

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 448/93

In the matter between

PAYEN COMPONENTS SOUTH AFRICA LIMITED APPELLANT

AND

<u>BOVIC GASKETS CC</u>	FIRST RESPONDENT
<u>VICTOR WILLIAM BODELL</u>	SECOND RESPONDENT
<u>ARTHUR LESLIE WILFRED OLIVER</u>	THIRD RESPONDENT
<u>DAVID GEORGE BOYCE</u>	FOURTH RESPONDENT
<u>THOMAS MICHAEL BODELL</u>	FIFTH RESPONDENT

CORAM: CORBETT CJ, HEFER, STEYN, FH GROSSKOPF
et SCHUTZ JJA

DATE HEARD: 9 MAY 1995

DATE DELIVERED: 25 MAY 1995

J U D G M E N T

SCHUTZ JA:

The appellant ("Payen" - applicant below) and the first respondent ("Bovic" - first respondent below) are competitors in the market for gaskets used in assembling and repairing motor vehicles. The customary aspersions are cast. Payen complains that Bovic's products are of inferior quality and that it does not keep a full range of gaskets, which allows it to concentrate on the more lucrative part of the market. The result is that it undercuts Payen. Bovic counters by ascribing Payen's higher prices to inefficiency, and charges that Payen is trying to establish a monopoly. However all that may be, the legal grounds on which Payen relies to curb Bovic's activities are copyright, unlawful competition, and, lastly and faintly, contract. There is no reliance

on trade mark or passing off, although many expressions associated with these disciplines are used. Resort to the Merchandise Marks Act and the Trade Practices Act was abandoned in this court.

The second respondent ("Bodell" - second respondent below) is a 50% member and the controlling force in Bovic. Three further persons were cited as respondents below but the claims against them were abandoned in this court, so that their participation in these proceedings is now confined to their claim for costs.

The activity of which Payen complains is the use by Bovic in its price lists and catalogues and on the wrappers containing its gaskets of the Payen code for identifying the huge range of gaskets in use in South Africa. Each code consists of five digits, the first two being letters and the other three numbers. The first letter indicates the type of gasket, so that, for instance, all

cylinder head gaskets commence with an A or a B. To give examples of complete codes, AF 240 denotes a cylinder head gasket for an Alfa Romeo 1300, and CJ 494 a head set for a Nissan L 185. There is nothing novel about such a system, but its utility is such that Bovic contends that it has become the language of the trade when identifying gaskets, so much so that it is necessary for any trader to use it (so it is contended).

Copyright Work?

First, the facts. Payen's essentially uncontested case is based on the evidence of five witnesses, Ellis, Thomas and Butler who depose to the code's English origins, and Parker - Nance and Galloway who describe its South African adaptations and accretions.

Companies not only enjoy perpetual succession but some also undergo changes of name and parentage. The "Payen Group" in the United

Kingdom is a good example, which tends to render the exposition following rather tortuous.

Coopers Mechanical Joints Limited ("CMJ") was a subsidiary of another Payen Group company, namely Engineering Components Limited ("EC"). The coding system for gaskets in use in 1970, although partly computer based, was unsatisfactory in several respects. One Machin, the management services manager of EC, tackled the problem first. What he did was to work out the mathematical basis for what was to become the new Payen coding system. He prepared a table of significance ("the table") which contains an outline of the later system, although there were some departures from the outline. The table is skeletal in form and is in no sense the final embodiment of the work. No copyright was claimed in it. It is neither a catalogue nor a price list.

The next step was taken by one Butler, the chief systems analyst working at EC under Machin. Using the table he "devised a computer program for allocating new reference numbers in place of the old" ("the program"). That is all that we are told about this important step.

Thomas took over the co-ordination of the project in October 1971. The old numbers were grouped in accordance with the classes of gasket, which were described. This data which was to be fed into the computer was then meticulously checked and re-arranged. Then, to quote the words of Thomas, also echoed by Butler, "the data was entered into the computer to generate new numbers in accordance with (the) program devised by Mr Butler." That is all we are told about this other important step.

Although the bulk of the new numbers was generated in this way, a significant part was formulated manually. This was done "by the staff of the Payen

technical department" where the old number was not in the standard format.

This technical department appears to have been that of EC.

