

SOUTH AFRICA / JUDGMENT

Better Homes Expo (Pty) Ltd v Consep Home Ideas (Pty) Ltd and Others (48170/17) [2019] ZAGPJHC 5; 2019 BIP 259 (GJ) (7 February 2019)

[2019] ZAGPJHC 5

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meyer

CASE / FILE NUMBER

48170/17

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

Case

no: 48170/17

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

BETTER

HOMES EXPO (PTY)

LTD Applicant

and

CONSEP

HOME IDEAS (PTY)

LTD First

Respondent

CONSEP

HOME IDEAS WEST RAND (PTY) LTD Second

Respondent

CONSEP

HOME IDEAS CENTURION (PTY)

LTD Third

Respondent

CONSEP

HOME IDEAS PRETORIA EAST (PTY) LTD Fourth

Respondent

CONSEP

HOME IDEAS BRYANSTON (PTY)

LTD Fifth

Respondent

CONSEP

GROUP (PTY)

LTD Sixth

Respondent

NICHOLAS

VAN DER

LIST Seventh

Respondent

THEODORUS

JACOBUS VAN DER

LIST Eighth

Respondent

Case

Summary: Trade

and competition - Passing off – requires proof of reputation,
misrepresentation and damage - use of descriptive phrase
in

designating business - evidence that mark has become distinctive must
be approached with circumspection – even if plaintiff
establishes that a prima
facie

descriptive phrase has acquired some degree of secondary meaning,
relatively minor differences will suffice to distinguish the
defendant's business when both use a mark which is descriptive
of the services they provide - must submit to risk of some
confusion

if another trader incorporates the same phrase in its trading name –
otherwise allowed an unfair monopoly in those
words.

JUDGMENT

MEYER J

- [1] The applicant, Better Homes Expo (Pty) Ltd trading as HOME IDEAS (Better Homes), seeks an interdict against the eight respondents - Consep Home Ideas (Pty) Ltd, Consep Home Ideas West Rand (Pty) Ltd, Consep Home Ideas Centurion (Pty) Ltd, Consep Home Ideas Pretoria East (Pty) Ltd, Consep Home Ideas Bryanston (Pty) Ltd, Consep Group (Pty) Ltd, the sole director of the first to third respondents, Mr Nicholas Van der List, and the sole director of the fourth to sixth respondents, Mr Theodorus Jacobus Van der List, respectively (collectively referred to as 'Consep') – preventing them from operating under the name CONSEP HOME IDEAS and thereby passing off their business as being connected or

associated with Better Homes, which uses the phrase HOME IDEAS in designating its business.

- [2] The business of Better Homes is to operate a permanent exhibition centre and a website where other businesses (from the home

improvement and renovation industry) market their goods and services to the public. Better Homes attracts the patronage of two distinct groups of customers; those offering goods and services in the home improvement and renovation industry and those seeking to acquire such goods or services. Although Better Homes only filed an application for the registration of the trademark HOME IDEAS on 10 June 2016 (the application is still pending), it has indisputably been making extensive use of the phrase HOME IDEAS since October 2005, when it commenced operating its exhibition centre – HOME IDEAS CENTRE. It is a permanent exhibition centre where hundreds of products from a hundred or more exhibitors are on daily display. Until February 2014, Better Homes also published its own magazine wherein the services and products of the exhibitors at the exhibition centre were promoted. As a result of the success of its HOME IDEAS CENTRE, it registered another company - Home Ideas Online (Pty) Ltd

- in March 2013, which company launched an online marketing platform for exhibitors to market their products and services on display at the HOME IDEAS CENTRE, also online. In March 2015, it 'took a strategic decision to combine the two companies under the registered company Better Homes Expo (Pty) Ltd t/a HOME IDEAS' (the applicant).

