

Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd
[2014] 2 All SA 282 (SCA)

Division: SUPREME COURT OF APPEAL
Date: 12 March 2014
Case No: 215/2013
Before: MS NAVSA, MJD WALLIS, NP WILLIS JJA, BC MOCUMIE and KGB SWAIN AJJA
Sourced by: P Zachia
Summarised by: DPC Harris

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Intellectual property - Passing off - Passing off occurs when one party represents, whether or not deliberately or intentionally, that its business, goods or services are those of another party or are associated therewith, and is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of one party are those of another or are associated with those of the other party - Proof of passing off requires proof of reputation, misrepresentation and damage.

Editor's Summary

As a major producer and distributor of maize meal products, the appellant had marketed its super maize meal under the name "White Star" since 1999. It complained that the respondent was passing off its super maize meal, marketed under the name "Star", by selling it in a get-up deceptively or confusingly similar to that of "White Star". It, therefore, it sought an interdict in the High Court, but its application was dismissed. That led to the present appeal.

In alleging confusingly similar get-up, the appellant referred to the facts that the respondent's product used the same three colours as it did on its product packaging; a prominent red star; prominent use of the name "Star" capitalised in red lettering; and a slogan very similar to that of the appellant's product.

Held - Passing off occurs when one party represents, whether or not deliberately or intentionally, that its business, goods or services are those of another party or are associated therewith. It is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of one party are those of another or are associated with those of the other party. The misrepresentation on which it depends involves deception of the public in regard to trade source or business connection and enables the offender to trade upon and benefit from the reputation of its competitor. Misrepresentations of this kind can be committed only in relation to a business that has established a reputation for itself or the goods and services it supplies in the market and thereby infringe upon the reputational element of the goodwill of that business. Accordingly, proof of passing off requires proof of reputation, misrepresentation and damage.

In respect of the appellant's reputation in its product, the Court noted that the product was introduced to the market as a vitamin enhanced form of maize meal in 1999, and that the tonnage sold rapidly increased over the years. In 2010, the year before these proceedings were launched, a survey of top brands in South Africa showed that it and one other were the two top-ranked brands for super maize meal. In order to show passing off, the appellant had to show

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that it enjoyed the reputation that was under attack both at the time when the respondent entered the market with its get-up and at the time of the misrepresentation that it sought to interdict.

While acknowledging that the appellant had established some reputation in its product, the respondent denied the existence of such a reputation at the time when it entered the market with its own product. Based on the evidence, the Court accepted for the purposes of this judgment that the appellant had established that it enjoyed the requisite reputation in its get-up at March 2001 and that that was the relevant first date for the purposes of its passing-off claim. The remaining issue between the parties was then whether the appellant had established the second and third requirements for passing off, namely misrepresentation and damage, by showing a reasonable likelihood that members of the public might be confused by the get-up adopted by the respondent. The Court was required to consider the type and class of customers who would buy super maize meal and the circumstances in which such goods would be displayed for sale. The average customer was to be taken as someone of average intelligence, eyesight, observation and recollection. The two products had to be considered not only as they would appear if sold side by side, but also on the basis of their being displayed separately in separate premises. Applying that approach, the Court concluded that while there was undoubtedly some visual similarity between the two get-ups, principally caused by the combination of a broadly white background with the symbols and lettering in red and green, the moment a customer saw a package the dissimilarities would become obvious. Such dissimilarities were sufficiently apparent and obvious to hold that there was no reasonable likelihood of confusion between the two.

The court below was correct to hold that the appellant had failed to make out a case of passing off and in dismissing the application for an interdict. The appeal was dismissed with costs.

