

**IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION**

CASE NO. 8828/2007

In the matter between:

ALLIANCE PROPERTY GROUP PTY (LTD)

APPLICANT

and

ALLIANCE GROUP LIMITED

FIRST RESPONDENT

AUCTION ALLIANCE

KWA-ZULU NATAL PTY (LTD)

SECOND RESPONDENT

JUDGMENT

SISHI J

INTRODUCTION

[1] The Applicant in this matter seeks a permanent interdict restraining the Respondents from passing-off their services in the field of property as those of the Applicant, or as being associated with the

Applicant in the cause of trade by using the name, mark & trading style “Alliance Group” or any other name, mark & trading style which is confusingly or deceptively similar to the Applicant’s mark & trading styles “Alliance Group”.

[2] The Applicant conducts business in the field of commercial and industrial property including property development and facilitation, evaluations and consultancy, property sales, property letting, property management and public auctions of property. The Applicant alleges that it conducts its business in major centers in South Africa, including in particular Kwa-Zulu Natal, Eastern Cape, Western Cape and Gauteng.

[3] The Respondents conduct the business of property inspections and evaluation, property auctions, business sales and property finance throughout South Africa. However, the core business of the Respondents is that of property auctions.

[4] The First Respondent commenced trading as “Auction Alliance Pty (Ltd)” in 1998. In May 2000 the First Respondent changed its name to “Auction Alliance Holdings Ltd” and thereafter in March 2003 to “Asset Alliance Ltd”. The First Respondent traded in Kwa-Zulu Natal prior to the incorporation of the Second Respondent in 2000. The Second Respondent was incorporated on 15 December 2000 as “Kusasa Commodities (Pty) Ltd” and changed its name on 7 March 2001 to “Auction Alliance Kwa-Zulu Natal (Pty) Ltd”. The Second Respondent conducts the First Respondent’s business in Kwa-Zulu Natal and has done so since 2001.

[5] In September 2007 the Respondents ceased using the names “Auction Alliance Group” and “Auction Alliance Kwa-Zulu Natal” and began trading as “Alliance Group”.

[6] The Applicant contends that these proceedings arise out of the Respondents’ change of the trading style from “Auction Alliance”, used essentially in relation to the conduct of auctions of immovable property to “Alliance Group” in September 2007, in the face of the

Applicant's existing reputation and goodwill residing in the trading styles "Alliance" and "Alliance Property Group" in the fields of property, including auctions. The Applicant contends that the effect of the Respondents conduct was to remove the only feature of their trading style, which distinguishes their services and business from those of the Applicant and to add Group element of the Applicant's trading style to their trading style, thereby misrepresenting that their business is that of the Applicant or associated in the cause of trade with the Applicant.

**THE LAW APPLICABLE AND THE MEANING OF PASSING -
OFF**

- [7] The following cases were referred to by the parties on meaning of passing-off.

Capital Estate & General Agencies (Pty) Ltd & Others v Holiday Inn Incorporated & Others 1977 (2) SA 916 (A), a case which deals with what has been a commonly used definition of passing-off, where Rabie JA stated the following at 929 C-D

“The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or connected with that of another. Whether there is a reasonable likelihood of such confusion arising is, of course, a question of fact which will have been determined in the light of the circumstances of each case. And if the evidence establishes that there is a reasonable likelihood of such confusion arising, even if the parties concerned cannot be said to be carrying on their activities in a common field, it is difficult to see how the absence of such a common field can nevertheless constitute a ground for denying a relief to an aggrieved party. The absence of a common field of activities is of course a factor which has to be taken into account when considering the question whether someone’s conduct is likely to lead to confusion of the kind mentioned but the proper weight to be assigned thereto would depend on the consideration of all relevant facts. The crucial question in every case is whether there is a reasonable likelihood of confusion and this being so it cannot be suggested that the absence of a common field of activity will always be sufficient to bar a party from obtaining relief.”

[8] ***Carterham Car Sales & Coach Works Ltd v Birkin Cars & Another***

1998 (3) SA 938 (A) in this case Harms JA referred, to the elements of the wrongs as

“... the “classical trinity” of reputation (or goodwill), misrepresentation and damage”, at 947 A-B.

In the same case at paragraph 15, Harms JA went on to state:

“The essence of an action for passing-off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of a plaintiff or is associated therewith”.

- [9] ***Premier Trading Co (Pty) Ltd & Another v Sporttopia (Pty) Ltd***
2000 (3) SA 259A at 266H to 267C where Nienaber JA stated the following:

“Passing-off is a wrong consisting of a false representation made by one trader (the defendant) to members of the purchasing public that the enterprise, goods, or services of a rival trader (the plaintiff) either belong to him (the defendant) or are connected, in the course of trade, with his own enterprise, goods or services. ... The defendant’s representation is a misrepresentation if it is likely to deceive or confuse the substantial number of the public as to the source, origin of his product. Passing-off to be actionable, he erodes the plaintiff’s goodwill. Goodwill is the product of accumulation of factors, the most important of which, in the context of passing-off is the plaintiff’s reputation. Reputation is the opinion, which the relevant section of the community holds the plaintiff or his product. If favourable, it would dispose potential customers to patronize the plaintiff or his product and, if unfavourable, it would tend to discourage them from doing so ...”

- [10] To illustrate that reputation has a territorial aspect, Harms JA in ***Carterham Car Sales & Coachworks Ltd, supra***, at para 20, said the following:

“The correct question can be distilled from the judgments on passing-off of this court mentioned earlier in paragraphs 15 and 16 In general terms, it appears to me to be whether the plaintiff has, in a practical and business sense, a sufficient reputation among the substantial number of

persons who are either clients or potential clients of the business. As far a location of reputation is concerned, it must subsist where the misrepresentation or complaint causes actual or potential damage to the drawing power of the plaintiff's business. Otherwise the misrepresentation would be made in the air and without any consequences..."

[11] In paragraph 22 of the same judgment, the court dealt with the aspect of timing. The following is stated:

"The reputation relied upon must have been in existence at the time the defendant entered the market, in other words, the plaintiff cannot rely on a reputation that overtook the business of the defendant. It must also exists when the misrepresentation is committed"

What can be crystallized from the cases referred to above is that passing-off is mainly about two issues, namely, reputation and misrepresentation.

THE APPLICANT'S REPUTATION

[12] The issue under this head is whether the Applicant has in a practical and business sense sufficient reputation among a substantial number of persons who are either clients or potential clients of its business. (See *Carterham Car Sales & Coachworks Ltd, supra*, at 947B-C).

