

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

DATE: 9 June 2022  
CASE NUMBER: 6031/21

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED

**COCHRANE STEEL PRODUCTS (PTY) LTD**

Applicant

And

**G HARROP-ALLIN & SONS (PTY) LTD**  
**(Main application)**

Respondent

**AND**

CASE NUMBER: 12358/21

**G HARROP-ALLIN & SONS (PTY) LTD**

Applicant

And

**COCHRANE STEEL PRODUCTS (PTY) LTD**  
**THE REGISTRAR OF TRADE MARKS**  
**(Counter-application)**

First Respondent  
Second Respondent

JUDGMENT

KOOVERJIE J

[1] This application relates, in the main, to trademark infringement. The applicant seeks to interdict the respondent from infringing its trademark.

[2] The application under case 6031/21 is based on section 34(1)(a) of the Trademarks Act, 194 of 1993 ("The Act") whereby the applicant contends that the respondent has infringed its trademark "RAZOR MESH" (main application).

[3] The respondent instituted a counter application under case number 12358/2021 for the expungement of the applicant's trademark in terms of section 24 read with sections 10(1) and (2) of the Act (counter application).

[4] The said matters were heard together. The parties will be referred to as they stand in the main application. The applicant will also be referred to as "Cochrane" and the respondent will be referred to as "Harrop" in the deliberation of this judgment.

## **A ISSUES FOR DETERMINATION**

[5] This court is required to determine:

- (i) whether Harrop infringed the mark in terms of section 34(1)(a) of the Act;
- (ii) whether Harrop's use is *bona fide* descriptive use and protected by section 34(2)(b) of the Act;
- (iii) whether the mark should be expunged from the Register of Trade Marks.

[6] The applicant's case is that the respondent has infringed the applicant's "RAZOR MESH" mark.

## **B ISSUES IN DISPUTE**

[7] Cochrane Steel Products (Pty) Ltd (Cochrane) is the registered proprietor of the trademark application number 1998/13142 **RAZOR MESH** (the trademark). The registration was acquired under Clause 6 "fences and fencing; fence posts and stays, articles of drawn or rolled metal; mobile and stationary barriers; electrified

fences and barriers". The registration was subject to the following endorsement or disclaimer (registration of this trade mark shall give no right to the exclusive use of the word 'razor' separately and apart from the mark). It is common cause that Harrop has used the trademark "RAZOR MESH" on its website.

[8] Harrop contended that its use did not constitute a trademark infringement and raised the following defences namely:

- (a) there was no likelihood of confusion as envisaged in section 34(1)(a) of the Act;
- (b) the trademark should be expunged from the register of trademarks on the basis that it is descriptive; and
- (c) the use of the mark amounted to a *bona fide* description and it was therefore protected by the defence contained in section 34(2)(b) of the Act.

[9] In essence, the applicant argued that Harrop's defences cannot be sustained in that the mark used by Harrop is identical to the registered trademark of Cochrane and there is a likelihood of confusion. Harrop has failed to establish that "RAZOR MESH" has a universal ordinary meaning which is descriptive of fences and the mark "RAZOR MESH" is not descriptive. Furthermore, Harrop has in fact made prominent use of the mark on its promotional material. Such prominent use does not constitute *bona fide* use.

## **C THE APPLICANT'S CASE**

[10] The thrust of the applicant's case was that Harrop utilised the mark "RAZOR MESH" which is an identical mark as its registered mark. It was emphasized that it is not even a similar mark but an identical mark. In such instances it was demonstrated that there need not be a further enquiry into whether or not a likelihood of confusion exists.

[11] In this regard the applicant made reference to ***Carfind (Pty) Ltd v Car Trader (Pty) Ltd 2016 JDR 0314 (GJ)***, **par 4** where the court upheld the approach in the

**Century City**<sup>1</sup> matter. Therein it outlined that the likelihood of confusion enquiry is only necessary when it is found that the marks were not identical. In this instance since Harrop's use of "RAZOR MESH" is identical to the registered "RAZOR MESH" trademark, there was no need to show evidence of actual instances of confusion.

