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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HOECHST PHARMACEUTICALS (PROPRIETARY)
LIMITED — APPELLANT

and

THE BEAUTY BOX (PROPRIETARY) LIMITED — 1st RESPONDENT
(in liquidation)

MEDCALF BARRY & ASSOCIATES
(PROPRIETARY) LIMITED — 2nd RESPONDENT
(in liquidation)

CORAM: CORBETT, GROSSKOPF, VIVIER JJA, NICHOLAS et BOSHOFF, AJJA

HEARD: 19 February 1987

DELIVERED: 12 March 1987

J U D G M E N T

NICHOLAS, AJA

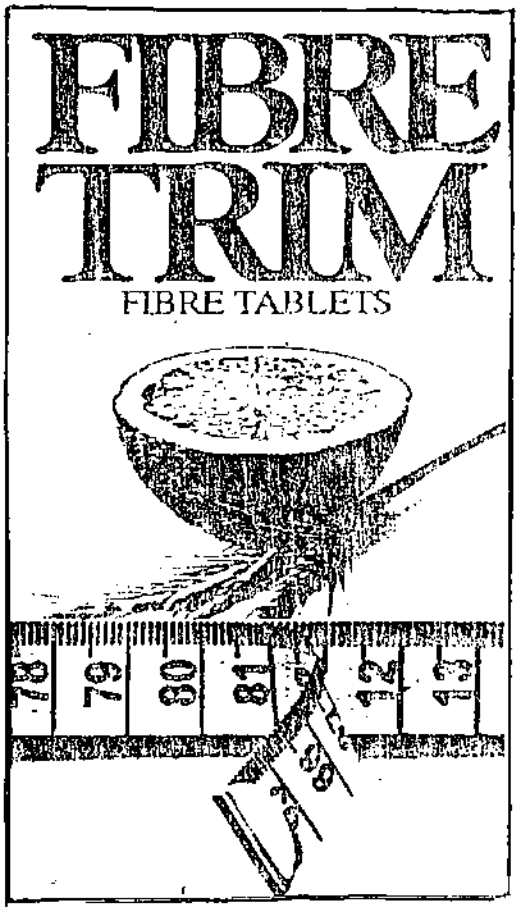
This is an appeal against an order of VAN NIEKERK J

in .....

in the Witwatersrand Local Division dismissing an application for an interdict in respect of alleged passing off.

The applicant in the Court a quo was HOECHST PHARMACEUTICALS (PTY) LIMITED ("HOECHST"). One of the products manufactured by it is called FIBRE TRIM. This is said to provide a natural way of reducing weight, and consists of tablets composed mainly of grain and citrus fibre and milk powder. HOECHST introduced it to the South African market in the latter part of November 1983.

The tablets are contained in a bottle packed in a cardboard box. The following is a black and white reproduction of the front of the box, which is what would ordinarily be seen by a prospective purchaser:



On the actual box the background is white; the printing is black; the half-orange and the head of wheat are in natural colours; and the tape measure, which surrounds the box, is yellow with black figures.

The bottle bears a label, the front of which is sub-

stantially .....

stantially identical.

Between November 1983 and February 1985 HOECHST engaged, at a cost of over R1 million, in an extensive advertising campaign to promote FIBRE TRIM. This included a television commercial, which was shown sixty-nine times on South African television between January 1984 and February 1985; and also radio advertisements, full page colour advertisements in magazines with a national circulation, and coloured posters exhibited at points of sale in pharmacies and supermarkets throughout the country. During 1984 HOECHST sold over 1,2 million boxes of FIBRE TRIM, with a turnover in excess of R8 million. FIBRE TRIM, it was alleged and not denied, became a market leader in the slimming aids market in South

Africa .....

Africa and in April 1985 when the application was launched, it held the dominant share of the market.

The television commercial was said to be the core of HOECHST's case. The following is a brief description of it.

> Articles of women's clothing are seen falling to the floor, apparently thrown from behind a screen. A slim, attractive blonde appears. She is clad in a white leotard, which has the words FIBRE TRIM and the motifs of half orange and head of wheat on the chest. She stands with arms akimbo and says that she is throwing away her fat clothes, forever. She is then seen in the same get-up holding a yellow tape measure about her waist. This picture fades and a FIBRE TRIM pack emerges, the words and the motifs and the tape measure from the leotard taking their place on the box, in front of which stands a FIBRE TRIM bottle.