Notes

For Intellectual property see:

- . LAWSA Second Edition Replacement Volume Vol 29
- . Burrell TD *Burrells South African Patent and Design Law* 3ed Durban LexisNexis 1999

Cases referred to in judgment

<i>Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd</i> [1977] 4 All SA 657 (1977 (4) SA 434) (W) - Referred to	292
<i>Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd</i> [2001] 4 All SA 235 (2001 (3) SA 884) (SCA) - Referred to	292
<i>Capital Estate and General Agencies (Pty) Ltd and others v Holiday Inns Inc and others</i> [1977] 3 All SA 306 (1977 (2) SA 916) (A) - Referred to	286
<i>Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd and another</i> [1998] 3 All SA 175 (1998 (3) SA 938) (SCA) - Referred to	286
<i>Century City Apartments Property Services CC and another v Century City Property Owners' Association</i> [2010] 2 All SA 409 (2010 (3) SA 1) (SCA) - Confirmed	290

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<i>Greenblatt v Hirschon</i> [1958] 4 All SA 304 (1958 (4) SA 371) (A) - Referred to	292
<i>Online Lottery Services (Pty) Ltd and others v National Lotteries Board and others</i> [2009] 4 All SA 470 (2010 (5) SA 349) (SCA) - Referred to	290
<i>Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd</i> [1984] 2 All SA 366 (1984 (3) SA 623) (A) - Referred to	288
<i>Premier Trading Co (Pty) Ltd and another v Sporttopia (Pty) Ltd</i> [1999] JOL 4947 (2000 (3) SA 259) (SCA) - Referred to	288
<i>Reckitt & Colman SA (Pty) Ltd v SC Johnson and Son SA (Pty) Ltd</i> [1993] 1 All SA 27 (1993 (2) SA 307) (A) - Referred to	289
<i>Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods</i> [1992] 2 All SA 337 (1992 (4) SA 118) (A) - Referred to	292

Judgment

WALLIS JA:

- [1] The appellant, Pioneer Foods (Pty) Ltd ("Pioneer"), is a major producer and distributor of maize meal products. One such is its super maize meal, which it has marketed under the name WHITE STAR since 1999. It complains that the respondent, Bothaville Milling, is passing off its super maize meal, marketed under the name STAR, by selling it in a get-up deceptively or confusingly similar to that of WHITE STAR. To that end, it sought an interdict against Bothaville Milling in the Free State High Court, but Lekale J dismissed the application. The present appeal is with his leave.
- [2] Pioneer's complaint that the get-up in which STAR super maize meal is packaged is confusingly similar to the get-up of WHITE STAR is best illustrated by comparing the two side by side, as in the picture below, which was attached to Bothaville Milling's answering affidavit and shows the two products positioned side by side in a shop.





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- [3] The packaging in both cases has white as the background colour and the writing and symbols in either green or red. Both depict a red star. The star is larger and more prominent in the case of WHITE STAR and situated slightly above the centre of the package, with one elongated point at the base and a burst of smaller stars rising from it at the top. The words WHITE and STAR are printed over the star in green block capital letters and a plain *sans serif* font, with STAR in larger type than WHITE. Below the star are the words "SUPER MAIZE MEAL" in green type and block capitals, but printed in a much smaller font than the name. Below that in turn, in red block capitals, but fairly narrow type, are the words "THE CLEVER CHOICE" and at the bottom of the package there is a green rectangular block in which, in white block capital letters, appear the words "MOVE TO THE TASTE".¹ The package depicted above is a 10kg pack, but Pioneer also packages the product in 25kg, 5kg, 2.5kg and 1kg packs.
- [4] In the case of STAR, the red star is superimposed on a green circle in the upper half of the pack. It is symmetrical and has a maize cob (mealie) printed on it in green and white. The word STAR is printed immediately below the star and slightly below the mid-point of the pack, in red block capitals and a slightly fancy *serif* font with green shadowing. The words "SUPER MAIZE MEAL" appear below that in green block capitals, and below that, in red block capitals, appears the slogan "THE PEOPLES CHOICE".² At one stage the lower portion of the pack bore a symbol in accordance with the regulations governing the marketing of maize products, but that symbol now appears adjacent to the star. The same symbol appears in the top corner of the WHITE STAR package. The package depicted above is a 12.5kg pack and it appears that there are also 25kg, 50kg and 80kg packages.
- [5] Pioneer identifies four major aspects of this get-up that it says will, in conjunction with one another, lead to the deception of customers and confusion in the market place. First, is the use of the same three colours, white, green and red. Second, is the prominent use of the star symbol in red. Third, is the equally prominent use of the name STAR capitalised in red lettering. Fourth, is the use of the slogan "THE PEOPLES CHOICE" as opposed to its own slogan "THE CLEVER CHOICE". It contended that the cumulative effect of these was to make the two products confusingly similar and was likely to lead to confusion in the marketplace. In doing so, it relied almost entirely on the visual impact of the respective get-ups asserting simply that the continued use of the star device "will no doubt result in a diversion of custom from the Applicant" and that the likelihood of deception and confusion among the public "is clear and apparent".