[12] It was submitted that Harrop's use constituted a contravention of Section 34(1)(a) of the Act which reads:

*"The rights acquired by registration of a trademark shall be infringed by –  
the unauthorised use in the course of trade in relation to goods or  
services in respect of which the trademark is registered, of an  
identical mark or of a mark so nearly resembling it as to be likely to  
deceive or cause confusion."*

[13] The applicant submitted that it had met the jurisdictional requirements for trademark infringement, namely that:

- (a) it has a registered trademark;
- (b) the respondent must have used the mark which is identical to the registered mark or is so similar to the registered mark that it is likely to deceive or cause confusion;
- (c) this use must be in relation to the goods covered by the registered mark;
- (d) this use must have been unauthorised; and
- (e) the use must have been in the course of trade<sup>2</sup>.

[14] On the requirement that the mark used by Harrop is likely to deceive or cause confusion, the following authorities were relied upon. The court, in **Roodezenat Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd and Another [2014] JDR 245 (2) SCA** illustrated the distinction between "deception" and "confusion":

*"Deception will result ... when a similarity was to cause members of the purchasing public to assume that the goods bearing the two competing trademarks come from the same source. "Confusion", on the other hand, will*

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<sup>1</sup> Century City Apartments Property Services CC and Another v Century City Property Owners Association 2010 (3) SA 1 (SCA)

<sup>2</sup> Craft Foods Inc v All Joy Foods (Pty) Ltd 1999 BIP- (122)

*occur if these members of the public will be caused to wonder if the goods had a common origin.”*

[15] The court in the **Century City** matter, at paragraph 13 appreciated that various factors come into play when determining if there was “deception” or “confusion”:

*“24 The likelihood of confusion must be appreciated globally, taking into account all relevant factors. It must be judged in 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 not have to rely on an imperfect picture or recollection of the marks. The courts 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 mark must be assessed by reference to all the overall impressions created by the marks bearing in mind the distinctive and dominant components. Furthermore, the association between the marks causes the public to wrongly believe that the respective goods come from the same economically linked undertakings, there is a likelihood of confusion.”*

(My emphasis)

[16] The applicant submitted that the mark “RAZOR MESH” is used by entities Sinoville Fencing, Impi Wire and Alliance Security Fencing due to their prior business relationships with Cochrane. In those instances, it was never used as a *bona fide* descriptive mark.

[17] Cochrane further argued that nowhere in the searches do the words “RAZOR MESH” appear. In this manner the search results made reference to other descriptive terms such as “Razor Wire Fencing”, “Flat Razor”, “Wire Galvanized”, “Razor Wire” and “Razor Wire Mesh”.

[18] Harrop’s particular reference to a Chinese entity, Perismar which made use of the words “razor mesh” including other descriptive terms such as “welded razor wire mesh” and “welded razor mesh”, is irrelevant for the purposes of determination of

this matter. Cochrane was correct in its argument the mark should be considered within the South African context only.

#### **D    RESPONDENT'S CASE**

[19] The respondent's case was that the words "RAZOR MESH" was used in an entirely descriptive manner and such words should be available to other similar traders for use in the course of trade (fencing and related type products). Moreover, there could be no deception or confusion in respect of the RAZOR MESH mark on Harrop's website as there is no association created in the minds of the public that the mark originated from Cochrane.

[20] It was submitted that an average consumer will recognise the words to be largely descriptive and to expect others to use similar descriptive marks but will be alert to detail which differentiates one provider from another. Simply put, the enquiry would be- Does the public perceive the use of the trademark as performing the function of a source identifier for Harrop's goods or services? The answer proffered was "NO".

[21] It was argued that Harrop's products and services are the same as those offered by Cochrane and a multitude of other traders also dealing in Class 6 fencing and related products industry. It was explained that the "RAZOR MESH" product is both intrinsic and complimentary to the razor type fencing product in South Africa. Counsel for the respondent explained that "it is a combination of razor wire arranged in the mesh pattern".

