

57/1958

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

Appeals Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

RAYMOND GREENBLATT Appellant,
(the "African Pharmacy")
versus

MORRIS HIRSCHSON Respondent.

Appellant's Attorney *H. L. ...* Respondent's Attorney *McIntyre W & P.*
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate *P. Lakiza* Respondent's Advocate
Advokaat vir Appellant Advokaat vir Respondent

(120) Set down for hearing on *Friday, 19th Sept, 1958.*
Op die rol geplaas vir verhoor op

1.2.5.7.8. (A) *9.45-12.10.*
CAV

- Appeal dismissed, with costs.

*Schreiner, Houties,
Beyers, ...
Eileen Thomsen, JJA.*

J. Houties
Regd. 26/9/58.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

RAYMOND GREENBLATT Appellant

and

MORRIS HIRSCHSON Respondent

Coram: Schreiner A.C.J., Hoexter, Peyers, van Blerk et
Ogilvie Thompson JJ.A.

Heard: 19th September, 1958.

Delivered: 26-9-1958

J U D G M E N T

SCHREINER A.C.J.:— The appellant, a chemist and druggist who carries on business under the style of "African Pharmacy" in Johannesburg, has at all material times been registered under Act 9 of 1916 as the proprietor of certain trade-marks under class 3 i.e. in respect of chemical substances prepared for use in medicine and pharmacy. The appellant's relative trade-marks are No. 350 of 1947, which is for the word "Ray-son", and No. 1782 of 1952, which consists of two Greek columns surmounted by a pediment on which is inscribed "Ray-son Brand". The last-named registration carries a disclaimer of any "right to the exclusive use of the surname 'Ray' apart from the mark", but this disclaimer does not affect the decision of the appeal.

As/.....

As part of his business the appellant prepares and bottles medicines which are sold under the above trade-marks exclusively to Non-Europeans. Among these medicines is a blood mixture.

In March 1957 the respondent, who trades in Alberton near Johannesburg as "Modern Medical Research Laboratories", advertised in a Bantu newspaper that he sold a blood mixture called "Rising Sun". The appellant wrote at once objecting to the respondent's use of this name in relation to a blood mixture, on the ground that it was likely to cause confusion with the appellant's article. Correspondence followed in which the respondent, while denying the possibility of confusion, stated that he was no longer using the "Rising Sun" mark in advertising matter and was prepared to limit his use of it to goods sold direct from his premises. The appellant was not content with this limitation of user on the part of the respondent and set down an application in the Witwatersrand Local Division for an order restraining the respondent from using the name "Rising Sun" in respect of the categories of goods falling, inter alia, under class 3. Though an interim interdict pending action was not specifically asked for in the petition, it could in a proper case be granted as an alternative form of relief, and in this Court

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counsel for the appellant made that his goal. BOSHOFF J. dismissed the application and the appellant now appeals to this Court, the parties having consented in writing to omit the intermediate appeal to the Transvaal Provincial Division.

Nothing turns on the existence of trade-mark No. 1782 of 1952. The respondent uses a totally different label from that embodied in this mark and there could be no possibility of confusion between them.

Counsel for the appellant drew our attention to a passage in the petition which states that the name Ray-son "has acquired wide repute amongst the non-European population of the Union." Though this allegation is denied by the respondent we were asked on behalf of the appellant to treat the denial as merely formal and to hold accordingly that the appellant had laid a sufficient foundation, prima facie, for passing off proceedings, the reputation of the appellant's mark being one of the things that would have to be decided on trial. But since it is not in dispute that the ^{appellant} appeal has the exclusive right to the use of trade-mark No. 350 of 1947, that it is valid and that it covers blood mixtures, and since no deceptive features other than the name similarity are alleged, the appellant's position could/.....

could not be improved by reliance upon passing off. The issue may therefore conveniently be stated to be whether the use by the respondent of the word "Rising Sun" on the containers of his blood mixture infringes the appellant's trade-mark No. 350 of 1947, consisting of the word "Ray-⁵son".

Section 125 of Act 9 of 1916 in effect defines infringement as the use of a mark substantially identical with the registered trade-mark or so nearly resembling it as to be likely to deceive. There is here no question of substantial identity and the appellant's case is that "Rising Sun" so nearly resembles "Ray-⁵son" as to be likely to deceive i.e. to lead to the respondent's blood mixture being bought and sold for the appellant's. In the decision of this issue regard must be had to the idea conveyed by the respective marks, to their appearance and, when, as here, they consist of words, to their sound (Kerly, Trade Marks, 7th Edition pages 620 et seq.).

