



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01577ADJ2023

In the matter between:

RCL GROUP SERVICES PROPRIETARY LIMITED

APPLICANT

and

**RCL HEALTH AND HYGIENE
PROPRIETARY LIMITED**

RESPONDENT

Presiding Member:

Brian Jennings

Date of handing down of decision:

10 July 2024

DECISION

Introduction

- 1 The applicant is RCL Group Services Proprietary Limited. The applicant changed its name from Bonny Bird Farms Proprietary Limited to RCL Group Services Proprietary Limited on 25 May 2012. 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.
- 2 The respondent is RCL Health and Hygiene Proprietary Limited, incorporated on 13 November 2019. The directors of the respondent are Itumeleng Susan Nthite (“**Nthite**”), Kagiso Mabaso (“**Mabaso**”) and Bongani Mokhine Dicky Ngobeni (“**Ngobeni**”). The principal business activities of the respondent are unlisted.
- 3 The applicant’s form CTR 142 lists only RCL Health and Hygiene Proprietary Limited as the respondent. It does not list the Registrar of Trade Marks (the CIPC) as a second respondent, despite the order contemplating same. Further, no evidence is before me that this application has even been served before the Registrar of Trade Marks and therefore it is curious that the Registrar of Trade Marks first makes its appearance as the second respondent, on the form CTR 145 – without any explanation for its omission and now sudden appearance. As a result, the Registrar of Trade Marks is not included as a party to this order.
- 4 On 14 November 2023, the applicant applied in terms of Form CTR142 to the Tribunal for an order, *inter alia* that the respondent change its name. An

affidavit by Zarina Noor Mahomed ("**Ms Mahomed**"), the applicant's legal advisor, duly authorised by way of a resolution of the board of directors of the applicant, passed on 20 July 2023 and signed by all the directors of the applicant at the time thereof, was filed in support thereof ("**Founding Affidavit**"). The applicant served the application on the respondent by hand on 21 November 2023 which is within the 5 business day requirement in accordance with Regulation 142(2) of the Regulations to the Companies Act.

- 5 The respondent failed to serve and file its answering papers within the 20-business day timeframe. On 27 February 2024, the applicant applied for a default order in terms of Form CTR 145. An affidavit deposed to by Liani Taljaard, a representative of the applicant's attorneys of record (the "**Affidavit**") was attached in support thereof.

Default order

- 6 The applicant has applied for a default order against the respondent in terms of Regulation 153(1) to the Companies Act. The requirements for a default order are as follows:
- 6.1 the applicant must have served the respondent with an initiating document;
 - 6.2 the respondent must not have filed a response within the prescribed period;
and
 - 6.3 the applicant must have applied to have the order, as applied for, issued against the respondent by the Tribunal.

Serving the respondent with an initiating document

- 7 On 14 November 2023, the applicant (through its attorneys of record) lodged Form CTR 142 in terms of section 160 of the Companies Act for an order that the respondent's name be changed to one which does not incorporate the mark "RCL" or "RCL FOODS" or any mark which is confusingly and/or deceptively similar to the applicant's "RCL FOODS" trademark.
- 8 The Companies Tribunal acknowledged receipt of the Form CTR 142 on 14 November 2023 by way of a physical stamp. On 21 November 2023 the applicant served, by hand, the Form CTR 142, filing notice, Founding Affidavit and annexures on the respondent. To date, the respondent has not filed any response. I am therefore satisfied that service was properly effected on the respondent as contemplated in Regulation 153(2)(b).

Respondent must not have filed a response within the prescribed period

- 9 It is evident from the papers before me that the respondent did acknowledge receipt of the applicant's service of the Form CTR 142 by way of signature of Ngobeni on the delivery letter. The respondent, however, did not file a response with the Tribunal.
- 10 The prescribed period of 20 business days from the date of service has elapsed, as contemplated in Regulation 143(1).

The applicant must have applied to have the order, as applied for, issued against the respondent by the Tribunal

- 11 On 27 February 2024, the applicant, (through its attorneys of record) applied to the Tribunal by way of Form CTR 145 for a default order. The Affidavit was

annexed to the Form CTR 145 Notice of Motion. It must be noted that the applicant's prayer in the form CTR 145 differs from the prayer in the form CTR 142, as in the form CTR 142, the applicant prayed for relief that the respondent changes their name to one that is not confusingly similar to the applicant's "RCL Foods" trademark. However, the applicant prayed in the form CTR 145 for relief that the respondent changes their name to one that is not confusingly similar to the applicant's "RCL" trademark.