[13] It is trite that the onus is on the Applicant to establish the requisite reputation. (*Premier Trading Company (Pty) Ltd supra* at 267 D-E) (*Initiative Promotions & Designs v Initiative Media South Africa 2005 BIP 516 (DCLD) at 525A-F*)

[14] In *Carterham Car Sales & Coaches Works Ltd, supra*, Harmes JA pointed out that the only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the first requirement for a successful passing-off action is proof of a relevant reputation. (At para 16) See also: *Brian Boswell Circus (Pty) Ltd v Boswell-Wilki Circus (Pty) Ltd 1985 (4) SA 466A at 479D* and *Adhoc-Ingrim Products Ltd v Birchim SA (Pty) Ltd 1977 (4) SA 434W at 436 – 437*)

[15] The Applicant contend that it has established its reputation and the Respondents on the other hand contend that the Applicant has failed to discharge the onus resting on it in establishing the requisite reputation.

[16] The principal deponent to the Applicant's founding affidavit is Robert Roy Marshall Alderdice, the Director of the Applicant whilst Rael Levitt, the Chief Executive Officer of Alliance Group Companies and Director of the First and Second Respondents has deposed to an answering affidavit and further affidavits on behalf of the Respondents.

[17] I shall first deal with the essential factual averments on the affidavits of both parties and their contentions on the aspect of the Applicant's reputation.

[18] Mr Alderdice says that the Applicant commenced business on the 4th of March 1997 and had adopted the trading name, the company name and trading style "Alliance Property Group". The Applicant traded under the style of "Alliance" and "Alliance Property Group" since 1997 and the use of these trading styles has been extensive through Kwa-Zulu Natal, the Eastern Cape, Western Cape and Gauteng.

[19] Mr Alderdice says that since its inception, the business of the Applicant has encompassed the facilitation of property development, property evaluations and property consultancy, property management, property sales, property letting and public auctions. He says that the Applicant has always enjoyed the highest reputation amongst the public, more particularly the public interested in the property field where the Applicant is known for its expertise and trustworthiness.

[20] Since 1997, the Applicant has facilitated a number of property developments having a combined value of over R800 million as a major aspect of its business. (See annexure “RA2A” pg 30 Record). They include the development of Rob Roy Retirement Lifestyle Village worth R160 million. Over the years since 1997, R427 million worth of property developments have been serviced through the Applicant. At the same time and as of September 2007 there were R413 million worth of developments being current projects which were facilitated and serviced by the Applicant. This is a substantial activity. Levitt for the Respondents has not denied these figures save

to deny that the Applicant is in any significant degree involved in the business of public auction.

[21] Over the years since 1997 the company's portfolio of commercial and industrial properties, which it manages, has grown to 54 buildings worth over R948 million. These properties are located in Kwa-Zulu Natal, Eastern Cape, Western Cape and Gauteng.

[22] Mr Alderdice says that one aspect of its business has been the conduct of public auctions of property. The Applicant conducted its first public auction during February 1998 when it auctioned a Glenashely Shopping center and has continued to conduct such auctions since then. The Applicant has conducted a number of such public auctions worth some R388 million.

[23] The largest of these auctions, according to Mr Alderdice took place in Dubai in November 2005 and involved auctioning property worth R283 million. The auction attracted considerable interest both in

South Africa and internationally as this was a first property auction in Dubai.

[24] The website report on an auction conducted by the Applicant in Dubai on page 39 Record reads as follows:

“The auction was expertly hosted by a representative from a world renown commercial and industrial property consultancy Alliance Property Group, who traveled from South Africa specifically for the event. Roy Alderdice auctioneer and managing director said it was a great honour and great privilege to conduct this very exciting and prestigious property auction here in Dubai”.

[25] It has been contended on behalf of the Applicant that one does not go and conduct an international auction unless one has a reputation. This was an indication that the Applicant has a reputation. In this regard, I pause to mention that reputation must subsist where the misrepresentation complained of causes actual or potential damage to the drawing power of the Plaintiff’s business – (See *Caterham Car Sales & Coachworks Ltd, supra at para 20.*)

[26] Alderdice testified that the Applicant has acted as consultants and advisors as well as auctioneers to IFA, the Dubai based company, which has been a core developer of the well-known prestigious

Zimbali Golf Course and Leisure Resort in KwaZulu Natal along with Moreland Developments.

[27] Since the year 1998, the Applicant's turn over from its property related activities primarily in the form of commissions has exceeded R91 million as reflected on the schedule marked "RA9" page 54, Record.

[28] The Applicant has made extensive use of the printed media including advertising boards in order to advertise its services and its property sales. The amount spent by the Applicant in advertising its services has exceeded R1.744 million. Levitt of the Respondents, however, testified that during the period 2003 – 2007 in Kwa-Zulu Natal alone, the Respondents spent the sum of R16 466 392-00 in relation to advertising. As far as the group advertng of the Respondents is concerned for the period 2006 – 2007, the Respondents spent the sum of R57 411 218-00. The advertising expenses of the Applicant, as compared to the Respondent a total of R400 927-00 for a period a 2006-2007 pale into insignificance.

[29] Mr Morley for the Applicant submits correctly in my view that if the Respondents submit that they have advertised far more extensively than the Applicant, if it is so, that advertising pertains to the mark “Auction Alliance”, not “Alliance Group”. He submits that throughout up until September 2007, the Respondents were “Auction Alliance”. That is distinct from “Alliance Property Group” for example. He submits further that it is not good enough to say, they engaged in more advertising than the Applicant over that particular period, but the advertising pertains to “Auction Alliance”, not to “Alliance” on its own or “Alliance Group”.

[30] Alderdice further testified that in further support of the Applicant’s reputation and goodwill in its name and trading style, “Alliance” and “Alliance Property Group”, he has annexed affidavits of Redmond Norgate Dales, Brian Duncan Reardon, Julian Hilton Beare, Murray Russell Collins and Russell Dennis Cleave who have extensive knowledge of the property industry in Kwa-Zulu Natal and who attest to the Applicant’s reputation covering the field of property. Some of the deponents also allege that in their opinion, the change of name

from “Auction Alliance” to “Alliance Group” will cause confusion to members of the public.

[31] Indeed, a close examination of these affidavits, reveal that the Applicant as “Alliance Property Group” has established a sound reputation in the property industry and has been well known in the Durban area.

[32] The Respondents contend that the word “Alliance” is common to both Applicant’s and Respondents’ names and that this word in the contexts of these names will result in confusion. The Respondent argued that even if it were to be found that the Applicant has established a reputation which would entitle it to the relief sought, the Applicant has failed to establish any reputation other than in Kwa-Zulu Natal and parts of the Eastern Cape.