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- [6] Bothaville Milling's response, substantiated by evidence, is that the combination of the colours white, green and red in the packaging of super maize meal is commonplace and used by a number of prominent brands. So too is the name STAR, either with or without a star symbol. As to the two slogans it says that they are linguistically, aurally and visually different. It, accordingly, discounts any prospect of customers being deceived or confused. In support of this it points out that it has been marketing its STAR product in this get-up since at least 2003. In that period, whilst Pioneer was on its own version aware of the STAR product and monitoring the market closely, it failed to identify a single incident of confusion or deception. Bothaville Milling, accordingly, attributes the present proceedings to a desire to stifle legitimate competition.
- [7] There is no dispute over the relevant legal principles. Passing off occurs when A represents, whether or not deliberately or intentionally, that its business, goods or services are those of B or are associated therewith. It is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of A are those of B or are associated with those of B.³ The misrepresentation on which it depends involves deception of the public in regard to trade source or business connection and enables the offender to trade upon and benefit from the reputation of its competitor. Misrepresentations of this kind can be committed only in relation to a business that has established a reputation for itself or the goods and services it supplies in the market and thereby infringe upon the reputational element of the goodwill of that business. Accordingly, proof of passing off requires proof of reputation, misrepresentation and damage.⁴ The latter two tend to go hand in hand, in that, if there is a likelihood of confusion or deception, there is usually a likelihood of damage flowing from that.
- [8] As regards Pioneer's reputation in WHITE STAR, the product was introduced to the market in 1999 as a vitamin enhanced form of maize meal. Since then it has been very successful. In volume the tonnage sold had increased from some 16 000 tons in 1999 to a little under 400 000 tons in 2010, the year before these proceedings were launched. In 2010, a survey of top brands in South Africa showed that it and one other were the two top-ranked brands for super maize meal. However, that is not the only critical date for the purposes of establishing its reputation in its get-up. In order to show passing off it must show that it enjoyed the reputation that is under attack both at the time when Bothaville Milling entered the market with its get-up and at the time of the misrepresentation that it seeks to interdict.⁵
- [9] Two possible dates present themselves insofar as the first relevant date is concerned. They are March 2001, when Bothaville Milling introduced its

present packaging by dropping the mark "NALEDI" that had previously been a significant component of its get-up, and August 2003, when it added the strapline "THE PEOPLE'S CHOICE" to its packaging. I start there because Counsel described the latter event as the straw that broke the camel's back, although it only sought to take the issue up eight years later. Be that as it may, by that date Pioneer's sales of WHITE STAR were well on track towards an annual tonnage of nearly 200 000 tons. Its marketing expenditure was nearly R7 million, with over R10 million having been spent on marketing from the time of its launch. Advertising on the radio, a major means of communication with the Black community for whom maize meal is part of their staple diet, was extensive, totalling 37 advertising spots a week on 5 different channels, although one does not know to what extent that advertising referred to the get-up of the product. In the absence of rebuttal this appears to be sufficient to establish the requisite reputation.

