IN THE COMPANIES TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CT01859ADJ2024

In the matter between:

NATIONAL BRANDS LIMITED **APPLICANT**
(REGISTRATION NO. 1948/029389/06)

and

EET SUM FOOD CO (PTY) LIMITED **FIRST RESPONDENT**
(REGISTRATION NO. 2022/662279/07)

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

Presiding Member: Professor Marumoagae

Date of the decision: 2 September 2024

DECISION (Reasons and order)

A INTRODUCTION

[1] The Applicant is **NATIONAL BRANDS LIMITED**, a public company duly incorporated under the company laws of South Africa with registration number 1948/029389/06 and registered address at 30 Sloane Road, Bryanston, Gauteng. The Applicant is represented by Mr Fanelesibone Craig Mabaso who is authorised to do so in terms of the resolution by the Applicant's Board of Directors.

[2] The First Respondent is **EET SUM FOOD CO (PTY) LIMITED,** a private company incorporated in terms of the company laws of South Africa with registration number 2022/662279/07. The First Respondent's offices are situated at Shop 17 Epsom Downs Shopping Centre, Bryanston, Johannesburg.

[3] The Second Respondent is the Commissioner of the Companies and Intellectual Property Commission appointed in terms of section 189 of the Companies Act 71 of 2008 (hereafter Companies Act).

[4] This is an application for a default judgment wherein the Applicant seeks an order that:

[4.1] the First Respondent's company name does not satisfy the requirements of sections 11(2)(*b*) and 11(2)(*c*)(i) of the Companies Act;

[4.2] the First Respondent is directed to choose a name that does not consist of, or incorporate the mark **EET-SUM-MOR**, or any other mark which is confusingly and/or deceptively similar to the Applicant's **EET-SUM-MOR** trademark; and

[4.3] should the First Respondent fail to choose a different name that does not infringe on the Applicant's trademark within 60 days from the date of the order, the Second Respondent be directed to change the First Respondent's name to its registration number.

B APPLICANT'S CASE

[5] The Applicant is a wholly owned subsidiary of AVI Limited. It contends that it operates one of South Africa's leading fast food consumer goods companies which offers a full range of sweets and savoury biscuits under its BEKERS master brand. It also offers baked and fried snacks under various brands. Further, its BAKERS range of biscuits is associated with outstanding quality and

includes a well-known EET-SUM-MOR biscuits. The Applicant alleges that it is the proprietor of the EET-SUM-MOR trademark which was registered in 1966 in different categories under classes 5 and 30.

[6] The Applicant alleges further that it has made widespread and extensive use of its EET-SUM-MOR trademark since 1940 in relation to biscuits. Further, the EET-SUM-MOR products are available at most supermarkets, wholesalers, and convenience stores in South Africa. This trademark is well known amongst consumers and is a household name in South Africa. Further, this trademark has been used in South Africa for over 80 years. According to the Applicant, this trademark has been extensively marketed to advertise its quality biscuit products and it enjoys strong common law rights regarding this trademark.

[7] The Applicant further contends that it has a substantial following on various social media platforms where the products bearing this trademark are displayed. Further, major food retailers in South Africa have also displayed products bearing the Applicant's trademark on their websites. Further, significant products bearing the Applicant's trademark have been sold in the past five years generating over two billion rands in profits.

[8] It is further contended that in the last five years, the Applicant spent over Sixty million marketing and advertising products associated with the EETSUM-MOR trademark. This trademark became well-known to a substantial proportion of the South African population. The Applicant further alleges that the EET-SUM-MOR trademark became an asset of considerable commercial value and importance.

[9] The Applicant alleges further that it learned of the First Respondent's existence in November 2023. It noted that the dominant and memorable portion of the First Respondent's name is 'EET-SUM', which is visually, phonetically, and conceptually confusingly similar to its well-known trademark, EET-SUM-MOR. According to the Applicant, the omission of the word 'MOR' from the First Respondent's name and the inclusion of the phrase 'FOOD CO' does not distinguish the First Respondent's name from the Applicant's well-known

trademark. In particular, the Applicant argues that the identical, and fanciful, misspelling of "eat some", which is a distinctive feature of the Applicant's trademark could not have been accidental in the First Respondent's name.

[10] The Applicant is concerned that members of the public may assume that the First Respondent is connected to the Applicant or that it is endorsed by the Applicant, which is not the case. Further, by using its current name when conducting its business, the First Respondent's name is likely to take unfair advantage of or be detrimental to, the distinctive character and reputation of the Applicant's well-known EET-SUM-MOR trademark. According to the Applicant, the First Respondent will, without any effort on its own part, benefit from the reputation that the Applicant has built through years of use and promotion of its EET-SUM-MOR trademark.

[11] It has also been alleged that the First Respondent's use of its name will dilute the Applicant's trademark rights. It will also infringe its trademark in terms of section 34(1)(*c*) of the Trade Marks Act. The Applicant also indicated that it has no control over the activities of the First Respondent and the quality of its products and services. The Applicant is concerned that should the First Respondent's products or services be of an unacceptable standard or even of a standard not identical to that of the Applicant, the use of the First Respondent's name could discredit or affect in some other way the good name and reputation which the Applicant enjoys in South Africa.

[12] According to the Applicant, its attorneys sent a letter to the First Respondent on 24 November 2023, requesting that the First Respondent's name be voluntarily changed to that which does not include the phrase 'EET-SUM'. On 15 January 2024, the Applicant's attorneys telephonically contacted the First Respondent's director to explain the contents of the letter sent on 24 November 2023. The First Respondent's director committed to changing the name of this company. However, the Applicant alleges that this did not happen. Further, the First Respondent's Director became unreachable when the Applicant attempted to follow up. The above-mentioned letter was sent by the sheriff to the First Respondent's registered address.