[33] Mr Levitt for the Respondents denies that the Applicant has any reputation outside Kwa-Zulu Natal other than areas in the Eastern Cape which were formerly part of Transkei and denied that the

Applicant conducts any business in the Western Cape or Gauteng and if it does that this business is negligible.

Use of “Alliance” as a descriptive name

[34] The Respondents contend that the word “Alliance” is a descriptive word and that the Applicant itself concedes that the word has descriptive connotations.

[35] The Respondents contended that the word “Alliance” is a descriptive word and it means: “a union or association formed for mutual benefit; a relationship based on affinity” (Concise Oxford English Dictionary 11th edition 2006, Oxford University Press).

[36] The Applicant on the other hand on the meaning of the word “Alliance” has referred to the Concise Oxford Dictionary (9th edition at 34) and states that it defines “Alliance” as follows:

“n1. a union or agreement to co-operate, especially of states by treaty or families by marriage. b. the parties involved. 2 (alliance) a political party formed by the allying of separate parties. 3 a relationship resulting from an affinity on the nature of qualities etc (*the old alliance between logic and metaphysics*). 4 bot a group of allied families....”

[37] In dealing with the principles applicable when a descriptive name is being used, counsel for the Respondents referred to the case of ***Rovex Ltd & Another v Prima Toys (Pty) Ltd 1982(2) SA 403 (C)*** in which the Court quoted with approval (at 405 E-H) the following passage from an Australian case, ***Hornsburg Building Information Center (Pty) Ltd v Sydney Building Information Center Pty Ltd***:

“There is a price to be paid for the advantages flowing from the possession of an eloquent 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 business 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, the plaintiff which uses descriptive words in its trade name will find that quite small differences in a competitors trade name will render the latter immune from action – *Office Cleaning Services Ltd v. Westminster Window & General Cleaners Ltd (1946) 63RPC 39 at 42 per Lord Simonds.*”

[38] His Lordship said (at 43), the possibility of blunders by members of the public will always be present when names consists of descriptive words –

“So long as descriptive words are used by two traders as part of their respective trade names, it is possible that some members of the public will be confused whatever the differentiating words may be.

The risk of confusion must be accepted, to do otherwise is to give the 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.”

[39] In *Selected Products Ltd v Enterprise Bakeries (Pty) Ltd 1963 (1)*

SA 237C the Applicant’s biscuits were called “Coconut Cookies” at

240F –243A, Theron AJ as he then was said:

“Now it has been stated over and again by the Courts that if a trader has applied to his merchandise ordinary descriptive words, he will have great difficulty in proving that such words constitute a trade name designating his goods as opposed to those of others. Save in most exceptionally circumstances no individual can be allowed to monopolise words which are the common heritage of us all and which provide a convenient and natural method – even if not the only or most correct method – of describing an article. The reluctance of the Courts to find that words primarily descriptive have acquired among the public or that class of the public likely to deal with the article designated thereby, a subsidiary or secondary meaning denoting or connoting a particular origin, is well illustrated by the following passage from the judgment of Lord Shand in *Cellular Clothing Company Ltd v Maxtion*” 1899 AC 326 (a case which has often been relied upon in our Courts) at page 340:

“of that case (i.e. *Reddaway v Banham 1896 AC 199*) I shall only say that it no doubt shows that it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has used it a right to its exclusive use or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristics. But I confess that I have always thought that I still think that it should be made almost impossible for anyone to obtain the exclusive right to the use of the word or term which is an ordinary use in

our language and which is descriptive only and indeed were it not for the decision in Reddawys case. I should say this made altogether impossible.”

[40] In *Park Court Hotel Limited v Trans World Hotel Limited (1972)*

RPA C 27, the plaintiff being the owner of the hotel called “Hotel International” sought to interdict the defendant from using the name “London International Hotel”. At page 31 line 3-7 the Court stated:

“A distinction is made between a distinctive word used in a name and an inventive or fancy name. The descriptive word need not be the only or necessary word to effect the description. It is sufficient if it is in the terms as stated in the speeches in the Cellular Clothing Company case, “applicable to the subject matter”, or if, by it, the description is “conveniently enough and appropriate enough described” and “aptly and appropriately describe”.”

At page 34, line 14 to 25 the Court went on to state in relation the use of the word “International”:

“So I conclude that it is a descriptive word and is used in the name as a descriptive word. But it seems to me that the words, though descriptive and in common use, like the word “International” as used in this case is not so strongly and inevitably descriptive in its own connotation as the word “Cellular” in the Cellular Clothing case. But it is descriptive, substantially descriptive, and in my view sufficiently descriptive to offend against the principle in law, or of policy in which the law has been jealous to safeguard, that a descriptive word shall not, except under stringent condition be monopolized. It seems to me that, in the present day

conditions particularly, it is undesirable that such a word as “International” should be monopolized in the context in which is used in this case.”

[41] The Respondents contend correctly in my view that the word “Alliance” like the word “International” is substantially and sufficiently descriptive that the Applicant cannot claim a monopoly on this widely used and descriptive word in its trade name.

[42] In *Sea Harvest Corporation (Pty) Ltd v Irvin & Johnson Ltd 1985 (2) SA 355(C)*, the learned Acting Judge stated the following at 360B –D:

“A long line of decisions in passing-off and trade mark cases has established that while descriptive words as opposed to invented or fancy words are used in a trade name or trade mark, 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. *Cellular Clothing v Murray 1899 AC 326 (HL)*; *Patlansky & Co Ltd v Patlansky Brothers 1914 (TPD) 475 at 492*; *Selected Products (Pty) Ltd v Enterprise Bakeries Ltd 1963 (1) SA 237(C) at 242F to 243B*; *Rovex Ltd & Another v Prima Toys (Pty) Ltd 1982 (2) SA 403(C)*”

[43] Mr Levitt for the Respondent testified that the meaning of the word “Alliance” makes it attractive for use in names of businesses in which

co-operation, networking and a united effort towards a common goal would be appropriate. The Respondents contend that for this reason it is clear that the word is used in a variety of company and trading names. This is particularly so in the field of property sales, management and development in which co-operation of number parties is required for a successful business venture. The Respondents have contended that they have established that apart from the Applicant and the Respondents, there are numerous corporate entities registered in South Africa in which the word “Alliance” features prominently in the entities’ names. These include: New African Alliance Properties, Strategic Alliance Property Ventures, Alliance Property Developments, Alliance Property Management, Global Alliance Properties, African Alliance Properties, Strategic Alliance Property Consultants, Strategic Alliance Property Investments, Strategic Alliance Property Consultants and Alliance Properties (Record pg 159 –167). Mr Morley for the Applicant submitted correctly that these are names on the register, e.g. in New Alliance Properties, the word “Alliance “ is very descriptive so as in Strategic Alliance Property Ventures, Alliance Property Developments is a

subsidiary of the Applicant. Strategic Alliance Property Consultants is located in Sandton, African Alliance Property is based in the Cape. Alliance Properties is based in the Western Cape.