The next important step is not expressly stated at all, namely the printing out by the computer of the list of new numbers. However, I suppose that it is implicit in the narration. What followed next, after many months, was two lists giving cross references from the old numbers to the new, and the new to the old ("the lists"). They were first used internally and were then published in February and April 1972. Although there is confusion and contradiction in the affidavits it seems that it is the originals that no longer survive, not the printed ones. Five named persons prepared these lists. They were all British subjects employed by EC or CMI. The lists were necessary for the transitional period.

They were used for the preparation of the first master catalogue,

which was published in October 1972. The format was that of the old catalogue but the numbers were new. Four other named persons prepared it. They too were British subjects and employees of EC or CMJ. All the later catalogues were based on the 1972 master.

After a master list had been entered into the computer it was thereafter kept up to date. This work was done by Butler and employees of EC, CMJ and Coopers Payen Limited ("CP" - the new name for CMJ after 1980, and thus still a subsidiary of EC).

As both South Africa and the United Kingdom give effect to the Berne Convention the various Payen companies and their employees are to be treated as if they were here.

Although there is a challenge on this point by Bovic, I think that it is obvious from the recitation of the facts so far that the preparation of the

new English catalogue involved much labour and at least some skill.

On 11 March 1988 EC and CP (formerly CMJ) assigned copyright and rights of a like nature in the numbering system to Payen International Limited ("PI"). EC is the wholly owned subsidiary of PI. What was not ceded was Butler's program. What was ceded was the "original works" consisting of the table, the 1972 and later catalogues, the computer printout of the summer of 1971 (here mentioned with Butler as the author), and the "New Reference/Old Reference." This last pair and the printout are shown as having been authored by Butler and being no longer in existence. Their best available reference is given as the "Interchange Lists February and April 1972." This last no doubt refers to the published cross-reference lists, whereas the "New Reference/Old Reference" presumably refers to the original manuscript or part manuscript form.

Although Payen (the applicant - Payen Components South Africa Limited - a subsidiary of PI's holding company Turner and Newall Limited) has been the exclusive licensee of the numbering system for a long time, a written licensing agreement was concluded with PI (by now the copyright holder) only in 1989. *Nemo dat quod non habet*. Payen's rights can be no better than PI's rights.

Parker-Nance has been involved in the production of the South African version of the catalogues and price lists using the new system since the first local edition in 1973. It had to be adapted to the South African market and has had to be kept up to date. Doing this has entailed "a vast amount of work". Among other things he has to keep abreast of new models as also modifications. New gaskets are referred either to CP in the United Kingdom or Components Eastern Limited ("our Far East Associate")

depending on the country of origin of the new engine. Numbers are allocated by the one or other of those companies. The new numbers are then included in the catalogue. Nothing more is said about the nature of the association with the Far East associate. One additional task has had to be undertaken in South Africa, namely the translation of the material into Afrikaans.

The catalogue cum price list is of a kind as may qualify as a "literary work" in the generous sense that that phrase is used in copyright law. Moreover it has been "written down" in a material form. Further, there has been enough labour and skill expended both in England and South Africa for the same to be "original", in the sense of copyright law.

Mr Ginsburg, for Bovic, raises two contentions, both related to authorship. The first goes along these lines. Except in those cases where the law provides otherwise, for copyright to subsist it must be possible to identify

a human author. Here there was no human author, as the author was a computer. Even though a computer program may qualify as a literary work, Butler's program cannot be relied upon because it has not been infringed. It is a completely different work from the printout or its successors. That, no doubt, is why it has not been relied upon by Payen. Nor has it even been assigned to PI. The program, so the argument proceeds, was the thing that mattered. It was what made or allowed the computer to do what it did. It was the "author" of the printout. Butler was merely the author of the program not the printout. This argument is not dependent upon its being only in 1992 that separate provision was made in our statutes for copyright protection for computer programs, which before qualified, if they qualified at all, as "literary works" in the ordinary way - *Northern Office Micro Computers (Pty) Ltd and others v Rosenstein* 1981(4) SA 123(C).

Mr Ginsburg relies on one English case *Express Newspapers PLC v Liverpool Daily Post & Echo PLC and others* [1985] 1 WLR 1089 (Ch): [1985] FSR 306 and two foreign textbooks Laddie, Prescott and Vitoria *The Modern Law of Copyright* 94 and Dworkin *Blackstone's Guide to the Copyright Designs and Patents Act 1988* 47. A distinction is drawn between "computer aided" and "computer generated" works. In the former case the computer is a mere tool like a pen or word processor. In the latter the work of creation is performed by the computer itself with relatively little human input. Perhaps it should be noted that the computer which Butler used was used in 1971 when computers had not yet been taught to do all the remarkable things they now do.