It was not and could not have been contended on ~~behalf~~ behalf of the appellant that there was any risk of deception by reason of the appearance of the trade-mark "Ray-⁵son" and the mark "Rising Sun", used by the respondent. If a person is not able to read he could hardly be deceived by the facts that each starts with the letter R

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and that there are other letters in common. For an illiterate man would not ordinarily regard words as pictures and buy his goods ~~for~~ by the shape of the words on their labels, and we are not here concerned with words printed in an unusual type. If, on the other hand, the potential buyer^{is} ~~was~~ able to read and buys by the printed word the difference in these words is sufficiently obvious to exclude the risk of deception.

It was, however, argued for the appellant that there was a similarity in sound and a similarity in idea and that, whether taken separately or in conjunction, the similarities were such as to raise a likelihood of deception. The similarity in idea is said to flow from the fact that the rising sun may show rays. That is quite true, and indeed it is quite common to depict a rising sun as a partly hidden disc with lines radiating from it. That is what the respondent shows on his label. But it is not clear to me that, even to an educated man who gave the matter some thought, the word "ray-son" would be likely to conjure up the picture of light rays proceeding outwards from a common source, be it the sun or any other. Such a man would realise that "ray-son" is not apt to describe a source of light rays. If he had to find a meaning for a word having that sound he would be more likely to find it in similar sounding words like "raisin" or the/.....

the traditional Irishman's pronunciation of "reason". An uneducated man, on the other hand, even if he were accustomed to using English, would probably not think on the lines of linking the word "ray-son" with anything at all, let alone with light rays and the rising sun. What the appellant gains in relation to the sound aspect by his reliance on the lack of education of his clients he loses in relation to the idea aspect. The latter does not in my view make any material contribution to the former on the facts of the case.

The appellant is, indeed, driven back on his contention that the sound of "rising sun" is so similar to the sound of "ray-son" as to make it likely that an illiterate native, having heard of Ray-son Blood Mixture, might ask a shop assistant for some of it in language rendered indistinct by his poor acquaintance with the English language, and that the shop assistant, knowing only Rising Sun Blood Mixture, might think that that was what the native was asking for in slurred and slovenly English. It is, of course, well established that one must look to the kind of customer and give effect to the likelihood that the buyer's illiteracy or uneducated use of language may make it easier for him to be misled or to mislead the shopkeeper who sells to him. But even in this field of illiterate natives regard

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must be had to the degree of carefulness that may be expected. The ordinary purchaser of the trad^e-mark decisions is neither very careful nor very careless (See American Chewing Products Corporation v. American Chicle Company, 1948(2) S.A.736 at page 743), and the ordinary illiterate native buyer must, I think, be taken to be a person who at least knows that articles have different names and that when he wants an article with a particular name he ^{should} ~~must~~ ask for it by that name with such clearness of diction as he can command, or else he may get the wrong article.

In the present case, though it may be assumed that illiterate natives would often be liable to mispronounce English words, there is no evidence to support the suggestion that they might be more likely than other persons to drop a syllable or pronounce the English "ay" sound, Cockney-fashion, like the long "i". These specific practices, if they exist, would have to be proved and there is no evidence to support them. No doubt, if one leaves out the second syllable of "rising" and pronounces the first syllable as if the word were "raising", one arrives at the appellant's trade mark. But these are not trifling changes; they are substantial.

We have not before us ~~actual~~

evidence/.....

evidence of actual deception, which, though not essential or even important, may in some cases tip the balance. Sometimes again, the circumstances may point to intentional ^Pcopying, and then the court is not inclined to hold that the dishonest trader was unsuccessful in his attempt to filch another's trade. In this case there is no allegation in the petition that the respondent has actually tried to deceive potential customers into buying his goods for the appellant's, but it was suggested in argument that, bearing in mind that the article was in each case a blood mixture, an intention to deceive might be inferred from the similarity of the names. I do not think that there are sufficient materials for such an inference.

It has been said that in infringement proceedings a closer likeness is required than in issues of registration (Halsbury, second edition, Vol.32 pages 591 to 592; Kerly page 619). In the American Chicle Company case - supra - GREENBERG J.A., at pages 741 to 743, discussed the test to be applied in deciding whether registration should be granted or refused and left open the question whether a reasonable possibility of deception was enough to lead to refusal or whether some degree of probability of deception is necessary. But, however that may be, it is clear that in infringement cases the onus is on the appellant to show that

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there is a probability of deception. On that issue there is, in the circumstances appearing from the papers before us, no ground for sending the matter to trial. For all that appears the court would be in no better position after such a trial to decide what is primarily a question of impression. Though some similarity in the sounds of the words composing the marks can be detected, the appellant has failed to convince me that there is a probability of deception.

The appeal is dismissed with costs.

Hoexter, J.A.

Beyers, J.A.

Van Blerk, J.A.

Ogilvie Thompson, J.A.

Concur

A. W. Johnson
25.9.58