[44] The Applicant submits that the Respondents have not demonstrated that these entities trade using these registered names in which the words “Alliance” features. The Respondents contend that it is highly unlikely that entities with such registered names would not trade using (descriptive) registered names. In this regard, I find that it is probable that these entities do trade as such.

[45] Mr Levitt, for the Respondents testified that the First Respondent effectively owned and controlled twelve (12) different companies with the words “Alliance” coined to their respective names since 11 March 1998 with no complaints whatsoever by the Applicant for a period of nearly ten (10) years. Save for stating that the related companies have never traded as “Alliance” or “Alliance Group”. These allegations have never been specifically denied by the Applicant.

[46] The Respondents have established that there are a number of entities which clearly trade using the word “Alliance” in their names which are active in the field of property. These include: Alliance Property; Strategic Alliance Property Consultants Pty Ltd; and African Alliance Properties. The locations of these companies have been dealt with in paragraph 48 above. None of them are located within the Province of KwaZulu Natal.

[47] Furthermore, the Applicant has also demonstrated (See annexure “RA15” to the Applicant’s replying affidavit, record page 227) that there are a large number of companies in Durban and surrounding areas which trade with the word “Alliance” featuring prominently in their names. These include amongst others Alliance Focus, Alliance Brokers, Alliance Business Brokers; Alliance Finance; Alliance Business Solutions; Alliance IT and Business Solutions, and Alliance Real Estate. The Respondents contend that it is clear that the Applicant cannot contend that the word “Alliance” represents its trade name within KwaZulu-Natal and the Eastern Cape and certainly not nationally. The Applicant cannot claim the right to exclusive use of a

word which is descriptive and is also used in a massive number of other businesses some of which are also active in the field of property. The Respondents appear to be correct in this regard.

[48] Mr Levitt also testified that in a research conducted by his legal representative on 22 January 2008, marked “RL80”, there are no less than twenty-two (22) entities in South Africa in which the word “Alliance” features prominently in the entities’ name.

[49] Any distinctiveness which may have attached to the Applicant’s trade name has been lost due to the fact there are so many entities trading with the same name or with a similar name (see *Peregrine Group Pty Ltd v Peregrine Holdings Ltd 2001(3) SA 1268 (SCA) at 1275 at paragraphs 12 & 13*; see also *Peregrine Group Pty Ltd v Peregrine Holdings Ltd 2000(1) SA 187(WLD)*). In the *SCA Peregrine Pty Ltd case* at paragraph 12, the Court stated as follows:

“...In sum, the registration of the Respondents’ names was not the cause of the likelihood of confusion because of the gradual erosion of the distinctive character of the word as part of the company name. And, because the appellants were not the first to adopt the word as part of their

names, they can not rely upon a vested right by virtue of the first use of registration.”

[50] The Respondents also contends that it is also instructive to note that the Applicant has not produced any evidence of it seeking to interdict any of these entities from trading with the word “Alliance” featuring prominently in their names. The Applicant is thus being selective in seeking to pursue the Respondents. The Respondents submit that the word “Alliance” has become synonymous with its business, namely, property, and that a significant portion of the public identifies the Respondents business with the use of the word “Alliance” in the property field. In this regard counsel for the Respondents referred to the evidence of advertising, which obviously indicates that the Respondents spend more per annum on advertising than the Applicant. It has, however, been pointed above that advertising relates to Auction Alliance. The Respondents contend that this advertising not only affects the reputation of the parties in the minds of the public but also will lead to the public being aware of the identity of the Respondents compared to the Applicant and then as a result there will be no confusion.

[51] The Respondents refer to paragraph 17 of the WLD *Peregrine case*, *supra*, which reads as follows:

“I do not agree with the registrar’s categorization of the word “*Peregrine*” as being an ordinary generic word. The word genus is defined in the Oxford dictionary as being “belonging to a genus or class; applied to a large group of or class of objects; general (opposed to specific or special class)... In any event the word *Peregrine* in the context in which it is used by the parties in this matter can hardly be described as generic or descriptive of the services which they offer. Be that as it may, I can not ignore the approach adopted by the registrar or that there are twenty-nine (29) companies and close co-operations which the registrar has permitted to use word *Peregrine* as part of their registered name.”

In paragraph 23 of the same case the following is stated:

“the name *Premier* was not descriptive of any of the products or services of the parties. It was simply an attractive English noun that enhanced the image of the companies which used it. In my view, the name *Peregrine* (which is also non descriptive of the services offered by the parties in the present matter) serves a similar purpose. I am mindful of the fact that the word *Peregrine* cannot be said to be in common to the same degree as the word Premier. The word is, however, an ordinary English word and has been permitted by the Registrar as part of the names of no less than twenty nine (29) companies. As such in my view, it would be inappropriate to confer a monopoly in the word *Peregrine* unless the word has acquired a secondary meaning in association with the business conducted by the Applicants...”

Then in paragraph 24 of the same case the Court refers to the *case Van Der Watt v Humansdorp Marketing CC 1993 (4) SA 779 (SE)*

were Zitsman JP held that:

“Where an Applicant uses his own name or mere descriptive words in naming his business, an interdict will not be easily granted unless the Applicant can show his name or the descriptive words used by him, have become so associated with his business or his products that they have acquired a secondary meaning and are associated in the minds of the public with the Applicant’s products or business, and with that of no-one else”. (At 782J – 783B)

[52] Counsel for the Respondent contends, correctly in my view, that this is exactly what is lacking in this case. He submits that nowhere in the Applicant’s papers one would find an allegation that the name “Alliance”, has acquired a secondary meaning. That is the reason why the Applicants say it symbolizes its business but symbolization is not good enough it has to acquire a secondary meaning. Indeed nowhere has the Applicant alleged that the name “Alliance” has acquired a secondary meaning as contemplated in that case.

[53] Reference is also made to paragraph 25 of the *Peregrine* case, *supra*, which reads as follows:

“I tend to consider whether the Applicants have established that the name *Peregrine* has as a result of the Applicant’s use of the name, acquired a

secondary meaning in the minds of the public. The Applicants do not expressly allege that they have established for the name *Peregrine* a secondary meaning in particularly market place. Instead they do so obliquely by denying the Respondents allegation that the Applicants have established such secondary meaning ...”

