



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No. **CT01162ADJ2022**

In the matter between:

**KAP INDUSTRIAL HOLDINGS
LIMITED (REGISTRATION NO. 1978/000181/06)**

APPLICANT

and

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

RESPONDENT

Presiding Member of the Companies Tribunal: Ms D Terblanche

Date of Decision: 8 February 2023

DECISION (Reasons and Order)

THE PARTIES

1. The Applicant is KAP Industrial Holdings Limited (the “Applicant”), a public company duly registered and incorporated under the company laws of the Republic of South Africa, with registration number 1978/000181/06, with its address of registered office at 3rd Floor, Building 2, The Views, Founders Hill Office Park, 18 Centenary Street, Modderfontein, Gauteng, 1645.

2. The Respondent is the Companies and Intellectual Property Commission (“CIPC” or the “Respondent”), a juristic person established in terms of s185(1) of the Companies Act 71 of 2008 (the CA).

THE APPLICATION

3. This is a default application in terms of section 160 of the CA, read with Regulation 13, further read with regulations 143 and 153 of the Regulations promulgated under the CA in 2011 as amended from time to time (the “Regulations”).

4. Section relevant provisions of section 160 of the CA provide 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.*

(My underlining)

5. Regulation 13 provides that –

“A person may apply in form CTR 142 to the Tribunal in terms of section 160 if the person has received - ... (c) a Notice Refusing to Reserve or Register a Name, in form CoR 9.5.”

6. Regulation 153¹ empowers the CT to issue default orders in instances where a person or persons who was served with an initiating document has not filed a response within the prescribed period, namely, within 20 days, as per Regulation 143².

¹ Regulation 153 provides that –

“(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.”

² Regulation 143 provides that –

“(1) been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must –

- (a) *serve a copy of an answer on the initiating party; and*
- (b) *file the answer with proof of service.”*

7. In considering whether the Companies Tribunal may grant the Applicant the relief it seeks, the Companies Tribunal must determine whether the application is in order procedurally, and the relevant timeframes, prescribed forms and procedures have been adhered.
8. Once I have addressed whether the Applicant met the procedural requisites for the application, I will then deal with the substantive matter, namely “... whether the name, or the reservation, registration or use of the name, ... satisfies the requirements of this Act.”

PRELIMINARY MATTERS

9. I now consider whether the –

- 9.1. Applicant received a Form CoR 9.5 as per Regulation 13(b).
 - 9.2. Applicant brought the application within three (3) months after the CIPC issued the Form CoR 9.5 (see section 160(2)(a) of the CA).
 - 9.3. Application meets the requirements of Regulation 153 read with Regulation 143 of the Regulations.
10. On perusing the application and the supporting documentation it appears the Respondent issued a Form CoR 9.5 to the Applicant on the 5th of September 2022.
 11. The Applicant filed its application with the CT on the 20th of September 2023, within the 3-month period.
 12. On the 20th of September 2022, the Applicant filed Form CTR 142 with the CT. This is evident from the CT’s date and time stamp appearing on the face of Form CTR 142, reflecting the date as 20 September 2022, and the time as 10:15.
 13. The Applicant proceeded to serve the Form CTR 142 and the application on the Respondent *via* email on the 20th of September 2022 at 14:15.

14. The Respondent acknowledged receipt of service on the same day at 17:22. This evidence appears from the respective emails' date and time stamps.
15. Despite having acknowledged receipt of the Form CTR 142 and the Applicant's application, the Respondent has not filed an answer within the twenty (20) business prescribed in Regulation 143(1), namely by 18 October 2022. This is evidenced by the email from Mandla Zibi of the Companies Tribunal to Moore Attorneys on 18 October 2022.
16. I am satisfied that the 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.

THE SUBSTANTIVE ISSUE FOR CONSIDERATION

17. The substantive question for consideration is whether the name the Applicant wished to reserve, satisfies the requirements of the Cam more specifically section 11(2)(b)(iii) of the CA.
18. The Applicant's submissions and evidence in support of the application appear from a founding affidavit deposed to by Chris-Mari Beetge, Assistant Group Company Secretary of the Applicant ("Beetge"), duly authorized by the Board of the Applicant. Mr. Shane Peter Moore, managing partner of Moore Attorneys Incorporated ("Moore"), deposed to a confirmatory affidavit.
19. The Respondent issued a 'Notice Refusing Name Reservation' on 5 September 2022. for the name KAP, in terms of section 11(2)(b) of the Companies' Act, *"due to the fact that it is confusingly similar to names already registered in the meaning of our name register in particular in terms of Sec 11(2)(b) of the Companies Act."* The Respondent indicated that it identified the following conflicts:-
 - 19.1. KAP DÉCOR
 - 19.2. KAP E TECH

19.3. KAP GRAPHIX

20. The Applicant summarized the bases upon which it believes its application for the reservation of the name KAP satisfies the requirements of Section 11 of the Companies Act in its Form CTR 142. It stated that –

20.1. *“The CoR 9.5 with reference number 9372778452, issued on 5 September 2022, was issued contrary to the provisions of section 11(2)(a) of the Companies Act, in that the proposed name KAP is not the same as the names cited on the Respondent’s form COR 9.5.*

