



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT01367ADJ2023**

In the matter between:

AFRISAM (SOUTH AFRICA) (PTY) LTD

Applicant

and

AFRISAM TRADING ENTERPRISE CC

First Respondent

**COMMISSIONER OF THE COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION**

Second Respondent

Presiding member: Richard Bradstreet

Date of decision: 19 September 2023

DECISION (Reasons and Order)

INTRODUCTION

1. The Applicant is Afrisam (South Africa) (Pty) Ltd, a private company duly incorporated in terms of the laws of Companies Act 71 of 2008 ("the Act"), with registration number 2006/005910/07, and having its registered office at Constantia Office Park, Afrisam House, Corner 14th and Potgieter Avenues, Weltevredenpark, Roodepoort, Gauteng, 1709.

2. The First Respondent is Afrisam Trading Enterprise CC, a close corporation duly incorporated in terms of the Close Corporations Act 69 of 1984, with registration number 2008/139925/23, and having its registered address at 11095 Mahambehlala Street, Kwazakhele, Port Elizabeth, Eastern Cape, 6205.
3. The Second Respondent is the Commissioner of the Companies and Intellectual Property Commission, appointed in terms of section 189 of the Act, who is cited in an official capacity as the person responsible for the function of the Commission in terms of the Act.
4. The Applicant is the proprietor of a number of trade marks incorporating the word “AFRISAM”, registered in various classes.
5. This application is brought:
 - 5.1. in terms of section 160(1) of the Act, seeking a determination and an order that the First Respondent’s name does not satisfy the requirements of section 11 of the Act, and that the First Respondent should be directed to change its name.
 - 5.2. in terms of regulation 153 of the Companies Regulations, to be determined by default, the First Respondent not having filed a response.
6. The Applicant became aware of the First Respondent’s name on the companies register through internal due diligence measures, and despite having been sent letters of demand to change its name, the First Respondent has not done so.

RELEVANT LAW

7. Any person with an interest in the name of a company is, in terms of section 160(1) of the Act, entitled to bring an application to the Companies Tribunal (in the prescribed manner) for determination of whether the name satisfies the requirements of section 11 of the Act.

8. Such application may be made “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” (section 160(2)).
9. The Act requires that a company’s name must:
 - 9.1. “not be the same as . . . the name of another company . . . [or] a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company” (section 11(2)(a)(i) and (iii));
 - 9.2. “not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) [above] 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;
 - [or]
 - (iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a) (iii), the company is the registered owner of the business name, trade mark, or mark, or is authorised by the registered owner to use it” (section 11(2)(b));
 - 9.3. “not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company . . . is part of, or associated with, any other person or entity” (section 11(2)(c)).

10. The Companies Tribunal, after considering such application (“and any submissions by the applicant and any other person with an interest in the proposed name that is the subject of the application”):
 - 10.1. “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 [the] Act” (section 160(3)(a)), and
 - 10.2. “may make an administrative order directing . . . 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” (section 160(3)(b)(ii)).
11. In relation to applications for default orders,
 - 11.1. “[i]f 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” (regulation 153(1)), and
 - 11.2. on such application, “the Tribunal may make an appropriate order – (a) after it has heard any required evidence concerning the motion; and (b) if it is satisfied that the notice or application was adequately served” (regulation 153(2)).
12. With regard to this application being brought by default in terms of regulation 153(1), this Tribunal is satisfied that there has been adequate service, and thus compliance with regulation 153(2)(b).
13. Having sent three letters of demand to the First Respondent to no avail (the latest being May 2022), the Applicant has good cause to bring the application before the Tribunal, and there has been no undue delay in doing so.

SIMILARITY OF NAMES

14. “Similar” in section 11(2)(b) means “having a marked resemblance or likeness”, and that the offending name should immediately bring to mind the well-known trade mark or other name (*Bata Ltd v Face Fashions CC* 2001 (1) SA 844 (SCA)).
15. The decision to be made involves a value judgment (*Cowbell AG v ICS Holdings* 2001 (3) SA 941 (SCA) para 10), the test being:

“whether, on a comparison of the two marks, it can properly be said that there is a reasonable likelihood of confusion of both marks are to be used together in a normal and fair manner, in the ordinary course of business”.
16. The test confirmed by the Supreme Court of Appeal in *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) at para 28 is relevant where such a value judgment must be made. The question is whether there is “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”. The particular circumstances of the case must be considered to determine whether such reasonable likelihood exists as a question of fact.
17. The word “AFRISAM” is distinctive and is the dominant and memorable portion of both the Applicant and First Respondent’s names. The words “Trading Enterprise” do not in any way distinguish the First Respondent’s business from that of the Applicant, the business of the latter including the supply of construction materials.
18. The First Respondent’s name would therefore immediately bring to mind to mind the name of the Applicant, and there would be a reasonable likelihood that ordinary members of the public would be confused between the two.

19. The Applicant has discharged the onus of showing that the likelihood of confusion as to the origin of the goods or the existence or non-existence of a connection between goods offered under the AFRISAM trade marks, and those offered by the First Respondent (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 642).
20. The name “Afrisam Trading Enterprise” is confusingly similar to the Applicant’s trade marks, and indeed the Applicant’s name. Moreover, there is a reasonable likelihood that members of the public would incorrectly apprehend some association between the two entities.
21. The First Respondent’s name therefore fails to satisfy the requirements of both sections 11(2)(b) and 11(2)(c) of the Act.

ORDER

22. It is accordingly ordered that:
 - a) the First Respondent is directed to change its name to one which does not incorporate the trade mark AFRISAM, or any other trade mark/ word that is confusingly similar or deceptively similar thereto;
 - b) failing compliance with paragraph (a) within 3 months from the date of this order, the Second Respondent is directed to change the name of the First Respondent to “2008/139925/23 (South Africa) CC” on the register;
 - c) the Tribunal’s Recording Officer (Registrar) is directed to serve this order on the First and Second Respondents.

Adv Richard Bradstreet

Member of the Companies Tribunal

19 September 2023