IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA ("THE TRIBUNAL")

Case number: CT01573ADJ2023

In the matter between:	
RCL GROUP SERVICES (PTY) LTD.	APPLICANT
and	
RCL PACKAGING (PTY) LTD.	FIRST RESPONDENT
REGISTRATION NO. 2019/298552/07)	
THE REGISTRAR OF COMPANIES	SECOND RESPONDENT

Presiding Member of the Companies Tribunal: D Terblanche
Date of Decision: 24 June 2024

DECISION (Reasons and Order)

THE PARTIES

1. The Applicant is RCL GROUP SERVICES (PTY) LTD. (the Applicant), a private company registered in accordance with the company laws of the South Africa under registration number 1957/004291/07. The Applicant has its principal place of business at 10 THE BOULEVARD, WESTWAY OFFICE PARK, WESTVILLE, KWA-ZULU NATAL, 3629. The Applicant changed its name from BONNY BIRD FARMS (PTY)

LTD to RCL GROUP SERVICES (PTY) LTD. on 25 May 2012. The Applicant is a subsidiary of the public listed entity RCL FOODS LIMITED.

2. The first Respondent is RCL PACKAGING (PTY) LTD. (first Respondent), a private company registered under the company laws of South Africa under registration number 2019/298552/07), having its registered address at 6 Klossie Street, Paarl, Western Cape, 7646. The company was incorporated on 18 June 2019. The companies register records CHRIS-MARE LESCH as the sole director of the first Respondent. This information appears from a copy of the disclosure certificate obtained from the Companies and Intellectual Property Commission ("CIPC").

3. The second Respondent is the Registrar of Companies (second Respondent). Its registered address is at the DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria. The Applicant joined the second Respondent in the application for purposes of notice and does not seek relief against it, should it not oppose the relief the Applicant seeks.

THE APPLICATION

4. The Applicant brought this default order application to the Companies Tribunal (the Tribunal) in terms of regulation 153 of the Regulations promulgated under the Companies Act No. 71 of 2008 (the CA) for an order in terms of section 160 of the Companies Act to consider its complaint and order the First Respondent to change its company name to one which does not incorporate and is not confusingly similar to the Applicant's RCL and RCL FOODS trade marks in terms of section 11(2) of the Companies Act.

5. The relevant provisions of section 160 of the CA relating to the application above to the Tribunal provide 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."
(Emphasis added)

6. Section 160(2) provides that –

"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."

6. Regulation 153(1)[1] empowers the CT to issue default orders in instances where a person or persons who was served with an initiating document has not filed a response within the prescribed period, namely, within 20 days, as per Regulation 143(1).

7. In considering whether the Tribunal may grant the Applicant the relief it seeks, the Tribunal must determine the preliminary matters, specifically whether the application is procedurally in order with regard to the timeframes, prescribed forms, and procedures.

8. After that I will consider the substantive issues, namely, *"... whether the name, or the reservation, registration or use of the name, (by the First Respondent) ... satisfies the requirements of this Act."*[2]

PRELIMANARY MATTERS

10. I will first consider the default application in the light of the provisions of Regulation 13(a) of the Regulations, and the submissions made by the Applicant.

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[1] Regulation 153 provides that –"*(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."*

[2] See section 160(1) of the CA.

11. Regulation 13(a) of the Regulations provides as follows:

> *"(a) A person may apply in Form CTR 142 to the Tribunal in terms of section 160 if the person has received... a Notice of a Potentially Contested Name, in Form CoR 9.6 or a Notice of a Potentially Offensive Name, in Form CoR 9.7, or has an interest in the name of a company as contemplated in section 160(1)...."*
> (Emphasis added).

12. The Applicant filed a Company Name Objection against the first Respondent's name on 10 November 2023 in the Form CTR 142 as prescribed by Regulation 142(1)(a) of the CA with its supporting affidavit. The stamped Form CTR142 bears the date stamp of 13 November 2023.

13. ZARINA NOOR MAHOMED (MAHOMED), the Applicant's legal advisor, deposed to the Applicant's founding affidavit in support of the application required by Regulation 142(1)(b) of the CA. The Applicant attached the resolution evidencing MAHOMED's authorization.

14. Regulation 142(2) requires the Applicant to serve a copy of the Company Name Objection Application on the Respondents within five (5) business days of 13 November 2023.

15. LIANI TALJAARD (TALJAARD), practising as such as a Senior Associate at the applicant's attorneys deposed to the affidavit in support of the default application.

