IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01256ADJ2023

In the matter between:

LISA VON BENECKE **APPLICANT**

and

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) **RESPONDENT**

Presiding Member of the Companies Tribunal: MINAH TONG-MONGALO
Date of Decision: 4 July 2023

DECISION (Reasons and an Order)

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1. INTRODUCTION

1.1. The Applicant is Ms. Lisa Von Benecke, the Director of K202131838.

1.2. The Respondent is the Companies and Intellectual Property Commission ("CIPC), a juristic person established in terms of s185(1) of the Act.

1.3. This is a review application requesting the Companies Tribunal ('the Tribunal' to:

1.3.1. Set aside the Respondent's decision to reject the reservation of the name 'LC DYNAMICS', "LC DYNAMICS ZA", "LC DYNAMICS SOUTH AFRICA" AND "LOW CARBON DYNAMIC TECHNOLOGY" on the basis that it is confusingly similar to various names that are confusingly similar, and

1.3.2. Direct the Respondent to reserve and register one of the proposed names.

2. BACKGROUND

2.1. The Applicant intends to register a corporation under the name 'LC DYNAMICS'. On 23 May 2022, the respondent notified the Applicant of its decision not to reserve the name. On 3 February 2023, the Applicant served the Respondent through an email at Corporatelegalservices@cipc.co.za. The Respondent intends to abide by the Companies Tribunal's decision.

3. THE APPLICANT'S SUBMISSIONS

3.1. The Applicant has argued that the Applicant's proposed name is not confusingly similar because none of the names she proposed appear in the Respondent's database.

4. APPLICABLE LAW

4.1. **Section 11** of the Act provides as follows: "11. **Criteria for names of companies.** —

(1)… ....

(2) The name of a company must— (a) not be the same as—

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

...

(b) not be confusingly similar to a name, trademark, 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; …

(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;"

4.2. Section 12 (2) provides: The Commission must reserve each name as applied for in the name of the applicant, unless-

(a) the applicant is prohibited, in terms of section 11(2)(a), from using the name applied for; or

(b) the name as applied for is already reserved in terms of this section.

4.3. Section 12 (3) that if there are reasonable grounds for considering that the name may be inconsistent with the requirements of-

(a) section 11(2)(b) or (c), -

(i) The Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant.

4.4. Section 195 (7) provides that a decision by the Companies Tribunal with respect to a decision of, or a notice or order issued by, the Commission is binding on the Commission, subject to any review by, or appeal to, a court.

4.5. **Companies Regulation 153** of 2011 provides for default orders:

4.5.1. *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.*

5. EVALUATION

5.1. I am convinced that the Applicant has made out a case for the main application to be considered on a default basis and proceed to deal with the case's merits.

5.2. The Respondent regards the Applicant's proposed name to conflict with Section

11(2)(b) of the Act in that it is 'confusingly similar' to those on its database.

5.3. "Similar" means the name in question has "a marked resemblance or likeness" to that of the Applicant. The offending name should immediately bring to mind the well-known trade mark or name.[1] The test for "confusingly similar" is, as in the case of passing-off: "...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 names must be so alike such that it may confuse the "ordinary reasonable careful man, i.e., not the very careful man nor the very careless man."[2] The said "reasonable man" is "the class of persons who are likely to be the purchasers of the goods in question"[3]

5.4. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined considering the particular circumstances of the case." [4]

5.5. The Constitutional Court said that the '[t]he question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the free speech of the Constitution and the property protection objectives of trademark law, would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved. The balancing of interests must be based on the evidence on record, supplemented by such knowledge of how the world works as every judge may be presumed to have.' [5] '[T]he ultimate test is whether, on a comparison of the two marks, it can properly be

[1] Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)
[2] Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280. In Cape Town Lodge CC v Registrar of Close Corporations and another [2008] 2 All SA 34 (C) 38 the court found that travellers were unlikely to think that Cape Town Lodge was part of the City Lodge.
[3] Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G.
[4] Adidas AG & another v Pepkor Retail Limited (187/12) [2013] ZASCA 3 (28 February 2013) para 28; Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc. and Others 1977 (2) SA 916 (A) at 929.
[5] Laugh It Off Promotions Cc V Sab International (Finance) Bv T/A Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) Sa 144 (Cc) Para 82.

said that there is a reasonable likelihood of confusion if both marks are to be used together in a normal and fair manner, in the ordinary course of business.'[6]

5.6. The Act empowers the Commission in S 12 (2) to deny the name reservation only if the name is prohibited in terms of S 11 (2) (a) or the proposed name is already reserved. *In casu*, this is not the case.

