

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT01333ADJ2023

In the matter between:

MOTUS CORPORATION LTD

APPLICANT

Registration number: 1969/002321/07

and

MOTUS TECHNICAL ACADEMY (PTY) LTD

FIRST RESPONDENT

Registration number: 2020/672042/07

COMMISSIONER OF THE COMPANIES AND

INTELLECTUAL PROPERTY COMMISSION

SECOND RESPONDENT

Presiding Member: Professor Marumoagae

Date of Decision: 13 July 2023

DECISION (Reasons and order)

A INTRODUCTION

[1] The Applicant is **MOTUS CORPORATION LTD**, a company duly incorporated in terms of the company laws of South Africa, with registration number: **1969/002321/07** and registered address at 1 Van Buuren Road, Bedfordview, Johannesburg. The Applicant is represented by its Company Secretary and

Head of Legal, Ntando Simelane, who is duly authorised to do so in terms of the resolution passed by the Applicant's board of directors on 15 March 2023.

[2] The First Respondent is **MOTUS TECHNICAL ACADEMY (PTY) LTD**, a company duly incorporated in terms of the company laws of South Africa with registration number: **2020/672042/07**. The First Respondent's registered address is 26 Bosch Street, Voelvlei, Kuils River, Western Cape.

[3] The Second Respondent is the Commissioner of Companies and Intellectual Property Commission (CIPC) appointed in terms of section 189 of the Companies Act 71 of 2008 (hereafter "Companies Act").

[4] This is an application for default judgment.

[4.1] The Applicant seeks an order directing the First Respondent to change its name to a name that does not incorporate the word 'MOTUS' which the Applicant has registered as its trademark in different classes.

[4.2] The Tribunal is required to determine whether the First Respondent's continued use of this word as part of its name infringes on the Applicant's trademarks.

[4.3] The Tribunal is also required to determine whether the First Respondent's name satisfies the requirements of section 11(2) of the Companies Act.

B RELEVANT FACTS

- [5] The Applicant is involved in the automotive industry. It is the proprietor of the registered trademark “MODUS” across twelve (12) different classes.
- [6] In January 2022, after a search conducted by its attorneys, the Applicant became aware that the First Respondent’s registered name includes a distinctive word that is similar to its registered trademarks.
- [7] In January 2021, the Applicant’s attorneys transmitted a letter to the First Respondent by email demanding that the First Respondent voluntarily change its registered name to an alternative name that does not incorporate its trademark. The First Respondent did not respond to this letter which prompted the Applicant to send another letter dated 22 March 2022 requesting a response to its previous letter.
- [8] The First Respondent’s lack of response led to the Applicant sending the letter by courier. On 12 April 2022, the First Respondent responded by stating that it will seek legal advice on the matter. In September 2022, the Applicant received a letter from the First Respondent’s legal representative. In this letter, the First Respondent did not respond to the substance of the Applicant’s letter but raised a completely different matter. The First Respondent alleged that the Applicant contracted it to provide training for learners at the Applicant’s various depots in 2017.
- [9] The Applicant requested the First Respondent to furnish it with proof of the agreement to provide the alleged training, which the First Respondent has since failed to provide.

C PARTIES MAIN CONTENTIONS

i) Applicant's contentions

- [10] The Applicant is a company listed on Johannesburg Stock Exchange. It is a leading automotive group that employs over 17 250 employees globally. It has spent a considerable amount of time, money, and effort in advertising and promoting its "MOTUS" trademarks for the goods and services in respect of which they are registered. According to the Applicant, the reputation and goodwill attached to its "MOTUS" trademarks make them assets of considerable commercial value and importance to it.
- [11] The dominant and memorable feature of the First Respondent's registered name is the word "MOTUS", which is visually, phonetically, and conceptually identical to the Applicant's registered "MOTUS" trademarks. The Applicant is of the view that the mere addition of the words "TECHNICAL ACADEMY" is not sufficient to distinguish the First Respondent's registered name from the Applicant's trademarks. The use of these two words is not enough to avoid confusion in the marketplace because the Applicant also provides technical training for artisans in the automotive sector.
- [12] According to the Applicant, the addition of the words "TECHNICAL ACADEMY" to the First Respondent's registered name may exacerbate the likelihood of confusion because they are also descriptive of the Applicant's services and directly relevant to its business which includes a training academy.
- [13] The Applicant further contends that confusion is not only established when the First Respondent's name is placed next to the Applicant's trademark but will also occur when a person who might have seen or heard of the Applicant's trademarks, and with an imperfect recollection of such trademarks, later come

across the First Respondent's registered name. Such a person would consider the First Respondent's name to be confusingly similar to the Applicant's trademarks.