16. According to Taljaard the Applicant served the name objection application on the First Respondent on 16 November 2023, on the first Respondent's sole director *via* the email address the first Respondent registered with the CIPC.

17. Regulation 143 requires of the first Respondent to serve and file an answer within twenty (20) business days of service of the Company Name Objection Application, should it

have wanted to oppose the Company Name Objection Application, i.e. by 14 December 2023.

18. According to the Applicant the first Respondent did not file or serve an answer opposing the Company Name Objection Application, rendering the first Respondent in default.

19. In terms or regulation 153(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 in terms of regulation 153(2) after it has heard any required evidence concerning the motion, and if it is satisfied that the notice or application was adequately served.

20. At this stage the Tribunal is only considering whether the Applicant's Company Name Objection Application was adequately served on the first Respondent for the Tribunal to entertain the required evidence concerning the Applicant's Company Name Objection Application in the first Respondent's absence.

21. Considering the submissions the Applicant made and the evidence the Applicant put forward, the Tribunal is satisfied that the Company Name Objection Application was adequately served on the first Respondent in terms of regulation 153(2).

22. The Tribunal will now proceed to consider the evidence the Applicant put forward in support of its Company Name Objection Application.

BACKGROUND AND THE APPLICANT'S OBJECTION GROUNDS

23. The below appear from the Applicant's affidavit (and the supporting documentation attached to the affidavit) in support of this application.

24. The Applicant is a leading South African food producer and part of the RCL Foods Group, and manufactures a wide range of branded and private label food products.

25. The Applicant is a leading food manufacturer in South Africa, producing a wide range of branded and private label food products. The Applicant retails its own products

through nationwide supermarket retailers and produces a variety of dealer-owned brands for a number of retailers and wholesalers.

26. In line with its purpose, the Applicant has acquired a number of businesses with deep South African roots and strong brands, which have enabled it to diversify its offering and enhance its reach. Included in its portfolio are well-known South African brands such as Pieman's pies, Mageu Number 1 beverages, Nola mayonnaise, Yum Yum peanut butter, Ouma rusks and Bobtail and Catmor pet food products.

27. The Applicant is the proprietor of several trade mark registrations and applications (for which the Applicant attached evidence from the CIPC records), which incorporate its well-known "RCL" mark in South Africa, namely –

    27.1 registration no. 2013/17548 RCL FOODS in class 29 in relation to "Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats, including poultry and poultry products.";

    27.2 application nos. 2019/23181 – 83 RCL FOODS YOUR FOOD PARTNERS, in classes 29, 30 and 31.

    27.3 application nos. 2019/23185 – 87 RCL FOODS, in classes 29, 30 and 31.

    27.4 application nos. 2022/15045 – 48 RCL, in classes 29, 30 and 31.

(hereinafter referred to as the "RCL Trade Mark" or "Applicant's trade mark")

28 The Applicant first applied for the registration of its RCL FOODS trade mark on 2 July 2013, some 10 years ago.

29 The Applicant has been making continuous and extensive use of the RCL name and trade mark in South Africa for over 10 (ten) years and has since gained a significant reputation in a broad spectrum of products and services. The Applicant has a strong presence on social media, and has made extensive use of the Applicant's RCL trade marks on:

29.1 LinkedIn, recording over 257 244 (two hundred and fifty; and

29.2 Facebook, recording over 56 000 (fifty-six thousand,) followers and over 54 000 (fifty-four thousand) people have liked the RCL Foods Facebook page at https://www.facebook.com/rclfoods/ . The Facebook page was created on 22 April 2014.

30 On or about 12 April 2022, it came to the Applicant's attention that the Respondent had caused a company to be incorporated in South Africa under the name RCL Packaging (Pty) Ltd. The Applicant reached out unsuccessfully on 9 May 2022 through correspondence to the first Respondent to resolve the dispute. The Applicant made another attempt on 9 November 2022. Whilst the first Respondent acknowledged receipt of the letter it did not respond to the Applicant.