C REQUEST FOR DEFAULT JUDGMENT

[13] Due to the First Respondent's failure to respond to the Applicant's demand, the Applicant approached this Tribunal for relief on 19 June 2024. The officials of this Tribunal acknowledged receipt of the Applicant's application on 19 June 2024. The sheriff's return of service indicates that the Applicant's application was served at the First Respondent's registered address on 20 June 2024. Service was made within five days of issuing the application as prescribed in Regulation 142(1) of the Companies Regulations, 2011.

[14] The First Respondent did not oppose the application. In terms of Regulation 43 of the Companies Regulations, if the First Respondent desired to oppose this application, it ought to have submitted its answer within 20 business days. The First Respondent did not file and serve its answer. Now the Applicant seeks a default decision against the First Respondent.

D LEGAL FRAMEWORK AND ANALYSIS

i) Interested Person

[15] In terms of section 160 (1) of the Companies:

> ***'… 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'.*

[16] In terms of section 160(2) of the Companies Act, a person with an interest in the name of a company can apply to this Tribunal:

> *'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'.*

[17] In this matter, as soon as the Applicant was made aware of the First Respondent's existence, it instructed its attorneys to start the process of getting the First Respondent to change its name. Since the Applicant did not find joy after directly attempting to resolve the matter with the First Respondent's director, it was justified in approaching this Tribunal.

[18] In both its main application and default application papers, the Applicant has demonstrated good cause why it needed to approach this Tribunal. It is attempting to protect its trademark. The Applicant also seeks to prevent the First Respondent from infringing its trademark thereby compromising its commercial interests. I am satisfied that the Applicant is a person with an interest in the First Respondent's name and has demonstrated good cause in this matter. The Applicant is properly before this Tribunal.

ii) Confusingly Similar

[19] The Applicant relies on section 11(2)*(b)* of the Companies Act, which among others, provides that the name of one company must not be confusingly similar to a trademark of another company unless each company bearing any such similar name is a member of the same group of companies[1] or the company is the registered owner of the trademark or is authorised by the registered owner to use it.[2]

[20] The First Respondent's name does not have the word 'MOR' which appears in the Applicant's trademark but contains the phrase 'FOOD CO' which does not appear in that trademark. The phrase 'FOOD CO' does not sufficiently distinguish the First Respondent's name from the Applicant's trademark. The most dominant words in the Applicant's trademark are the deliberately misspelt words 'EET SUM', which have been reproduced as they are in the First Respondent's name. This renders the First Respondent's name confusingly similar to the Applicant's trademark. The two have a high degree of aural and visual similarity. The phrase 'FOOD CO' is purely descriptive and clearly

[1] Section 11(2)(*b*)(i) of the Companies Act.
[2] section 11(2)(*b*)(iii) of the Companies Act.

demonstrates that the First Respondent is engaged in a food business, which is the industry in which the Applicant has used its 'EET SUM-MOR' trademark.

[21] The Applicant has made a case that EET-SUM-MOR is a well-known brand in South Africa. The First Respondent's continued use of 'EET SUM' as part of its name which is its dominant part will likely lead to confusion. I agree with the Applicant that the First Respondent is taking advantage of the goodwill in its trademark. This will likely lead consumers to believe that the First Respondent or its services and products are somehow associated with the Applicant. I agree that the First Respondent's name is confusingly similar to the Applicant's trademark and thus, violates section 11(2)(*b*) of the Companies Act.

[22] The Applicant neither endorsed any of the First Respondent's activities nor provided the First Respondent permission to use and profit from the usage of its trademark. This Tribunal must offer protection to the Applicant. In terms of section 11(2)(*c*) of the Companies Act, the First Respondent must not falsely imply, suggest, or reasonably mislead anyone into incorrectly believing that it is associated with the Applicant. The First Respondent's name creates this impression. I am of the view that the First Respondent violated this provision.

E CONCLUSION

[23] I am satisfied that this application was made in accordance with the prescribed procedure. I am also satisfied that a reasonable opportunity was provided to the First and Second respondents to oppose this application if they so wished. Failure by the First Respondent, in particular, to oppose this matter and file its answering affidavit warrants a default judgment being granted in favour of the Applicant.

[24] First Respondent's registered name is confusingly similar to the Applicant's registered trademark which is EET-SUM-MOR. The First Respondent's registered name has a marked resemblance or likeness and immediately suggests the Applicant's registered trademark to the person looking at it.

[25] There is a reasonable likelihood that ordinary members of the public or a substantial portion thereof may be confused into incorrectly believing that the

First Respondent's business activities are endorsed by the Applicant.[3] The Applicant must be protected from the First Respondent's prejudicial conduct.

ORDER

[26] In the results, the following order is made:

a) The First Respondent is ordered in terms of section 160(3)(*b*)(ii) of the Companies Act to change its registered name to a name that does not incorporate the word "EET-SUM" or any part of the Applicant's trademark, because its registered name is in contravention of sections 11(2)(*b*)(iii) and 11(2)(*c*)(i) of the Companies Act.

b) The First Respondent is ordered to change its name within ninety (90) calendar days of the date of receipt of this order and to file a notice of amendment of its Memorandum of Incorporation to effect the change of its name

c) Should the First Respondent fail to change its name as stated in paragraph b of this order, the Second Respondent is ordered to change the First Respondent's name to its registration number.

d) The Registrar of this Tribunal is directed to serve this order on the Respondents.

e) There is no order as to costs as the application was not opposed.

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Professor Marumoagae

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