[22] Harrop attempted to illustrate the manner and context within which the term "RAZOR MESH" was used, by providing numerous website screenshots from several businesses trading in fencing and related products, as that of Cochrane and Harrop.

[23] It was proffered that there was no indication or impression in the mind of the consumer or the public at large that the "RAZOR MESH" fencing emanates or originates exclusively from Cochrane Steel. There is in fact no evidence to this

effect. The context and manner of use of “RAZOR MESH” on the websites of Sinoville Fencing, Impi Wire and Alliance Security Fencing does not convey any association with Cochrane Steel. The general public in purchasing security fences are not aware of the business relationship amongst the respective parties. All they are confronted with is the information as it appears on the website. The public merely understands that the “RAZOR MESH” product emanates from entities from where they were purchased.

[24] It was further argued that if the word “RAZOR MESH” had a trademark significance and the significance of the trademark was associated with Cochrane, then surely the results on the google search would have made reference or indicated the business of Cochrane in some manner. Cochrane therefore failed to show in what way consumers are deceived or confused by Harrop’s *bona fide* descriptive use of the term “RAZOR MESH” in relation to fencing products.

## **E    ANALYSIS**

[25] Section 10(1) stipulates a mark is inherently capable of being registered as a trademark if three essential elements are present, namely:

- (a) it must consist of a sign capable of being represented graphically and with sufficient certainty;
- (b) it must be a sign capable of use provided for in the manner set out in Section 2(3) of the Act.
- (c) it must be a sign capable of distinguishing the goods of one person from the same kind of goods in the course of trade with any other person (my emphasis).

Harrop argued that the trademark falls foul of the aforesaid third criteria.

[26] The Act defines a trademark as:

[...]a “a mark used or proposed to be used by a person in relation to goods or services for the purposes of distinguishing the goods or services in relation to which a mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with another person.”

[27] In order to determine if the mark is capable of distinguishing the following factors are considered, namely:

- (a) the nature of the mark;
- (b) the goods in relation to which a mark has been used; and
- (c) the manner in which the mark has been used.

The distinctive character of a mark is being assessed. Firstly, with reference to the goods in respect of which the registration has been applied for, and secondly, with reference to the perception of the mark by the relevant public.

- **Bona fide description**

[28] Cochrane's mark "RAZOR MESH" would not be infringed if the respondent succeeds in its defence, namely that the use was bona fide descriptive. Harrop's defence was that its use was a *bona fide* description as envisaged in terms of Section 34(2)(b), which stipulates:

*"A trademark is not infringed by the use by any person of any bona fide description of or indication of the kind, quality, quantity, intended purpose, origin or other characteristic of his goods, or services, or time of production of the goods or the rendering of services."*

[29] However, this defence is subject to a limitation which provides that the use in question must be consistent with fair practice. The defence protects the use of the term as *bona fide* description and does not cover trademark use. Hence the use of words which are descriptive of the goods concerned constitutes a defence.

[30] The defence comes into play when it can be demonstrated that the use is a genuine attempt to describe the goods as opposed to attempts to gain unfair advantage of goodwill attached to another person's trademark. This defence will further assist the respondent when it is clear that the goods or services concerned are not connected to the proprietor of the registered trademark.

[31] Cochrane contended that Harrop's reliance on this defence must fail on the basis, that firstly the mark "RAZOR MESH" is not descriptive, therefore, Harrop's use cannot be descriptive use; secondly, the mark "RAZOR MESH" is not used in a *bona fide* manner.