THE COMPLAINT

31 The Applicant asserts that the first Respondent's registration of the company name, RCL PACKAGING PTY LTD., is in conflict with the provisions of sections 11(2)(a)(iii), and 11(2)(b)(i) of the Companies Act in that:

31.1 the Respondent's company name, RCL PACKAGING, is confusingly similar to the Applicant's registered trade mark for the mark RCL FOODS and common law rights for the marks RCL and RCL FOODS and falsely implies or suggests, or is such as would reasonably mislead a person to believe incorrectly, that the company is part of or associated with, linked to or endorsed by the Applicant and/or that the Respondent is an authorised subsidiary of the Applicant;

31.2 the dominant and most memorable part of the First Respondents company name is the element "RCL," and the addition of the word PACKAGING is not sufficient to negate the likelihood of confusion or deception. To the contrary and as submitted above, the addition of the word PACKAGING further exacerbates the likelihood of confusion, as it is indicative that the Respondent is a subsidiary company of the Applicant responsible for the packaging of all the Applicant's products;

31.3 the fact that the Applicants trade mark RCL FOODS is so well known in South Africa through its services offered and products supplied to most food retailers across South Africa, that members of the public would assume the Respondent's company name, RCL PACKAGING to be associated with the Applicant;

31.4 the Respondent has failed to specify its trading activities which increases the likelihood of the Respondent's activities could expand and conflict with the trading activities of the Applicant.

31.5 the Applicant's business itself operates on a large scale with its products supplied in retailers countrywide and the existence of a company name which is so similar to the Applicant's registered trade mark and which is not the Applicant or associated therewith, will likely lead to confusion in the marketplace.

31.6 the Respondent's business activities are listed as "not restricted," and / or are not disclosed, this coupled with the fact that the Applicant's well-known RCL trade mark is wholly incorporated in the company name implies that the Respondent is a part of, connected with, or is an extension of, the Applicant's business.

31.7 It is undeniable that the relevant public might be confused into believing that the Respondent is a subsidiary company of the Applicant responsible for the packaging of its thousands of products.

32 The Applicant is therefore entitled to the relief afforded to any person with an interest in the registered name under sections 160(1), (2)(b) and (3)(b)(ii) of the Companies Act, in the form of an administrative order directing the Respondent to choose a new name within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances.

THE SUBSTANTIVE ISSUE FOR CONSIDERATION

33 The substantive question for consideration is whether the first Respondent's company name contravenes the requirements the provisions of provisions of sections 11(2)(a)(iii), and 11(2)(b)(i) of the Companies Act as alleged by the Applicant.

DISCUSSION AND ANALYSIS

34 This is an unopposed application. Despite being served with the application; the first Respondent chose not to answer to the application.

35 In terms of sections 11(2)(a)(i) and (b) and 11(2)(c)(i) of the Companies Act, the name of a company must:

"(a) not be the same as –

(i) ... ;

(ii) ... ;

(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 ... , unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company

(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;

(ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;

(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 authorized by the registered owner to use it; or...

(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..."

36 From the Applicant's submissions, which stand uncontroverted, the Applicant's RCL trade mark is wholly incorporated in the first Respondent's company name.

37 One word differentiates the Applicant's RCL and RCL Foods trade marks and the first Respondent's name, namely, the word "Packaging".

38 I have considered the Applicant's submissions that the first Respondent's registration of the company name, RCL Packaging Pty Ltd., is in conflict with the provisions of sections 11(2)(a)(iii) and (b) and 11(2)(c)(i) of the Companies Act in that:

38.1 The first Respondent's company name, RCL Packaging (Pty) Ltd., is confusingly similar to the Applicant's registered trade marks RCL and RCL Foods and the Applicant's common law rights for the marks RCL and RCL FOODS and falsely implies or suggests, or is such as would reasonably mislead a person to believe incorrectly, that the company is part of or associated with, linked to or endorsed by the Applicant and/or that the first Respondent is an authorised subsidiary of the Applicant;

38.2 The registration and use of the first Respondent's company name, RCL Packaging (Pty) Ltd, is likely to mislead or cause confusion to members of the public to believe incorrectly, that the first Respondent's company is a part of or associated with the business of the Applicant and/or that the first Respondent is a subsidiary of the Applicant, which is not the case;

38.3 The dominant and most memorable parts of the first Respondents company name is the elements "RCL". The addition of the word "Packaging" is not sufficient to negate the likelihood of confusion or deception;

38.4 Given the reputation of the Applicant, the use of the word "RCL" with the word "Packaging" would most likely mislead members of the public into believing that the first Respondent is a part of or associated with the

business of the Applicant, and/or that the first Respondent is a subsidiary of the Applicant, which is not the case.

38.5 The fact that the Applicant's trade mark RCL FOODS is so well known in South Africa through its services offered and products supplied to most food retailers across South Africa, that members of the public would assume the first Respondent's company name, RCA FOODS is associated with the Applicant or alternatively the Applicant has changed its name.

