

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT025May2015

In the matter between:

Triumph International Aktiengesellschaft

Applicant

and

Trimph Holdings (Pty) Ltd

Respondent

Coram: Delport P.A.

Decision handed down on 10 December 2015

Decision

INTRODUCTION

- [1] The applicant applies for a default order that the respondent be ordered to change its name because it does not comply with s 11(2)(b) and s 11(2)(c)(i) of the Companies Act 71 of 2008 ("Companies Act").
- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 265 April 2011) ("Companies Act regulations" / "regulations") regulate an application to the Companies Tribunal ("Tribunal") as well as the application for a default order under certain circumstances.

BACKGROUND

- [3] The applicant is Triumph International Aktiengesellschaft incorporated in terms of the laws of Germany.

- [4] The respondent is Trimph Holdings (Pty) Ltd, a company incorporated in South Africa under registration number 2011/117791/07.
- [5] The application has a previous history when it was lodged under CTR008/03/2013. In that application however, the Tribunal (per K Manamela) found that the founding affidavit was deficient and the application was refused.
- [6] The founding affidavit now makes it clear that the deponent, Claudia Meindel who was apparently properly authorised to make the affidavit, was duly placed under oath by the notary public, Prof Dr Dieter Mayer as is evident from page 11 of the founding affidavit in respect of the subsequent application dated 26 May 2015.
- [7] A copy of the CTR 142 and the founding affidavit was served at the address of the respondent as per the records of the Companies and Intellectual Property Commission.
- [8] The service was not in accordance with s 220 of the Companies Act or with table CR3 in terms of Annexure 3 of the regulations. For some reason it was done in terms of Rule 4 of the Uniform Rules of Court.
- [9] The service was also not within the 5 business days as required by reg 142(2) as it was served on the respondent on 4 June 2015 (the error in the date was pointed out in the founding affidavit for the application for a default order) and there is no explanation as to the non-compliance or a request for condonation.
- [10] According to the Sheriff the service was to a brother of the “owner of” (whatever that may mean) the respondent.
- [11] Rule 4 of the Uniform Rules state that it should be delivered to an employee and (if there are no employees or there are employees but none can be found at the premises) a copy must be affixed to the main door. This is also the process prescribed by table CR3 in terms of Annexure 3 of the regulations.
- [12] I see no benefit in applying a technical and formalistic interpretation to the requirements of eg Rule 4 of the Uniform Rules of Court and table CR3 in

terms of Annexure 3 of the regulations under these circumstances. It would lead to “insensible and unbusinesslike results”: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. The test should be, as in the case of the National Credit Act No. 34 of 2005. “As long as steps taken show on a balance of probabilities that the notice is likely to have reached the consumer, the court before which the proceedings are brought may be satisfied that the notice was delivered.”: *Kubiyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) and also, *inter alia*, *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* [2014] 1 All SA 294 (SCA) para 16.

[13] Despite deficiencies, this was the second notice to the respondent and the steps taken would indicate, in my opinion, that the notice reached the respondent.

[14] The applicant became aware of the name of the respondent in 2012 and the process started with the first application in 2013 and ran, more or less continuously, up to the present application. I therefore do not think there was any delay which requires the applicant to show “good cause” as required in s 160(2)(b).

[15] There was no reaction from the respondent and the applicant applies for a default order in terms of reg 153:

15.1 that the respondent’s name does not comply with s 11(2)(b) and with s 11(2)(c)(i);

15.2 that the respondent is directed in terms of s 160(3)(b)(ii) to choose a name that does not consist of or incorporate the mark (sic) TRIMPH or any other mark (sic) which is confusingly and/or deceptively similar to the applicant’s TRIUMPH; and

15.3 for costs in favour of the applicant in terms of reg 156.

[16] The word “TRIMPH” is not a mark and s 11 does not refer to a “mark”.

APPLICABLE LAW

- [17] The remedies in s 160 are available, as far as it is relevant here, to “any...person with an interest”.
- [18] In *Ex parte application of Gore NO 2013 JOL 30155 (WCC)* para 35 the Court said that “[T]he term ‘interested person’ is not defined. I do not think that any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle...”. In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 389 the principle was stated as: “He failed, therefore, to show that he had what Van den Heever JA (in *Ex parte Mouton and Others* [1955 (4) SA 460 (A)] described as “n aktuele en teenswoordige belang’ [actual and existing interest] in the matter. . .” and in addition a person must also have a direct interest (*Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101). (*Henochsberg on the Companies Act 71 of 2008* at 101 and at 322(21) also in respect of “Any interested person”)).
- [19] The applicant is, as registered owner of certain trade marks, therefore a person with an interest as required by section 160 (1).
- [20] A “person” is defined in section 1 of the Companies Act to include a ‘juristic’ person. A “juristic person” is then defined in said section 1 as including “a foreign company”. The definition of a “foreign company” is *inter alia* “an entity incorporated outside the Republic”. The applicant is therefore a “person” for purposes of section 160.
- [21] In the ruling of the Tribunal in CTR008/03/2013, no “final judgment or order” was made on the merits and the Tribunal is therefore, in respect of the present matter, not *functus officio*: *Firestone South Africa (Pty) Ltd v Genticuro Ag* [1977] 4 All SA 600 (A) at 606.
- [22] Section 11 of the Companies Act provides as follows:
- “(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;
 - (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 (9), as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960), unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company;
 - (iii) 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 (Act No. 194 of 1993), 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 No. 17 of 1941), except to the extent permitted by or in terms of that Act;
- (b) not be confusingly similar to a name, trade mark, 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;
 - (ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a) (ii), the

company, or a person who controls the company, is the registered owner of that defensive name or business name;

