by the Court a quo. In substance it would have prohibited appellants from representing directly or indirectly that their concerts are a continuation of the concerts which respondent staged in Johannesburg in 1992 and 1993.

I turn to the alternative cause of action: unlawful competition. Reluctant as one may be to have to opine on matters of ethics and business morality, the decision of this Court in Schultz v Butt 1986 (3) SA 667 (A) obliges one to do so when a claim that competition is unlawful is made and the claimant is not objecting to one of the more clearly defined manifestations of unlawful competition such as passing-off, or trademark infringement. The test is ultimately whether the conduct complained of is offensive to the general sense of justice of society because it is incompatible with boni mores. consider that even if due allowance be made for the need to avoid

taking an unduly censorious view of the conduct of businessmen and women in their pursuit of profit, the conduct of Williams should be regarded as unacceptable. She was hired at considerable expense to organize and promote respondent's concerts. Her conduct throughout her association with respondent shows that she was intent upon exploiting the commercial opportunities of such concerts to the future detriment of respondent. Her surreptitious attempt to have the name registered as a trademark while still working for respondent and after respondent has asked her to investigate whether respondent could register the mark, was deceitful and underhand and an attempt to steal a march on her client. Her incorporation in March 1992 of a new close corporation (Orchestral Productions whose name was changed in June 1993 to Promenade Concerts) and the unauthorised placing in the programme for the 1992 concerts of a postcard inviting early booking

for the "1993 Proms" and requiring it to be sent, not to her, but to the newly formed close corporation were but further steps in her campaign of exploitation of the opportunity, presented by respondent having hired her to organize its concerts, of competing subsequently with respondent. The advertisements which she placed and the letter (annexure "U" to the founding affidavit) which she wrote to those who had attended respondent's concerts are yet further examples of her cynical exploitation of the situation. Her selection of dates for her own concerts was yet another attempt to pre-empt respondent's concerts.

It must be emphasised that this is not a case in which the question is whether a third party would have been acting unlawfully if he had behaved in a similar manner. The question is whether the law permits Williams who had been hired and paid by respondent to

promote its concerts and generate goodwill for its concerts, to behave in a manner so patently incompatible with what she had been paid to do for respondent. The answer depends upon whether or not such conduct is consistent with the boni mores and general sense of justice of contemporary society. In Trego v Hunt 1896 AC 7 the House of Lords decided that even in the absence of a restraint clause, the seller of a business was not entitled to trade in opposition to the buyer for the simple reason that the seller could not be permitted to erode, by competing with the buyer, the value of the goodwill for which he had been paid. Here, appellant was paid inter alia to generate support for respondent's concerts. She used the opportunity to prepare the ground for a diversion of the supporters of respondent's concerts to her own concerts and thereafter set about competing directly with respondent the moment her contract with respondent had come to an end.

I have little doubt that conduct of this kind is beyond the pale of what may legitimately be done in the name of even the robust competitiveness which characterises modern business, and that it should not be dignified with the epithet lawful. I conclude therefore that this cause of action too was made out and that respondent was entitled to some form of relief by way of interdict.

For these reasons, I would dismiss the appeal after recasting the interdict to conform to the relief to which I think respondent had shown itself to be entitled. A consideration of the precise form which the relief should take and what orders as to costs would be appropriate is not justified in the light of the view which the learned Chief Justice and the other members of the Court take of the matter.

R M MARAIS