20.2. *In accordance with section 12(2)(a) of the CA, the Respondent must reserve the proposed name KAP is not prohibited from using the name as applied for in terms of section 11(2)(a) of the Companies Act.*

20.3. *Furthermore, the Applicant is the registered proprietor of a number of trade mark registrations incorporating the proposed name KAP, including, inter alia, KAP on its own. The Applicant bears a substantial reputation in the name KAP, and is therefore entitled to its reservation, registration, and use.”*

21. The Applicant submitted that two (2) of the (3) three name registrations, the Respondent asserted are confusingly similar to the name the Applicant wished to reserve, have been changed due to Applicant’s actions. The one resulting from a successful challenge in this Tribunal against KAP E TECH, and a second through negotiations with KAP GRAPHIX. Both these company registrations have been amended, and the amended names registered.

22. According to the Applicant, as appears from Moore’s confirmatory affidavit, Applicant has become aware of various company name registrations incorporating the word ‘KAP’, including -

22.1. Three (3) company registrations the Applicant resolved through negotiations.

22.2. Two (2) company registrations of companies who were parties to proceedings before this Tribunal, with the Tribunal having ruled in the Applicant’s favour.

22.3. Fifteen (15) company registrations potentially subject to future proceedings before this Tribunal.

- 22.4. Twenty-nine (29) company registrations which are in the process of deregistration and where the Applicant will not act for the time being; and
- 22.5. Twenty (20) company registrations which the Applicant does not view as confusingly similar. This last category includes KAP Décor (Pty) Ltd with registration number 2022/239628/07.
23. The Applicant submitted that it is the proprietor of 6 trade marks that are identical to the proposed name 'KAP', 2 each in classes 35, 39 and 42 respectively, registered from 29 July 2019 and expiring on 16 November 2027.
24. The Applicant argues that the Respondent –
- 24.1. Contravened section 11(2)(b)(iii) of the CA, in refusing to approve the Applicant's application for the reservation of the company registration name KAP. The Applicant is the proprietor of the KAP trade mark, and the registered owner of the company name KAP Industrial Holdings (Pty) Ltd, in addition to other companies falling within the Applicant's group of companies, which also include KAP in their registered company names.
- 24.2. Must reserve each name the Applicant applied for under section 12(2) of the CA, unless the Applicant is prohibited from using the name it applied for (see section 11(2)(a) read with section 12(2)(a) of the CA); or unless the name has already been reserved, see section 12(2)(b) of the CA.
- 24.3. May not refuse a name reservation application based on its view that the name applied for is inconsistent with section 11(2)(b), (c) or (d) of the CA. If the respondent is of the view that the name applied for is inconsistent with section 11(2)(b), (c) or (d) of the CA, the Respondent's remedy lies in section 12(3) of the CA, which provides that Respondent may require the Applicant to serve a written notice on a person who may have an interest in the name. That person (who may have an interest in the name), may then apply to the CT for a determination in terms of section 160 of the CA. The Applicant referred this Tribunal to the matter of Anna Françoise du Preez vs the Companies and Intellectual Property Commission, Case number CT017Jul2018, in support of

this argument.

EVALUATION

25. Section 160(3) of the CA mandates the CT to –

“(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 ...”

26. Due to this being a default application, only the Applicant made submissions and argued for the CT to grant its application.

27. The Applicant made its submissions and placed its evidence before the CT by way of a founding affidavit and supporting documentation, by its Company Secretary, Beetge, confirmed by Moore, managing partner of Moore Attorneys incorporated.

28. I am called upon to decide whether the name KAP the Applicant applied to reserve, satisfies the requirements of section 11 of the CA. I will limit my considerations to section 11(2)(b) of the CA, as the Respondent refused the name reservation application on the basis that the name KAP is confusingly similar to three other company registrations in contravention of section 11(2)(b) of the CA.

29. In the Form COR 9.5 the Respondent stated that -

“The following conflicts were identified – KAP Decor, KAP E Tech and KAP Graphix”; and

“Unfortunately none of your names can be approved due to the fact that it within the meaning of our name register in particular in terms of Sec 11(2) (b) of the Companies Act.”

30. I will also not deal with the CoR 9.5 insofar as it relates to the company registrations of KAP GRAPHIX and KAP E TECH. Based on the Applicant’s submissions and evidence

before me, which I accept, the application has become moot insofar as those company registrations are concerned.

31. The evidence before me is uncontrivable that these companies' names have indeed been amended. This is evident from -

31.1. Annexure FA17, COR14.3 - Certificate issued by the Commissioner of Companies & Intellectual Property Commission on Wednesday, September 7, 2022 at 15:01 , reflecting dated changing the name of KAP E TECH in accordance with the Tribunal order dated 5 May 2022.

31.2. Annexure FA19, reflecting the Amended registration certificate (COR14.3) with an effective date of 1 September 2020 for KAP GRAPHIX, that "The above company has filed an amendment of its Memorandum of Incorporation in terms of section 16 of the Companies Act, 2008, changing the company name from KAP GRAPHIX to OURIDIA."

