



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT01541/ADJ/2023

In the matter between:

RED AND YELLOW HOLDINGS (PROPRIETARY) LIMITED

Applicant

and

CREATIVE SCHOOL OF BUSINESS AND ENGINEERING (Pty) Ltd

(2021/428963/07)

First Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

Second Respondent

Date of Decision: 22 July 2024

Coram : N Cawe

DECISION

INTRODUCTION

- [1] The Applicant applies for a default order that the First Respondent be ordered to change its name as it does not comply with, *inter alia*, s 11(2)(a)(iii) and (b)(i) of the Companies Act 71 of 2008 (“Companies Act” / “Act”).
- [2] Applicant relies on regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”), which regulate applications for relief regarding name changes, and the application for a default order, to the Companies Tribunal, respectively.
- [3] The jurisdiction of the Tribunal in this matter is as determined by Section 160 of the Act.

BACKGROUND

- [4] Applicant is RED AND YELLOW HOLDINGS (PROPRIETARY) LIMITED, a company duly registered under the company laws of South Africa, and having its principal place of business at 2nd Floor, Durham Avenue, Salt River, Cape Town, Western Cape, South Africa. The Applicant is the proprietor of CREATIVE SCHOOL OF BUSINESS, which was registered in July 2017, and operates in the higher education sphere of business.
- [5] The First Respondent is CREATIVE SCHOOL OF BUSINESS AND

ENGINEERING (Pty) Ltd, a company duly incorporated in terms of the the Act, with registration number 2021/428963/07, having its registered address at number 2163, Borolelo Location, Swartruggens, North West, South Africa, 2835.

- [6] The Second Respondent is the Companies and Intellectual Property Commission (“CIPC”), having its registered address at Block F, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria. The Second Respondent is cited only in its official capacity as the custodian of the companies register. No costs order is sought against the Second Respondent, save in the event that these proceedings are opposed by the Second Respondent
- [7] An affidavit in support of the CTR 142 in terms of reg.142, was deposed by Verusha Kershia Maharaj, the Managing Director of the Applicant, who was authorised to depose thereto by a of the Board of the Applicant dated 3 October 2023.
- [8] Form CTR 142 and the Founding Affidavit, deposed by Amina Suliman, the attorney principally seized with the matter at Adams and Adams Attorneys, were served at the registered address of the First Respondent by the Sheriff of the High Court, on 24 October on Mr Tshegofatso Mmusi, the son of the sole director of the First Respondent, Mr Jan Mmusi.
- [9] The service, as required by reg. 142(2), was served no earlier than the stipulated 5 business days after notification required by the Tribunal.

[10] No Answering Affidavit was filed by First Respondent, 20 days after service, in terms of reg. 143. The 20 day period expired on 21 November 2023. The Applicant then filed an application for a default order on 5 December 2023.

[11] The default order application, in the Form CTR 145 and reg. 153 Supporting Affidavit, deposed by Suliman is for an order :

“11.1.1. ordering the First Respondent to change its company name to one which does not incorporate and is not confusingly similar to the "CREATIVE SCHOOL OF BUSINESS" trademark; and/or

11.1.2. ordering the Companies Office to deregister the First Respondent's company name; and

11.1.3. ordering the First Respondent to pay the costs of this application; and

11.1.4. further and/or alternative relief.”

[12] The basis of the application is that the First Respondent's name is in contravention of section 11(2)(a) of the Companies Act (para 9.2 of the Founding Affidavit). No mention is made of s 11(b)(i) as per the Form CTR 142 and it is not clear if it was abandoned by the applicant. The omission, though, does not adversely affect Applicant's case as the other sections mentioned in the application are good enough to sustain Applicant's case.

[13] The Applicant based its application on the following provisions of the Act (at para. 7.3 of the Founding Affidavit):

“11(2)(a)(iii) not be the same as, or confusingly similar to 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; and

11(2)(b)(i) 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.”

APPLICABLE LAW

[14] Section 160, which is the basis for applications in name disputes provides, as far as is relevant for the present matter, as follows:

“160. Disputes concerning reservation or registration of company

names.—(1) ... 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, 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 the 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.”

[15] Section 11, as far as it is relevant for the present matter, provides as follows

“(2) The name of a company must—

- (a) not be the *same* as—

- ...
- (iii) 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 No. 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;
- ...
- (c) not be *confusingly similar* to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless—
- (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; or; [emphasis added]
- ...”