- [3] The first respondent, Consep Home Ideas (Pty) Ltd, was registered as a company on 11 July 2016. The other Consep Home Ideas companies (the second to sixth respondents) were registered during the period 12 July 2016 to 31 January 2017. Towards the middle of June 2016, Better Homes objected to the use by Consep of the phrase HOME IDEAS in designating its business. In a letter from its attorneys, dated 19 July 2016, Consep gave the following undertaking:

'Our clients agree and undertake not to use the words Home Ideas in isolation but reserve the right to use the words "Consep Home Ideas" as per the registered names of two of the group companies on its own or in combination with other words.'

The undertaking was not acceptable to Better Homes, and it instituted the present application almost 17 months later, on 8 December 2017.

- [4] The managing director of Better Homes, Mr Steve McAlpine, states in its founding affidavit:

'The Seventh and Eighth Respondents [Messrs Nicholas and Theodorus Van der List], via their respective entities, were thus clearly targeting home improvement and renovation exhibitors and suppliers (most of whom were our clients) at that time, and they were doing so either under entity names incorporating the Applicant's trade marks, and/or by using the Applicant's trade marks as part of its marketing.'

In answer, Mr Theodorus Van der List, on behalf of Consep, states:

‘It has never been the Respondents’ intention to target home improvement and renovation exhibitors. Rather, the Respondents have been in the business of property development for a significant period of time. As a change of stance, it was decided to establish and set up exhibition centres throughout the Republic inviting contractors to display their product, which contractors would be offered development opportunities through Consep’s development arm. It is not now and never has been the Respondents’ intention to compete with Home Ideas. In so far as they are concerned, the markets are very different and the concepts to which such markets relate are substantially different too.’

[5] Consep thus alleges that it operates exhibition centres allowing exhibitors to display their products with the objective of obtaining business through Consep’s development arm. The allegation, however, is entirely inconsistent with the marketing

material distributed by Consep. On its website it describes its business thus: ‘Consep Home Ideas has made it possible to find the supplier or product for your home improvement and renovation project at one convenient location!’ On its Facebook page it displays advertisements describing its services as ‘Hundreds of EXHIBITORS displaying everything needed to improve your home UNDER ONE ROOF’ and ‘House Construction + Renovation Showroom’. I accept, therefore, that Consep and Better Homes carry on business in a common field of activity.

[6] The name and logo which Better Homes display at its exhibition centre and on many of its marketing items and other documents depicted in the papers resemble a simple image of a house. The words HOME IDEAS in bold capital letters and in blue (or in white when it appears on a blue background), are configured below each other in such a way as to resemble the brick and mortar part of a house with two painted red brush strokes at angles above them to resemble the roof and chimney. Together they resemble a simple image of a house. In the case of its HOME IDEAS CENTRE the word CENTRE appears below the word IDEAS also in bold capital letters and in a smaller font as part of the depiction of a house. The get-up of Consep’s trade name, on the other hand, is the words CONSEP HOME IDEAS with or without a separate logo, which is a 3D multi-coloured drawing of a house with walls, a door, windows, roof and chimney, including a loft room. The drawing does not incorporate its trading name.

[7] As was said by Wallis JA in *Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd* 2014 BIP 486 (SCA) para 76,

‘. . . [p]assing 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. 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. 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.

(Footnotes omitted.)