[32] It must be appreciated that not every use of the trademark by a competitor falls within the ambit of S 34(1)(a), thus constituting an infringement. In this instance, an infringement occurs when the use of the trademark affects or is likely to affect the functions of the trademark, namely its essential function of guaranteeing to consumers the origin of the goods. In ***Discovery Ltd and Others v Liberty Group Ltd 2020 (4) SA 160 (GJ) AD 22*** where the court stated:

*“While the proprietor of a registered mark has a monopoly over its use, it is not an unlimited monopoly. Not every use of the trademark by the competitor will fall within the ambit of section 34(1)(a) and thus constitute an infringement. An infringement occurs when the use of a trademark affects or is likely to affect the functions of the trademark, in particular its essential function of guaranteeing to consumers the origin of the goods.”*

[33] It cannot be gainsaid that “RAZOR MESH” was used by Cochrane as a badge of origin. Cochrane’s mark was inherently capable of distinguishing the goods and services of the proprietor from those of another. Cochrane remains the registered proprietor of the mark “RAZOR MESH” and was used on its website. Harrop could have used the mark other than a badge of origin.

[34] The use must be seen through the eyes of the public. Trademarks are all about public perception<sup>3</sup>. All that has to be shown is that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection<sup>4</sup>. Such persons would include consumers, end-users and those involved in the fencing industry.

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<sup>3</sup> Cowbell AG v ICS Holdings Ltd 2001 (3) SA 941 SCA at 949 D

<sup>4</sup> Commercial Auto Glass (Pty) Ltd v The Baker Street Trust 2006 JDR 139 at par 57

“It is not incumbent on the applicant to show that every person (customer) in the class of goods for which the trade mark has been registered would probably be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the impression that the goods in relation to which the defendant’s mark is used are the goods of the proprietor of the registered mark, or that there is a material connection between the defendant’s goods and the proprietor of the registered mark.”

[35] Furthermore, consideration must be given to the manner in which the marks are used<sup>5</sup>.

[36] Cochrane emphasized that where there is undue prominence given to the mark, then the use is not *bona fide*. The words were not used as a mere description, “RAZOR MESH” was used as a mark in a prominent manner. Our authorities have accepted that use will not be *bona fide* and fair where undue prominence is given to the mark. Moreover, by giving emphasis to the words indicates that it is likely to be seen as a trademark and not a mere description<sup>6</sup>

[37] I have observed that Harrop used the mark on its brochure:

- (i) the words “RAZOR MESH” have been used in capital letters, same as the mark “RAZOR MESH”. It was used as a heading for a descriptive paragraph;
- (ii) the words “RAZOR MESH” is used in bold and is in larger text;
- (iii) the words “Razor Mesh” appeared under Harrop’s product heading, the heading “PRODUCTS-RAZOR”. The type of products identified were “BTC”, “Flat Wrap”, and “Razor Mesh”. Furthermore, the words were also used where the first letters of the words are in capital “Razor Mesh”;
- (iv) on further page the words “Razor Mesh” is used again. It appears as a heading with a description of what constitutes “Razor Mesh” fencing, namely *“Barbed tape protection system deters obstructs intrusion, providing a maximum delay in crossing the perimeter fence. This product is specifically designed for high security areas”*.

[38] I find it apt to refer to the **Plascon Evans** matter where the court stated that the marks must be viewed as they would be encountered in the market place and against the background of the relevant circumstances. The purchaser may encounter goods bearing the defendant’s mark, with an imperfect recollection of the registered mark. If each of the marks contains a main or dominant feature or by some significant or striking or idea the likely impact made by this on the mind of the customer must be taken into account. Marks are remembered by general

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<sup>5</sup> Plascon Evans supra at 640G – 641E

<sup>6</sup> Bayerische Motoren Werke AG v BW Tech 2004 BIP 170 T 170H – 171F

impressions or by some significant or striking feature. And finally, consideration must be given to the manner in which the marks are likely to be employed, i.e. use of the name makes in conjunction with a generic despatch of the goods.

[39] Even if the words were used to describe the type of fencing, the enquiry remains, whether the use was *bona fide*.

[40] In the **Plascon Evans** matter at 645 F the court defines “*bona fide* description”. It was illustrated that it is when the words were used in relation to the goods which fairly describes of the goods, generally for the purpose of describing the character or quality of the goods. However, for there to be *bona fides*, there must be an honest use of the trademark.