- 12 In light of the prayer in form CTR 142 including further or alternative relief, I am prepared to read into the prayer in form CTR 142, the prayer for the inclusion of the reference to the applicant's "RCL" trademark.

Does the application comply with section 160 of the Companies Act?

- 13 I am called upon to express a view in terms of section 160 of the Companies Act as to whether the applicant, as a person with interest in the name of the respondent, is entitled to apply for a determination by the Tribunal as to whether the respondent's name satisfies the requirements of the Companies Act.
- 14 As the applicant is the proprietor of the registered trademarks as set out in the Founding Affidavit, I am satisfied the application is entitled to make the application it so makes.
- 15 The time requirements in terms of section 160 of the Companies Act, are as follows – an application must be brought either (i) within 3 months after the date of a notice contemplated in section 160(1); or (ii) on good cause shown at any time after the date of registration of the name that is the subject of this application.

- 16 No notice in terms of section 160(1) was received by the applicant, therefore I must assess the timing of the applicant's application in respect of good cause shown.
- 17 In *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017), the Court held at para 18 that “[t]he section requires the applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application... [and] 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.”
- 18 “Good cause” therefore has two elements, namely, the merits of the case, as well as an “explanation ... as to the delay in bringing the application.”
- 19 I deal first with the explanation for the delay in bringing the application.

Explanation for the delay in bringing the application

- 20 The applicant's Founding Affidavit specifies that it became aware of the respondent's name registration during May 2022.
- 21 The applicant avers in its supporting affidavit that it attempted to contact the respondent in an effort to resolve the dispute amicably.
- 22 During November 2022, the applicant's attorneys of record sent a letter of demand via courier to the respondent. The applicant did not receive a response to the letter of demand.

- 23 The delay in bringing an application must not be inordinate so as to, in turn, bring harm to the respondent. Section 160 also protects the interests of the companies so registered and those of its creditors and the possible prejudice to be suffered either by the respondent/s and/or the creditors of the respondent/s, if there is an order to change its name, must be taken into account – see *The Highly Nutritious Food Company (Pty) Ltd* case *supra* para 16.
- 24 The applicant avers in their affidavit that there was no delay in bringing their objection to the respondent's company name. In this regard, the applicant stated that the applicant only became aware of the respondent's company name during May 2022, whereafter a letter of demand was successfully delivered to the respondent during the month of November 2022. In this regard, the applicant provides no insight as to the 6-month delay between them becoming aware of the respondent's name and them delivering a letter of demand to the respondent.
- 25 In addition to the above, the applicant stated in their affidavit that when it appeared that the respondent was not forthcoming, the applicant proceeded to gather the necessary documentation and worked diligently to collect and collate the substantial evidence required for the founding evidence in order to prepare for and launch the objection. I cannot regard this explanation as satisfactory as I do not see the substantial evidence before me.
- 26 The applicant further avers that the resolution needed to authorise the applicant's attorneys to bring this application on its behalf was only signed on 20 July 2023 as a result of the busy schedules of the directors. I do not regard

this as sufficient and cannot accept that a delay of near 8 months is reasonable, nor is any evidence led of such busy schedules.

27 Following the execution of the aforementioned resolution, the applicant applied to the Tribunal on 14 November 2023.

28 I am therefore of the view that the period of time between the applicant becoming aware of the respondent and the date on which the applicant brought the application to the Tribunal is not entirely supported by the averments made, but I accept it is not *per se* unreasonable and prejudicial to the respondent.

29 In light of the prejudice element, namely whether the delay from registration of the respondent was prejudicial to the respondent, this cannot be determined without evidence from the respondent as to whether it was in business and the extent of that business, and the respondent failed to respond: see also *Highly Nutritious Food Company (Pty) Ltd v Eat Right Catering Services (Pty) Ltd and Another (CT014Apr2016) [2017] COMPTI 101 (24 November 2017)* in respect of the delay in bringing an application.