- [8] Consep resists the relief claimed by Better Homes on the grounds that the words HOME IDEAS are descriptive or words in common use and that the addition by it of the word CONSEP before the words HOME IDEAS suffices to distinguish its business, particularly if the overall impact of the entire get-up that includes the trading name of each on potential customers is compared. (I interpolate to mention that there was no appearance for Consep at the hearing of this matter although it filed an answering affidavit and heads of argument; its former attorneys of record withdrew shortly before the hearing.)
- [9] Better Homes argues that its reputation in the mark HOME IDEAS has been established through its extensive use and promotion of the mark since October 2005, during which time it has conducted a sustained and significant campaign to market the services it offers under this mark. The trading name displayed at its exhibition centre has since then included the words HOME IDEAS. It published its own magazine from October 2005 until February 2014 with the words HOME IDEAS on the cover page as a sub-brand until July 2008 when it became the sole mark. Therein over a hundred exhibitors advertised their products and services. It operates a website (www.homeideas.co.za) on which the exhibitors also advertise their products and services. That website, it is undisputed, was visited by 149 129 users and had 616 813 page views during January 2016 to December 2016 and was visited by 111 401 users and had 430 596 page views between January 2017 and October 2017. Better Homes also advertises its services on television and radio and it places advertisements, which bear the mark HOME IDEAS, in prominent South African newspapers and magazines. It conducts online marketing and survey campaigns, and by email, using material which bears the mark HOME IDEAS. Better Homes' corporate stationery, contracts, invoices and building signage bear the mark HOME IDEAS. Between 2009 and 2017 Better Homes spent R26 million on marketing the services it offers under the HOME IDEAS mark.
- [10] But evidence that a mark has become distinctive by use must be approached with circumspection. In *On-Line Lottery Services (Pty) Ltd v National Lotteries Board* [2009] 4 All SA 470 (SCA), Heher JA said this:
- '[14] Of course, as pointed out in *Cadbury (Pty) Ltd v Beacon Sweets and Chocolates (Pty) Ltd* and another [2000] ZASCA 2; 2000

- (2) SA 771 (SCA) at 779C-D [also reported at [2000] 2 All SA 1 (A) – Ed], evidence that a mark has become distinctive by use must be approached with circumspection as the sole producer or distributor of a product cannot by means of advertising or selling the product under its generic name render the name capable of distinguishing in terms of section 9. The caution applies equally to the provision of a service said to be protected by a trade mark.
- [15] In *First National Bank of Southern Africa Ltd v Barclays Bank Plc and another* 2003 (4) SA 337 (SCA) [also reported at [2003] 2 All SA 1 (SCA) – Ed], this Court was required to decide whether the mark “PREMIER” was registrable in relation to cheques, banking and credit card services and certain related marketing and merchandising services. In upholding the decision of the Registrar of Trade Marks that the word “PREMIER” was not registrable for such goods and services, it approved the dictum of Jacob J in *British Sugar Plc v James Robertson and Sons Ltd* [1996] RPC 281 at 3012 that there is “an unspoken and illogical assumption that use equals to distinctiveness”. This assumption is based on the fact that common words are naturally capable of use in relation to the goods or services of any trader no matter how extensively such common words have been used by any individual trader of goods or services of that class.
- [16] In *The Canadian Shredded Wheat Co Ltd v Kellogg Co of Canada Ltd*
- [1938] 55 RPC 125 (PC) at 145 Lord Russell pointed out that:
- “A word or words to be really distinctive of a person’s goods must generally speaking be incapable of application to the goods of anyone else.”*
- [11] The words HOME IDEAS are indeed commonly used in the English language. ‘The place where one lives permanently, esp. as a member of a family or household; a fixed place of residence’ and ‘A conception of something to be done or achieved; an intention, a plan of action’. These are some of the definitions of the words ‘home’ and ‘idea’ in *The New Shorter Oxford English Dictionary* Clarendon Press Oxford 1993 Vol 1 at 1250 and 1303. They are ordinary English words and their combination does not render them capable of distinguishing the business of Better Homes and the services it offers from similar competing businesses in the marketplace and the services they offer. Their joinder is simply a combination of known words which convey the meaning of ideas for the home. It does not constitute an original epithet which is not in ordinary linguistic use.
- [12] Better Homes takes issue with Consep’s contention that the phrase HOME IDEAS is descriptive of the services offered by the parties. They both, it argues, provide advertising or marketing services. This argument, in my view, ignores the fact that what the HOME IDEAS CENTRE and HOME IDEAS website and the CONSEP HOME IDEAS exhibition centres are all about is the provision of ideas for those interested in or intending to improve or renovate their homes, i.e. which appliances, door and window frames, tiles, kitchens and the like, to install and who or which companies could do it for them. The words HOME IDEAS are, in my view, common words and naturally capable of use in relation to the business of Better Homes, Consep or any undertaking carrying on a similar business. Those words are not

incapable of application to other businesses in that common field of activity.