[54] Towards the end of paragraph 25 at D, the following is stated:

“... The Respondents have not however, established that the term *Peregrine* has acquired a secondary meaning in the minds of the public associated with their business. Based on my assessment of the evidence none of the litigants have established the existence of a secondary meaning in the *Peregrine* name which is associated with their respective businesses. On this ground alone, given the generic nature of the word *Peregrine* and the extent of its use by the legal entities in the corporate world, it would be inappropriate to permit the Applicants or the Respondents (for that matter) to be entitled to a monopoly of the name.”

The Respondents contend that this is the position in the present case.

The Applicants cannot be granted a monopoly in this name.

[55] Mr Morley’s submission that the *Peregrine* case, *supra*, only deals with company name registration is not correct. This case also deals with passing-off of goods (see paragraphs 1, 2, 32 of the *Peregrine* case (WLD)). The Applicant’s claim in this case is based on both

section 45(2A) of Act 61 of 1973 and on the grounds of common law passing-off so as the finding by the Court.

[56] Evidence has established that apart from the Applicant and the Respondents, there are a number of corporate entities in South Africa in which the word “Alliance” features prominently in the entities names. The names of these companies active in the filed of property have been given (see paragraphs 49, 52 and 53 above). The Applicant itself has shown (in annexure “RA15, Applicant’s Replying Affidavit, record page 227) that there are a large number of companies in Durban and surrounding areas which trade with the word “Alliance” featuring prominently in their names. These include (amongst others) Alliance Brokers; Alliance Business Brokers; Alliance Finance; Alliance Institute Business Solutions; Alliance Institute IT & Business Solutions and Alliance Real. I therefore find that the word “Alliance” is indeed a descriptive word and in this case is used as a descriptive word.

[57] The Applicant therefore cannot claim the right to exclusive use of a word which is descriptive and is also used in a number of other businesses some of which are active in the field of property. The law requires that descriptive words shall not save in exceptional circumstances be monopolized. The word “Alliance” is substantially and sufficiently descriptive that the Applicant cannot claim a monopoly on this widely used and descriptive word in its trade name. Furthermore, the name “Alliance” is not descriptive of any of the services offered by the parties in this case. It would therefore be inappropriate to confer a monopoly in the word “Alliance” unless it has acquired a secondary meaning in association with the business conducted by the Applicant.

[58] Based on my assessment of the evidence in this matter neither the Applicant nor the Respondents have established the existence of a secondary meaning in the name “Alliance” which is associated with their respective businesses. In the result neither party is entitled to the monopoly in the name “Alliance”.

[59] The Respondents referred to its adverts dealing with the name change.

Two of such adverts in the commercial review states that Alliance Group was formerly Auction Alliance and Action Alliance has now become Alliance Group (pgs 59 & 61 of the Papers). The Respondents contends that why would someone who wants to pass off his goods as those of the competitor go into print and advertise that it is the company formerly know as Auction Alliance and contends that this is the very last thing one would like to do. Most probably no reference would be made to the company's former name Auction Alliance if the intention is to pass off its goods as those of the competitor.

[60] The Applicant submits that the Respondents cannot rely upon a reputation which has overtaken that of the Applicant. In support of this proposition the Applicant has referred to the case of is ***Carterham Car Sales & Coachworks Ltd, supra, at page 950 H-J:***

“The reputation relied upon must have been in existence at the time the defendant entered the market, in other words, a plaintiff cannot rely upon a reputation that overtook the business of the defendant (***Antheuser-Busch Incorporated v Budejovicky Budvar – NP (t/as Budweiser Budvar***

Brewery) & Others (1984) FSR413 (CA) at 462), it must also exist when the misrepresentation is committed.”

[61] According to the Respondents this authority establishes that an action of passing-off cannot be established by a party relying on a reputation which overtook that of the Defendant/ Respondent. It is not authority for the proposition that a Defendant/Respondent cannot rely on its own reputation overtaking that of the Plaintiff/Applicant. It must exist when the misrepresentation is being committed.

[62] The Respondents’ contention with regard to the above quoted paragraph in *Carterham Car Sales & Coachworks Ltd, supra*, appears to be correct. There is no suggestion in this case that the Applicant’s reputation overtook the reputation of the Respondents, on the facts of this case it appears to be vice versa with the Respondent’s active advertising campaign after the change of its name.

MISPRESENTATION

[63] The Applicant contend that the Respondents have not established any use of the name “Alliance” on its own as opposed to “Auction

Alliance” and that at best “Auction Alliance” was the only symbol that indicated their business and reputation. The Respondents first began to trade as “Alliance Group” in September 2007. They have advertised their change of name and trading style extensively. The Applicant contend that even taking the Applicant’s style “Alliance Property Group” and the trading style “Alliance Group”, it has now become for all intents and purposes virtually identical. The missing word “property” matters not because they are trading as “Alliance Group” in the field *inter alia* of property. Using “Alliance Group” in relation to property is likely to lead to deception and confusion. What the Respondents have done in essence is the remove the distinguishing feature of their trading style, those which distinguish them from the Applicant and brought themselves as it were within the ambit of deception and confusion. The Applicant also contended that apart from leaving out the non-distinctive word “property”, the name and trading style “Alliance Group” is identical to the Applicant’s name and trading style “Alliance Property Group”.

[64] It was held in *Sir Roberts McAlpine Ltd v Alfred McAlpine PLC* (2004) *RPC* 36 in which the defendant dropped the word ALFRED from its logo and re-branded itself with the word McAlpine across a slanted purple logo that:

“(35) It is apparent from this that the word ALFRED as a distinguisher is played down so that it is virtually non-existent. No replacement distinguisher is provided.

(36) Accordingly there is, and will be, a situation in which McALPINE features exclusively in a trading of persona of Alfred (Alfred McAlpine PLC). Does this amount to a misrepresentation for the purposes of law of passing-off? In relation to relevant activities it seems to me that it does. I have already found that the word is capable of referring to Robert (Sir Robert McAlpine Ltd) so using the word will inevitably amount to a misrepresentation because the business being referred to is not in fact of Robert ... Since the use of that word lies at the heart of the present corporate presentation and image, the misrepresentation is made out.

(50) Alfred has taken steps to suggest that it is the sole owner of the name, and to do that is to affect the value of the name to Robert because it starts to elbow it out – it deprives Robert of some of the value of the name or diminishes Robert’s rights”.