30 I now turn to deal with the merits.

Merits of the case

31 In granting a default order it is critical to take the rights of the respondent into account and to ensure that justice is done to all the parties.¹ I cannot just accept the assertions made by the applicant and must conduct a thorough review of the evidence.

¹ Refer the Tribunal's decision on 3 May 2022 Independent Institute of Education (Pty) Ltd v IIE Varsity College (Pty) Ltd and one other - CT00922ADJ2022.

32 Two grounds of non-compliance with the Companies Act was raised by the applicant, section 11(2)(a)(iii) and section 11(2)(b)(i).

33 In assessing "confusingly similar" under section 11(2)(b), I do not intend to summarise the law as it stands, but I have had regard to the following decisions and their relevant decisions, starting with the oft quoted passage:²

"Mere similarity is also not sufficient, it must be confusingly so. As to the requirement for confusingly similar, the test, 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':

34 I have also had regard to the principles summarised in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) at paragraphs 640 to 641, in that one must –

34.1 compare the mark in use (in this case, the registered name of RCL Group Services Proprietary Limited) and the registered mark (in this case, the RCL trademark);

34.2 have regard to the similarities and differences;

² *Adidas AG and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) para 28.

- 34.3 assess the impact that the mark in use would make upon the average type of customer (meeting the standards as prescribed) who would be likely to purchase the kind of goods to which the marks are applied;
- 34.4 compare the marks as they would be encountered in the marketplace and relevant surrounding circumstances;
- 34.5 consider them side-by-side; and
- 34.6 consider the manner in which the marks are likely to be employed.

35 As previously indicated, I am persuaded by the decision in *New Media Publishing (Pty) Ltd v Eating Out Web Services CC*³ that contextualises the assessment of "confusingly similar", being as follows:

"There is, it seems to me, an interdependence between the two legs of the inquiry: the less the similarity between the respective goods or services of the parties, the greater will be the degree of resemblance required between their respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark, and vice versa..."

Application to the current facts

36 Having regard to the above, the use of the "RCL" name in the registered name of the respondent is, in my assessment, so similar as regards the average type of customer that it would be confusing in relation to the type of goods or services to which the "RCL Foods" or "RCL" trademarks would be applied. This remains so despite the respondent's name being qualified with the words "Health" and "Hygiene". Accordingly, the registered name of the respondent

³ 2005 (5) SA 388

does not comply with the requirements of section 11(2)(b) of the Companies Act.

37 I have also had regard to the use of the trademark in the marketplace as alleged by the applicant and relevant surrounding circumstances, including the fact that the applicant markets its goods and services in a distinctive way, with "RCL" being the house name with various suffixes added thereto. I am of the view that the applicant has sufficiently illustrated that due to the vast number of trademarks duly registered by it, as well as its wide variety of goods and services that it supplies under those trade marks, the degree of similarity between the respondent's registered name and the applicant's trade marks, is certain to be deceiving, or at the very least confusing, to the ordinary customer. In fact, the applicant has been successful in applications such as this one before me, against other companies on similar grounds.

38 For this reason, the placement of the word "RCL" at the beginning of the respondent's name is, in my mind, falsely implying or suggesting, or is such as would reasonably mislead a person to incorrectly believe that the respondent is part of, or associated with, the applicant. Accordingly, the registered name of the respondent does not comply with the requirements of section 11(2)(c)(i) of the Companies Act.

Costs

39 From the facts of this matter, it is clear that the applicant only resorted to instituting this application once it became clear that the respondent would not engage with the applicant, by not responding to the applicant's letter of demand and its application. Moreover, the applicant's attempts at resolving

the matter without an application to the Tribunal were surely not waylaid, as it attempted to contact the respondent in an effort to resolve the issue amicably.

- 40 I cannot condone the conduct of the respondent, in refusing to even engage with the applicant on the matter of its name and necessitating the bringing of this application which it did not even oppose.

Order

- 41 The following order is made:

- 41.1 the respondent is ordered to change its company name (and file the necessary amendment to its MOI) to one which complies with section 11 of the Companies Act and which does not incorporate the applicant's "RCL" or "RCL Foods" trademark or one which is not confusingly similar thereto; and
- 41.2 the respondent is to pay the applicant's costs of suit.

BRIAN JENNINGS
MEMBER OF THE COMPANIES TRIBUNAL