[13] In *PepsiCo v Atlantic Industries* [2017] ZASCA 109, Rogers AJA said the following about the test to be applied in determining whether a word is really distinctive of a trader's business, goods or services or merely descriptive:

'[8] It is probable that for most South African consumers the word 'Twist' as applied to Atlantic's beverages is an arbitrary brand name without meaning. Like a made-up word, a common word which is arbitrary when applied to a particular product is the exemplar of a mark inherently capable of distinguishing. [See eg *Orange Brand Services Ltd v Account Works Software (Pty) Ltd*

[2013] ZASCA 158 para 15.] Such words are to be contrasted with descriptive words. It is a common feature of trade mark legislation that purely descriptive marks may not be registered. The reason is that other traders should not be barred from using them in relation to their goods. Lord Parker in *W & G Du Cros [Registrar of Trade Marks v W & G Du Cros Ltd* [1913] UKHL 588; [1913] AC 624 at 634, cited with approval inter alia in *Joshua Gibson Ltd v Bacon* 1927 TPD 207 at 203 and *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Ltd* 1979 (1) SA 532 (T) at 536G-H] formulated the test as being 'whether other traders were likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark . . . in connection with their goods'. More succinctly, in order for a word to be really distinctive of a proprietor's goods it 'must generally speaking be incapable of application to the goods of anyone else' (see this court's decision in *On-line Lottery [On-line Lottery Services (Pty) Ltd v National Lotteries Board & another*

[2009] ZASCA 86; 2010 (5) SA 349 (SCA) para 16] quoting with approval a dictum of Lord Russell in *Shredded Wheat [Shredded Wheat Co Ltd v Kellogg Co of Canada Ltd*

[1938] 55 RPC 125 (PC)). For as Lord Simonds said in *Copper Works [Copper Works application* (1953) 71 RPC 150 at 153]:

'Paradoxically perhaps, the more apt a word to describe the goods of a manufacturer, the less apt it is to distinguish them: for a word that is apt to describe the goods of A, is likely to be apt to describe the similar goods of B.'

[9] In the High Court of Australia, Kitto J in *Clark Equipment [Clark Equipment Co v Registrar of Trade Marks* [1964] HCA 55; (1964) 111 CLR 511 para 5] expressed the same idea well when he said that the question whether a mark is adapted to distinguish should be tested

'by reference to the likelihood that other persons, trading in goods of the relevant kind and being actuated only by proper motives

- in the exercise, that is to say, of the common right of the public to make honest use of words forming part of the common heritage, for the sake of the signification which they ordinarily possess - will think of the word and want to use it in connection with similar goods in any manner which would infringe a registered trade mark granted in respect of it.'

[10] The approach in *Du Cros and Clark Equipment* was recently affirmed by the High Court of Australia in *Cantarella* [*Cantarella Bros Pty limited v Modena Trading Pty Limited* [2014] HCA 48; (2014) 254 CLR 337, particularly paras 70-71] where the following was stated [para 59]:

‘When the "other traders" test from *Du Cros* is applied to a word . . . the test refers to the legitimate desire of other traders to use a word which is directly descriptive in respect of the same or similar goods. The test does not encompass the desire of other traders to use words which in relation to the goods are allusive or metaphorical.’

[14] When the ‘other traders’ test is applied to the phrase *HOME IDEAS* it becomes apparent that they are descriptive of the business of *Better Homes* and of other undertakings carrying on a similar business. The words have a generic descriptive

meaning. The phrase, as applied to *Better Homes’* business, is not an arbitrary name without meaning that is inherently

capable of distinguishing its business and the services it offers. It is *Better Homes’* mark as a whole (the depiction of a simple home by the words *HOME* and *IDEAS* configured below each other and the painted red brush strokes at angles above them) that distinguishes its business and services from that of any competitor and not the phrase *HOME IDEAS* by itself. To adapt Lord Parker’s words, other competitors were likely, in the ordinary course of their business and without any improper motive, to desire to use the same words in connection with their businesses and services.

