THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT020Sep2014

In the matter between:

Maxi Groepskemans (Proprietary) Limited Applicant

(Registration number: 1991/001408/07)

and

Maxi Brokers (Proprietary) Limited Respondent

(Registration number: 2013/043286/07)

Coram: S. Gounden

Decision handed down on 1 April 2015

DECISION

INTRODUCTION

[1] The Applicant applies in terms of section 160 of the Companies Act 71 of 2008 ("Act" / "Companies Act") and regulations 143 and 153 of the Companies Regulations (GN R351 in GG 34239 of 26 April 2011) ("Companies Regulations" / "regulations") for a default order that the respondent be ordered to choose a new name (and to change its name) and file an amendment accordingly;

BACKGROUND

[2] The Applicant is the proprietor of the trademark "Maxi" for some 5 years and has been conducting business under that name.

[3] The Applicant filed an objection to the name “Maxi Brokers” as stated above as prescribed by regulation 142 (1) (a), together with a supporting affidavit as required by regulation 142 (1) (b). Louis Abraham Francois Cronje has signed the affidavit and a resolution from Maxi Groepskemans (Proprietary) Limited states that he was duly authorised to act for and on behalf of the Applicant.

[4] The applicant supplied the Sheriff with the application to be served on the respondent on the 2 October 2014. In terms of regulation 142 (2) it should be served on the respondent within 5 days of filing it with the Companies Tribunal. The date stamp of the Companies Tribunal on the CTR 142 is the 29 September 2014.

[5] Regulation 142 provides as follows:

“(2) The applicant must serve a copy of the application and affidavit on the respondent named in the application, within 5 business days after filing it.”

[6] In terms of regulation 153 (1) read with regulation 143 (1), the first respondent has 20 days to respond, failing which the Applicant is entitled to apply for a default order as provided for in regulation 153 (1).

[7] The Applicant therefore applies to the Companies Tribunal in terms of regulation 153 (2) that said Companies Tribunal makes a default order in terms of regulation 153 (1).

ISSUES

[8] A resolution of the Board of the Applicant authorising Louis Abraham Francois Cronje to act for and on behalf of the Applicant was included in the application.

[9] The Sheriff was unable to serve the application on the respondent as the respondent was not at the registered address, as per the CIPC record.

[10] The Applicant requests that the Companies Tribunal grants the relief in the form that the Respondent be ordered to choose a new name (and to change its name) and file an amendment accordingly; on the grounds that the use of

the name “Maxi” by the Respondent is in contravention of sections 11 (2) (b) and (c) (i) of the Companies Act.

[11] The Applicant is the registered proprietor of the “Maxi” trade mark in South Africa under trade mark registration numbers:

- 2006/26897; class 36 – in respect of insurance, financial affairs, monetary affairs, real estate affairs, medical aid services including group schemes;

[12] The Applicant submit that the dominant and memorable feature of the Respondent’s name “Maxi Brokers” is the word “Maxi”, which is visually, phonetically and conceptually identical to the Applicant’s “Maxi” trade mark. The Applicant contends that the remaining portion “Brokers” is insufficient to distinguish the Respondent from the Applicant and in fact increases the likelihood of confusion given that it is descriptive of both parties’ services.

[13] The Applicant claim that the Respondent’s principal business is not disclosed. However, the addition of the descriptive words “Brokers” to its name encompasses the services for which the Applicant has a registered trademark right.

APPLICABLE LAW

[14] The jurisdiction of the Companies Tribunal is stated in section 160 of the Act and is 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."

[15] Section 11 (2) of the Companies Act, as far as it is relevant for the present application, 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;…

(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;…;

(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;…"

EVALUATION

[16] The question that needs to be answered is whether "Maxi" as in the name of the Respondent is in contravention of sections 11 (2) (b) and (c) (i) of the Companies Act.

[17] "Maxi" as used by the Applicant is a trading name and is not the name of the company. The name of the Respondent, "Maxi Brokers" is not the same as the name of the Applicant, and therefore there is no contravention of section 11 (2) (a) (i).

[18] "Similar" as in section 11 (2) (b) would be "having a marked resemblance or likeness" and that the offending mark (or name) should immediately bring to mind the well-known trademark (or other name): *Bata Ltd v Face Fashions CC* 2001 (1) SA 844 (SCA). As to the requirement for "confusingly" similar, the test, as in the case of passing-off, should be: "…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. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in the light of the particular circumstances of the case.": *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.

The name of the Respondent therefore can clearly be confusingly similar to the trademark of the Applicant, which is “Maxi”. In fact it is clearly similar, and therefore there is contravention of section 11 (2) (b) (i).

[19] Section 11 (2) (c) (i) therefore requires that the name of a company must not:

- falsely imply or suggest that the company is part of or associated with any other person or entity
- be such that the name would reasonably mislead a person to believe that the company is part of or associated with any other person or entity

[20] The same principles as in respect of section (2) (b) (i) would also apply in respect of section (2) (c) (i) because in this instance, apart from the requirement that the name must falsely imply, which, it is submitted, requires fault, it can, alternatively also reasonably mislead a person to hold a certain belief. The requirements to “reasonably believe”, should be the same as in *Adidas AG & another v Pepkor Retail Limited* case *supra*; *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc. and Others* case *supra*.

In this case, using the name “Maxi Brokers” would reasonably mislead a person to believe that the company is associated with “Maxi” as Maxi is a well-known trademark. The remaining portion of the name increases the confusion given that the applicant trades in various products.

FINDINGS

[21] The name of the Respondent is in contravention of section 11 (2) (b) of the Companies Act.

[22] The name of the Respondent is in contravention of section 11 (2) (c) (i) of the Companies Act.

[23] It can be said that “Maxi Brokers” will reasonably mislead the reasonable man (person) to believe incorrectly that there is an association with “Maxi”. The whole name “Maxi Brokers” in not desirable as the name is confusingly and deceptively similar to the trademark “Maxi” registered by the Applicant. The fact that the applicant’s trademark registered incorporates the business that

the respondent is in, will, as under section 11 (2) (b), increase the likelihood / possibility that the reasonable man (person) will be misled.

ORDER

[24] The application is granted, that the Respondent must choose a new name, (and change its existing name) and file an amendment to CIPC accordingly. This must be effective within 3 months from the date of this ruling. Should the Respondent not change its name within 3 months, the CIPC is directed in terms of Section 160(3)(b)(ii) read with Section 14(2)(b)(i) to remove the name “Maxi Brokers”.

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S. Gounden

MEMBER OF THE

COMPANIES TRIBUNAL

Pretoria

1 April 2015