IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00729ADJ2021

In the matter between:

ASSUPOL LIFE LTD. **APPLICANT**

and

CORNERSTONE ASSOCIATIONS (PTY) LTD **FIRST RESPONDENT**

THE COMMISSIONER OF COMPANIES **SECOND RESPONDENT**

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 08 July 2022

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1. Applicant is Assupol Ltd., a company duly incorporated in accordance with the company laws of South Africa with its registered address at Building 6, Summit Place Office Park, 221 Garsfontein Road, Menlyn, Pretoria, Gauteng.

1.2. First Respondent is Cornerstone Associations (Pty) Ltd, a company duly incorporated in accordance with the company laws of South Africa, with registration number K2018/083344/07, and having its registered address at 5 Pineway Street, Kelvin, Sandton, Gauteng 2090.

1.3. Second Respondent is the Commissioner of Companies appointed in terms of section 189 of the Companies Act 71 of 2008 ("the Act"), responsible for the

functioning of the Companies and Intellectual Property Commission (CIPC), which includes the registration of companies in terms of the Act.

1.4. Jacques Erasmus, Applicant's Senior Executive Manager, duly authorised, deposed to the founding affidavit for the initial application. Jennifer Pienaar, a Partner at Adams & Adams who are Applicant's lawyers, deposed to the default judgment application.

1.5. This is an application for a determination order:

a. that First Respondent's name does not satisfy the requirements of section 11(2) of the Act, and

b. that First Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.

2. BACKGROUND

2.1. A few months after Applicant became aware of First Respondent's offending name, and in an attempt to settle the dispute amicably, its lawyers addressed a letter of demand to First Respondent.[1] First Respondent's director responded positively and undertook to effect the name change via the CIPC.[2] In the ensuing months, there was correspondence between the Applicant and First Respondent, wherein the latter requested extensions of time to comply, and this was agreed to by Applicant. However, after a year had passed, according to Mr Erasmus, the CIPC records in respect of First Respondent remained unchanged.

2.2. On 19 July 2021 this Tribunal stamped Applicant's CTR 142 form in which the above-mentioned relief is sought. From 21 - 23 July 2021, the Sheriff of Halfway House, Alexandra attempted in vain to serve a copy of the application at First Respondent's registered address. According to Ms Pienaar, the Sheriff also attempted in vain to serve the application on Applicant's other director's

[1] Annexure C7 of Founding Affidavit: letter dated 2 June 2020.
[2] Annexure C8 of Founding Affidavit: email dated 10 June 2020.

residential address. This director was contacted telephonically. He informed the Sheriff that he no longer resides there, and that the company is not conducting business.[3] In both instances, there were returns of non-service.

3. ISSUES

3.1 A preliminary issue that I will address in my evaluation is whether or not Applicant is justified in bringing a default application.

3.2 The second issue on the merits, is whether or not Applicant is entitled to the relief sought. In support of Applicant's contention that First Respondent's name flouts the provisions of section 11(2) of the Act, Applicant submits that the inclusion of the word CORNERSTONE in First Respondent's name infringes its registered trademark "Cornerstone".

4. APPLICABLE LAW

4.1 **Section 11** of the Act provides as follows: "11. **Criteria for names of companies.** —

(1)....

(2) The name of a company must— (a) not be the same as—

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

...

(b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless—

(i) in the case of names referred to in paragraph (a) (i), each company bearing any such similar name is a member of the same group of companies; …

(c) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company—

(i) is part of, or associated with, any other person or entity;"

[3] Annexure CA-6 of Default Judgement Affidavit: Sherriff's return of non-service dated 20 August 2021

4.2 **Section 160** of the Act deals with **disputes concerning reservation or registration of company names** and enunciates the jurisdiction of the Companies Tribunal as follows:

(1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive name, or the registration of a company's name, or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether ***the name, or the reservation, registration or use of the name, or the transfer of any such reservation or registration of a name, satisfies the requirements of this Act****.*

(2) An application in terms of subsection (1) may be made— (a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or (b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.

(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is the subject of the application, the Companies Tribunal –:

(a) ***must make a determination*** *whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and*

(b) may make an administrative order directing-

(i) the Commission to

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended name that had been contested as the name of a company;

(cc) cancel the reservation of a name, or the registration of a defensive

name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph."

4.3 **Part C of the Act is titled: Transparency, accountability and integrity of companies. Section 23** thereunder deals with Registration of external companies and registered office, and states at paragraph 3:

"Each company or external company must-

(a) continuously maintain at least one office in the Republic; and

(b) register the address of its office, or its principal office if it has more than one office …

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee."

4.4 **Companies Regulation 153** of 2011 provides for default orders:

(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.

5. **EVALUATION**

5.1 At the outset, I deal with the question of whether the default application in terms of Regulation 153 is justified. Even though there are no opposing papers filed, I am satisfied the First Respondent is aware of the application since there was correspondence between the parties, and the Sheriff informed one of its directors telephonically thereof.

5.2 I am convinced that Applicant has made out a case for the main application to

be considered on a default basis, and proceed to deal with the merits of the case.

5.3 Applicant claims statutory and common law rights in the word Cornerstone, its business having begun decades ago. Applicant also claims widespread and extensive use of its trademark “Cornerstone” nationally in its financial and insurance services. Ms Erasmus goes into much detail in his affidavit to describe the substantial goodwill and reputation of the Applicant.