[15] Even if the phrase *HOME IDEAS* can be said to have acquired some degree of secondary meaning through use - to designate *Better Homes’* business – *Better Homes*, in my view, has also failed to establish 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 mark and get-up adopted by *Consep* for its exhibition business into thinking that its business is *Better Homes* or from that stable. (*Pioneer Foods* para 14.)

[16] Whether there is a reasonable likelihood of such confusion arising is a matter for the judgment of the court. It is a question of fact which will have to be determined in the light of all the circumstances of each case. (See *Capital Estate and General Agencies (Pty) Ltd and others v Holiday Inns Inc and others* 1977 (2) SA 916 (A) at 929E; *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 942C-D; *Pioneer Foods* para 14.) In *Century City Apartments Property Services CC & another v Century City Property Owners’ Association* 2010 (3) SA 1 (SCA) para 13, Harms JA referred to the following dictum by Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch) ([2004] RPC 41) para 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.’

And in Pioneer Foods para 14, Wallis JA said:

‘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.’

[17] Better Homes relies upon the similarity in names alone. In On-Line Lottery Services, Heher JA said this:

[37] Passing-off protects a trader against deception, arising from a misrepresentation by a rival concerning the trade source or business connection of the rival’s goods or services: Reckitt and Colman SA (Pty) Ltd v SC Johnson and Son SA 1993 (2) SA 307 (A) at 315B [also reported at

[1993] 1 All SA 27 (A) – Ed]. It does not protect a mark or get-up in itself: Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and another [1998] ZASCA 44; 1998 (3) SA 938 (SCA) at paragraph [29] [also reported at [1998] ZASCA 44; [1998] 3 All SA 175 (A) – Ed]. Many unsuccessful attempts have been made to restrain alleged passing off arising from the use of descriptive names. In summary, the reason for this lack of success is set out in Sea Harvest corporation (Pty) Ltd v Irvin and Johnson Ltd 1985 (2) SA 355 (C) (the “prime cuts” case) at 360B-D [also reported at [1985] 1 All SA 532 (C) – Ed], viz that the courts will not easily find that such words have become distinctive of the business or products of the person using them, and will not give what amounts to a monopoly in such words to one trader at the expense of others.

[38] If a term is descriptive, in the sense that it is the name of the goods themselves, it cannot simultaneously denote any particular trade source. Therefore, a party cannot be prevented from unambiguously using a descriptive term in its original descriptive sense, unless it has wholly lost that descriptive sense and become distinctive of the claimant in every context: Wadlow, The Law of Passing Off (Sweet and Maxwell) 3ed at 616.

[39] Even if the claimant succeeds in proving that a prima facie descriptive terms has acquired some degree of secondary meaning, the scope of protection for the mark is narrower than for a wholly arbitrary term. Relatively minor differences will suffice to distinguish the defendant's goods or business when both use a mark which is descriptive of the goods and services they provide. This applies even though the defendant is using the closely similar term in a trade mark sense: *Wallow*, op cit, at 617, paragraph 4.'

(Footnote omitted.)

[18] And in *Sea Harvest Corporation (Pty) Ltd v Irvin & Johnson Ltd* 1985 (2) SA 351 (CPD) at 360J-361D, Aaron J said the following:

'As stated in *Kerly Law of Trade marks and Trade Names* 11th ed in para 16.50:

"where a trader adopts a trading name containing words in common use, some risk of confusion may be inevitable, and that risk must be run unless the first trader is allowed an unfair monopoly in those words".

The principle was reaffirmed by the Full Bench decision of this Court in *Rovex Ltd and Another v Prima Toys (Pty) Ltd* 1982 (2) SA 403 (C), where SCHOCK J adopted with approval the following passage from the Australian case of *Hornsby Building Information Centre (Pty) Ltd v Sydney Building Information Centre* [1978] HCA 11; (1978) 52 ALJR 392, approved by the Privy Council in the case of *Cadbury Schweppes (Pty) Ltd and Others v Pub Squash Co (Pty) Ltd* [1981] 1 All ER 213 at 218:

"There is a price to be paid for the advantages flowing from the possession of an eloquently descriptive trade name. Because it is descriptive it is equally applicable to any business of a like kind, its very descriptiveness ensures that it is not distinctive of any particular business and hence its application to other like businesses will not ordinarily mislead the public. In cases of passing off, where it is the wrongful appropriation of the reputation of another or that of his goods that is in question, a plaintiff which uses descriptive words in its trade name will find that quite small differences in the competitor's trade name will render the latter immune from action. The risk of confusion must be accepted, to do otherwise is to give to one who appropriates to himself descriptive words an unfair monopoly in those words and might even deter others from pursuing the occupation which the words describe."