[65] The Applicant referred to the summary of the McAlpine case at H13 page 100 which says:

“The effect of the defendant’s re-branding exercise was to play down the word ALFRED as a distinguisher, so that it was virtually non-existent. No replacement distinguisher was provided. There was and there would be a situation in which McALPINE featured almost exclusively under the trading persona of the defendant. Because the word McAPLINE was capable of referring to the claimant, so using the word would inevitably amount to a misrepresentation because the business being referred to was not that of the claimant”

[66] In this particular case the Applicant contends that they have a reputation and goodwill in “Alliance Property Group” and in Alliance. They are the symbols by which they are known. The Respondents had a symbol “Auction Alliance”. What they have done they have dropped the distinguisher “Auction”. The Respondents have brought themselves into the ambit of blurring and diminishing the value of the Applicant’s goodwill and in doing so they are likely to cause deception or confusion. By their actions in this case, one must have regard to the immensity of the advertising campaign, the Respondents are now suggesting to the world that they are the “Alliance Group”. They want to oust as it were, the reputation and goodwill of the Applicant.

[67] The Applicant submitted that in *Initiative Promotions & Designs CC v Initiative Media SA (Pty) Ltd (2005) BIP 516* the Applicant had established a reputation in the word “Initiative”. The Respondent, which had been trading as “MAI”, which was the abbreviation for the name “Media Initiative Africa”, and later as “INB” which was the abbreviation for the name “Initiative Nota Bene”, adopted the word “Initiative” as dominant feature of its trade name. It was held by his Lordship Mr. Justice Levinson that a passing-off had been established and that the Respondent’s use of the name “Initiative” was unlawful (at 529F & 531F). The Applicant submits that in this matter the Respondents re-branding exercise constitutes a misrepresentation that “Alliance Group” is, or is associated with, the business of the Applicant.

[68] Mr Morley submitted that there is evidence on the papers of the Applicants use of the word “Alliance” on its own. He referred to annexure “RA7 and RA8” on the papers, pages 42 to 46 record. He specifically referred to page 45 where it is stated that Alliance’s clients includes major banks and retailers. He also referred to page 50

of the record, depicting the company's profile, and specifically to the paragraph reading as follows:

“A barometer of Alliances growth can be measured in its staff which has grown by 300s”

He submitted that there is evidence of dominant features of “Alliance Property Group Ltd” trading style being Alliance.

[69] Both annexures “RA7 and RA8” inclusive of the company profile clearly indicates by the headings that the company involved is “Alliance Property Group Ltd”. This is not evidence that the Applicant ever traded using the name “Alliance” on its own. There is no such evidence on the papers before Court. The Applicant in this case has not established reputation on the word “Alliance” on its own. The Respondents too have not advanced any evidence that they ever traded using the name “Alliance” on its own. It has always been used by both parties in conjunction with other names. I therefore find that the Applicant has not established that the name “Alliance” is its own trading style. The facts of this case are distinguishable from the case of Initiative Promotions & Designs CC supra. In that case the Applicants had established a reputation in the word “Initiative”. The

Respondents adoption of the word “Initiative” as a dominant feature in its trade name established passing-off.

[70] Mr Morley for the Applicant referred to the case of Hoechst Pharmaceuticals (Pty) Ltd c The Beauty Box (Pty) Ltd 1987 (2) SA 600 (A) at 619 D where Nicholas AJA stated:

“Confusion per se does not give rise to an action for passing-off. It does so only where it is the result of a misrepresentation by the Defendant that the goods which he offers are those of the Plaintiff or are connected with the Plaintiff...”

Mr Morley then submitted that if there is a misrepresentation which causes confusion and indirect misrepresentation, it is when one sees a name which is calculated to deceive or cause confusion.

The difference between the businesses of the Applicant and the Respondents

The Respondents allege that there are a number of important differences between the business of the Applicant and that of the Respondents. These differences are the following:

- The Respondents conduct the business of property inspections and evaluations, property auctions, business sales and property finance throughout South Africa. However, (Record pg 87 para 17) the Applicant is active in Kwa Zulu Natal and Eastern Cape only;
- The Applicant has conducted auctions but this has been extremely limited. For example in 2007, the Applicant did not conduct any auctions whilst in the preceding 9 years the Applicant conducted an average of 2.4 auction a year; (Record pg 91 para 23.3)
- The Applicant's business is focused on private sales and not auctions. The Respondents main area of business is auctions; (Record pg 91, para 23.3)
- The Applicant primarily provides property management services whilst the Respondents do not; (Record pg 90, para 23.2)

[71] The Applicant's response to these allegations is that although there are differences between the Applicant and the Respondents' business, they are active in the property field and their services are offered to

buyers and sellers of property. (Record pg 203, para 25; record pg 212, para 55).

[72] The Respondents submit that in terms of the Plascon- Evans Rule, the differences between the Applicant and the Respondents businesses as alleged by the Respondents must be accepted.

[73] There is evidence to demonstrate that the Applicant's business also conducts auctions, but at a lesser scale than the Respondents. It is therefore not be correct as the Respondents contend that the Applicant's business is focused on private sales and not on property auctions. There is ample evidence to demonstrate that the Applicant is also involved in property auctions.

[74] The Applicants' allegation that the Respondents' main area of business is in the conduct of auctions should be viewed in the light of the Respondents' advert in the Natal Mercury of 6 September 2007 which reads as follows:

“Auction Alliance is not just a name change, it is an evolution of Alliance Group” (Annexure “RA11” pg 56 Record).

[75] A further advert proclaiming the word “Auction Alliance” is not just a name change it is an evolution of “Alliance Group” reads as follows:

“For years we have been connecting buyers and sellers under the Auction Alliance brand. Our continued mission to keep you, our client, one step ahead has led to several exciting assets sales and service offering. As a result we have “evolved” our brand to Alliance Group. Our focus now extends beyond auctions to a diverse range of specialist assets and services. It’s about true wealth creation for you. It show we keep you ahead of the game”

[76] The Applicant contended correctly in my view that because not only has the name been changed or the trading style been changed from “Auction Alliance” to “Alliance Group”, but now there is the proclamation to the world that the Respondents are now going to diversify their services. The contention by the Respondents that their main area of businesses is in auctions cannot be correct in the light of what is set out above. Although there are some differences in their fields of activity, they are both involved in the property field.

Geographical Considerations

[77] The Respondents have contended that whilst they conduct their business throughout South Africa, the Applicant is active in Kwa Zulu

Natal and in parts of the Eastern Cape only. The Respondents have alleged that they initially traded in Western Cape and Gauteng but have now conducted auctions nationally since 1998.

