



## IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT01166ADJ2022**

In the matter between:

**TIMETOSWITCH CC** First Applicant  
(Registration number: B2007058592)

**MONEYSHOP CO ZA (PTY) LTD** Second Applicant  
(Registration number: K2018096455)

and

**MONEY SHOP (PTY) LTD** First Respondent  
(Registration number: 2018/605779/07)

**COMMISSIONER OF COMPANIES** Second Respondent

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### DECISION (Reasons and Order)

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#### INTRODUCTION

1. The First Applicant is Timetoswitch CC, a South African close corporation with registration number B2007058592, incorporated in accordance with the law of the Republic of South Africa and having its registered address and principal place of business at 38 Dover Street Ferndale Randburg Gauteng 2194.

2. The Second Applicant is MoneyShop Co ZA (Pty) Ltd, a South African private company with registration number K2018096455, incorporated in accordance with the company laws of the Republic of South Africa and having its registered address and principal place of business at 38 Dover Street Ferndale Randburg Gauteng 2194.
3. The First Respondent is Money Shop (Pty) Ltd (registration number 2018/605779/07), with its registered address at E708 Oodyglen Mpumalanga Township Hammarsdale Kwa-Zulu Natal 3699.
4. The Second Respondent is the Commissioner of the Companies and Intellectual Property Commission, established in terms of section 185 of the Companies Act 71 of 2008 ("Companies Act"), cited in its official capacity as custodian of the companies register.
5. The First Applicant is the registered owner of the trademark "MONEYSHOP" (registration no 2019/17144), which has been registered in class 36 to cover *insurance; financial affairs; monetary affairs; real estate affairs*.
6. On 6 May 2022, a registered letter of demand was sent to the First Respondent by attorneys representing the First and Second Applicants. This letter, *inter alia*, objected to the similarity between the First Respondent's name and the MONEYSHOP trademark, alleging non-compliance with the Companies Act, and informing the First Respondent of the Applicants' intention to approach this Tribunal for appropriate relief. No response to this letter has been forthcoming.
7. The Applicants now seek a declaration that the First Respondent's name is contrary to the Companies Act, and an order directing the Second Respondent to change the First Respondent's name to its registration number.

8. This application is brought:
  - 8.1. in terms of section 160(1) of the Companies Act to determine whether the Respondent's name complies with the requirements of section 11 of the Act, and
  - 8.2. in terms of regulation 153 of the Companies Regulations, to be determined by default, the First Respondent not having filed a response.

## **RELEVANT LAW**

9. A company's name, in terms of section 11 of the Companies Act, must
  - 9.1. "not be the same as [or confusingly similar to] the name of another company [or] 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 trade mark as contemplated in Section 35 of the Trade Marks Act, 1993" (sections 11(2)(a)(i) and (iii), and 11(2)(b)); and must
  - 9.2. "not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company . . . is part of or associated with, any other person or entity" (section 11(2)(c)(i)).
10. Any person with an interest in the name of a company is, in terms of section 160(1) of the Act, entitled to bring an application to the Companies Tribunal (in the prescribed manner) for determination of whether the name satisfies the requirements of section 11 of the Companies Act.
11. Such application may be made "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" (section 160(2)).

12. The Companies Tribunal, after considering such application (“and any submissions by the applicant and any other person with an interest in the proposed name that is the subject of the application”):
  - 12.1. “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 [the] Act” (section 160(3)(a)), and
  - 12.2. “may make an administrative order directing . . . 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” (section 160(3)(b)(ii)).
13. In relation to default applications,
  - 13.1. “[i]f 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” (regulation 153(1)), and
  - 13.2. on such application, “the Tribunal may make an appropriate order – (a) after it has heard any required evidence concerning the motion; and (b) if it is satisfied that the notice or application was adequately served” (regulation 153(2)).

