



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01111/ADJ/2022

In the matter between:

AMKA PRODUCTS PROPRIETARY LIMITED

APPLICANT

and

AMKA TRADING PROPRIETARY LIMITED

FIRST RESPONDENT

COMMISSIONER OF COMPANIES

SECOND RESPONDENT

Presiding Member of the Companies Tribunal: MINAH TONG-MONGALO

Date of Decision: 28 February 2023

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1. The applicant is Amka Products Proprietary Limited, a company duly incorporated in terms of the company laws of South Africa, with registration

number 1979/005849/07, and its registered place of business is recorded as 14 Ellman Street, Sunderland Ridge, Centurion, 0157.

- 1.2. First Respondent is Amka Trading (Pty) Ltd., a company incorporated in terms of the Companies Act 71 of 2008 (“the Act”), with registration number 2020/846201/07, and having its registered address at 23 Kipling Road, Castlevue, Germiston, Gauteng, 1401.
- 1.3. The Second Respondent is the Commissioner of Companies appointed in terms of s189 of the Act, cited herein as the head of the Companies and Intellectual Property Commission (“CIPC), a juristic person established in terms of s185(1) of the Act.
- 1.4. This is an application for a determination order:
 - 1.4.1. That First Respondent’s name does not satisfy the requirements of s11(2) of the Act, and
 - 1.4.2. That First Respondent be directed to choose a new name as provided for in terms of s160 of the Act.

2. BACKGROUND

- 2.1. The Applicant owns the trademark “Amka” in various classes. The first application for this trademark was made in 1987 and has since been renewed several times. The Applicant has been conducting business in South Africa since the 1950s, manufacturing and distributing health, beauty, and home care products. The Applicant also has associated companies under the Amka Group. It also operates in various countries.
- 2.2. Upon discovering the First respondent’s use of the trademark “Amka”, the Applicant’s attorneys engaged the First respondent. However, such engagements did not result in the settlement of the dispute. Consequently, the Applicant approached the Companies Tribunal (‘the Tribunal’) for a determination.

- 2.3. The Applicant's application satisfied the prescribed procedural requirements in that:
- 2.3.1. The Applicant submitted the prescribed CTR 142 Application Form and supporting documents on 3 August 2022. The Tribunal affixed a date stamp on the aforesaid form on an even date.
 - 2.3.2. Through the Sheriff of the High Court, Germiston South, the Applicant served the S 160 application on the First Respondent by personal service on 4 August 2022. The Applicant's attorneys also served an electronic copy via email to the First Respondent on 11 August 2022. Proof of delivery was attached.
 - 2.3.3. The First Respondent was afforded the 20 days to submit a reply affidavit but failed to do so.
 - 2.3.4. The representative of the Applicant has provided proof of authority to act on behalf of the Applicant in this matter.
- 2.4. Following the failure by the First Respondent to file an answering affidavit within twenty (20) business days, the Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the Regulations).¹

3. ISSUES

- 3.1. The Applicant requests this Tribunal to find that the First Respondent's name does not satisfy the provisions of s11(2) of the Act. It submits that including the word 'Amka' in the First Respondent's name infringes its registered trademarks.
- 3.2. The Applicant claims common law and statutory rights in 'Amka' given its widespread and extensive use thereof as far back as 1987.

4. THE APPLICANT'S SUBMISSIONS

- 4.1. The Applicant has argued that:
 - 4.1.1. The First Respondent's name is confusingly similar to the Applicant's well-

¹ GN R351 in GG 34239 of 26 April 2011.

known distinctive trade mark, AMKA. The addition of the word “Trading” does not serve to distinguish the First Respondent’s name from the Applicant’s trademark.

- 4.1.2. Because the two marks are visually and phonetically identical, confusion or deception is possible. Moreover, the Google search results using the First Respondent’s name brings up result for the Applicant’s business.
- 4.1.3. The Applicant’s name is well-known in South Africa and in other countries. Any bad service, inferior products, and publicity on the First Respondent will harm the Applicant’s 70-year reputation and goodwill. This will affect the Applicant’s associations and its relationship with the investors.
- 4.1.4. Consequently, the name “Amka Trading Property Limited’ does not satisfy the requirements of S 11 (2) (a) or (b) or (c) of the Act.

5. APPLICABLE LAW

5.1. **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;”*

5.2. **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.”

5.3. **Companies Regulation 153** of 2011 provides for default orders:

5.3.1. *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.*

6. EVALUATION

6.1. I am convinced 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 case's merits.

6.2. Section 11(2)(b) of the Act restricts the registration of names that are 'confusingly similar to a name, trade mark, mark, or word or expression' to that of the aggrieved party.