EVALUATION AND FINDINGS

- [16] From what the Applicant sets out as the procedural steps taken, in Amina Suliman’s Founding Affidavit, I am satisfied that a case has been made for the application to be dealt with on a default basis. I, therefore, proceed to deal with the merits of the case.
- [17] Section 11(2)(a) refers to a name that is the “same”. The name of the First Respondent is not the same as that of the applicant as contemplated in

s11(2)(a) of the Companies Act. “Same” is *exactly identical*: See eg. *Williams v*

Janse van Rensburg (3) 1989 (4) SA 884 (C); *Century City Apartments*

Property Services CC and Another v Century City Property Owners Association

[2010] 2 All SA 1(SCA). It is the Applicant’s subsidiary that bears the words

“CREATIVE SCHOOL OF BUSINESS ” as part of it’s name. These are the words

that form part of First Respondent’s name that are said not to conform with

Section 11 of the Act, as they are confusingly similar to Applicant’s subsidiary

which has the trademark “CREATIVE SCHOOL OF BUSINESS”, according to

the Applicant.

- [18] In respect of s 11(2)(b)(i) it is required that a name must not be “confusingly similar to a name, trademark, mark, word or expression contemplated in paragraph (a)”. The test, which would be the same as “to reasonably mislead”, as in the case of passing-off, should be: “. . . 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 the light of the particular circumstances of the case.” *Adidas AG and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) para. 28. It is not necessary to find that all or most consumers would be confused. It is enough that a substantial number of them are likely to be confused: *PepsiCo v Atlantic Industries* (983/16) [2017] ZASCA 109 (15 September 2017) para 30 and *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA).

- [19] With fancy or “created” names, i.e. names not consisting of everyday words, it will be easier to prove confusion. However, in respect of a word in everyday use, and the possible confusion, it was said in *Bata Ltd v Face Fashions CC & Another* 2001 (1) SA 844 (SCA) para 10: “It is an ordinary word in everyday use, as distinct from an invented or made-up word, and it cannot follow that confusion would probably arise if it is used in combination with another word.”: See also *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 10.

[20] In *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* (970/12)

[2013] ZASCA 158 (22 November 2013) the Supreme Court of Appeal said (para

10), with reference to *Kerly's Law of Trade Marks and Trade Names* (14th ed.

Para. 17–23) that whether there is a likelihood of deception or confusion is a

question of fact, and for that reason decided cases in relation to other facts are

of little assistance, except so far as they lay down any general principle.”

[21] “.....”, would be *confusingly similar* for the reasonable person to the trade mark

“.....” and would therefore not comply with s 11(2)(b)(i). This obviously only

applies in respect of the words, and not logos, where the design and colour would

play a significant role. In *Cowbell v ICS Holdings* 2001 (3) SA 941 (SCA), the court

stated that “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 in a normal and fair

manner, in the ordinary course of business”.

[22] In light of the glaring similarities in the names of the First Respondent and the

Applicant's entity, it can be concluded that the words 'CREATIVE SCHOOL OF

BUSINESS AND ENGINEERING ', in the former would reasonably mislead the reasonable person to believe, incorrectly, that there is an association with the Applicant's 'CREATIVE SCHOOL OF BUSINESS' trademark.

- [23] (1) The First Respondent's name, "CREATIVE SCHOOL OF BUSINESS AND ENGINEERING" does not comply with s 11(2)(b)(i) of the Companies Act, as it bears an uncanny resemblance to that of Applicant owned entity, "CREATIVE SCHOOL OF BUSINESS". The addition of the words "AND ENGINEERING" to First Respondent's name is merely descriptive and not sufficient to negate the likelihood of confusion or deception in the consumer.
- (2) The fact that the First Respondent has failed to specify its trading activities increases the likelihood of the First Respondent's activities conflicting with the activities of the CREATIVE SCHOOL OF BUSINESS.

[24] I, therefore, find that the Applicant is entitled to the relief sought under Section 160(1), (2)(b) and (3)(b)(ii) of the Act.

ORDER

[25] In the circumstances I make the following administrative order:

25.1 The First Respondent is directed, in terms of s 160(3)(b)(ii), to choose a name which does not consist of, or incorporate, the words "CREATIVE SCHOOL OF BUSINESS";

25.2 The First Respondent is to file a notice of an amendment of its

Memorandum of Incorporation, within 30 days of receipt of this order in

order to change its name.

25.3 The Tribunal must order the Companies Office to deregister the First

Respondent's company name, alternatively, register its company

registration number as its company name (2021/428963/07), 30 days from

date of receipt of this order should the First Respondent not comply with

this Order.

25.4 This order must be served on the Respondent by the Tribunal's Recording

Officer (Registrar).

25.5 There is no order as to costs as the matter was unopposed.

N CAWE

COMPANIES TRIBUNAL MEMBER:

22 July 2022