[41] A *bona fide* use means honest use of the trademark, without the intention to deceive anybody and would unequivocally making it clear that the goods are not connected in the course of trade with the proprietor of the trademark<sup>7</sup>.

[42] In the **Gillette** matter<sup>8</sup> (a European authority) the court set out the factors that should be considered when a determining if the use was *bona fide*. The court held that “*account should be taken of the overall presentation of the product marketed by the third party, particularly the circumstances in which the mark which the third party is not the owner of is displayed in the presentation, the circumstances in which a distinction is made between the mark and the mark or sign of the third party, and the effort made by that third party to ensure that consumers distinguish its products from those of which it is not the trademark owner*”. The court further stated, “*use will not be bona fide, however if the user does not unequivocally make \*it clear that his goods are not connected in the course of trade with the proprietor of the trademark ...*”

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<sup>7</sup> Commercial Auto Glass Pty Ltd v BMW AQ\*\* 2007 (6) SA 637 SCA at par 12

<sup>8</sup> Gillette Company and Gillette Group Finland OY v LA – Laboratories Ltd OY [2005] FSR 37 case no C-228/03/(ECJ)

[43] The defence would only assist the respondent if it was made clear that the goods and services were not connected to Cochrane, being the proprietor of the registered trademark<sup>9</sup>. This, in my view, Harrop failed to demonstrate.

[44] Our authorities have further indicated that when dealing with honest practice, account should be taken of the overall presentation of the product marketed by the party, the circumstances in which the mark is displayed in its presentation, between the proprietor's mark and that of the other party as well as the effort made by such party to consumers in distinguishing the two products. No such distinction was made by Harrop. Moreover, the prominent use of the mark "RAZOR MESH" in itself was not *bona fide*. No effort was made by Harrop to ensure that its customers could distinguish its products from that of Cochrane. I therefore find that the "use", although it was descriptive, was not *bona fide*.

## **F     THE COUNTER APPLICATION**

[45] This then brings the court to whether there is merit in the respondent's counter application. The counter application is premised on section 24(1) of the Act. It permits the expungement of a trademark from the register where the trademark is an entry wrongly made or wrongly remaining on the register. In a wrongly made expungement challenge, Harrop would be required to show that the relevant mark did not satisfy the requirements for registration when it was registered<sup>10</sup>.

[46] In the wrongly remaining expungement challenge, Harrop would be required to show that the mark has become deceptive or lost its distinctiveness as a result of the events occurring after registration and the relevant date for this purpose is the date on which the expungement application was made.

[47] In this instance, the onus is on Harrop to establish that the mark concerned should be cancelled. Harrop's case is that the trademark is an entry wrongly made or

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<sup>9</sup> BMW AGV Autostyle Retail (TPD 5887/2005) [3 November 2005 paragraph 6 of the judgment (referred to in the Commercial Glass 2007 SCA matter)]

<sup>10</sup> Lotte Confectionery Co Ltd v Prion Corporation 2015 BIP 224 GP, par 10

wrongly remaining because it contravenes either of the provisions of Sections 10(1), 10(2)(a), 10(2)(b) or 10(2)(c) of the Act.

[48] As alluded to above, I have already set out the circumstances under which marks are inherently capable of registration. However, marks which fall under Section 10(2) are inherently incapable of distinguishing and therefore the registration purposes must be proved to have become factually capable of distinguishing through use. The three instances are, namely:

- Section 10(2)(a) provides that:  
*“A mark shall not be registered if it is not capable of distinguishing within the meaning of section 9. Section 9(2) stipulates that a mark shall be capable of distinguishing if “it is inherently capable of distinguishing or it is capable of distinguishing by reason of prior use thereof.”*
- Section 10(2)(b) provides that if the mark *“consists exclusively of a sign or indication which may serve in trade, to designate the kind, quality, intended purpose, value, geographical origin or other characteristics of the goods or services or the mode or time of production of the goods or of rendering of the services.”*
- Section 10(2)(c) provides that if the mark *“consists exclusively of a sign or an indication which has become customary in the current language in a bona fide and established practices in the trade.”*

For purposes of section 10(2)(c) the critical question is whether the relevant mark is capable of distinguishing or a generic description<sup>11</sup>.