- (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 of the business name, trade mark, or mark, or is authorised by the registered owner to use it; or
 - (iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a) (iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;
- (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;
 - (ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;
 - (iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;
 - (iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—
 - (aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or
 - (bb) international organisation; and...”

[23] Section 11(2)(b) of the Companies Act provides *inter alia* that the name of a company must not be confusingly similar to certain names and/or expressions mentioned in s 11(2)(a). The applicant did not bother to indicate which of the

four alternatives in s 11(2)(a) is relied on. Regulation 142(3)(a) clearly states the detail to be set out in CTR 142. This has not been complied with.

EVALUATION

- [24] The first question is then whether the name of the respondent is “confusingly similar” to (presumably) the trade mark of the applicant as required in s 11(2)(b).
- [25] The question is therefore whether the name of the respondent and the trade mark of the applicant are alike in a manner that will confuse the reasonable person, being the “ordinary reasonable careful man, ie not the very careful man nor the very careless man” (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E); *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA); *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C); *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013).
- [26] In *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C) the Court found that the use of the name “Azisa Media CC” in respect of an existing name ‘Azisa’ is not “undesirable” as was used in the 1973 Companies Act, but that the word “Azisa” *alone* would in all likelihood lead to inconvenience and confusion amongst the customers.
- [27] It needs to be added that the word “undesirable in terms of the 1973 Companies Act included notions of confusion and deception, and the authorities on “undesirable” can be used *mutatis mutandis* in respect of s 11 (b) and (c) of the 2008 Companies Act: *Cape Town Lodge CC v Registrar of Close Corporations and Another* [2008] 2 All SA 34 (C) and *Henocheberg on the Companies Act 71 of 2008* at 56.
- [28] The word “Triumph” in the applicant’s trade mark does not seem to be close to the “Trimph” in the respondent’s name and it does not even sound (phonetically) close, although it must be added that the Companies Act does

not provide for any phonetic similarity (dissimilarity) as claimed in para 5.2 of the (original/first) founding affidavit.

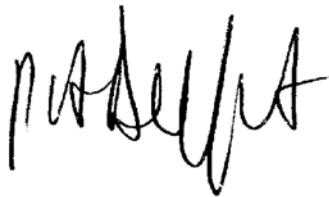
- [29] Although it may be argued that there may be a “visual” similarity as averred in para 5.2 of the (original/first) founding affidavit, it is clearly not enough to establish confusion as required by s 11(2)(b) if the test as in para 25 *supra* is applied.
- [30] There is no such word as “Triumph” in the English language and this would, in my opinion, further lessen the possibility of confusion.
- [31] The effect of the business by the respective parties is of no consequence in company law, as s 11 does not require a link to or a connection with a business activity as in the case of eg the Trade Marks Act No. 194 of 1993 and it also does not require or refer to a link to the goods or services in respect of which a mark has been registered in terms of the Trade Marks Act.
- [32] On the basis of the test for similarity (confusion) above and the *Azisa (Pty) Ltd* case *supra*, the reasonable person will not be confused and s 11(2)(b) will not be applicable.
- [33] “*Falsely* imply or suggest” in s 11(2)(c)(i) means *knowingly* false as the word “false” does not mean merely “incorrect” (*R v Scott* 1939 EDL 18) and requires, in my opinion, also fault in the form of intent (or maybe even negligence: *S v Oberholzer* 1971 4 SA 602 (A)). This was not proved or even averred.
- [34] The second part of s 11(2)(c)(i), ie to “reasonably mislead” is, in my opinion, the same test as in “confusingly similar”, but in this instance the requirement is not in respect of the name itself, but in the effect of that name. One could, in my opinion, also use elements of the test for passing-off, ie the likelihood of confusion. The results would be the same as the question would still be if the reasonable careful person will be misled by the name to think the respondent is associated etc with the business of the applicant.

[35] Section 11(2)(b) is not applicable as stated above, and therefore the requirements of s 11(2)(c)(i) were also not complied with

ORDER

[36] (a) The application is refused

(b) No order is made in respect of costs.

A handwritten signature in black ink, appearing to read 'M. A. B. J. A.', is positioned above a horizontal line.

MEMBER OF THE COMPANIES TRIBUNAL