[14] The First Respondent's name would reasonably mislead a person to incorrectly believe that the First Respondent is somehow associated with the Applicant, which is not the case. This confusing similarity could lead to injury to the Applicant's business because the Applicant does not have control over the operations of the First Respondent and the quality of the goods and services offered by the First Respondent.

[15] Thus, allowing the First Respondent to continue to trade with its registered name given the potential of the First Respondent venturing into the Applicant's market would be damaging to the Applicant's trademarks, goodwill, and reputation. The First respondent would be able to take advantage of the Applicant's goodwill because its registered name is confusingly and deceptively similar to the Applicant's registered trademarks.

ii) Respondent's contentions

[16] Despite being served with the Applicant's application and founding affidavit by the sheriff on 31 March 2023 at its registered address, the First Respondent failed to serve and file its answering affidavit to place its version before the Tribunal. The only thing that provides a sense of the First Respondent's take on these proceedings is the letter its legal representative transmitted by email to the Applicant's legal representatives on 20 September 2023.

[17] Unfortunately in this letter, the First Respondent chose to completely disregard the issue of its registered name and only dealt with the alleged contract between the parties where the Applicant allegedly contracted the First

Respondent to provide learners with training at the Applicant's depots. The First Respondent failed to substantiate these allegations with proof despite being requested to do so by the Applicant.

- [18] Despite being served with the Applicant's application by the sheriff, the Respondent neither filed its answering affidavit within the required 20 business days period nor brought an application for condonation to be allowed to file such affidavit outside the prescribed time periods. It is on this basis that the Applicant seeks an order on a default basis.

C LEGAL FRAMEWORK AND ANALYSIS

- [19] The Applicant is entitled in terms of section 160(1) of the Companies Act to request this Tribunal to determine whether the First Respondent's registered name or the use thereof satisfies the requirements of this Act. The Applicant may approach this Tribunal on good cause shown at any time after the registration of the offensive name.¹

- [20] The Applicant was entitled to approach this Tribunal because its efforts to resolve the matter directly with the First Respondent by transmitting several letters to the First Respondent failed. Even with the benefit of legal assistance, the First Respondent failed to respond to the substance of what the Applicant raised in its letters. In *Highly Nutritious Food Company (Pty) Ltd v Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC 471 (22 September 2017) para 18, the court held that:

¹ Section 160(2)(b) of the Companies Act.

“[s]ection 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application but to show good cause as to why the application must be entertained”.

The court further held that:

“... to evaluate good cause, the Tribunal was obliged to look at the whole matter including the merits to determine whether it was in the interests of justice to entertain the application”.

[21] The Applicant desires to protect its reputation and goodwill. Secondly, in its letter dated 20 September 2022, the First Respondent acknowledged that it is aware of the Applicant and its business. Most importantly, the First Respondent alleged that its founder conducted business with the Applicant in 2017, before its incorporation. It is difficult not to conclude that the First Respondent is taking advantage of the Applicant's goodwill. The First Respondent claims to have been contracted to render services to the Applicant, which services the Applicant demonstrated includes services that the Applicant provides. This means that the First Respondent already competes with the Applicant. For these reasons, I am convinced that the Applicant has demonstrated good cause to bring this application.

[22] In terms of section 11(2)(a) and (b) of the Companies Act, the name of one company must not be the same as that of another company. Such a name must also not be confusingly similar to a name, trademark, mark, word, or expression of another company unless such companies are members of the same group of companies. The Applicant has registered the word “MOTUS” as its trademark in different classes. This word is also a distinctive word in the First Respondent's registered name. Apart from being the Applicant's trademark, the word “MOTUS” is also part of the Applicant's registered name. The First Respondent's continued use of its registered name is not only likely to cause

confusion but also to deceive those who are aware of the Applicant's trademarks and registered name.