32. This then leaves KAP DÉCOR, and whether KAP, the name the Applicant applied to reserve, is confusingly similar to KAP DÉCOR.

33. Section 11(2)(b) provides that –

"The name of the company must ... (b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless - (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 or owner of the business name, trade mark or mark, or is authorised by the registered owner to use it; ..."

(My underlining)

34. On the plain reading of this above text, the prohibition on 'confusingly similar' company names is not absolute. As intimated by the use of the word 'unless' in the text of section 11(2)(b) of the CA, 'confusingly similar' company names are allowed if the company name is similar to a trade mark or company name the company owns.

35. The fact of this matter, on the evidence before me, is that the Applicant is the owner of

the trade mark KAP, and owner of the business name KAP.

36. I agree with the Applicant that its name reservation application is consistent with the provisions of section 2(b)(iii) of the CA. The Applicant is the proprietor of the KAP trade mark (6 of them), and is the registered owner of the company name KAP Industrial Holdings (Pty) Ltd, in addition to other companies falling within the Applicant's group of companies, which also include KAP in their registered company names.
37. I find that the name KAP satisfies the requirements of the CA, specifically with reference to section 11, and more specifically section 11(2)(b)(iii) of the CA.
38. The Applicant challenged the Respondent issuing it with a Form CoR 9.5 in two respects:
- 38.1. Firstly, the Respondent was obliged to approve the Applicant's name reservation application. Section 12(2) of the CA obliges the Respondent to reserve the name the Applicant applied for, as the Applicant was not prohibited to using the name in terms of section 11(2)(a)³, and the name was not reserved in terms of section 12 of the CA⁴.
- 38.2. Secondly, that the Respondent was not empowered under section 12(3) of the CA to issue the Applicant with a Form CoR 9.5. The Respondent alleged the Applicant contravened section 11(2)(b) of the CA. In such an instance, section 12(3)⁵ of the CA mandates the Respondent to serve a notice on an interested

³ Section 11(2) provides as follows:

" The name of a company must not be the same as

- (i) the name of another company, domesticated company, registered external company, close corporation or cooperative;
 - (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 subsection 9, or as a business name in terms of the business names act, 1960 [act 27 of 1960], unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favor of the company;
 - (iii) a registered trademark 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 trademark or a well-known trademark as contemplated in section 35 of the trademarks act, 1993 open brackets act 194 of 9093 close brackets, 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 17 of 1941], except to the extent permitted by or in terms of that act;"
- (My underlining)

⁴ Section 12(2)(b) provides that "*The Commissioner must reserve each name as applied for in the name of the applicant, unless – (b) the name as applied for is already reserved in terms of this section.*"

⁵ Section 12(3) of the CA provides that –

"If, upon reserving a name in terms of subsection (2), there are reasonable grounds for considering that the name may be inconsistent with the requirements of –

party, for that interested party to apply to the CT for a determination under section 160 of the CA, should that interested party so wish.

FINDINGS

39. I considered and find that the balance of probabilities favours the Applicant.
40. I find that the Applicant's name KAP satisfies the requirements of section 11 of the CA.
41. On the plain reading of the provisions of sections 12(2) and 12(3) of the CA, applied to the facts of this matter, the Respondent is obliged to adhere to the prescripts of section 12(2) and 12(3) of the CA.
42. The Respondent -
 - 42.1. Was obliged to reserve the name KAP the Applicant applied for.
 - 42.2. Acted contrary to the provisions of section 12(3) of the CA by issuing the Applicant with Form CoR 9.5.

CONSIDERATION OF THE ORDER SOUGHT

43. The Applicant requests the Companies Tribunal to grant the following orders –
 - 43.1. Directing the Respondent to comply with *inter alia* sections 11 and 12 of the Companies Act,
 - 43.2. Setting aside Form CoR 9.5 refusing the reservation of the name KAP,
 - 43.3. Ordering the issuance of Form CoR 9.4, approving the reservation of the name KAP; and
 - 43.4. Granting the Applicant further and / or alternative relief.

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- (a) section 11(2)(b) or (c) -
- (i) the Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant; and
 - (ii) any person to whom a notice is required to be given in terms of subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160; or ..."

44. Section 160(3) of the CA prescribes the orders the CT may grant after making a determination on an application in terms of section 160 of the CA. It provides that the CT may make an administrative order directing -

“(3)(b)(i) ... the Commission to—

- (aa) reserve a contested name, or register a particular defensive name that had been contested, to the applicant;*
- (bb) register a name or amended name that had been contested as the name of the 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*

“(3)(b)(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.”

ORDER

45. Having considered the Applicant’s application, the orders the Applicant seek, and the orders the CT may grant, I hereby -
- 45.1. Set aside the Form CoR 9.5 the Respondent issued to the Applicant refusing the reservation of the name KAP.
 - 45.2. Orders the Respondent to issue Form CoR 9.4, approving the reservation of the name KAP.
 - 45.3. Orders the Tribunal’s Recording Officer to serve this order on both the Applicant and the Respondent within 5 days of issuance.

45.4. Make no costs order.

Dated at Johannesburg on this 8th day of February 2023.

Ms. Diane R Terblanche