**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT00785/ADJ/2021**

**In the matter between:**

**SAFIKA HOLDINGS PROPRIETARY LIMITED** **APPLICANT**

**And**

**SAFIKA KINGS PROPRIETARY LIMITED** **FIRST RESPONDENT**

**COMMISSIONER OF COMPANIES** **SECOND RESPONDENT**

---

Presiding Member of the Companies Tribunal: ISHARA BODASING
Date of Decision: 25 October 2021

---

**DECISION** (Reasons and an Order)

---

## 1. INTRODUCTION

1.1. Applicant is Safika Holdings (Pty) Ltd., a company incorporated in terms of the company laws of South Africa, with registration number 1996/001693/07, and its registered address at Safika House, 1st Floor, 89 Central Street, Houghton, 2198, Gauteng.

1.2. First Respondent is Safika Kings (Pty) Ltd, a company incorporated in terms of the company laws of South Africa, with registration number 2019 / 534976 / 07,

and having its registered address at 48 St James Road, Southernwood, East London Eastern Cape, 5201.

1.3. Second Respondent is the Commissioner of Companies, appointed in terms of s189 of the Companies Act 71 of 2008 ("the Act"). Second Respondent is cited in his official capacity as the person responsible for the function of the Companies and Intellectual Property Commission ("CIPC"), such as the registration of companies based on the Act.

1.4. This is an application for a determination order:

a. That First Respondent's name does not satisfy the requirements of s11(2) of the Act, and

b. That First Respondent be directed to choose a new name as provided for in terms of s160 of the Act.

## 2. BACKGROUND

2.1. On 12 August 2021 Applicant received a stamped copy of its application to this Tribunal for the abovementioned relief. On 16 August 2021, the Deputy Sheriff of East London served a copy of the application on First Respondent at its registered address.

2.2. Applicant also emailed an electronic version of the application for relief to First Respondent's three directors, on the email addresses in First Respondent's Memorandum of Incorporation as per Second Respondent's records. There had been communication during March and April 2021 between Applicant's legal representatives and two of First Respondent's directors on those email addresses.

2.3. First Respondent did not file an answering affidavit within twenty (20) business days, following which, on 05 October 2021, Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the Regulations).[1]

[1] GN R351 in GG 34239 of 26 April 2011.

2.4. Nokuthula Luphoko, Applicant's Chief Financial Officer duly authorised as per Resolution that was attached, deposed to the founding affidavit for the initial application. Somayya Khan, an attorney with Adams & Adams Attorneys, and who are Applicant's legal representatives, deposed to an affidavit in support of the application for default judgment.

**3. ISSUES**

3.1 Applicant requests this Tribunal to make a finding that First Respondent's name does not satisfy the provisions of s11 (2) of the Act. It submits that the inclusion of the word 'Safika' in First Respondent's name infringes its registered trademarks. Proof of registration of Applicant's trademarks in South Africa was attached to the application.

3.2 Applicant claims common law and statutory rights in the word 'SAFIKA' given its widespread and extensive use thereof as far back as 1997, and its use of the 'SAFIKA' trademark in various fields. It has a large market share and presence in, *inter alia,* the South African information technology sector and in financial services.

3.3 Applicant submits that the dominant and memorable part of First Respondent's name is identical to the Applicant's trademark "SAFIKA", and that the remaining portion of First Respondent's name 'Kings' does not serve to distinguish it.

3.4 Applicant also contends that it has not authorised the use by First Respondent of its trademark; therefore the offending name 'Safika' is confusingly similar to its trademarks in 'SAFIKA' in various classes and is in contravention of s11(2) of the Act.

3.5 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. It submits that an internet search of First Respondent's name

immediately brings up results for Applicant; therefore members of the public are likely to believe that First Respondent was formed for the purpose of rendering services on behalf of the Applicant.

## 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, trademark, 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;"*

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 **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 I am satisfied 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.

5.2 "Similar" in section 11(2)(b) would be "having a marked resemblance or likeness" and that the offending name should immediately bring to mind the well-known trade mark or other name.[2] 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." [3]

5.3 "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."[4] 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."[5]

5.4 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

---

[2] Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA

[3] 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

[4] Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280

[5] Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G

be concluded that confusion and/or deception may arise from the side-by-side use of the trade mark and the First Respondent's name, which can lead to injury of the Applicant's business, especially since it has no control whatsoever over the quality of services rendered by the Respondent.

5.5 The doctrine of imperfect recollection has been explained by our courts[6]: 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.

5.6 In **Cowbell AG v 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."

5.7 It can therefore also be concluded that the word 'Safika' in First Respondent's name will reasonably mislead the reasonable person to believe incorrectly that there is an association with the Applicant's 'SAFIKA' trademarks.

5.8 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's 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."

5.9 Thus, permitting the First Respondent to keep the name 'Safika' in its company name will create confusion and hinder the Registrar from maintaining and

[6] Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B

promoting good governance and administration of a corporate entity in the interest of the general public. It is evident therefore that the name 'Safika' as incorporated in the First Respondent's company name falls within the ambit of Section 11(2) as argued.

## 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): its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that First 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 'SAFIKA' as it is in contravention of Sections 11(2) of the Act.

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

7.3 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 There is no order of costs against the First Respondent, as the matter has not been opposed.

7.5 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.

7.6 The Registrar of Second Respondent is directed to:

a) Inform the First Respondent forthwith of the decision of the Tribunal;
b) Ensure that the name is changed within the requisite time period as aforesaid;
c) Invite the First Respondent to file an amended Memorandum of Incorporation using a satisfactory name.

**ADV. ISHARA BODASING**