[49] I have also indicated that the words “RAZOR MESH”, “Razor Mesh” and “razor mesh” were not used in a *bona fide* descriptive manner. The prevailing issue purely for determination is whether the mark is purely descriptive. If so, then it would compromise the registration of the mark.

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<sup>11</sup> Union Swiss (Pty) Ltd v Medpro Pharmaceutical (Pty) Ltd 2009 BIP 114 C at par 18

[50] I take cognisance of the fact that Harrop has been in the fencing industry since 1947. Its products include goods falling into the class 6, including barbed wire, electric fencing, fencing mesh, gates, posts and stays, razor etc.

[51] Harrop's argument was that the term "RAZOR MESH" is purely descriptive and has become customary in the fencing trade and thus failed to meet the requirements for registration contained in section 10(1) of the Act. In my view, this defence cannot succeed for the reasons set out below.

[52] The registration of "RAZOR MESH" was to enable Cochrane's goods to be distinguished from others. In ***Pepcor Retail (Pty) Ltd v Truworths Ltd 2016 BIP 286 SCA, paragraphs 10 to 11*** the court stated:

*"The purpose of a trademark is to indicate the origin of the goods or services in connection with which it is used, that is to service a batch of origin ... The fundamental function of a trademark is thus to distinguish the goods or services of one person from the goods or services of another. In order to fulfil this function, a mark must be "capable of distinguishing goods or services within the meaning of section 9 of the Act".*

*Thus, for a mark to be registerable in terms of the Act (and for it to remain on the register) it must have inherent distinctiveness by reason of prior use."*

[53] In order to determine if a mark is inherently distinctive, is a question of fact which must be determined with regard to all the relevant circumstances including the nature of the mark, the relevant goods, the industry within the mark is intended to be used and the perception of the average consumers in that industry.

[54] To this effect, Cochrane submitted that for Harrop to succeed in its counter application, it is required to establish that the mark has universal ordinary meaning, either in general or in the fencing trade that is descriptive of fences, and that it is not a skilful or covert allusion. Cochrane submitted that the words "RAZOR MESH" used together does not have a universal ordinary meaning.

[55] Cochrane argued further that the mark "RAZOR MESH" is not purely descriptive. Many trademarks contain an allusion to some characteristic of the goods

or services in which they are used and it is often said that the best trademarks contain a skilful allusion to a particular characteristic of the goods or services in question.

[56] The descriptiveness of trade marks composed of words must be determined, not only in relation to each word spoken separately, but also in relation to the whole as they appear. Any perceptible difference between the combination of words submitted for registration and the terms used in common parlance of the relevant class of customers is apt to cover a distinctive character on the word combination enabling it to be registered as a trademark<sup>12</sup>.

[57] To illustrate the uniqueness of the mark, the court, in ***Pepsico v Atlantic Industries***<sup>13</sup> held that: *“twist is not descriptive of Atlantic’s beverages. No trader would wish to use the word “twist” in relation to its soft drinks ...”* If “twist” has any meaning as applied to soft drinks, it is allusive or metaphorical.

[58] It is undoubtedly clear that the word “RAZOR MESH” does not have a universal ordinary meaning. The combination of the words “RAZOR MESH” is not defined in the dictionary. Furthermore, a submission that it is descriptive of fences, is also not correct. It is not in dispute the words as they stand separately - “RAZOR” and “MESH” are defined in the dictionary and in those instances they have each carry a universal ordinary meaning. Furthermore, the word “Razor” particularly is not common parlance in the fencing industry.

[59] Cochrane conceded that “MESH” could describe a characteristic of a fence but the phrase “RAZOR MESH” is not descriptive of fences, particularly if you look at the dictionary meaning of “RAZOR”.