In .....

In February 1985, THE BEAUTY BOX (PTY) LTD (the first respondent in the application) produced a product under the name EASI SLIM, with substantially the same ingredients as FIBRE TRIM. MEDCALF BARRY & ASSOCIATES (PTY) LTD (the second respondent) was responsible for its marketing and distribution. In the case of EASI SLIM, too, the tablets were in a bottle, packed in a cardboard box having the same dimensions as the FIBRE TRIM box. The following is a black and white reproduction of the front of the box:

On .....

On the actual box the background is white; the printing is black except for the word FIBRE, where it is first used, which is in red; the girl has blonde hair; the leotard she is wearing is red; and the tape measure, which surrounds the box, is yellow with black markings.

The .....

The bottle bears a label, the front of which is substantially identical.

In the notice of motion, HOECHST sought an order interdicting the respondents inter alia

(i) from dealing in the course of trade with a product marketed in the bottle and box in the form illustrated;

(ii) from using a tape measure in conjunction with any slimming product in circumstances which were specified;

(iii) from using a yellow tape measure in relation to any packaging or label for a fibre slimming product; and

(iv) from passing off any fibre slimming product as the applicant's FIBRE TRIM product.

Its cause of action was said to be based on unlawful competition and, more particularly, on passing off.

In his judgment in the Court a quo, VAN NIEKERK J

said .....

said that in his view, whether the products were placed side by side or inspected individually, there could be no confusion whatsoever between them; and that, taking full cognisance of the television advertisement, he was not persuaded that the respondents had in any way represented EASI SLIM as the product of the applicant. Accordingly, the applicant had failed to make out a prima facie case for the relief which it claimed, and the application was dismissed with costs.

Leave to appeal to this Court was granted.

After the appeal had been noted, both the respondents were placed under provisional liquidation. Thereafter HOECHST duly gave notice, in terms of s. 359(2)(a) of the

Companies .....

Companies Act, No 61 of 1973, of its intention to proceed with the appeal. The attorneys acting for the respondents advised the Registrar of this Court that in the light of their financial situation the respondents would not formally be opposing the appeal. In consequence only HOECHST was represented at the hearing.

In the leading case of Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others 1977(2) SA 916 (A), RABIE JA said at 929 C-E:

> "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 is 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 to be determined in the light of the circumstances of each case."

In Policansky Bros. Ltd. v L & H Policansky, 1935 AD 89, WESSELS CJ pointed out at 97 that -

> "The Roman-Dutch Law was well acquainted with the general principle that a person cannot, by imitating the name, marks or devices of another who had acquired a reputation for his goods, filch the former's trade."

and said at 98 that -

> "As our Roman-Dutch authorities do not deal with the various aspects of passing-off actions that modern conditions have evoked, we in South Africa have followed the principles enunciated by the English

> and American courts where such principles are not in conflict with either our common law or our statute law."

The classic dictum in England is that of LORD KINGSDOWN in Leather Cloth Co Ltd v American Leather Cloth Co Ltd (1865) 11 HL Cas 523 at 538:(11 ER 1435):

> "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord Langdale in the case of Perry v Truefitt (1845) 6 Beav. 66)'be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.'"

The applicable principles were stated in the speech of LORD PARKER OF WADDINGTON in A.G. Spalding and Bros v A W Gamage Ld (1915) 32 RPC 273 (H.L.) at 284 lines 16-29:

> "My .....

"My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on."

The .....

The application of the principles is not limited to material appearing on the goods themselves. That was made clear in the opinion of the Judicial Committee of the Privy Council in an appeal from Australia (Cadbury-Schweppes Pty Ltd v The Pub Squash Co Ltd (1981) RPC 429) where LORD SCARMAN said at 490 lines 36-44:

> "The width of the principle now authoritatively recognised by the High Court of Australia and the House of Lords is, therefore, such that the tort is no longer anchored, as in its early nineteenth century formulation, to the name or trade mark of a product or business. It is wide enough to encompass other descriptive material, such as slogans or visual images, which radio, television or newspaper advertising campaigns can lead the market to associate with a plaintiff's product, provided always that such descriptive material has become part of the

> goodwill of the product. And the test is whether the product has derived from the advertising a distinctive character which the market recognises."

