



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01504ADJ2023

In the matter between:

**LEKKA DJY AUTO (PTY) LTD
(2023/594789/07)**

APPLICANT

and

**LEKKADJY AUTO AMD WELDING (PTY) LTD
(K2023963810)**

RESPONDENT

Presiding Member of the Companies Tribunal: MINAH TONG-MONGALO

Date of Decision: 7 NOVEMBER 2023

DECISION (Reasons and an Order)

INTRODUCTION

1. The Applicant is Lekka Djy Auto Pty Ltd, a company duly incorporated in terms of the company laws of South Africa, with registration number 2023/594789/07 and its registered place of business is recorded as 9 Neutron Street Triangle Farm, Western Cape 7530.
2. Respondent is LekkaDjy Auto and Welding, a company incorporated in terms of the

Companies Act 71 of 2008 ("the Act"), with registration number 2023/963810/07, and having its registered address at 9 Neutron Street, Triangle .

3. From the Applicant's Form CTR142 read together with his supporting affidavit, it is clear that this application concerns a name dispute in terms of section 160(1) of the Companies Act, 2008 ("Companies Act"), read with section 11(2)(a)(iii) of the Companies Act.

BACKGROUND

4. The Applicant's director, Jolandi Tito and the Respondent's director, Ruan van Der Walt, held shares in the Applicant company. The Applicant was incorporated on 24 February 2023. Ruan van Der Walt resigned as a director of the Applicant on 16 March 2023.
5. On 25 August 2023 the Respondent was incorporated, and the sole director is Ruan van Der Walt.
6. The purported proof of service attached to the application is a page with stating the document was for attention of Ruan van Der Walt. The name of the person of received the document is stated as Ruan, no surname provided, signed and dated 26 September 2023. However, this does not state was received by the signatory and whether the signatory is the director of the Respondent.
7. It is unclear whether or not this is a default judgment application.

ISSUES

8. The Applicant requests the Tribunal to make a finding that the Respondent's name does not satisfy the provisions of s11(2) of the Act. It submits that including the Respondent's name is confusingly similar to the Applicant's name.

THE APPLICANT'S SUBMISSIONS

The Applicant has argued that:

9. The Respondent was incorporated by the former shareholder of the Applicant who is competing unfairly in the same industry utilising marketing prior to the registration of the Applicant.
10. Consequently, the Respondent must change its name to one that is not confusingly similar and the Second Respondent should be ordered to change the Respondent's name to its registration number.

APPLICABLE LAW

11. **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;”

12. **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.”

13. **Companies Regulation 153 (1)** of 2011 provides for default orders:

13.1.1. *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.*

Companies Regulation 153 (2) state that the Tribunal may make a default order if it is satisfied that the notice or application was adequately served.

EVALUATION

14. 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.

15. 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.

16. "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.¹ 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."² The said "reasonable man" is "the class of persons who are likely to be the purchasers of the goods in question"³

17. Furthermore, the trade mark is considered well-known in the Republic "if it is well-

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

² *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.

³ *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315F-G.

known to persons interested in the goods or services to which the mark relates.”⁴
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.⁵

18. 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.”⁶

19. The intellectual property owners and reputable business names must be protected from ‘those passing themselves or coat-tailing’ on their reputation and goodwill.⁷ 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.⁸ 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 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

20. The names LEKKA DJY AUTO (PTY) LTD and LEKKADJY AUTO AMD WELDING (PTY) LTD are so similar that the public may be deceived to believe that the two are associated. Therefore, the reasonable man, who need not be a very careful man as per *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* is likely to be deceived that the two entities are associated.

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

⁵ *Cape Town Lodge CC v Registrar of Close Corporations and another* [2008] 2 All SA 34 (C).

⁶ *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.

⁷ Farouk Cassim et al *The Law of Business Structures* 2 ed Juta and Company Ltd (2021) at 120.

⁸ *Ibid.*

FINDINGS

20.1. There is insufficient proof that the application was served on the Respondent.

ORDER

20.2. The Application is refused.

20.3. The Applicant is permitted to bring this this application again, seeking an order for the Respondent to change its name, and ensuring proper service of the application for a default order on the Respondents. The Companies and Intellectual Property Commission should also be joined as a second respondent.

MINAH TONG-MONGALO