- [10] At the earlier date in March 2001, the position is less clear. WHITE STAR had been launched in a market dominated by two other major brands. Even so it had achieved sales of some 15 000 tons in 1999 and 65 000 tons in 2000. In 2001, its sales doubled again so one can infer that by March of that year something of the order of 35 000 tons had been sold. In 2000, R3,5 million had been spent on marketing and advertising and a similar amount was spent in 2001. It is plain that there was on-going and successful marketing of the brand. In 1999, WHITE STAR was also made available to consumers through demonstrations at various community functions, such as church gatherings, choir festivals and elections, which attracted substantial numbers of people.
- [11] Bothaville Milling does not challenge this evidence and at various points in the opposing affidavit concedes in general terms that Pioneer has established some reputation in WHITE STAR. However, it categorically denied the existence of such a reputation at the time when it entered the market with its STAR product. That was in 2000, when the product was launched as NALEDI STAR. The packaging was similar to that depicted above, save that above the star and mealie cob logo appeared the word NALEDI in lettering as prominent as the word STAR below the logo. At that stage there could have been no possible claim that the get-ups of the competing products were confusingly similar. The prominence of the word NALEDI was sufficient to prevent confusion.
- [12] In March 2001, the word NALEDI was removed from the pack, in order to avoid a dispute with a third party that held a registered trade mark NALEDI together with a device mark. At the same time small changes were made in the colouring of the words describing the product as well as the removal of the background against which they were printed.⁶ In my

view, the addition of the strapline in 2003 added little if anything to the appearance and impact of the STAR product from the perspective of the consumer. If the two were confusingly similar then the scope for such confusion existed from March 2001. The addition of the strapline could not have converted a get-up that was not confusingly similar to Pioneer's into one that was.

- [13] The heads of argument on behalf of Bothaville Milling were confined to a submission that, because Pioneer Foods launched its brand and adopted its get-up in 1999, and before 2003 Bothaville Milling had been using earlier variants on its own get-up as finally established in 2003 "it is highly unlikely that the Appellant had any repute or goodwill in its WHITE STAR get-up at the time when the Respondent commenced use of its packaging". This submission is somewhat flimsy in the face of the evidence summarised above and blurs the sequence of events. It does not take account of the fact that until March 2001 the presence in bold type of the word NALEDI would have served to distinguish the two get-ups. Nor does it take account of the limited impact of the addition of the strapline in August 2003. By that date there is certainly some evidence of a reputation in the WHITE STAR product and, if the later date of August 2003, is taken that evidence had grown stronger. Although this is not the strongest case in terms of proving the existence of the necessary reputation I accept for the purposes of this judgment that Pioneer established that it enjoyed the requisite reputation in its get-up at March 2001 and that this was the relevant first date for the purposes of its passing-off claim.
- [14] The remaining issue between the parties is then whether Pioneer Foods established the second and third requirements for passing off, namely misrepresentation and damage, by showing a reasonable likelihood that members of the public may be confused by the get-up adopted by Bothaville Milling for its STAR product into thinking that it is WHITE STAR or is related to WHITE STAR.⁷ This is a matter for the judgment of the court but in making it the court has regard to the type and class of customers who will buy super maize meal and the circumstances in which such goods will be displayed for sale. The average customer is to be taken as someone of average intelligence, eyesight, observation and recollection. The two products must be considered not only as they would appear if sold side by side, but also on the basis of their being displayed separately in separate premises. Allowance must be made for imperfect recollection on the part of the consumer. What falls to be compared is not any single element of the get-up or even each element separately, but the overall impact of the entire get-up of each on potential customers. In the case of a product such as this, falling in the category of fast moving consumer goods, the matter is largely one of first impression rather than lengthy examination, as customers buying such staple items will ordinarily be looking for their "usual" brand as part of routine domestic shopping.⁸

- [15] Pioneer's case on the likelihood of confusion is expressed in the following way in the founding affidavit of Mr Bower:

"The Respondent has embarked on a campaign of copying the applicant's WHITE STAR get-up and performance

thereby constituting a pattern of unlawful conduct in terms of which a confusingly or deceptively [similar] get-up and pay-off line is adopted to that of the applicant's WHITE STAR product in relation to the same fields of activity with the clear intention of deriving benefit from the applicant's repute and goodwill in and to its get-up and the business associated therewith to the detriment of the applicant's rights. As a result the respondent's use of the STAR get-up is likely to give rise to deception or confusion amongst a substantial number of interested persons accompanied by a reasonable apprehension of damages."

However, this is a statement of conclusions rather than evidence of how the two products are likely to be viewed in the market place.

- [16] The only tangible direct evidence adduced in support of those conclusions was in the form of affidavits by six consumers in Stellenbosch who were interviewed by an attorney, shown the STAR package and asked for their views as to its provenance. As they had previously been asked whether they consumed maize meal and knew WHITE STAR super maize meal, as well as how long they had known it and how they recognised it, there can be little surprise in learning that when they were shown the STAR package they said (with remarkable unanimity according to their affidavits) that they initially thought it was "associated with White Star, due to the prominent red star and the colours red, green and white appearing on the packet". Apart from the criticism to which the use of such standard form affidavits should rightly be subjected,⁹ it is interesting to note that none of these deponents said that they thought that the package they were shown was a package of WHITE STAR. That suggests that even though their minds had specifically and inappropriately been drawn to the latter product they did not think that STAR and WHITE STAR were the same.
- [17] Apart from this Pioneer lead no other evidence of the likelihood of confusion amongst the purchasing public. It confined itself to assertions that the similarity in packaging "will no doubt result in a diversion of custom from the applicant" and that the likelihood of deception and confusion amongst the public "is clear and apparent". That requires an examination of the four features on which it relied. First, there was the use of the colours red, green and white. Second, was the red star symbol. Third, was the use in bold type of the word STAR and last the use of the strapline. I remind myself that it is the combination of these in the overall get-up that must be considered. However, it is difficult to do this if one does not examine the individual elements and identify those that are most distinctive and have the greatest impact on potential customers.¹⁰
- [18] Having done that, it seems to me that the central feature of Pioneer's get-up is the elongated red star and upper star burst with the words WHITE

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STAR superimposed upon it in green block capitals in a *sans serif* font. The word STAR is given additional prominence by the fact that it is printed larger than any of the other wording on the package. It is the impact of the star with the superimposed words that is the immediately striking feature of the get-up. I am reinforced in that impression by the fact that in many of its marketing items depicted in the papers one finds both the star and the words WHITE STAR printed in different colours often without any reference to either super maize meal or the strapline. Thus, there are golf shirts with a red star and blue lettering; a red bowl where the star and the name are printed in gold and a white one where they are in red; a T-shirt where the star is red and the printing white and a pen and notebook where both the star and the name are in white. This suggests that for Pioneer it is the star and the name WHITE STAR that are the key features.

- [19] Whilst the STAR packaging also has a red star as its central feature the star is regular in shape and superimposed on a green circle with a large maize cob prominently printed in green and white in the centre of the star. The word STAR is printed below the depiction of the star in red block capitals and serif type with a green shadowing. On any footing it is markedly different from the central feature of Pioneer's get-up. One can readily imagine a customer being offered the one saying: "I want the one with the stars" or "I want the one with the mealie". It is more difficult to imagine a customer confusing the two.
- [20] Pioneer wisely does not seek to rely upon the similarity in names alone. Similarity in name alone, particularly a descriptive name or a name consisting in a word in common use, is rarely a ground for passing off because of the difficulty in establishing that it has become distinctive of the business or products of the person using them and courts will not give what amounts to a monopoly in such words to one trader at the expense of another.¹¹ But even in the limited context within which it relies upon the use of the word STAR as part of its overall get-up there seem to me to be difficulties with its contentions. The reason is that it is clear, and this is a central feature of its advertising and marketing, that its product is always marketed as WHITE STAR and never as STAR alone. The word WHITE is not an inconsequential or immaterial (the words mean the same) addition to the name. It is an integral part of it and there is no evidence that customers ask for it in an abbreviated form.
- [21] Accepting the difference in context between a trade mark and a passing off case, there are a number of cases in which courts have had to consider whether one word mark is confusingly or deceptively similar to another. The matter was dealt with in this Court in *Century City*,¹² where Harms DP said:

