



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01052/ADJ/2022

In the matter between:

FLIGHT CENTRE TRAVEL GROUP (PTY) LTD

APPLICANT

and

**FLIGHT CENTRE TRAVEL TOURS (PTY) LTD
(2019/540655/07)**

FIRST RESPONDENT

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

SECOND RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 10 September 2022

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1. Applicant is Flight Centre Travel Group (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa, with registration number 1994/000253/06, and its registered address at 299 Pendoring Road, Blackheath, Johannesburg.

- 1.2. Applicant is the owner of the trademark “Flight Centre” in various classes and areas in which it has been conducting business.
- 1.3. First Respondent is Flight Centre Travel Tours (Pty) Ltd., a company incorporated in terms of the Companies Act 71 of 2008 (“the Act”), with registration number 2019/540655/07, and having its registered address at 7 Aston Street, Sandton, Gauteng, 2031.
- 1.4. Second Respondent is the Companies and Intellectual Property Commission (“CIPC), a juristic person established in terms of s185(1) of the Act.
- 1.5. This is an application for a determination order:
 - a. That First Respondent’s name does not satisfy the requirements of s11(2) of the Act, and
 - b. That First Respondent be directed to choose a new name as provided for in terms of s160 of the Act.

2. BACKGROUND

- 2.1. During December 2021, Applicant engaged First Respondent’s director via email about its objection to First Respondent’s name. First Respondent’s Director acknowledged this and indicated her need to seek legal advice. Nothing further was forthcoming despite Applicant’s further correspondence with First Respondent.
- 2.2. On 07 June 2022 this Tribunal stamped Applicant’s CTR 142 application for relief. On 10 June 2022, the Sheriff of Sandton South served a copy of the application on the First Respondent by attaching a copy thereof to the principal front door of its registered address. On 13 June 2022 Applicant also had a copy of the application emailed to Respondents.
- 2.3. First Respondent did not file an answering affidavit within twenty (20) business days, following which, on 11 August 2022, Applicant applied for a default order

in terms of Regulation 153 of the Companies Regulations (the Regulations).¹

- 2.4. Euan James Ian McNeil, Applicant's Managing Director deposed to the affidavits for the initial application and in support of the application for default judgment.

3. ISSUES

- 3.1 Applicant requests this Tribunal to make a finding that First Respondent's name does not satisfy the provisions of s11(2) of the Act. It submits that the inclusion of the word 'Flight Centre' in First Respondent's name infringes its registered trademarks.
- 3.2 Applicant claims common law and statutory rights in the words 'FLIGHT CENTRE' given its widespread and extensive use thereof as far back as 1990s, and its use of the 'FLIGHT CENTRE' trademark in various fields. It has a large market share and presence in the South African travel and tourism industry.
- 3.3 Applicant submits that the dominant and memorable part of First Respondent's name is identical to the Applicant's trademark "Flight Centre". Applicant contends that the remaining portion of First Respondent's name 'Travel Tours' is purely descriptive of its activities and business interests. Applicant concludes that First Respondent's name is therefore confusingly and deceptively similar to Applicants' registered trademark 'Flight Centre'.
- 3.4 Applicant further submits that First Respondent's activities clearly overlap with those of the Applicant in relation to goods or services.² This has resulted in First Respondent taking unfair advantage of, or being detrimental to, the distinctive character and repute of its well-known 'Flight Centre' trademark and amounts to an infringement of s34(1) of the Trade Marks Act.

¹ GN R351 in GG 34239 of 26 April 2011.

² Evidence in support of this was attached to the application

3.5 Applicant also contends that it has not authorised the use by First Respondent of its trademark. 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 First Respondent. It submits that members of the public are very likely to believe that First Respondent was formed for the purpose of rendering services on behalf of the Applicant. Thus it claims that the First Respondents company name does not comply with the provisions of s11(2)(b) 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 I am convinced 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.

5.2 “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.³ 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.”⁴

5.3 “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.”⁵ 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

³ Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)

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

or deception.”⁶

- 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 First 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 Respondent. The doctrine of imperfect recollection has been explained by our courts⁷: 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."
- 5.5 It can therefore also be concluded that the word ‘Flight Centre’ in First Respondent’s name will reasonably mislead the reasonable person to believe incorrectly that there is an association with the Applicant’s ‘Flight Centre’ trademarks.
- 5.6 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’s 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 First

⁶ Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G

⁷ Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B

Respondent to keep the name 'Flight Centre' 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 'Flight Centre' as incorporated in the First Respondent's company name falls within the ambit of Section 11(2) as argued.

- 5.7 Finally, I am mindful of the order handed down by Mbongwe, J. in the matter of **Comair Ltd v Kulula South Africa**⁸ wherein it was declared that this Tribunal is empowered to make an administrative order directing Second Respondent to change the name of a company to its registration number, if First Respondent fails to change its name within a certain period as ordered.

6. FINDINGS

- 6.1 I find that the balance of convenience favours the Applicant.
- 6.2 Applicant has shown that First Respondent has transgressed Sections 11(2)(b) and (c): its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that 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 'FLIGHT CENTRE' as it is in contravention of Sections 11(2)(b)(iii) and (c)(i) of the Act.

⁸ Comair Ltd v Kulula South Africa (Pty) Ltd (unreported) High Court of South Africa, Gauteng Division, Pretoria, Case Nr: 65895/2019

- 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 30 (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.
- 7.5 Since the 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 Second Respondent is directed to change First Respondent's name to its registration number, if First Respondent fails to change its name within 30 days of receipt of this order.

ADV. ISHARA BODASING