In the present case, HOECHST's complaint is that the EASI SLIM packaging misrepresents that it is the product of, or is associated with, HOECHST.

It does not contend that the misrepresentation appears from a comparison of the EASI SLIM pack with the FIBRE TRIM pack alone. That attitude is undoubtedly correct, having regard to the general impression produced by the two packs, and the important differences between them - in particular, the FIBRE TRIM pack does not contain a representation of a blonde in a red leotard, and the EASI SLIM pack does not have the motifs of a half orange and a head of wheat.

As .....

As formulated in the founding affidavit, and developed at length in counsel's heads of argument, HOECHST's case was that the comparison to be made was one between the EASI SLIM pack and the complete "gestalt impression" of FIBRE TRIM. This "gestalt", it was said by Mr NEL, who is the product marketing manager of the relevant division of HOECHST,

> "... lies not only in the physical product packaging but also very materially in HOECHST's advertising of it. Put another way, users of slimming aids, who have a passing familiarity with the product FIBRE TRIM, have an image of it comprised in part of recollection of the packaging and in part of recollection of <u>themes</u> in advertising for it." (Nel's emphasis)

Reliance was placed particularly on the television commer-

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cial, but also on HOECHST's other advertising. NEL said that "a costumed blonde is central to the trade dress or gestalt of ... FIBRE TRIM", and that the symbols of a costumed blonde and yellow tape measure perform the function of "linking ineluctably the television advertising with the image on the FIBRE TRIM packaging itself". What he appears to be saying is that the "gestalt impression" is a composite memory image derived from the recollection of visual perceptions received at different times from the FIBRE TRIM pack and from advertising sources.

The word "gestalt" came into the English language by way of Gestalt Psychology. It is defined in Volume I of the Supplement of the Oxford English Dictionary as:

"A .....

> "A 'shape''configuration', or 'structure' which as an object of perception forms a specific whole or unity incapable of expression simply in terms of its parts (e.g. a melody in distinction from the notes that make it up)."

NEL and HOECHST's counsel do not, it is clear, use the word "gestalt" in that sense. As they use it, it is an object not of perception, but of recollection. Counsel could not refer to any such use of it in a dictionary or a standard work of reference, or a work on psychology. Nor was there expert evidence from a psychologist to lend support to the bald assertions of NEL, whose only claim to expertise is in the field of marketing pharmaceutical, personal hygiene and health products. At best the existence of a "gestalt impression" is no more than theoretical, and there has

been .....

been no attempt to prove that any individual, let alone a substantial part of the public, has the "gestalt impression" which NEL describes.

When faced with these difficulties, counsel abandoned any reliance on "gestalt impression". At the end of the day their argument was that the repeated showing of the television commercial, and the other advertising, had established a blonde in a leotard,and a yellow tape measure,as symbols per se of HOECHST's product, which it was said, "are linked together through the packaging".

From some of the affidavits filed on behalf of HOECHST, it appears that when the deponents were shown the EASI SLIM pack in the course of the marketing survey which will be re-

ferred to later in this judgment, it recalled to them the television commercial, including the lady throwing away her "fat clothes", and a yellow tape measure. That, however, does not establish a case. What HOECHST had to show was that as a result of the television advertising a blonde in a leotard,and a yellow tape measure,had become part of the goodwill of the product, which required proof that the product had derived from the advertising a distinctive character which the market recognized. (See the statement by LORD SCARMAN in the Cadbury-Schweppes case quoted above.)

In Oertli A G v E J Bowman (London) Ld & Others (1957) RPC 388 (CA) JENKINS LJ said at 397 lines 10 to 34:

> "It is,of course, essential to the success of any claim in respect of passing-off based .....