[60] The use of “RAZOR” in relation to fences is in fact a skilful (and covert allusion). In the definitions relied on by both parties, it has been illustrated that the meaning generally ascribed to a “razor”, an instrument used to cut hair or to shave hair.

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<sup>12</sup> Webster and Page, South African Law of Trade Marks, fourth edition, p 3-11

<sup>13</sup> (2017) JOL 38846 SCA

[61] I am mindful that it is not conclusive to use only dictionary meanings and it should not be used in isolation. The question in every case is not merely to have regard to the definition of the words but what the average consumer would have understood if he or she has seen the mark in context<sup>14</sup>.

[62] Furthermore, although the primary function of the trademark is that it is portrayed as a “badge of origin<sup>15</sup>”, it does not however mean that the mark must be recognisable. Recognition of the mark cannot and does not mean that the consumer regards the goods and services as represented by the mark as distinguishable from similar goods or services of another. What the mark should do is trigger in the mind of an average consumer its specific origin and as such its distinctiveness when purchasing the goods<sup>16</sup>.

[63] A mark can however lose its distinctiveness when the proprietor of the mark allows the mark to be used by others in the trade as a generic term. In this instance, the fencing industry, Cochrane’s submission that the mark was only used by the entities it associated itself with, could not be denied. Cochrane is currently in the process of preventing the use of its mark with Wired Adventures, another business. The litigation against Harrop is but one instance.

[64] From the aforesaid observations I find no satisfactory evidence put forward to illustrate firstly, that at the time of registration of the mark, it was not distinctive or secondly that “RAZOR MESH” or “Razor Mesh” was merely descriptive or had become a common term in the fencing industry.

[65] The argument put forward that at least seven South African businesses and three Chinese businesses have used the term “RAZOR MESH” cannot be relied upon. I have noted that the words “RAZOR MESH” was not used by the said businesses in this combination. In fact, the words “razor” or “mesh” were used either separately or in conjunction with other words. Moreover, the use was not descriptive.

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<sup>14</sup> Hasbro Inc v 123 Nahrmittel GmbH 2011 FSR 21 539 ChD paragraph 171

<sup>15</sup> Beecham Group Plc v Triomed Pty Ltd 2003 (3) SA 639 at 645 A-C

<sup>16</sup> Union Swiss matter supra, par 13



[66] It was illustrated that even in the Chinese context the words “razor mesh” are used with other words, namely “square hobe razor wire”, “welded mesh” and “wire mesh fences”.

[67] In the South African context there is a sufficient basis that demonstrates that “RAZOR MESH” was capable of distinguishing the goods from those of others in the trade, both at the time of registration and when this application was instituted.

[68] A mark will not be inherently capable of distinguishing where it carries a universal ordinary meaning which is descriptive of the goods. However, in this instance, the mark was a covert or skilful allusion to such goods and was therefore capable of distinguishing<sup>17</sup>. A mark capable of distinguishing should remain on the register.

[69] Consequently, I find that the Respondent has infringed the applicant’s mark “RAZOR MESH”. Furthermore, the counter-application cannot succeed for the reasons set out above.

[70] In the premises, I make the following order:

- (1) The application under case no. 6031/21, the trademark infringement application, is granted with costs.
- (2) The application under case no. 12358/21 is dismissed with costs.

**H KOOVERJIE**  
**JUDGE OF THE HIGH COURT**

*Appearances:*

<i>Counsel for the Applicant:</i>	<i>Adv IA Learmonth</i>
<i>Instructed by:</i>	<i>Rademeyer Attorneys</i>
	<i>C/O Jacobson &amp; Levy Inc</i>

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<sup>17</sup> *Pepsico Inc v Atlantic Industries* 2017 BIP 122 SCA 1 par 12, *Pepkor Retail Pty Ltd v Truworths* 2016 BIP 286 SCA, par 17

*Counsel for the Respondent:*    *Adv PP Ferreira*

*Instructed by:*                      *Smit & Van Wyk Inc*

*Date heard:*                            *22 February 2021*

*Date of Judgment:*                *9 June 2022*