Dworkin describes a computer generated work in these terms (*op cit* 47):

"The computer-generated category is really aimed at more sophisticated devices such as those now beginning to be marketed whereby a computer can produce to order an original piece of music in the style of a known composer."

And again at 185-6:

"There is now a crucial distinction between a *computer-aided* work, as in the above case (the *Express Newspapers* case), and a *computer-generated* work. The latter work is one which is created without expenditure of significant human skill and effort in the completed work. For example, the compilation of new crossword puzzles, moves generated by computer chess programs or computer-generated original pieces of music in the style of a known composer. The steps to be taken by the operator of the machine may be so trivial that it is difficult on normal principles to say that he or she is the author. The real creative work is done by the person who devises the original computer program, but it would be inconvenient and misleading to treat that programmer in all cases as the owner of the copyright in the new works which his program produces, for example, in all the new music produced by the various programs which are sold to the public."

Laddie (*op cit*) says at 94:

"There may be cases where the real work has been done by the computer, the human contribution being too trivial or not

sufficiently related to the work that has emerged. Suppose a computer linked directly to a large number of meteorological instruments and programmed automatically to print out a weather chart on demand. It seems factually wrong to contend that the deviser of the program is the 'author' of the chart. He may have died many years ago, the program may have been bought in from an independent software house, yet every day quite different charts are printed out. (It is true that the programmer's labour and ingenuity are in a sense responsible for the chart; but in that sense so are the efforts of the designers of the computer itself; for that matter, so are those of the inventor of the barometer.) It is perhaps even more artificial to argue that the operator of the computer is the author: the only skill and labour he had employed is ensuring that the flow of programs and data to the machine is maintained. It might be said that the real author is the owner or hirer of the computer who has expended the capital in setting up and operating the system; but such person is probably a body corporate, and if considered to be the 'author', would enjoy a potentially perpetual copyright."

The *Express* case was concerned with a competition entitled "Millionaire of the Month" published in three newspapers with a view to increasing circulation. Numerous cards, each carrying a five-letter code, were

distributed free and at random to members of the public. In order to see whether or not they had won a prize those taking part in the competition could check the cards against grids containing 25 letters and two separate rows of five letters which were published daily. Various prizes were offered to lucky winners. Another newspaper copied the scheme as it was, and an infringement action was brought. The manner in which the scheme had been prepared for the plaintiff was fully explained in the affidavits. What had to be done was to produce a large number of combinations which would suffice for a year or so, whilst at the same time ensuring that there would not be too many winners. The description proceeds (at 1093 C):

"What Mr Ertel says is that he started off by seeing whether he could work out these grids by just writing down appropriate sequences of letters. It soon became apparent to him that, although this could be done, and done without too much difficulty when just producing a small number of grids, if you are going to produce sufficient for a year's supply or something of

that order, it becomes a very different matter indeed. It was immediately apparent to him that the labour involved in doing this could be immensely reduced by writing out an appropriate computer programme and getting the computer to run up an appropriate number of varying grids and letter sequences.

Mr Ertel did all this. He programmed his computer; he ran out the results; he checked the results; and the steps which he had to take in this regard show that indeed the preparation of these grids and sequences of five letters involved a great deal of skill and labour."

The point taken before Whitford J and the manner in which he disposed of it are contained in these words (at 1093):

"A point was taken by Mr. Jeffs on the question of the employment of a computer, the suggestion of Mr. Jeffs being that, whatever might be the position of anything that was done before the computer was employed, although he was prepared to accept that computer programmes might well be copyright works, the result produced as a consequence of running those programmes, was not a work of which it could truly be said that Mr. Ertel was the author.

I reject this submission. The computer was no more than the tool by which the varying grids of five-letter sequences were produced to the instructions, via the computer programmes, of

Mr. Ertel. It is as unrealistic as it would be to suggest that, if you write your work with a pen, it is the pen which is the author of the work rather than the person who drives the pen."

The distinction between computer generated and computer aided works drawn in these writings seems to me to be valid and such as should be recognized here. It may be of importance in cases where ownership and duration of copyright are in issue, and bears upon this case because the question whether copyright did or did not vest in 1971 or 1972 must be decided with reference to the Copyright Act 63 of 1965 - see S 43 of the Copyright Act 98 of 1978 as interpreted in *Appleton and another v Harnischfeger Corporation and another* 1995 (2) SA 247(A) at 260 E and 261 G-H.