## **APPLICANT’S SUBMISSIONS**

14. In relation to the their use of the MONEYSHOP trade mark, the Applicants submit, *inter alia*, that:

- 14.1. Significant goodwill in the MONEYSHOP trade mark has accrued to the First Applicant as a result of its use by the Second Applicant (the trade mark licensee) since at least 2011.
  - 14.2. Since 2011, the Second Applicant has made extensive and continuous use of the MONEYSHOP trade mark as its trading name "MONEYSHOP" in South Africa. As a result of such extensive use, the Second Applicant has built up a substantial and extensive reputation in the trade mark, which rights accrued to the First Applicant by virtue of the licence agreement.
  - 14.3. Because of its extensive use and reputation, the MONEYSHOP trade mark qualifies as a well-known trade mark in terms of section 35 of the Trade Marks Act 1993
15. In relation to the objection to the First Respondent's name, the Applicants submit, *inter alia*, that:
- 15.1. The MONEYSHOP trade mark has, without authorisation from the First Applicant as owner, been included in its entirety in the First Respondent's company name.
  - 15.2. The fact that the First Respondent uses the MONEYSHOP trade mark as two words instead of one is insufficient to distinguish the name.
  - 15.3. The First Respondent's company name is confusingly similar to the MONEYSHOP trade mark, and its name would therefore be likely to cause deception and/or confusion amongst members of the public in that they are likely to believe:

15.3.1. that there is some form of association between the First Respondent's company and "the Applicants company and trade mark" (*sic*), and/or

15.3.2. that the goods/services of the First Respondent are in some way endorsed by the Applicants.

## EVALUATION AND FINDINGS

16. With regard to this application being brought by default in terms of regulation 153(1), this Tribunal is satisfied that there has been adequate service, and thus compliance with regulation 153(2)(b).

17. It also appears that the applicant passes the "good cause" test in that a reasonable explanation is given as to why the application should be heard by the Tribunal, and there has been no "undue delay" in bringing the application.

18. In determining whether the First Respondent's name is *confusingly similar* to the trade mark owned by the First Applicant, the relevant test is that used in relation to passing-off. According to *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) para 28 and *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc. and Others* 1977 (2) SA 916 (A) at 929, this turns on whether there is:

*"... 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."*

19. 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 (*ibid*); and the similarity in this regard must be such that it would confuse the "ordinary reasonable careful man, i.e. not the very careful man nor the very

careless man” (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E) at 280).

20. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 641H-642C the court found that the *onus* is on the plaintiff to show the probability or likelihood of deception or confusion, and set out the elements to be taken into account in a determination thereof:

*“It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant’s mark is used are the goods of the proprietor of the registered mark, ie the plaintiff, or that there is a material connection between the defendant’s goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection.”*

21. Whether there is a reasonable likelihood of such confusion arising is a matter for the judgment of the court and it is a question of fact which will have to be determined in the light of all the circumstances of each case (*Better Homes Expo (Pty) Ltd v Consep Home Ideas (Pty) Ltd and Others* (48170/17) [2019] ZAGPJHC 5; 2019 BIP 259 (GJ) (7 February 2019) at para 16.
22. In the present case, the Applicants have succeeded in discharging the onus of establishing a reasonable likelihood of deception or confusion on the part of persons encountering the name “Money Shop”, and this Tribunal accordingly finds that the First Respondent’s name falls foul of the restriction contained in section 11(2)(b) of the Companies Act – particularly, in so far as the confusing similarity relates to the MONEYSHOP trade mark owned by the First Applicant.

23. Although the Applicants do not appear to have framed their objection to the First Respondent's name in terms of section 11(2)(c)(i) of the Companies Act, the submissions made in relation to the name being such as would reasonably mislead a person to believe incorrectly that the First Respondent is associated with the First and/or Second Applicant have merit, and support a finding that the name "Money Shop" and the "MONEYSHOP" trademark are confusingly similar.

## **ORDER**

24. It is accordingly ordered that:
- a) the application be permitted to be brought by default;
  - b) the First Respondent is directed to change its name to one which does not incorporate the MONEYSHOP trade mark, and which is not confusingly and/or deceptively similar to the MONEYSHOP trade mark;
  - c) failing compliance with paragraph (b) within 3 months from the date of this order, the Second Respondent is directed, in terms of section 160(3)(b)(ii) read with section 142 of the Companies Act, to change the name of the First Respondent to its registration number followed by "(South Africa)" as the company's interim name on the companies register;
  - d) the Tribunal's Recording Officer (Registrar) is directed to serve this order on the First and Second Respondents.

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**Adv Richard Bradstreet**

Member of the Companies Tribunal

28 March 2023