based on the use of a given mark or get-up that the plaintiff should be able to show that the disputed mark or get-up has become by user in this country distinctive of the plaintiff's goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get-up will be understood by the trade and the public in this country as meaning that the goods are the plaintiff's goods. The gist of the action is that the plaintiff, by using and making known the mark or get-up in relation to his goods, and thus causing it to be associated or identified with those goods, has acquired a quasi-proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind,which right is invaded by any person who, by using the same or some deceptively similar mark or get-up in relation to goods not of the plaintiff's manufacture, induces customers to buy from him goods not of the plaintiff's manufacture as goods of the plaintiff's manufacture, thereby diverting to himself orders intended for and rightfully belonging to

the plaintiff. But, as appears from "Kerly on Trade Marks", 7th Edition, at page 521, "it is not, however, necessary to show that the customers who knew the goods of the plaintiff's firm by a particular name or get-up knew anything whatever about the plaintiff. It is immaterial that they did not even know his name; for it is sufficient to prove that purchasers of his goods recognised, by the use of the marks in question in connection with them, that they were goods of a particular class, and to show that such class is, in fact, constituted by his goods". See also William Edge & Sons Ld. v. William Niccolls & Sons Ld., (1911) A.C. 693. Nevertheless, if the plaintiff cannot prove the association or identification of the disputed mark or get-up in this country with goods in fact of his manufacture, the action fails in limine."

(See also the speech of VISCOUNT SIMONDS in the appeal to the House of Lords((1959)RPC 1 at 4 lines 21 to 31)).

JENKINS .....

JENKINS LJ was dealing with the use of "a given mark or get-up", but what he said applies with equal force to the use of other descriptive material such as visual images on television.

In the FIBRE TRIM commercial there are various camera shots of the costumed blonde, showing her inter alia throwing away her "fat clothes", standing with arms akimbo, and standing with a yellow tape measure about her waist. Posters exhibited in shops and supermarkets showed the same or a "look-alike" blonde in the latter pose.

In my opinion persons viewing the commercial would not see the girl as a symbol of FIBRE TRIM at all; they would see her as a girl who plays a part in a commercial which adver-

tised FIBRE TRIM. (It is open to doubt whether a blonde, in leotard or swimming costume, could, as such and without more, ever be distinctive of a particular slimming product: pictures of women (blonde or brunette) so clad form part of the common coinage of slimming and other product advertising.)

Nor do I think that it has been shown that the shot of the girl momentarily standing with arms akimbo (which is the only one bearing any similarity to the blonde on the EASI SLIM package) has become distinctive of FIBRE TRIM.

There is no evidence, other than NEL's assertion, that a yellow tape measure has become distinctive (in the

relevant sense) of FIBRE TRIM. From the copies of advertisements contained in the papers, it would seem that a tape measure is a visual cliché in slimming products advertising - not surprisingly in the present day, when a woman's figure is often defined by her "vital statistics", and the waist-line is a preoccupation of the not-so-slender.

The conclusion is that HOECHST did not prove the necessary association or identification of a costumed blonde or a tape measure with FIBRE TRIM.

It was argued, however, that it had been shown that there was actual confusion between FIBRE TRIM and EASI SLIM. In this regard reliance was placed on the report of a marketing survey carried out by MARKINOR (PTY) LTD, under the direction of Dr PRISCILLA DE GASPARIS, its research director

since .....

since 1983, whose affidavit was filed by HOECHST.

In a passing off case decided in 1968 (Coca Cola Co v William Struthers & Sons Ltd,(1968)RPC 231 (Court of Session) there was evidence of this kind. This had been obtained by an employee of SOCIAL SURVEYS GALLUP POLLS LIMITED, an organisation which carried out market research and the like.

The LORD PRESIDENT (LORD CLYDE) observed at 236 lines 8-10:

> "We are accustomed to Gallup Polls of this nature conducted to confirm a politician's hopes or fears, but it is a novel expedient to use answers to a questionnaire as evidence in a court of law."

The expedient is novel no longer. The law reports contain a number of cases in which it has been adopted: in South Africa in Rusmarc(SA)(Pty) Ltd v Hemdon Enterprises (Pty) Ltd

1975 .....

1975(4) SA 626 (W) and Die Bergkelder v Delheim Wines (Pty) Ltd, 1980(3) SA 1171 (C); in New Zealand in Customglass Boats Ltd v Salthouse Brothers Ltd,(1976) RPC 589; and in England in the G E Trade Mark Case, (1969) RPC 418 (Ch.D); (1970) RPC 339 (Court of Appeal); and (1973) RPC 297 (House of Lords); Lego System Aktieselskab and Another v Lego M Lemelstrich Ltd(1983)FSR 155 (Ch.D);and Stringfellow v McCain Foods (G.B.) Limited (1984) RPC 501 (in the Chancery Division and the Court of Appeal).