"[13] [I]f the appellant's brand name were to be confusingly similar to the registered mark ('be likely to deceive or cause confusion'), it infringes.

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I am satisfied that the appellant's brand name, in spite of the addition of the word 'apartments', is confusingly similar to Century City. The point is well illustrated by the facts in *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch) ([2004] RPC 41). The registered mark was the word 'Compass' in relation, in simplified terms, to computer and computer-related services. The defendant traded in the same fields under

the name Compass Logistics. After pointing out that the two marks were not identical in the light of *LJJ Diffusion SA v Sadas Vertbaudet SA* the court proceeded to consider whether they were confusingly similar. Laddie J said this (paras 24-25):

[24] . . . The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question. That customer is to be taken to be reasonably well informed and reasonably circumspect and observant, but he may have to rely upon an imperfect picture or recollection of the marks. The court should factor in the recognition that the average consumer normally perceives a mark as a whole and does not analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. Furthermore, if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion.

[25] Applying those considerations to the facts of this case, there can be little doubt that a likelihood of confusion exists between the Defendant's use of the sign or mark COMPASS LOGISTICS in relation to its business consultancy services and the notional use of the mark COMPASS used in relation to business consultancy services, including those in relation to which the Defendant specialises. The dominant part of the Defendant's mark is the word compass. For many customers, the word logistics would add little of significance to it. It alludes to the type of area of consultancy in which the services are carried out."

Harms DP then continued as follows:

"[14] This means that one has to assume reasonable notional use by a trademark owner of the name Century City for purposes of providing services for reserving and maintaining accommodation at apartments. The appellant's use of Century City Apartments would to my mind have given rise to the likelihood of confusion. I therefore conclude that the appellant's use of its brand name infringed the mentioned trademark registration. The same applies to the use of its domain name. This does not mean that the registration remained unimpeachable. I shall revert to this issue.

[15] I do not agree with the High Court that this conclusion applies to the appellant's corporate name 'Century City Apartments Property Services CC'. It is in my view materially different from the trademark Century City. I can do no better than to refer to the facts in *10 Royal Berkshire Polo Club Trade Mark* [2001] RPC 643 esp at 653. The question was whether this mark was confusingly similar to the well-known Polo mark. The court held that it was not because it did not capture the distinctiveness of the trademark owner's mark; that the message of the mark came from the words in combination; and that the word Polo

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functioned adjectivally in the context of the applicant's mark. Adjectival use may be distinctive from the use of a word as a noun. The same considerations apply too in the present case to exclude the reasonable possibility of confusion or deception."

[21] The word STAR is a word in common use. Pioneer uses it in conjunction with the word WHITE to distinguish and identify its product. Accepting that it has been successful in doing this, as is implicit in its claim to reputation, the absence of the word WHITE would, in my view, be significant to a customer purchasing super maize meal. As Bothaville Milling's trade mark registration of the Star label reflects, the word "STAR" and the device of a star as such are common features of marks registered in the same class, that is, maize meal, samp and maize rice.

[22] There is undoubtedly some visual similarity between the two get-ups, principally caused by the combination of a broadly white background with the symbols and lettering in red and green. However, the moment a customer saw a package the dissimilarities would become obvious. In my view, they are sufficiently apparent and obvious to hold that there is no reasonable likelihood of confusion between the two.