[78] Mr Alderdice testified in the replying affidavit that although a large proportion of its business is conducted in KwaZulu Natal, the Applicant also conducts a significant amount of business in the Eastern Cape. The Applicant is also conducting business in Western Cape and Gauteng. He estimates that approximately one third of the Applicant's income is derived from business it conducts in the Eastern Cape. The Applicant however has not stated what portion of its income, if any, is derived from the Western Cape and Gauteng.

[79] In this regard the Respondents contends that the only reasonable inferences that can be drawn is that the vast majority of the remaining two third of income is derived from business activities in KwaZulu Natal. The Respondents submit further that on the proper application of the test in ***Plascon Evans Paints. Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 632A*** (“Plascon- Evans Rule”), the court must find

that the Applicant's business is limited to KwaZulu Natal and any business conducted outside that area is very limited. The Respondents referred to the case of ***GPS Restuarante BK v Cantina Tequila (Mexican Connection CC) (1997 1 ALL-SA 603(T) at 609 B-D***, the Court quoted with approval the case of ***Star Industrial Company Ltd v Yap Kwee COR 1976 FSR 256 at 269*** in which that court stated:

“Goodwill as the subject of proprietary right is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. It is local in character and divisible; if the business is carried on in several countries and separate goodwill attaches to it in each”.

(See also: ***Tie Rack PLC v Rack Store (Pty) Ltd & Another 1989 (4) SA 427 (TPD)***)

[80] The Respondents correctly pointed out that a right which is being capable of being protected must in the area in which an Applicant seeks to prevent another from using a similar name or get up. See ***Carterham Car Sales & Coach Works Ltd supra at par 20*** where the following is stated:

“...as far as the location of reputation is concerned, it must subsist where the misrepresentation complained of causes actual or potential damage to the drawing power of the plaintiff's business. Otherwise the misrepresentation would be made in the air and without any consequences...”

[81] Although the Applicant appears to have demonstrated that it has reputation within the province of KwaZulu Natal and some parts of the Eastern Cape, the issue is whether it has also establish whether it has such reputation capable of being protected outside those areas. The Respondents have contended that they in comparison have traded nationally and have substantial reputation in areas in which the Applicant has no presence or reputation. This apparent from the following facts:

- The Applicant is based in Durban;
- The example of alleged actual confusion have all taken place or arisen in KwaZulu Natal;
- The affidavit of Collin, Dales, Realton, Beare and Cleaver who trade in KwaZulu Natal and Durban established that the Applicant has a reputation in KwaZulu Natal and nowhere else. In this regard the Respondent appear to concede that these affidavits establish that the Applicant has a reputation in KwaZulu Natal and nowhere else;
- The Applicant, itself, states that it has grown into one of Durban leading industrial and commercial consultants (Record pg 42).

[82] There is only a bare allegation by the Applicant's deponent that the Applicant also conducts business outside KwaZulu Natal and Eastern

Cape. There is no evidence on the papers to demonstrate that the Applicant also conduct business either in Western Cape or Gauteng or anywhere else other than the single sale which appeared to be a once off incident in Dubai which of course does not add to the reputation of the Applicant as Dubai is outside South Africa. The Applicant has contended that it also conducts business in Western Cape and Gauteng by virtue of its property management there. Annexure RA3, p34 of record, referred to by Applicant in support of this allegation does not bare testimony to this, it only refers to Applicant's clients in KwaZulu Natal and some parts of Eastern Cape and other unnamed areas.

[83] The probabilities are therefore high that the Applicant has not discharged the onus of proving that it has a reputation in areas outside KwaZulu Natal and parts of the Eastern Cape.

[84] The question to be decided in this regard is whether the Applicant's goodwill extends to areas outside KwaZulu Natal and some parts of the Eastern Cape and in my view, the Applicant must prove this fact on a balance of probabilities. On my assessment of all the facts, in

this regard, I am satisfied that the Applicant has not succeeded in establishing that its reputation extends beyond the areas of KwaZulu Natal and parts of the Eastern Cape.

Probability of deception or confusion

[85] The crucial question in every case of passing-off is whether there is a reasonable likelihood of confusion or deception. The onus is on the Applicant to prove that there is confusion or deception on the balance of probabilities. (*Capital Estate & General Agencies (Pty) Ltd & Others v Holiday Inn Incorporated & Others 1977 (2) SA 196 (A) at 929 C-E*); *Selmack Pty Ltd v West Street Trading Company Pty Ltd 1981 (4) SA 707 (D and CLD) at 712 H*). I must point at this stage that based on my assessment of the evidence in this matter there is common field of activity on the businesses of both the Applicant and the Respondent. The most common being the sale of property, whether industrial, residential or otherwise, they are both engaged in the field of property. It has been submitted on behalf of the Applicant correctly in my view that in the present case the common customers are buyers and sellers of immovable property and it matters not that to the particular method by which the desire to buy and sell property.

Although as a matter of law, common field of activity is not required, evidence has established that there is a common field of activity in the businesses of both the Applicant and the Respondents.

[86] Evidence of persons who have been actually deceived is of great importance in cases of passing-off. The Applicant has presented the following evidence in this regard:

- The Applicant has received telephone calls from members of the interested public inquiring as to the Alliance Groups collection with the Applicant, this evidence is not supported by any confirmatory affidavits. The Respondents submitted correctly in my view that no evidential weight should be attached to this evidence as it is of a hearsay nature.

[87] Collins, Dales, Messrs Rearton, Beare and Cleave have filed affidavits on behalf of the Applicant and they are of the opinion that the change of name from “Action Alliance” to “Alliance Group” will cause confusion to members of the public. The Respondents have submitted, correctly in my view, that the opinions of these individuals that confusion could occur is irrelevant to these proceedings as they are in no better position than the Court to make such a determination.

Mr Morley for the Applicant has conceded that these witnesses cannot give evidence that is relevant to the issue of deception or confusion.

[88] Alderdice in his Supplementary Affidavit testified that a journalist in his report was confused regarding the identity of the Applicant and the Respondents. He then prepared a press release which included the following:

“Please note that the Alliance Property Group is not to be confused with Cape Town based, and recently rebranded, Alliance Group (formerly Auction Alliance). The two companies are entirely separate and are not related in any way.”

