



**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

CASE NO: CT11OCT15

In the matter between:

AFGRI POULTY (PTY) LTD

Applicant

(Registration number: 1955/002635/07)

and

DAYBREAK POULTRY FARM (PTY) LTD

Respondent

(Registration number: 2011/015693/07)

Decision handed down on 20 APRIL 2016

DECISION

INTRODUCTION

- [1] This is an application in terms of section 160 (3) (b) (ii) and Regulation 153 of the Companies Act No. 71 of 2008 (“the Act”).
- [2] The Applicant applies for a default order that the Respondent be ordered to change its name, “Daybreak Poultry Farm (Pty) Ltd” because it does not comply with section 11 of the Act.

BACKGROUND

- [3] The Applicant is Afgri Poultry (Pty) Ltd a company with limited liability duly incorporated in terms of the Companies Act No. 71 of 2008, as amended with its registered address at 12 Byls Bridge Boulevard, Highveld, Extension 73, Centurion, Gauteng.
- [4] The Respondent is Daybreak Poultry Farm (Pty) Ltd, a private company duly incorporated in terms of the Companies Act No. 71 of 2008, as amended with its registered address at Flat 6, 1 Military Hospital, Thaba Tswane, Gauteng.
- [5] The Applicant is the registered proprietor of the “DAYBREAK FARMS” names in different classes in the Republic of South Africa in terms of the Trade Marks Act No. 194 of 1993.
- [6] The name “DAYBREAK FARMS” is registered under the following classes:

- a) 2007/05322 DAYBREAK FARMS trademark in class 35 in respect of Advertising; business management; business administration; office functions.
- b) 2007/05323 DAYBREAK FARMS trademark in class 40 in respect of Treatment of materials.
- c) 2007/05324 DAYBREAK FARMS trademark in class 44 in respect of Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.
- d) 2008/02193 DAYBREAK FARMS label in class 29 in respect of Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.
- e) 2008/02194 DAYBREAK FARMS logo in class 29 in respect of Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.

[7] The Applicant filed an objection to the name "DAYBREAK FARMS" in terms of regulation 142 (1) (a) and (1) (b) of the Act.

[8] The applicant seeks the following relief:

“An order in terms of Section 160 (3) (b) (ii) of the Companies Act ordering the Respondent to amend its name not containing the elements DAYBREAK FARMS and to file a new Memorandum of Incorporation, to this effect.”

APPLICABLE LAW

[9] Before I deal with the objection and/or application filed, I wish to highlight what I believe to be the relevant provisions of the Act.

Section 11 (2) (a) (b) and (c) of the Act

[10] Section 11 (2) (a), (b) and (c) reads as follows:

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 the section 12 (9), or as a business name in terms of the Business Act, 1960 (Act 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 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 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;*
 - (iv) *a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act 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 name 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 defensive name or to business name referred to in paragraph (a) (ii), in 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

(v) 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) 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, or operated, sponsored, supported or endorsed by, or enjoys the patronage of, any –

(aa) foreign state, head of state, head of government or administration or any department of such a government or

administration; or

(bb) international organisation; and

(cc) not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute –

(i) propaganda of war;

(ii) incitement of imminent violence; or

(iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.”

EVALUATION

[11] The name “DAYBREAK FARMS.” is a trade mark registered under the following classes:

a) 2007/05322 DAYBREAK FARMS trade mark in class 35 in respect of Advertising; business management; business administration; office functions.

b) 2007/05323 DAYBREAK FARMS trade mark in class 40 in respect of Treatment of materials.

- c) 2007/05324 DAYBREAK FARMS trade mark in class 44 in respect of Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.
- d) 2008/02193 DAYBREAK FARMS label in class 29 in respect of Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.
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[12] The Deponent to the Applicant's affidavit Rivasha Maharaj in paragraph 5.2.2 of states that:

'As it has been stated above, the similarity between the name DAYBREAK POULTRY FARM and the DAYBREAK FARMS will inevitably lead to person dealing with being led into assuming that the Respondent is connected in some way with the Objector, when this is not the case . In addition, the reference to "poultry" and "farm" in the offending name can only heighten the likelihood of consumers being misled as poultry farming is precisely the field in which the Objector's trade marks are used and registered. Therefore persons encountering

the Respondent are likely to think that there is a connection in the course of trade between the Objector and the Respondent.”

[Own emphasis and underlining]

[13] Further, the Deponent to the Applicant’s affidavit in paragraph 5.1.6 of states that:

“I submit that the offending name will reasonably mislead members of the public into believing that the Respondent is connect with, or associated with, the Objector, when it is not the case. It is that the offending name contravenes Section 11(2 (c) of the Act.”

[14] The first issue is whether the name DAYBREAK FARMS is the same as the registered trade mark or marks belonging to the Applicant and whether the name of the Respondent is confusingly similar to the trade mark, mark belonging to the Applicant.

[15] The second issue is whether the name DAYBREAK FARMS would falsely imply or suggest, or be as would reasonably mislead a person to believe incorrectly, that the Respondent is part of, or associated with the Applicant.

FINDING

[16] The trade marks relied upon by the Applicant in respect of the alleged infringement under section 34(1) (b).

- [17] I do not consider it necessary to deal with Applicant's alleged infringement under section 34 (1) (b) of the Trade Mark Act as disputes relating to trade mark infringement does not fall within the jurisdiction of the Tribunal.
- [18] No evidence was furnished in which the use of the mark would reasonably mislead a person and/or consumers to believe that the Respondent is part of or associated with the Applicant. Confusingly similar to the trade mark, mark belonging to the Applicant.
- [19] Further no evidence was furnished in which the use of the mark would reasonably mislead a person and/or consumers to believe that the Respondent is part of or associated with the Applicant.
- [20] In my view the application is not sufficient on the based on lack of evidence which would reasonably mislead consumers to believe that the Respondent is part or associated with the Applicant.
- [21] Therefore the application cannot succeed due to insufficient information, to conclude that consumers would reasonably believe that the Respondent is part of or associated with the Applicant, in support of its application.

ORDER

In the result the following order is made:

- a) The Application is dismissed.

MMOLEDI MALOKANE

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Date: 20 APRIL 2016