[23] However, if I had some residual doubt about the position, it would be dispelled by the fact that there is simply no evidence of any confusion in the market place between the two products, in the period between 2001 and the commencement of proceedings in August 2011. Although such evidence is not essential to prove a likelihood of confusion in the market place,¹³ it can, if it is present, tip the balance in one direction and, if absent, tip it in the other.¹⁴ It is most surprising that after nearly 10 years of competitive trading, with what are said by Pioneer to be confusingly similar get-ups, not a single customer or store has reported any confusion.¹⁵ There is not even someone such as the lone customer who, in one case, was misled in her purchase of biscuits,¹⁶ nor anything resembling the finding of a mix-up of products on the shelf that occurred in the same case.¹⁷ Instead, the evidence shows that Bothaville Milling has sold its STAR product principally to the wholesale market and, at the date of its answering affidavit, had 102 clients in 68 different towns, some of them being large national chains. These wholesalers have then sold STAR super maize meal to retail outlets or possibly individual customers in many parts of the country, but especially in the Free State, KwaZulu-Natal and the Eastern Cape. Yet there is no evidence of a wholesaler being misled, or of a retail customer complaining that they had inadvertently purchased STAR when they wanted to buy WHITE STAR.

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[24] I do not think that this can be attributed to potential customers being unsophisticated or, as suggested in argument, to the different brands of super maize meal, all being essentially the same. The evidence from Bothaville Milling is that, even in rural areas, which is the principal target area at which its product is aimed, the average purchaser is brand conscious and knows their preferred brand and its qualities and is familiar with both its packaging and its price. This is important, as the evidence is that STAR generally retails at a discount of about 15% to the price of WHITE STAR. The evidence of brand surveys put up by Pioneer in support of its claim to a reputation shows that maize meal is one of the most brand loyal products on the

South African market. If that is correct it militates against there being confusion in the market place even among relatively unsophisticated consumers, and consumers of super maize meal are by no means all unsophisticated. However, many of them are of limited means and are, accordingly, careful about how they spend their money especially on a staple element of their diet. They are more likely to take added care to ensure that they purchase the product they know and like.

[25] Nor does it lie in Pioneer's mouth to claim that the two products are essentially the same and that consumers cannot tell the difference between them. It chose to annex to its founding affidavit marketing material in which it claimed that WHITE STAR is easy to cook, keeps the eater feeling full for longer without being heavy or forming lumps, and is always soft and fluffy. A brand survey published in a widely published newspaper, on which it relied, claimed that consumers preferred its product because of its colour, texture, quality and flavour. The most important factor in selling maize meal was said to be its taste. WHITE STAR has been marketed by Pioneer as being of unrivalled quality according to the founding affidavit and the brand surveys on which it placed reliance to establish its reputation. I can see no reason why it should not be held to those claims and to their logical corollary that consumers will be able to detect if they are eating something other than their preferred brand and, if this occurs as a result of misrepresentation, some at least of them, are likely to take this up with their retail supplier. If that occurred I have little doubt that this would filter back to Pioneer through its sales representatives.

[26] In these situations, it is commonplace for parties who fear that passing off is taking place to send agents to suppliers to make test purchases and see if they can detect cases of confusion. That was not, so far as we are aware, done in this case. Another method for detecting confusion is to undertake properly constructed consumer surveys. Again that has not been done. Nor, although Pioneer complained that STAR was making inroads into its markets in KwaZulu-Natal and the Eastern Cape, was any information forthcoming about the basis for these claims or investigations undertaken to ascertain why this was happening. The end result is that there is a complete absence of any evidence that in some 10 years of competitive trading (8 if one takes the 2003 date as being the relevant one) incidents of confusion have occurred. That strongly reinforces my impression from an examination of the different get-ups as they appear on the packaging of these products that they are not confusingly similar.