5.4 Applicant also contends that the dominant and memorable part of First Respondent’s company name is identical to the Applicant’s trademark “CORNERSTONE”. Applicant argues that First Respondent’s name is therefore confusingly and deceptively similar to Applicant’s subsidiary with the registered company name Cornerstone Brokers Corporate (Pty) Ltd., and is in contravention of Section 11(2)(b) and (c)(i) of the Act.

5.5 Applicant has underscored the prejudice it will suffer if denied relief, especially as it does not have control over the quality of products or services of First Respondent.

5.6 “Similar” in section 11(2)(b) of the Act would be “having a marked resemblance or likeness” and that the offending name should immediately bring to mind the well-known other name.[4] The test for “confusingly similar” is, as in the case of passing-off: “... a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the goods or merchandise of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in light of the particular circumstances of the case.” [5]

[4] Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA
[5] Adidas AG & another v Pepkor Retail Limited (187/12) [2013] ZASCA 3 (28 February 2013) para 28; Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc. and Others 1977 (2) SA 916 (A) at 929

5.7 “Confusingly similar” in Section 11(2)(b) has to be examined carefully to determine if this is in fact so *in casu*. In considering case law on the concept, it must be as alike in a manner that will confuse the “ordinary reasonable careful man, i.e. not the very careful man nor the very careless man.”[6] The “reasonable man” has been further qualified: “A rule of long standing requires that the class of persons who are likely to be the purchasers of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception.”[7]

5.8 In line with what was stated in **Ewing t/a The Buttercup Dairy Company v Buttercup Margarine Corporation Ltd 1917 (34) RPC at 232 and 238**, it can be concluded that confusion and/or deception may arise from the side-by-side use of the Applicant’s and Respondent’s names, which can lead to injury of the Applicant’s business, especially since it has no control whatsoever over the quality of services rendered by Respondent.

5.9 The doctrine of imperfect recollection has been explained by our courts[8]: there is a probability that a substantial number of people will be at least confused, if not deceived, given the fact that an individual does not have the two marks before him, side by side and that memory is often imperfect. In **Cowbell AG vs ICS Holdings 2001 (3) SA 941 (SCA)**, the court said: "the decision involves a value judgment and that the ultimate test is whether, on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both marks are to be used together in a normal and fair manner, in the ordinary course of business."

5.10 It can therefore be also be concluded that the words “CORNERSTONE” in First Respondent’s name will reasonably mislead the reasonable person to believe incorrectly that it is the same as or there is an association with the Applicant.

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[6] Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280
[7] Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G
[8] Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B

5.11 Finally, in the case of **Polaris Capital (Pty) Ltd v The Registrar of Companies and Polaris Capital Management Inc.** (unreported judgment, Case No. 11607/2005, CPD), the learned judge commented on undesirability in terms of Section 45 (2) of the 1973 Companies Act: "It is submitted that by allowing the close corporation name to remain on the register, in addition to causing deception and confusion, its registration will hinder the registrar's role in maintaining and promoting good governance and administration of corporate entities in the interest of the general public."

5.12 Thus, permitting the Respondent to keep the name CORNERSTONE in its company name will create confusion and hinder the Registrar from maintaining and promoting good governance and administration of a corporate entity in the interest of the general public. It is evident therefore that the name CORNERSTONE as incorporated in the Respondent's company name falls within the ambit of Section 11(2)(b)(iii) and (c) as argued.

5.13 As indicated above, section 23(3)(a) of the Companies Act expressly states that, "each company ... must continuously maintain at least one office in the Republic". It is the First Respondent's duty to ensure that the Commission's records regarding its business are up to date and correct. Clearly, First Respondent is no longer conducting business from its registered address, and has not informed the Registrar of Companies thereof.

6. **FINDINGS**

6.1 I find that the balance of convenience favours the Applicant.

6.2 Applicant has shown that First Respondent has transgressed Section 11(2)(b) and (c): its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that the Respondent is part of, or associated with the Applicant. Hence it is entitled to an order as claimed in terms of Section 160 of the Act.

6.3 The Applicant's application is granted as set out below.

7. ORDER

7.1 An administrative order is made in terms of Section 160(3)(b)(ii) that First Respondent change its name to one which does not incorporate the word CORNERSTONE, as it is in contravention of Sections 11(2)(b)(iii) and (c)(i) of the Act.

7.2 This order must be served on the Respondents by the Tribunal's Recording Officer (Registrar).

7.3 The First Respondent is hereby ordered to change its name within 60 (calendar) days of date of receipt of this order and to file a notice of amendment of its Memorandum of Incorporation.

7.4 Since the First Respondent is a profit company, in accordance with Section 11(1)(b) and (3)(a) of the Act, it can use its registration number as its company name immediately followed by the expression "South Africa", should it not be in a position to use another name.

7.5 The Registrar of CIPC is directed to appraise the First Respondent forthwith of the decision of the Tribunal and to ensure that the name is changed within the requisite time period as aforesaid; and to invite the First Respondent to file an amended Memorandum of Incorporation using a satisfactory name.

7.6 First Respondent is ordered to pay Applicant's costs.

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ADV. ISHARA BODASING