

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case: CTO14SEP2015

In the matter between;

CENTOW ROADSIDE ASSISTANCE
(Registration Number 2005/003730/23)

Applicant

and

SENTOW ROADSIDE ASSIST
(Registration Number 2015/259358/07)

Respondent

Presiding Member of the Tribunal: Lucia Glass

DECISION (Reasons and Order)

INTRODUCTION

1) This is an application in terms of section 160 of the Companies Act 71 of 2008 (the Act). The basis of this application is that the name "**SENTOW ROADSIDE ASSIST**" is prohibited in terms of Section 11 of the Act, as it is similar to the Applicant's company name "**CENTOW ROADSIDE ASSISTANCE**". The matter was opposed and was heard on the 24th February 2016 at the Companies Tribunal Office in Pretoria.

APPLICANT'S CASE

2) Mr Jacques Terblanche, who is the only active Director and member of the Applicant appeared on behalf of the Applicant. He alleged that the Applicant had

been operating under the name of "**CENTOW ROADSIDE ASSISTANCE**", for the past 10 years covering most areas of Gauteng.

3) He alleged that there is confusion in the marketplace as to what Company his clients are dealing with, because the Respondent's name is so similar, operates in the same industry, and one of Respondent's directors had previously worked for the Applicant. He gave an example of a telephone call he received regarding a 'bumper damage' to a vehicle in Boksburg relating to the Respondent, Sentow Roadside assist. He had not had any dealings with the 'bumper damage' to a vehicle in Boksburg and more importantly, he was not Sentow Roadside assist, but Centow Roadside Assistance. He alleged that the Respondent's name can and did mislead persons to believe incorrectly, that the Respondent company, is, is part of, or associated with, the Applicant Company.

4) He further averred that the general public and Insurance companies, have viewed and will in future view the Respondent, "**SENTOW ROADSIDE ASSIST**", as the same company, as the Applicant's, "**CENTOW ROADSIDE ASSISTANCE**" and believe that they are dealing with the Applicant, when in fact they are dealing with the Respondent, as the names are so confusingly similar.

RELIEF SOUGHT BY THE APPLICANT

5) The Applicant asks that an order be made, in terms of Section 11(2)(b) of the Act, read together with Section 160 of the Act, directing that the Respondent choose a new name.

RESPONDENT'S CASE

6) Appearing for the Respondent, was Shane and Michelle Senekal, who are the only Directors and Members of the Respondent.

7) Michelle Senekal alleged that the Respondent would benefit if it was ordered to change its name, as it could not prospect new customers until it changed its name. She also believed that the Applicant and Respondent's names were too similar and averred that it was the fault of CIPCI that this name was approved, as they had applied for 4 other names, inter alia, Senekal towing and recovering, Gauteng towing

and Shane towing, and the only name that was approved was Sentow Roadside Assist. She also alleged that the name 'Sentow' was derived from the first section of their surname 'Senekal'.

APPLICABLE LAW

Section 11 (2) (a) and (b) of the Act

8) The relevant sections of the Act that apply are;

" Sec 11 (2) *The name of a company must—*

(a) not be the same as, or confusingly similar to—

(i) the name of another company, registered external company, close corporation or co-operative unless the company forms part of a group of companies using similar names;

(b) 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;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—

(aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(bb) international organisation;"

9) The Applicant seeks remedies in terms of Section 160 which reads as follows:

"Part B

Rights to seek specific remedies

Disputes concerning reservation or registration of company names.

Section 160.

(1) A person to whom a notice is delivered in terms of section 12(3) or section 14(3) 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 satisfies the requirements of section 11.

(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 satisfies the requirements of section 11; and

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name for the applicant in terms of section 12;

(bb) register the contested name, or amended name as the name of a company; or

(cc) cancel a reservation granted in terms of section 12, if the reserved name has not been used by the person entitled to it; 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."

APPLICATION OF THE COMMON LAW UNDER THE PREVIOUS COMPANIES ACT.

10) In order to come to a finding as to whether, the names are "the same or confusingly similar" and whether the name is able to "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" it is my view that it will be useful to look at past High Court judgments even though they are not made in terms of the Act.

11) In 1948¹ the courts considered it appropriate to say "*the court must not only consider the marks when placed side-by-side but must have regard to the position of a person who might at one time see or hear one of the marks and later possibly with an imperfect recollection of the mark, come across the other mark*".

12) In more recent times, 2000 in an unreported judgement² the court said: "*If one compares the name Kentron which the applicant has used and is still using with the name Kentronics which the first respondent is using, its is clear that there is a visual and phonetic differences. It is however, also obvious that there are similarities. The name Kintronics incorporates the whole of the applicants trading style Kentron.*"

13) In 2001 the court said:³ "*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 together in a normal and fair manner, in the ordinary course of business*".

EVALUATION

14) The dominant words in the Applicant's name are **CENTOW ROADSIDE ASSISTANCE** and the dominant words of the Respondent's company name are **CENTOW ROADSIDE ASSISTANCE**. The dominant words in both Applicant and Respondent names are very similar. The difference is that Centow is spelt with a 'C'. in the Applicant's name and Sentow, is spelt with a 'S' in the Respondent's name. The pronunciation, however of the two words, may be identical. The word that follows is identical and is also misleading, both have the word 'Roadside'. The Applicant has the word 'assistance' where the Respondent has the word 'assist' which is also misleading.

¹ AMERICAN CHEWING PRODUCTS CORPORATION v AMERICAN CHICLE COMPANY 1948 (2) SA 736 (A)

² DENEL (PTY) LTD AND KENTRONICS (PTY) LTD AND THE REGISTRAR OF COMPANIES TDP CASE NO 213527/2000 (unreported)

³ COWBELL AG V ICS HOLDINGS 2001 (3) SA 941 (SCA)

15) The dominant words of the names of Respondent and Applicant are phonetically and visually confusingly similar.

16) If members of the public merely look at the two names of the two different entities there will be no doubt that they will be misled by the similarity of the names.

17) Members of the public will be confused or deceived into believing that the business of the Applicant is linked to, or associated with that of the Respondent.

FINDINGS

18) When the Respondent's dominant words in its name "**SENTOW ROADSIDE ASSIST**", and the Applicant's name "**CENTOW ROADSIDE ASSISTANCE**", are compared, the dominant words in the name, are confusingly similar and I am certain that the applicant will be prejudiced if I do not make an order as prayed.

19) The name "**CENTOW ROADSIDE ASSISTANCE**", is far too similar to "**SENTOW ROADSIDE ASSIST**", which falsely implies or suggests, and reasonably misleads a person to believe incorrectly, that the respondent is part of, or associated with the applicant's business.

20) I am convinced that if the two names are compared, there is no doubt in my mind that they are confusingly similar and there will be confusion if both company names are to be used together in a normal and fair manner, in the ordinary course of business.

I proceed to make an order in the following terms;

a) The Respondent is directed to change its name to one which does not incorporate and is not confusingly and or deceptively similar to Applicant's name "**CENTOW ROADSIDE ASSISTANCE**".

b) The Respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name as per a) above.

c) The Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph.

d) This Determination must be served on the Applicant, Respondent and the Registrar of Close Corporations of the Companies and Intellectual Property Commission who will change the Respondent's name to its company number should the Respondent not file the notice in terms of b) above.

e) Any other person with an interest in the name that is the subject of this application may, within twenty (20) business days after receiving the notice of this determination and administrative order, apply to a court to review the determination.

LUCIA GLASS

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Dated this 29th February, 2016