5.7. If the Commission is of the view that the proposed name contradicts section 11 (2) (b), that is, it may be confusingly similar, or it contradicts section 11 (2) (c), that is, the proposed name may falsely imply or suggest a non-existent association, amongst others, the Commission may direct the Applicant to notify the affected parties. Instead of doing so, the Commission rejected the name reservation.

5.8. I concur with *Ernst Brand v Companies And Intellectual Property Commission* CT00414ADJ2020 and *James William Van Vught v Companies And Intellectual Property Commission* CT01112ADJ2022, that the Respondent acted contrary to what the Act dictates.

5.9. On 23 May 2022 the Respondent rejected the Applicant's application to register LC Dynamics in that it conflicts with "LC Dynamic Carports and Projects" and "Mzolo Dynamic LC Services Primary Co-Operative Ltd." On 26 January 2023 the Respondent registered LC Dynamics with the sole director being Lloyd Chikati, registered address being 5 Postma Street, Rustenburg, North West, 0300, registration number 2023/526483/07. Mzolo Dynamic LC Services Primary Co-Operative Ltd is primary cooperative with a registered address at 2548 Phomolong, Kroonstad under registration number C2013020408. LC Dynamic Carports and projects yielded no results. There is also a name that is reserved under "LC Dynamics".

5.10. "Low Carbon Dynamic Technology" was said to conflict with "Low carbon Solar" and "Low Carbon Technologies." There is a name reserved under "Low Carbon Emission Solutions", tracking number 9378688900. Moreover, the company's

[6] Cowbell AG v ICS Holdings 2001 (3) SA 941 (SCA).

"Low Carbon Energy", registration number 2016/315235/07, was registered in July 2016 with sole director Sudashon Naidoo, with a registered address in Kwa-Zulu Natal. "Low Carbon Solar" was registered on 18 February 2015 under registration number 2015/045620/07 with registered address 8 Mentis Avenue, Bedfordview, Johannesburg, the sole director being Oliver Mentis.

5.11. Based on director information and addresses, it is likely that these companies are unrelated. Nevertheless, the respondent registered the names which incorporate the names "Dynamics" and "Low Carbon." LC Dynamic is registered under 2023/526483/07, yet the exact name has been reserved. The COR9.5 dated 23 May 2022 does not refer to a company registered under the name "LC Dynamics." Considering that name reservation is valid for six months and that at the time of the Applicant's application for name reservation, there was no name registered as "LC Dynamics", it can safely be assumed that the name which is now registered under 2023/526483/07, was registered or reserved after the Applicant's request. Moreover, between 2015 and 2016 the Respondent registered names incorporating "Low Carbon". Consequently, the Respondent is not consistent in the treatment of name reservations. However, considering that the name "LC Dynamics", registration number 2023/526483/07 did not exist when the Applicant made a decision, it is possible that at the time of the Respondent's decision, the name was not confusingly similar to any registered name.

5.12. As of the date of this decision, "LC Dynamics" is confusingly similar to the one bearing the same name under registration number 2023/526483/07. "Low Carbon Dynamic Technology" is undesirable as it may lead customers to believe that there is an association between "Low Carbon Dynamic Technology" and "Low Carbon Solar" and "Low Carbon Energy". Consequently, the proposed names are not undesirable.

6. FINDINGS

6.1. In respect of "LC Dynamics", the Respondent's decision to reject name

reservation in line with section 11 (2) (b) on the basis that it is confusingly similar may have been incorrect when it issued a decision because the name did not exist at the time of the Applicant's application for name reservation. However, at the date of this decision, the name is registered; therefore, I cannot direct the Respondent to register "LC Dynamics". "Low Carbon Dynamic Technology" is confusingly similar to "Low Carbon Solar" and "Low Carbon Energy", thus undesirable.

6.2. Consequently, the proposed names, LC Dynamics, LC Dynamics ZA, LC Dynamics South Africa Low Carbon Dynamic Technology, are undesirable as per section 11 of the Act.

7. ORDER

7.1. The Application is dismissed.

7.2. There is no order of costs.

MINAH TONG-MONGALO