There are two problems associated with such surveys: the problem of getting the evidence before the court (the problem of admissibility); and the problem of the value of the survey, having regard to the way in which it was con-

ducted .....

ducted (the problem of weight).

In the view which I take of the survey in the present case, it is not necessary to consider the first problem, and I shall assume, without deciding, that the survey is admissible in evidence.

There has been scepticism expressed as to the value of such evidence. In his judgment in the Chancery Division in the Stringfellow case (supra) at 513, WHITFORD J said:

> "Before I come to the evidence on which I am able to rely, I must mention some evidence upon which I do not propose to rely at all. Both parties decided to commission public opinion surveys. I confess that my experience in the past so far as public opinion surveys in proceedings of this kind are concerned has

not .....

> not been a happy one and this case has been no exception. I do not say that the day may not come when I shall find such a survey or such surveys of value; I say only that it has not come yet."

(Compare the observations of SLADE L J in his judgment in the Court of Appeal at 532 lines 10-12).

The survey in the present case was commissioned by HOECHST in January 1985 in anticipation of the market launch of EASI SLIM. It was stated in the introduction to the report:

> "(The pack of EASI SLIM) uses the same themes as advertising for (HOECHST's) highly successful product, Fibre-Trim - a young woman in a bathing suit and tape measure. (HOECHST) suspects that Fibre-Trim's seating in the public mind is being misappropriated by Easi-Slim. Consequently research was commissioned to establish

whether in fact consumers of slimming products are confused between the two products, Easi-Slim and Fibre-Trim."

The survey consisted of separate interviews, at which a questionnaire was used, with two hundred white females who were users of slimming products. An EASI SLIM product pack was shown to each interviewee, who was then asked a number of questions, including -

Q.2 Have you seen or heard of this before?

Q.3 When did you first see or hear of this?

Q.4 How did you first get to see or hear about this?

Q.5 Have you seen or heard any advertising for this?

Q.6 Please tell me everything you can remember about the advertising.

Dr. DE GASPARIS analysed the results of the survey, which .....

which she summarized in her affidavit as follows:

In regard to Q.1, she said:

> "Of the 200 persons interviewed, 45,5%(or 91 interviewees) said that they had seen or heard of EASI SLIM fibre tablets before;
> A further 35% (or 70 interviewees) said that they had possibly heard of the product, but were not quite sure;
> The remaining 39 interviewees in the sample initially declared the product to be FIBRE TRIM, but almost immediately changed their mind."

In regard to Q.2, 40 interviewees claimed to have first seen or heard of the product on television, 20 interviewees claimed to have seen it in magazines and 12 interviewees claimed to have heard about the product in radio advertising. Dr. DE GASPARIS said that -

"While .....

> "While no certain conclusion can be drawn from the mere fact that 36% of the sample claimed to have first encountered in advertising a product which had not been advertised (i.e. the interviewees could have been speculating) a very different picture emerges (when the answers to Qs. 5 and 6) are analysed)... 105 interviewees claimed to have seen advertising for the product. (This represents 65% of the 161 interviewees who declared they were familiar with the product). Thus in total 72 interviewees (or 36% of the sample) claimed first to have heard of the product in advertising."

She continued:

> "The nature of a great deal of the advertising material recalled unequivocally indicates, in my opinion, familiarity with distinct themes in FIBRE TRIM's advertising, with which themes I am fully familiar ... Those themes are -
>
> 1. the lady who threw away her fat clothes/ a skinny model throwing away her fat clothes

(25 interviewees);

2. the use of the Springbok cricketer, Alan Kourie, in the advertising (2 interviewees)."

Her conclusion was that "this aspect of the survey positively indicates complete confusion in a significant proportion between the EASI SLIM pack and FIBRE TRIM as advertised."

In my opinion, that conclusion is unacceptable for the reasons which follow..

(a) A fundamental criticism of the survey is, to use the words of LORD CLYDE in the Coca Cola case (supra)at 236-7:

> "... that it arises from an artificially contrived situation wholly divorced from 'the course of trade', and the evidence thus sheds little if any light on the question whether when the persons interviewed were actually buying the products

of .....

of one or the other of the parties to this case they would confuse one product with the other."

(b) No comparison between the two products was at any time invited. Interviewees were not shown the FIBRE TRIM pack, even at the end of the interview, when a sight of it might have provided a wholesome corrective to their mistaken impressions.