According to Mr Alderdice upon receipt of this press release by the reporter with the Natal Mercury prepared a report which was published in the Natal Mercury on Tuesday 20 May 2008, Alderdice testified that notwithstanding their warning to the reporter not to confuse the Applicant with the First Respondent, it will be noted from the report that the Applicant has been confused with the First Respondent. In his report, the reporter referred to the “Alliance Group” instead of the Applicant on two occasions in his report. Besides the fact that this evidence is in fact hearsay, this has not been

confirmed by the reporter. There was no reason for the reporter to be confused as he was warned previously by Mr Alderdice in a press release. In my view this does not constitute evidence of actual confusion.

[89] Alderdice testified that the first page of the Google search of the World Wide Web, the word “Alliance” in pages from South Africa result in a link to the Respondents’ website. The printout of such search is “RA17” on page 229 on record. He submits that a person who is aware of the Applicant’s “Alliance” mark and wishes to search the telephone directory or the internet for its contact details is likely to be diverted to the Respondents’ details by conducting such a search. Interestingly what appears on annexure “RA17” amongst other names is the Respondents’ previous name “Auction Alliance” and not “Alliance Properties”. According to the Respondents this search demonstrate how common the use of the word “Alliance” is (256 000) results in South Africa returns, record page 229), and how the Applicant cannot have any rights to its exclusive use. The Respondents submit that it is trite that the results of such a search

engine are not within the Respondents' control. It is highly unlikely that a person would search for the Applicant by using the word "Alliance" only. The results for a similar search conducted using the word "Alliance Property Group" are very different. The Applicant has not produced any evidence that members of the public are being diverted to the Respondents or their website due to this search engine. No confusion exists as the Applicant and the Respondents' websites are also so different that no reasonable person could be confused by them. The Applicant's first name of its website appears on page 182 record annexure "RL37" and it is boldly written "Alliance Property Group", the Respondents' website appears on page 184 record annexure "RL38" and it is also written in bold "Alliance Group", there are a number of differences on the two websites. A close examination of these websites reveals that no reasonable minded person can be confused by the two websites.

[90] It is clear from the analysis of the evidence presented by Applicant in support of actual confusion that the evidence establishes no actual confusion in the significant portion of the public. The issue is

therefore whether there is any likelihood that a significant portion of the public would be confused or misled in dealing the businesses of the parties.

[91] The Applicant's getup in annexures "RL7 and RL8" to the Applicant's Founding Affidavit, record pages 42 to 43 have been correctly described by the Respondents as follows:-

- the Applicant's name is written in white on a blue background;
- the text below is in red;
- the name "Alliance Property Group" is written in a font which is not in caps (i.e. in capital letters);
- the name of the Applicant is written as "Alliance Property Group " and below a horizontal line, the words "Commercial and Industrial Property Consultant" appear (record pages 42 to 52);
- the words are also placed in close proximity to a grycoscope which is a mark or logo of the Applicant (record page 42 to 52).

[92] The Respondents' get-up (which is reflected in annexure "RL11" to the Applicant's Founding Affidavit, record page 56 and pages 146, 147, 153 to 158) can be described as follows:-

- the name "Alliance Group" is written in blue on a white background;
- the word "Alliance" is also written in caps and the word "Group" in ordinary letters;
- the text of the Respondents advertisement is usually blue or black depending on whether the colour will reproduce well in the media in which the advertisement is being placed;
- in addition, the words "Alliance Group" never appear without a triangle facing downwards either below or next to the words. This triangle (which is also blue) forms an integral part of the trademark of the "Alliance Group" and is distinctive of the Respondents' business.

[93] The Applicant submitted that by virtue of the marked similarities between the "Alliance Group" and the Applicant's trading style, there is at least a reasonable likelihood that members of the public may be confused in believing that the business of the Respondent is connected

with that of the Applicant. The Applicant submitted that this is exacerbated by the following similarities between the Respondent's advertisement and the Applicant's boards:

- both are printed in the same colours, namely, blue and white;
- both are printed in similar fonts and the use a combination of capital letters and small letters;
- the text of the Respondent's advertisement is often blue which is the colour predominately used by the Applicant.

[94] The Applicant submits that the differences do not obviate the likelihood of deception or confusion as the word mark "Alliance" is dominant and buyers and sellers are unlikely to draw the distinction on the basis of the non-distinctive elements of the respective advertisements.

It is clear that relatively small differences, in get-up may be sufficient to avoid confusion or deception (see *Reckitt Colman SA (Pty)Ltd v SC Johnson & Son (Pty) Ltd 1995 (1) SA 725 TPD*). In this matter

the Court found that differences between the Applicant and Respondent's get-up will avoid any confusion.

[95] The Applicant submits that the confusion lies in the name. The most important ways in which companies' reputation is spread in any industries is by word of mouth. People spreading reputation of a company by word of mouth, do so because of their experience with that company and not as a result of seeing advertisement in the media or elsewhere.

Considering the distinctions and similarities referred to above, I am of the view that there is no reasonable likelihood that members of the public at large may be confused into believing that the business of the Respondent is or connected with that of the Applicant.

[96] Considering the totality of the evidence presented, and argument advanced in this regard, I am of the view that the Applicant has certainly failed to prove that there is a reasonable likelihood of confusion or deception in this matter.

[97] Consequently, the Applicant has failed to establish that the Respondents are passing-off their property or services as those of the Applicant, or as being associated with the Applicant in the course of trade, by using the name, mark and trading style “Alliance Group”.

[98] In order for the Applicant to succeed in obtaining a final interdict the Applicant must establish:

- (1) A clear right;
- (2) An injury actually committed or reasonably apprehended; and
- (3) The absence of any other satisfactory or alternative remedy.

I am satisfied that the Applicant has failed to satisfy the requirements for a final interdict.

[99] In the result the Applicant’s application falls to be dismissed.

[100] There is no reason why costs should not follow the result in this matter. Counsel for the Respondents has asked for costs of three Counsel. Although this matter is complex, it is not complex enough to warrant the engagement of two Silks and one Senior Junior. One

Senior Counsel and one Senior Junior would have been able to represent the Respondents adequately in this matter. In the circumstances, I will allow the costs of two Counsel in this matter.

In the result, I make the following order:

- 1) The application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel.

SISHI J

Date of hearing : 20 June 2008

Date of Judgement : _____

Applicants' Attorneys : Cox and Yeats
C/o Stowel and Co.
295 Pietermaritzburg Street
Pietermaritzburg

Applicants' Counsel : Adv. G.E. Morley SC and D.W. Finnigan

Respondents' Attorneys : Hofmeyr Herbstein Gihwala Incorporated
C/o Mason Incorporated
3rd Floor Fedsure House
215 Church Street

Pietermaritzburg

Respondent's Counsel : Adv. H. M. Carstens SC; Adv. J. A Roux
SC and Adv. D. Van Reenen