This brings me back to the facts. Has Payen proved that there was a human author, in other words that the printout was not computer generated?

In answering this question it is necessary first to observe that the facts set out by Payen are extremely sparse at some critical points. Also that computer literacy is not to be assumed in persons over 50, as most judges are. Copyright is a technical subject and it is essential that a party trying to prove it establishes the technical points necessary for his claim: *Vagar (t/a Rajshree Release) v Transavalon (Pty) Ltd (t/a Avalon Cinema)* 1977 (3) SA 766(W) at 775 C.

However, I consider that enough evidence has been produced. After the computer had received the data what remained was essentially an arithmetic function including the requirement that there should be no duplication.

Mr. Ginsburg's second point was that Payen has not proved what the original "work" was, a matter sometimes interwoven with the paramount

question of identifying the author, as is pointed out in Dean *Handbook of South African Copyright Law* 1-15. It is true that Mr. Puckrin, for the appellant, had difficulty in pinpointing at what point the original work came into existence, and there were even contradictions in his argument. This is not surprising given the sketchiness of the affidavits at some places. But there is, I think enough, just enough, to get him home. The first printout was the basis of all that followed. What was added or changed thereafter was done by employees of the assignors or of Payen. Problems that might have arisen if this had not been so do not arise. Nor do I think that the fact that later numbers are supplied by CP or Components Eastern Limited affects the result. There is clearly a need for international uniformity in numbers. The process seems to be no more or no less than adding or removing items in a railway timetable on the basis of information supplied. What Payen is doing is

maintaining an up-to-date compilation.

For these reasons I consider that Payen has proved copyright in its catalogue cum price list.

Copyright Infringement

In terms of S 43 of the Copyright Act 98 of 1978 questions of infringement are to be decided in accordance with that Act even although copyright vested before it came into force.

Infringement in this case under S 23 would consist in reproducing (meaning copying) the work in any manner or form (S 6(a)). Reproduction of any substantial part would suffice (S 1 (2A)). By that standard there clearly were repeated infringements by Bovic's use of the Payen code in its catalogues cum price lists. Indeed Bovic has sought to justify such use in relation to unlawful competition. But it has desisted and now uses its own

numbering system for purposes of identification. The Payen code does not appear in the current catalogue. As this retraction occurred after the bringing of the application, Payen is entitled to its costs at least until Bovic stopped using Payen's numbering system. But Payen still seeks an interdict. Bovic's response is that apart from changing its catalogue cum price list it has undertaken not to repeat its use of the Payen system in them in the future and that Payen has no need of an interdict, as there is no reasonable ground for apprehending further harm. An issue has been sought to be raised as to whether an undertaking has in fact been given. Mr. Ginsburg has formally said in his heads and in his argument that it has. That binds his client. An interdict is not a remedy for a past invasion of rights: *Philip Morris Inc and Ano v Marlboro Shirt Co SA Ltd and Ano* 1991 (2) SA 720 at 735 B. However, the infringement complained of is not confined to the catalogues

and price lists.

Although the wrappings in which Bovic's gaskets are sold bear Bovic numbers, they to this day also bear a disclaimer that includes Payen's numbers, in this form, "This product is supplied by Bovic Gaskets. The number mentioned below is for identification purposes only and in no way suggests that this gasket set is anything other than a Bovic product.

Alternative To: (and then follows the Payen number)."

Bovic justifies this conduct by saying that it is done in order to identify the products to the purchaser in terms of a Payen number with which he is invariably more familiar.

This is copying in fact. The question is whether it is copying of a substantial part. In this connection Copinger and Skone James (*op cit*) say at 8-26 to 8-27:

"Quality not quantity taken the test. It has repeatedly been held that 'substantial' in this connection relates much more to the quality of what has been taken than to the quantity. The quality, or importance, of the part taken is frequently more significant than the proportion which the borrowed part bears to the whole work. Thus if so much is taken that the value of the original is sensibly diminished, or that the labours of the original author are substantially, and to an injurious extent, appropriated by another, that is sufficient, in law, to constitute a piracy *pro tanto*.