(Also see *Burnkloof Caterers* at 938G.)

[19] Applying those principles and considerations to the facts of this case, I am of the view that Consep's use of the trade name CONSEP HOME IDEAS does not in itself carry the complaint of passing off. Consep depicts the name CONSEP HOME IDEAS in a get-up, which is not deceptively or confusingly similar to that used by Home Ideas. I accept that the word CONSEP is not a fancy or invented word, but merely a corrupt spelling for the word 'concept'. Some of the meanings which *The New Shorter Oxford English Dictionary* Clarendon Press Oxford 1993 Vol 1 at 467 ascribe to the word 'concept' are '[a] product of the faculty of conception; an idea of a class of objects, a general notion; a theme, a design'. Nevertheless, the word CONSEP is not an inconsequential or immaterial addition to Consep's

trade name, but a significant component of the name. The word CONSEP and the very different get-up in which the words CONSEP HOME IDEAS appears, are differences that suffice to distinguish Consep's business from that of Better Homes. It is Better Homes' whole get-up, which incorporates its trade name, that has a

figurative element and not the words HOME IDEAS standing alone. Its distinctive and dominant component is the depiction of a simple image of a house. It is the impact of the words HOME and IDEAS configured below each other with the two printed red brush strokes at angles above them that is the immediate striking feature of its trade name get-up. These key features are not present in the get-up of Consep, which, on any footing, is markedly different from the central feature of Better Homes' trade name get-up. Consep's mark does not capture the distinctiveness of Better Homes' mark. The two trade name get-ups are linguistically, aurally and visually different. The differences will be seen immediately, and, in my view, the relevant customers will clearly distinguish the one business from the other.

[20] To bear out its assertion of confusion in the mind of the public, Better Homes refers to its sales consultants who repeatedly

encountered consumers confused between Home Ideas and Consep and its Sales Account Manager, Ms McAlpine, and receptionist, who, in their interactions with clients, encountered some who were confused by Consep's inclusion of the words HOME IDEAS in its trade name. These allegations of actual confusion are by no means satisfactory evidence as to actual confusion caused by the representation of which Better Homes complains. Leaving aside the issue of the hearsay nature of these statements (a matter I need not decide), they are statements of conclusions rather than evidence – primary facts – of actual confusion in the market place. (See *Burnkloof Caterers* at 942A; *Pioneer Foods* para 15.) Consep has been carrying on business using the name CONSEP HOME IDEAS for close on 17 months before Better Homes instituted these motion proceedings on 8 December 2017, and there is no satisfactory evidence of actual confusion in the marketplace. Such evidence, it is trite, is not essential to proof a likelihood of confusion, but, to use the words of Wallis JA in *Pioneer Foods* para 23, 'it can, if present, tip the balance in one direction and, if absent, tip it in the other'. In any event, Better Homes adopted a trading name containing words in common use, and, insofar as some risk of confusion may be inevitable, the risk must be run by it. Otherwise it is allowed an unfair monopoly in the phrase HOME IDEAS.

[21] In the result the following order is made:

The application is dismissed with costs.

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing: 6 December 2018

Date of judgment: 7 February 2019

Counsel for applicant: Adv I Learmonth

Instructed by: De Beers Attorneys, Claremont, Cape Town

c/o BDK Attorneys, Houghton, Johannesburg

Counsel for respondents: No appearance (heads of argument prepared by Adv S Mushet)

Instructed by: Gittins Attorneys, Bedfordview, Johannesburg

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