[27] In the circumstances, the court below was correct to hold that Pioneer failed to make out a case of passing off and in dismissing the application

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for an interdict. The appeal is dismissed with costs, such costs to include those consequent upon the employment of two Counsel.

(Navsa, Willis JJA, Swain and Mocumie AJJA concurred in the judgment of Wallis JA.)

For the appellant:

AR Sholto-Douglas SC and BJ Vaughan instructed by *Werksmans Attorneys*, Stellenbosch and *Webbers*, Bloemfontein

For the respondent:

CE Puckrin SC and LG Kilmartin instructed by *Adams & Adams*, Pretoria and *Honey Attorneys*, Bloemfontein

Footnotes

- 1 The photographs in the record reveal that this latter slogan has undergone some variation over the years. Initially it included the words "Vitamin enriched" or "The First with Vitamin A" but in 2008/2009 it became "Move to the taste" or "Move to the energy", with the reference to vitamin A being removed.
- 2 In an earlier iteration of the STAR package the colours of the printed words were the reverse of those described above.
- 3 *Capital Estate and General Agencies (Pty) Ltd and others v Holiday Inns Inc and others* [1977 \(2\) SA 916](#) (A) at 929B-D [also reported at [\[1977\] 3 All SA 306](#) (A) - Ed].
- 4 *Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd and another* [1998 \(3\) SA 938](#) (SCA) paras [13], [15] and [16] (hereafter *Caterham*) [also reported at [\[1998\] 3 All SA 175](#) (SCA) - Ed].
- 5 *Caterham* para [22].
- 6 The packaging depicted in the record for the NALEDI product shows two rectangular blocks in red, above and below the words NALEDI and STAR, containing in white block capital letters the description "Special Maize Meal". The picture incorporated in this judgment shows, that was changed to 'Super Maize Meal' in green block capitals and the rectangular block was removed. There is nothing in the papers concerning this change, although special maize meal and super maize meal are by law different products.
- 7 *Premier Trading Co (Pty) Ltd and another v Sporttopia (Pty) Ltd* [2000 \(3\) SA 259](#) (SCA) at 266I-J and 267B-C [also reported at [\[1999\] JOL 4947](#) (SCA) - Ed].
- 8 The exercise is similar to that undertaken in respect of trade-marks as described by Corbett JA in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984 \(3\) SA 623](#) (A) at 640G-641E [also reported at [\[1984\] 2 All SA 366](#) (A) - Ed].
- 9 *Premier Trading Co (Pty) Ltd and another v Sporttopia (Pty) Ltd*, *supra* at 270H.
- 10 *Reckitt & Colman SA (Pty) Ltd v SC Johnson and Son SA (Pty) Ltd* [1993 \(2\) SA 307](#) (A) at 317C [also reported at [\[1993\] 1 All SA 27](#) (A) - Ed].
- 11 *Online Lottery Services (Pty) Ltd and others v National Lotteries Board and others* [2010 \(5\) SA 349](#) (SCA) para [37] [also reported at [\[2009\] 4 All SA 470](#) (SCA) - Ed].
- 12 *Century City Apartments Property Services CC and another v Century City Property Owners' Association* [2010 \(3\) SA 1](#) (SCA) paras [13]-[15] [also reported at [\[2010\] 2 All SA 409](#) (SCA) - Ed].
- 13 *Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods* [1992 \(4\) SA 118](#) (A) at 126E-F [also reported at [\[1992\] 2 All SA 337](#) (A) - Ed].
- 14 *Greenblatt v Hirschon* [1958 \(4\) SA 371](#) (A) at 376D [also reported at [\[1958\] 4 All SA 304](#) (A) - Ed].

- 15 *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* [1977 \(4\) SA 434](#) (W) at 439E-H [also reported at [\[1977\] 4 All SA 657](#) (W) - Ed].
- 16 *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* [2001 \(3\) SA 884](#) (SCA) para [9] [also reported at [\[2001\] 4 All SA 235](#) (SCA) - Ed].
- 17 Para [8].