- [23] Section 11(2)(c) of the Companies Act makes it explicitly clear that the name of one company must not falsely imply or suggest or be presented in such a way as to reasonably mislead a person to incorrectly believe that such a company is part of or associated with another company. I am of the view that the Applicant has demonstrated by there are people who are likely to be confused when they see or hear of the First Respondent's registered name. In fact, such persons are likely to be reasonably misled into associating the First Respondent with the Applicant and attributing the services and products of the First Respondent to the Applicant. This will be injurious to the Applicant's business because the Applicant does not have control over the quality of such goods and services. The Appellate Division (as it then was) in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*, held that:

'The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant's mark is used are the goods of the proprietor of the registered mark, i.e. the plaintiff, or that there is a material connection between the defendant's goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection'.²

- [24] The establishment of the reasonable likelihood of confusion is a question of fact that must be determined based on all the circumstances of the case before the Tribunal.³ Even though it was registered as a company in 1969, the Applicant was founded in 1948. It established itself as a key player in the automotive industry and built a good reputation and goodwill. The First Respondent was

² 1984 (3) SA 623 (A) 641-642.

³ *Better Homes Expo (Pty) Ltd v Consep Home Ideas (Pty) Ltd and Others* 2019 BIP 259 (GJ) para 16.

only registered as a company in 2020. The First Respondent's letter dated 20 September 2023 makes an allegation that leads to the conclusion that the First Respondent was registered as a company to take advantage of the alleged business opportunity from the Applicant. Among others, the said letter states the following:

[24.1] the Applicant contracted the founder of the First Respondent to develop a training course and provide training to the learners at all of the Applicant's depots in 2017;

[24.2] the training course remains the property of the First Respondent's founder which is his main source of income;

[24.3] the founder of the First Respondent was under the impression that the Applicant would make use of its services for a considerable period of time; and

[24.4] the Applicant unilaterally cancelled the alleged contract leading to the First Respondent suffering financial loss.

[25] It is worth noting that the First Respondent failed to prove the existence of the alleged contract. Most importantly, having regard to the First Respondent's date of registration with the second respondent, it is clear from this letter that at the time the First Respondent was allegedly contracted by the Applicant, the First Respondent did not exist. Its founder was operating as a natural person. The inference is irresistible that the founder of the First Respondent created the First Respondent with a view to operate in the same market as the Applicant. Further that he chose to use the Applicant's distinctive name which is also its trademark with a view to take advantage of the Applicant's goodwill and reputation in the

market. Most importantly, to confuse and deceive consumers into believing that the First Respondent is somehow associated with the Applicant.

- [26] In terms of section 34(1)(a) of the Trade Marks Act 194 of 1993, the rights acquired through the registration of a registered trademark are infringed by

“[t]he unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark, so nearly resembling it as to be likely to deceive or cause confusion”.

- [26.1] The “MOTUS” trademark has, without authorization from the Applicant as owner, been included in the First Respondent's registered name. The Applicant deserves protection from the negative consequences that will likely flow from this conduct.

D CONCLUSION

- [27] I am satisfied that the First Respondent's name violates section 11(2)(a) and (b) of the Companies Act, in that it is confusingly similar to the Applicant's registered name and trademark and that the First Respondent is not a member of the Applicant's group of companies.

- [28] I am further of the view that the First Respondent's registered name violates section 11(2)(c) of the Companies Act. The First Respondent's name falsely implies, suggests, and is presented in such a way as to reasonably mislead a person to incorrectly believe that the First Respondent is part of or associated with the Applicant.

[29] On the facts of this case as narrated above and the First Respondent's interaction with the Applicant as described in the letter dated 20 September 2022, the fact that the First Respondent included the phrase "TECHNICAL ACADEMY" after the word that constitutes the Applicants' trademark and registered name is insufficient to distinguish the First Respondent's registered name from the Applicant's trademark and registered name.

[30] The First Respondent's company name is confusingly similar to the Applicant's "MOTUS" trademark, and its name would therefore be likely to cause deception and/or confusion amongst members of the public in that they are likely to incorrectly believe that there is some form of association between the First Respondent and the Applicant. Further that the First Respondent's goods and services are associated with the Applicant.

ORDER

[31] I make the following order:

[31.1] The First Respondent is ordered in terms of section 160(3)(b)(ii) of the Companies Act to initiate a process that will lead to the change in its name to one that does not incorporate the word "MOTUS".

[31.2] The First Respondent is ordered to change its name within ninety (90) calendar days of the date of receipt of this order by filing a notice of amendment of its Memorandum of Incorporation.

[31.3] Should the First Respondent fail to initiate a process of changing its name as ordered in paragraph 32, the Second Respondent is directed to change the First Respondent's name to its registration number.

[31.4] The Registrar of this Tribunal is ordered to serve on the First and Second respondents with this order and its reasons.

[31.5] There is no order as to costs since the matter was not opposed.

Professor Marumoagae