In deciding questions of this sort, regard must be had to the nature and objects of the selection made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work. It may be relevant to consider whether there has been an *animus furandi* on the part of the defendant in the sense of an intention on the part of the defendant to take for the purpose of saving himself labour. Many mixed ingredients enter into the consideration of such questions. In short, the question of substantiality is a matter of degree in each case and will be considered having regard to all the circumstances. Generally, it is not useful to refer to particular decisions as to the quantity taken."

See also *Galago Publishers (Pty) Ltd and Ano v Erasmus* 1989

(1) 276(A) at 285 B-F, *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990

(2) SA 164(D) at 177 D - 178 F and also the remark of Petersen J in *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 610, "what is worth copying is *prima facie* worth protecting." In the passage cited above in *Galago* there is a quotation from *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465(HL) at 469, in which Lord Reid says that a convenient short cut in deciding whether the part copied is a substantial part is sometimes to ask whether that part on its own would have qualified for copyright. But, he adds, that is a short cut only and:

"A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be."

I consider that that passage fits this case. It would be wrong to take one wrapper and say that the code on it is not a substantial copying, then

to take the next and say the same, and so on. That would be to ignore that a large part of the whole has been copied. But the matter goes further. Even ignoring warehouses, I can readily imagine that in shops a large collection of gaskets will be displayed on racks, shelves and the like, or otherwise readily accessible to members of the public, so that a substantial part of the Payen numbers will indeed be displayed together, on any meaning of the word substantial. The fact that the mode of presentation differs from what is presented in the Payen catalogue does not, to my mind, make a difference.

I would therefore grant an interdict in respect of wrappers. That means that Bovic is still infringing to this day. That being so I would grant an interdict in respect of the catalogues cum price lists as well, despite Bovic's undertaking. What also influences me in this connection is that I think that Bovic has been less than frank in its affidavits in suggesting that the numbers

copied were not Payen's numbers, but the numbers of an English firm Clough and Wood. Mr. Ginsburg has rightly not sought to press this suggestion and I do not think that I need expand upon it further.

Unlawful Competition

Having reached the conclusion which I have in connection with copyright it is strictly unnecessary to deal with unlawful competition, but I shall nonetheless indicate briefly why I do not consider that such competition has been proved.

The broad and flexible principles relating to this branch of the law have been stated in this Division in *Schultz v Butt* 1986 (3) 667(A) at 678F - 679E and *Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A). It is unnecessary for me to restate them. But I would repeat that in judging questions of unlawfulness, not only in this field, questions of policy

may play an important part, and that in the field of unlawful competition an important one is the need for free competition.

Mr Puckrin, who urged this part of his case not too strongly, had some difficulty in defining exactly what constituted the unlawfulness. In the first place he said that Bovic was competing and had appropriated part of the market built up by Payen without itself having expended skill, time and effort. This is not in itself unlawful - see *Taylor and Horne* (above) at 422 B-D. But there were added elements he said. They were that there had been not only an appropriation but a slavish misappropriation. It is not clear to me what the use of the pejoratives adds. Then it was said that Bovic had been spared building up its own system. Finally, what Bovic had done "facilitated substitution". All in all not an impressive list, when reliance on all the recognized heads

of unlawful competition is excluded.

The main reasons why I consider that unlawfulness has not been proved are these:

First, much of Payen's evidence is to be found in the interstices between copyright and passing off. In the case of copyright S 41(4) of the Act expressly provides that no copyright or right in the nature of copyright shall subsist otherwise than by virtue of the Act or some other law. Turning to passing off, it has not been relied upon at all as such. In my opinion a court should be wary of allowing the sharp outlines of these two established branches of the law of unlawful competition, evolved through long experience, to be fudged by allowing a vague penumbra around the outline. Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most such

cases it is one of the established categories or nothing.

Secondly, what we are concerned with is a numbering system.

The case is like *Taylor and Horne* (at 422 G-E) in that it is not concerned with the appropriation of another's product or performance as such. There is a question of degree involved, but I think that the complaint stands beyond the periphery.

