



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT004NOV2018

In the matter between:

**GROWTHPOINT PROPERTIES LTD.
(Reg. Nr. M1987/004988/06)**

APPLICANT

and

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

FIRST RESPONDENT

**GROWTH POINT TRAINING AND DEVELOPMENT
SOLUTIONS CC (REG. Nr. 2009/133702/23)**

SECOND RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 17 MARCH 2019

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1. Applicant is Growthpoint Properties Ltd. (Reg. Nr. M1987/004988/06), a company duly incorporated in accordance with the company laws of South Africa,

and having its registered address at The Place, 1 Sandown Drive, Sandton, Gauteng.

- 1.2. First Respondent is the Companies and Intellectual Property Commission (“CICP), a juristic person established in terms of section 185(1) of the Companies Act 71 of 2008 (“the Act”).
- 1.3. Second Respondent is Growth Point Training and Development Solutions CC (Reg. Nr. 2009/133702/23) a close corporation duly incorporated in terms of the Close Corporations Act 69 of 1984, and having its registered address at 1 Springer Close. Marina Da Gama, Western Cape, 7945.
- 1.4. This is an application for a determination order:
 - a. that Second Respondent’s name does not satisfy the requirements of section 11(2) of the Act, and
 - b. that Second Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.
- 1.5. Roland Krabbenhoft, Applicant’s Company Secretary, deposed to the Founding affidavit, and the affidavit in support of the default application was deposed to by Applicant’s legal representative, Likonelo Magagula; both having been duly authorised to do so.

2. BACKGROUND

- 2.1. On 7 November 2018 Applicant approached this Tribunal for relief, and the Sheriff of the High Court served a copy of the application on the Second Respondent. The *dies induciae* for opposing the application lapsed on 5 December 2018.
- 2.2. Second Respondent did not file an answering affidavit within twenty (20) business days, following which, on 26 February 2019 Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the

Regulations).¹

3. ISSUES

- 3.1 Applicant requests the Tribunal to make a finding that the First Respondent's name does not satisfy the provisions of section 11(2) of the Act. It submits that the inclusion of the words GROWTH POINT in Second Respondent's name infringes Applicant's registered name and trademarks.
- 3.2 Applicant claims statutory and common law rights in the word GROWTHPOINT, along with widespread and extensive use thereof nationally, and a global footprint. Mr Krabbenhoft goes into much detail in his affidavit to describe the substantial goodwill and reputation of the Applicant, which commenced its enterprise around 1987.
- 3.3 Applicant also contends that the dominant and memorable part of Second Respondent's company name is identical to the Applicant's name and trademark "GROWTHPOINT". Applicant contends that Second Respondent's name is therefore confusingly and deceptively similar to the Applicant's and is in contravention of Section 11(2) of the Act.
- 3.4 Although Applicant is well-known in the property industry, it also engages in some training initiatives, and has underscored the prejudice it will suffer if denied relief. This is especially so as it does not have control over the quality of products or services of the Second Respondent.

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 —*

¹ GN R351 in GG 34239 of 26 April 2011.

(a) not be the same as—

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

(ii) a name registered for the use of a person, other than the company itself or a person controlling the company, as a defensive name in terms of section 12(9), or as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960), unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company;

(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 in the Republic for registration as a trade mark or a well-known trademark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

(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;

...

(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 authorised by the registered owner to use it; or

(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;

(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 160** of the Act deals with **disputes concerning reservation or registration of company names** and enunciates the jurisdiction of the Companies Tribunal 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.***

(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, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and*

(b) may make an administrative order directing-

(i) the Commission to

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended name that had been contested as the

name of a company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; 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.”

4.3 **Companies Regulation 153** of 2011 provides for default orders:

(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 “Similar” in section 11(2)(b) would be “having a marked resemblance or likeness” and that the offending name should immediately bring to mind the well-known trade mark or other name.² 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. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in light of the particular circumstances of the case.”³

² Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)

³ 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

- 5.2 “Confusingly similar” in Section 11(2)(b) has to be examined carefully to determine if this is in fact so *in casu*. In considering case law on the concept, it must be as alike in a manner that will confuse the “ordinary reasonable careful man, i.e. not the very careful man nor the very careless man.”⁴ The “reasonable man” has been further qualified: “A rule of long standing requires that the class of persons who are likely to be the purchasers of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception.”⁵
- 5.3 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.”
- 5.4 In line with what was stated in **Ewing t/a The Buttercup Dairy Company v Buttercup Margarine Corporation Ltd 1917 (34) RPC at 232 and 238**, it can be concluded that confusion and/or deception may arise from the side-by-side use of the trade mark and the Second Respondent’s name, which can lead to injury of the Applicant’s business, especially since it has no control whatsoever over the quality of services rendered by the Second Respondent. The doctrine of imperfect recollection has been explained by our courts⁶: there is a probability that a substantial number of people will be at least confused, if not deceived, given the fact that an individual does not have the two marks before him, side by side and that memory is often imperfect. In **Cowbell AG v ICS Holdings 2001 (3) SA 941 (SCA)**, the court said: "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."

⁴ Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280

⁵ Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G

⁶ Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B

- 5.5 It can therefore be also be concluded that the words “GROWTH POINT” in Second Respondent’s name will reasonably mislead the reasonable person to believe incorrectly that there is an association with the Applicant’s “GROWTHPOINT’ trademarks. The fact is that the two businesses can clearly have similar or overlapping activities in respect of their corporate branding, and this will, as under section 11(2)(b), include the likelihood/possibility that the reasonable person will be misled.
- 5.6 Finally, in the case of **Polaris Capital (Pty) Ltd v The Registrar of Companies and Polaris Capital Management Inc.** (unreported judgment, Case No. 11607/2005, CPD), the learned judge commented on undesirability in terms of Section 45(2) of the 1973 Companies Act: “It is submitted that by allowing the close corporation name to remain on the register, in addition to causing deception and confusion, its registration will hinder the registrar’s role in maintaining and promoting good governance and administration of corporate entities in the interest of the general public.” Thus, permitting the Second Respondent to keep the name GROWTH POINT in its company name will create confusion and hinder the Registrar from maintaining and promoting good governance and administration of a corporate entity in the interest of the general public. It is evident therefore that the name GROWTH POINT as incorporated in the Second Respondent’s company name falls within the ambit of Section 11(2) as argued.

6. FINDINGS

- 6.1 I find that the balance of convenience favours the Applicant.
- 6.2 Applicant has shown that Second Respondent has transgressed Section 11(2)(b): its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that Second Respondent is part of, or associated with the Applicant. Hence, Applicant is entitled to an order as claimed in terms of Section 160 of the Act.

6.3 The Applicant's application is granted as set out below.

7. ORDER

- 7.1. An administrative order is made in terms of Section 160(3)(b)(ii) that Second Respondent change its name to one which does not incorporate the words GROWTH POINT as it is in contravention of Section 11(2) of the Act.
- 7.2. This order must be served on the Respondents by the Tribunal's Recording Officer (Registrar).
- 7.3. Second Respondent is hereby ordered to change its name within 60 (calendar) days of date of receipt of this order and to file a notice of amendment of its Memorandum of Incorporation.
- 7.4. There is no order of costs against the Second Respondent, as the matter has not been opposed. Second Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment.
- 7.5. The Registrar of CIPC is directed to inform the First Respondent forthwith of the decision of the Tribunal and to ensure that the name is changed within the requisite time period as aforesaid; and to invite the First Respondent to file an amended Memorandum of Incorporation using a satisfactory name.

ADV. ISHARA BODASING