(c) Two of the questions were subject to serious criticism. It is basic, if a survey is to have any value, that the questions should be fair, and that they should be so formulated as to preclude a weighted or conditioned response. In his affidavit, Mr. GREEN, the managing director of MANIKOR, said that "It is important that questions asked in surveys of this kind be free from bias so that a true response is elicited

from .....

from each interviewee." It is at least as important that the questions should be free from suggestio falsi.

Qs 1 and 5 were likely to mislead and consequently to elicit incorrect answers. It was implicit in Q.1 (namely, "Have you seen ... this before") that the pack exhibited was available to be seen in the market place. Similarly it was implicit in Q.5 (namely, "Have you seen ... any advertising for this") that the product had been the subject of visual advertising which could have been seen by the interviewee. Both suggestions were false. The survey, according to GREEN, was conducted "within one or two days of the initial and sporadic first distribution of EASI SLIM fibre tablets on the market". And up to that time there had been no visual advertising of EASI SLIM. In these circumstances,

it would have been natural for interviewees to think, mistakenly, that they had seen the EASI SLIM pack, and that they had seen advertisements for it. It is probable that many of them were in doubt, or guessing - that is indicated by the fact, that out of a total of 200, 70 interviewees said that they had possibly heard of the product, but were not quite sure, and 39 initially declared the product to be FIBRE TRIM but almost immediately changed their minds. If they were in doubt or guessing, they would have been likely, in view of the false suggestion, to give the answers "yes" to Q.1 and to Q.5, and in answer to Q.6 to recall the advertising which they had seen, namely, that of FIBRE TRIM.

(d) The survey did not deal with the important question of

what was the cause of any confusion which might have existed. 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 goods which he offers are those of the plaintiff or are connected with the plaintiff. That has not been shown. The cause of any confusion is probably to be found elsewhere.

In Halsbury's Laws of England,(4th ed., Vol 48 para 153)) it is said:

> "Where the public is familiar with the plaintiff's goods or services of a particular kind, substantial numbers of persons may assume that competing goods or services offered by a newcomer are the goods or services of the plaintiff with whom they have hitherto been familiar, but confusion arising merely from this cause is to be disregarded."

In .....

In support the learned authors cite Jones Bros Ltd v Anglo-American Optical Co (1912) 29 RPC 361 (C.A.), where FLETCHER MOULTON L.J., having posed the question, "What evidence have (the plaintiffs)called?", said at 369 lines 19-24:

> "They have called people, most of whom knew of the Plaintiffs' goods and did not know of anybody else who was making goods of that colour and nature; and it is very natural that, having seen dusters of that colour and nature they thought, at first sight, that they were the Plaintiffs' goods, because they did not know of anybody else who was making them."

See also Compatibility Research Ltd v Computer Psyche Co Ltd 1967 RPC 201 (Ch.D) where STAMP J said (206 lines 17-25):

> "No doubt both the plaintiff and the defendant companies are carrying on similar businesses; also, no doubt, they are using similar methods; and, if it be the fact that,

> until the defendants set up business, the plaintiff's business or its methods was almost unique in this country ... it seems very likely that members of the public who had heard of the plaintiff's business and how it was carried on would, when the defendants started their business, assume, when they came upon the defendant's pamphlets or brochures, that this was the business of which they had heard. ..."

When it was introduced by HOECHST, FIBRE TRIM was the first fibre slimming product on the South African market. HOECHST's advertising of it was extensive. Sales were "huge". The only competing fibre tablet referred to in the papers was QUIKSLIM, which the first respondent introduced in September 1984. According to NEL "the product did not do anywhere near as well as FIBRE TRIM". The QUIKSLIM pack was not depicted in the papers and there was no evidence of the extent to which it

had .....

had been advertised.

In these circumstances, it is probable that interviewees, who had heard of FIBRE TRIM, and seen the advertising would, when shown the EASI SLIM pack, assume that this was the product of which they had heard and which they had seen advertised.

My conclusion is therefore that HOECHST failed to make out a case of passing off, and that VAN NIEKERK J correctly dismissed the application.

The appeal is dismissed with costs.

H C NICHOLAS, AJA

CORBETT, JA
GROSSKOPF, JA
VIVIER, JA
BOSHOFF, AJA
} Concur