38.6 The first Respondent has failed to specify its trading activities which increases the likelihood of the first Respondent's activities could expand and conflict with the trading activities of the Applicant.

38.7 The inclusion of the word "Packaging" in the first Respondent's company name further exacerbates the likelihood of the first Respondent's activities conflicting with the trading activities of the Applicant.

39 It is likely that the existence of the first Respondent's company name which is so similar to the Applicant's registered trade marks, and with which the Applicant not associated, will lead to confusion in the marketplace.

40 Any reference to the first Respondent's name by a member of the public would automatically lead a person to believe that the Respondent is connected to the Applicant.

41 Any visual reference to the first Respondent's name would automatically create confusion as a member of the public may be led to believe that the first Respondent is connected to the Applicant, as the combination of "RCL" and "Packaging" may spark a recollection of the Applicant by a member of the public who may have an imperfect recollection of the Applicant's name and trade mark.

42 It is clear from the uncontested evidence the Applicant placed before the Tribunal that the Applicant is an established, widely known and well-reputed business enterprise. It cannot be ruled out that the first Respondent has registered the company name to benefit from the Applicant's good will and reputation in the market.

FINDINGS

43 I find that –

43.1 The addition of the word "Packaging" in the first Respondent's name is not sufficient to negate the likelihood of confusion or deception with the Applicant's trade marks.

43.2 The first Respondent's name RCL Packaging (PTY) Ltd is confusingly similar to the Applicant's registered trade marks RCL and RCL Foods in contravention of section 11(2)(b)(iii) of the CA.

43.3 Falsely implies or suggests or is such as would reasonably mislead a person to believe incorrectly, that the first Respondent is part of or associated with, linked to or endorsed by the Applicant and/or that the first Respondent is an authorised subsidiary of the Applicant in contravention of section 11(2)(c)(i) of the CA.

44 The Applicant is therefore entitled to the relief afforded to any person with an interest in the registered name under sections 160(1), (2)(b) and (3)(b)(i) and (ii) of the Companies Act, the Tribunal considers just, equitable and expedient in the circumstances.

ORDERS SOUGHT

45 I will now proceed to consider the orders the Applicants seeks.

46 The Applicant sets out the orders it seeks from the Tribunal, i.e. that the Tribunal,

46.1 Orders the First Respondent to change its company name to one which does not incorporate and is not confusingly similar to "RCL" and "RCL FOODS" trade mark; and/or;

46.2 Orders the second Respondent to change the First Respondent's company name to its registration number, i.e., 2019/298552/07 in the event of non-compliance with paragraph 46.1 above.

46.3 Orders the First Respondent to pay the costs of this application; and

46.4 Further and/or alternative relief.

47 The Tribunal is not satisfied that the Applicant met the requirements for the Tribunal to issue a default order against the second Respondent for the order the Applicant seeks against the second Respondent.

48 The requirements are set out in regulation 153 as below reproduced, namely, -

48.1 Regulation 153(1) provides that: "*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."*

48.2 Regulation 153(2)(b) provides that: *"On an application in terms of sub-regulation (1),* the *Tribunal may make an appropriate order... if it is satisfied that the notice or application was adequately served."*

49 The Applicant made no allegation nor put any evidence before the Tribunal that it served the *notice or application* on the second Respondent.

50 The Tribunal cannot issue an order against a party who had not been served and consequently deprived of the opportunity to answer to the application and the order sought against it.

ORDER

51 I hereby –

51.1 Direct the first Respondent to change its name to one which does not incorporate and is not confusingly and or deceptively similar to Applicant's trade marks. The first Respondent's name must not include the words or a word confusingly similar to the Applicant's "RCL" and "RCL FOODS "trade mark in the new name;

51.2 Directs the first Respondent to file a notice of an amendment of its Memorandum of Incorporation, within sixty (60) days of receipt of this order in order to change its name as per paragraph 51.1 above;

51.3 Awards further relief in exempting the first Respondent from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph 51.1 above:

51.4 Instructs the Registrar of the Companies Tribunal to bring this ruling to the attention of the first and the second Respondents; and

51.5 Orders the first Respondent to pay the Applicant's costs of this application.

DATED AT JOHANNESBURG THIS 24th DAY OF JUNE 2024.

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MS D R TERBLANCHE

MEMBER OF THE COMPANIES TRIBUNAL