Thirdly, there is a considerable body of evidence, including that of traders from Delarey to Soshanguve to the effect that the Payen code system is in general use in the gasket market in South Africa, is indeed within the public domain. It would be unrealistic, indeed futile for the court to try and alter this situation. So why, absent copyright of course, restrain Bovic? This evidence comes from Bovic's side. But Payen has sought a final interdict on paper. The problem that a judge faces when reading first the founding

papers and then the answer is nowhere better stated than by Jane Austen in ch 36 of Pride and Prejudice:

"... it was impossible not to feel that there was great duplicity on one side or the other ... She put down the letter, weighed every circumstance with what she meant to be impartiality - deliberated on the probability of each statement - but with little success. On both sides it was only assertion. Again she read on. But every line proved more clearly that the affair, which she had believed it was impossible that any contrivance could so represent as to render Mr Darcy's conduct in it less than infamous, was capable of a turn which must make him entirely blameless throughout the whole."

Payen not having proceeded by way of action and not having even asked for oral evidence, must bear the consequence that it is not feasible nor just to expect a judge to decide this issue in Payen's favour on the papers.

I have spoken of the Payen code as being in general use. In fact Bovic tried to pitch its case much higher, contending that it was driven to its plagiarism by necessity. There was no other way. Necessity is a strong word.

That the compulsion was not as great as claimed is proved by the fact that Bovic has now largely desisted from its former practices and is still in the market. Temptation yes, convenience yes, advantage yes, but necessity no.

Thirdly, on the evidence there is no likelihood of deception.

There is no direct evidence that anyone has been deceived and a considerable body of testimony that customers and dealers will not be confused. Again Bovic's version must be accepted. Indeed I understood Mr. Puckrin to abandon reliance on confusion at the start of his argument.

Fourthly, it has also to be accepted that Bovic's products are not inferior, whatever Payen says and whatever substance there may or may not be in its contentions in this regard.

All in all I do not consider that unlawfulness has been established. In this respect I agree with the decision of the court *a quo* (whilst

disagreeing on copyright infringement). That court's decision is reported as *Payen Components SA Ltd v Bovic Gaskets CC and others* 1994 (2) SA 464(W).

Contract

It is suggested that an exchange of correspondence in 1988 and 1989 led to a contractual undertaking by Bovic not to use the Payen system. There was a demand for such an undertaking by Payen's attorneys and a threat to take action when it was not given. On 1 June 1989 Bovic's attorneys wrote, "We have been instructed that our client has in fact complied with the various demands made by you, without admitting that it was liable to do so, but our client is not prepared to undertake to pay your client damages." Payen's attorneys wrote back noting the statement that Bovic had complied with Payen's demands and repeating its demand for a written undertaking.

The matter rested there for some two years until the exchanges leading to this litigation commenced. Nowhere in this correspondence do I find an acceptance of Payen's offer couched in the form of a demand. Payen may have been entitled to feel that it had been deluded. But in my opinion there was no contract.

Condonation

Payen has applied for condonation of the late filing of a short volume five of the record. There was no opposition other than on the prospects of success and the non-compliance was explained, with the result that the application was granted subject to wasted costs being paid by Payen, such costs to include the costs consequent upon the employment of two counsel.

Costs

By reason of the withdrawal of the claims against the third to fifth respondents in this court they are entitled to their costs in both courts.

This is a case warranting the employment of two counsel.

Order

In the result I order that:

1. The appeal is allowed, the first and second respondents are ordered to pay the appellant's costs jointly and severally, and the appellant is ordered to pay the costs of the third, fourth and fifth respondents, all costs to include the costs consequent upon the employment of two counsel.
2. The order made by the court *a quo* is set aside and replaced by the following:

"An order is granted:

1. Interdicting the first and second respondents, their agents and employees, from infringing the applicant's copyright vesting in the applicant's identifying code system set out in its catalogues and price lists by:
 - (a) (i) reproducing, or
 - (ii) publishing, or
 - (iii) making an adaptation thereof, or any part thereof, in any material form;
- (b) reproducing or publishing or distributing whether in the course of trade or otherwise the first respondent's price list dated 4 March 1991 (or any infringing version thereof);
- (c) reproducing or publishing the said identifying code

system (or adaptations thereof) which appear in the applicant's catalogues and price lists on the first respondent's gaskets or gasket sets or the wrappers in which they are contained.

2. Ordering the first and second respondents jointly and severally to pay the applicant's costs, such costs to include those consequent upon the employment of two counsel.
3. Ordering the applicant to pay the costs of the third, fourth and fifth respondents, such costs to include the costs consequent upon the employment of two counsel."

W. P. Schutz

W P SCHUTZ
JUDGE OF APPEAL

CORBETT	CJ)	
HEFER	JA)	
STEYN	JA)	CONCUR
FH GROSSKOPF	JA)	