



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01009ADJ2022

In the matter between:

ITALTILE FRANCHISING (PTY) LTD

APPLICANT

and

CTM BUILDERS (PTY) LTD

FIRST RESPONDENT

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

SECOND RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 30 MAY 2022

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1. Applicant is Italtile Franchising (Pty) Ltd, a company duly incorporated in accordance with the company laws of South Africa, with registration number

1991/005995/07, and having its registered office at The Italtile Centre, Cnr. William Nicol Drive and Peter Place, Bryanston, Gauteng.

- 1.2. First Respondent is CTM Builders (Pty) Ltd., a company duly incorporated in accordance with the company laws of South Africa, with registration number 2021//001222/07, and with its registered address at Portion 12, Farm 986 Leaches Bay, East London Eastern Cape, 5201.
- 1.3. Second Respondent is the Companies and Intellectual Property Commission (“CIPC), a juristic person established in terms of section 185(1) of the Companies Act 71 of 2008 (“the Act”).
- 1.4. This is an application for a determination order:
 - a. that First Respondent’s name does not satisfy the requirements of section 11(2) of the Act, and
 - b. that First Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.

2. BACKGROUND

- 2.1. On 14 April 2022 Applicant approached this Tribunal for relief and also served a copy of the application electronically on the First Respondent.¹
- 2.2. First Respondent did not file an answering affidavit within twenty (20) business days, following which, on 26 May 2022 Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the Regulations).²
- 2.3. Brandon Wood, Applicant’s Chief Financial Officer duly authorised,³ deposed to the founding affidavit for the initial application. Gaelyn Scott, a practicing

¹ Annx. SG4.2: email delivery notification of main application attached to the application for default judgment.

² GN R351 in GG 34239 of 26 April 2011.

³ As per Applicant’s Board of Directors Resolution dated 26 July 2016

attorney and Director Edward Nathan Sonnenbergs, representing Applicant, deposed to the affidavit in support of the application for default judgment.

3. ISSUES

3.1 A preliminary issue that I will address in my evaluation is whether or not Applicant is justified in bringing a default application. Applicant became aware of First Respondent's 'offending' name in October 2021 and brought an application to this Tribunal some six months later. Applicant argues that good cause has been shown because the delay is attributed mainly to its attempts to trace and communicate with First Respondent via its attorneys and a commercial investigator. Evidence of this is included in Applicant's papers.

3.2 Applicant contends that the dominant and memorable part of First Respondent's company name is identical to the Applicant's trademark: CTM. Applicant contends that First Respondent's name is therefore confusingly and deceptively similar to the Applicant's and is in contravention of Section 11(2)(b) and (c)(i) of the Act.

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 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 At the outset, I deal with the question of whether the default application in terms of Regulation 153 is justified. In this regard, I refer to the dictum of Twala, J. in the Highly Nutritious Food Company case:⁴

Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the

⁴ Highly Nutritious Food Company (Pty) Ltd. v Companies Tribunal and Others, High Court, Gauteng Local Division, Case nr. 91718/2016

application but to show good cause as to why the application must be entertained. The 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 but refer to the merit of the application as well. It is section 160(1) that prescribes, for a particular category of persons, to launch an application within a period of three (3) months after they became aware of the registration of the name.

5.2 Although section 160 of the Act is there to protect the interests of companies so registered and their creditors, Applicant's attorneys were at pains to trace and communicate with First Respondent. It seems that First Respondent does not have an online presence, and the courier could not locate the physical address. However, the application was successfully delivered to an email address that was traced by the commercial investigator as belonging to First Respondent's Director.

5.3 I am satisfied that Applicant has made out a case for the main application to be considered on a default basis and proceed to deal with the merits of the case.

3.1 Applicant claims statutory and common law rights in the use of the name CTM in relation to its variety of goods and services, including building and construction materials; widespread and extensive use thereof nationally and regionally; its having traded under the CTM banner as far back as 1992. Mr Wood goes into much detail in his affidavit and supporting documentation to describe and underscore the substantial goodwill and reputation of the Applicant.

3.2 Applicant also contends that the dominant and memorable part of the First Respondent's company name, "CTM" is identical to the Applicant's trademark CTM.⁵ Applicant has also argued that the word "Builders" in the First Respondent's name, exacerbates the likelihood of confusion because of the

⁵ Annx. BW3 – BW3.13: Proof of registration of Applicant's trademarks in South Africa attached to the application.

clearly overlapping business activities.

- 3.3 Applicant has underscored the prejudice it will suffer if denied relief, especially as it does not have control over the quality of products or services of the First Respondent.
- 5.4 “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.⁶ 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.”⁷
- 5.5 “Confusingly similar” in Section 11(2)(b) must 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.”⁸ 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.”⁹
- 5.6 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 names of the parties, which can lead to injury of the Applicant’s

⁶ Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)

⁷ 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

⁸ Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280

⁹ Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G

business, especially since it has no control whatsoever over the quality of goods and services rendered by the First Respondent. The doctrine of imperfect recollection has been explained by our courts¹⁰: 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.

- 5.7 In **Cowbell AG vs 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."
- 5.8 It can therefore be concluded that the word "CTM" in First Respondent's name could mislead the reasonable person to believe incorrectly that there is an association with the Applicant's business. The two businesses have overlapping activities, and this will, as under section 11(2)(b), include the likelihood/possibility that the reasonable person will be misled.
- 5.9 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 First Respondent to keep the name CTM 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 public. It is evident therefore that the name CTM as incorporated in First Respondent's company

¹⁰ Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B

name falls within the ambit of Section 11(2)(b)(iii) and (c) as argued.

6. FINDINGS

6.1 I find that the balance of convenience favours the Applicant.

6.2 Applicant has shown that First Respondent has transgressed Section 11(2)(b) and (c) of the Act: its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that the First Respondent is part of, or associated with the Applicant. Hence it 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 First Respondent change its name to one which does not incorporate the word CTM, as it is in contravention of Sections 11(2)(b)(iii) and (c)(i) of the Act.

7.2 This order must be served on the Respondents by the Tribunal's Recording Officer (Registrar).

7.3 The First 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 First Respondent, as the matter has not been opposed. The First Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment.

7.5 Since First Respondent is a profit company, in accordance with Section 11(1)(b) and (3)(a) of the Act, it can use its registration number as its company name immediately followed by the expression “South Africa”, should it not be in a position to use another name.

7.6 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