6.3. "Similar" means the name in question has "a marked resemblance or likeness" to that of the Applicant. The offending name should immediately bring to mind the well-known trade mark or 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. The names must be so alike such that it may confuse the "ordinary reasonable careful man, i.e., not the very careful man nor the very careless man."³ The said "reasonable man" is "the class of persons who are likely to be the purchasers of the goods in

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

³ Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd 1979 (2) SA 276 (E) at 280. In Cape Town Lodge CC v Registrar of Close Corporations and another [2008] 2 All SA 34 (C) 38 the court found that travellers were unlikely to think that Cape Town Lodge was part of the City Lodge.

question”⁴

- 6.4. Furthermore, the trade mark is considered well-known in the Republic “if it is well-known to persons interested in the goods or services to which the mark relates.”⁵ The Applicant bears the onus of proving on a balance of probabilities that when comparing the two marks, there is the likelihood of confusion or deception.⁶
- 6.5. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined considering the particular circumstances of the case.⁷
- 6.6. The intellectual property owners and reputable business names must be protected from ‘those passing themselves or coat-tailing’ on their reputation and goodwill.⁸ Furthermore, a determination must be made whether the proposed name may mislead the public to believe that there is a non-existent association between two companies that are in fact not associated with each other.⁹ While protecting the legitimate rights of an existing business, care must be taken not to unfairly restrict freedom of expression. The Constitutional Court said that the ‘[t]he question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the free speech of the Constitution and the property protection objectives of trademark law, would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved. The balancing of interests must be based on the evidence on record, supplemented by such knowledge of how the world works as every judge may

⁴ Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at 315F-G.

⁵ McDonald’s Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another [1996] 4 All SA 1 (A)

⁶ Cape Town Lodge CC v Registrar of Close Corporations and another [2008] 2 All SA 34 (C).

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 Farouk Cassim et al *The Law of Business Structures* 2 ed Juta and Company Ltd (2021) at 120.

⁹ Ibid.

be presumed to have.’¹⁰ “[T]he 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.”¹¹

- 6.7. The only distinction between the two names is that one is ‘Products Proprietary Limited’ and the other is ‘Trading (Pty) Ltd’. The dominant name is ‘Amka’. Consequently, there is a high probability that the public may conclude that the two are associated, which is not the case.
- 6.8. In line with **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 First Respondent. The doctrine of imperfect recollection has been explained by our courts¹²: 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.
- 6.9. 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

¹⁰ Laugh It Off Promotions Cc V Sab International (Finance) Bv T/A Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) Sa 144 (Cc) Para 82.

¹¹ Cowbell AG v ICS Holdings 2001 (3) SA 941 (SCA).

¹² Standard Bank of South Africa Limited v United Bank Limited & Another 1991 (4) SA 780 (T) 8011 to 802B.

Respondent to keep the name 'Amka' in its company name will create confusion and hinder the Second Respondent from maintaining and promoting good governance and administration of a corporate entity in the general public's interest. Evidently, the name 'Amka' as incorporated in the First Respondent's company name falls within the ambit of Section 11(2), as argued by the Applicant.

- 6.10. Finally, I am mindful of the order handed down by Mbongwe, J. in the matter of **Comair Ltd v Kulula South Africa**¹³, wherein it was declared that this Tribunal is empowered to make an administrative order directing the Second Respondent to change the name of a company to its registration number if the First Respondent fails to change its name within a certain period as ordered.

7. FINDINGS

- 7.1. The balance of convenience favours the Applicant.
- 7.2. The Applicant has shown that the First Respondent has transgressed Sections 11(2)(b) and (c) in that its name is confusingly similar and falsely implies, or could reasonably mislead a person to incorrectly believe, 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.
- 7.3. The Applicant's application is granted as set out below.

8. ORDER

- 8.1. The First Respondent is ordered to:
- 8.1.1. change its name to one which does not incorporate the word 'AMKA' as it is in contravention of Sections 11(2)(b)(iii) and (c)(i) of the Act; and to
- 8.1.2. file a notice of amendment of its Memorandum of Incorporation within 30

¹³ Comair Ltd v Kulula South Africa (Pty) Ltd (unreported) High Court of South Africa, Gauteng Division, Pretoria, Case Nr: 65895/2019

(calendar) days of the date of receipt of this order.

- 8.2. Since the First Respondent is a profit company, per 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.
- 8.3. The Second Respondent is directed to change First Respondent's name to its registration number if First Respondent fails to change it within 30 days of receipt of this order.
- 8.4. The Tribunal's Recording Officer (Registrar) must serve this order on the Respondents.
- 8.5. There is no order of costs against the First Respondent, as the matter is not opposed.

MINAH TONG-MONGALO