IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00422ADJ2020

In the matter between:

Agri-Boost (Pty) Ltd	Applicant
and	
Agri Boost SA (Pty) Ltd	First respondent
Commissioner of the Companies and Intellectual Property Commission	Second respondent

Coram: Delport P.A.

Date of decision: 24 November 2020

Decision

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1. INTRODUCTION

The applicant applies to the Companies Tribunal for and order, inter alia, that the name of the first respondent does not comply with section 11 of the Companies Act 71 of 2008 ("Companies Act"). of the applicant

2. BACKGROUND

2.1 The applicant is Agri-Boost (Pty) Ltd (2012/197490/07) duly represented by Leon Smit ("Smit"), the sole director as per the records of the second respondent.

2.2 The first respondent is Agri Boost SA (Pty) Ltd (2016/ 438253/07) duly represented by Charles Henry Fourie ("Fourie"), the sole director.

2.3 The second respondent is the Commissioner of the Companies and Intellectual Property Commission.

2.4 The applicant was registered in 2012 with the name Agri-Boost (Pty) Ltd.

2.5 The first respondent was Caloline (Pty) Ltd, a shelf company, and the name was changed, and obviously approved by the second respondent, to Agri Boost SA (Pty) Ltd on 15 May 2020.

2.5 The applicant seeks the following relief:

"1. That the tribunal find the Respondent's company name contravenes section 11(2) of the Companies Act 71 of 2008

2. Order the First Respondent to remove Agri Boost SA (Pty) Ltd from the Second Respondent's Names Register

3. Alternatively order the Second Respondent to remove Agri Boost SA (Pty) Ltd from the Second Respondents names Register

4. Further or alternative relief

5. Costs if the application is opposed"

3. ISSUES

3.1 There are allegations by Fourie that he is shareholder and still a director of the applicant.

3.2 No cogent proof was submitted of the directorship and the information on the COR39 issued by the second respondent on 21 August 2020 listing Leon Smit as the sole director is accepted a *prima facie* proof.

3.3 Should this information not be correct for whatever reason, the application for rectification is not in this forum.

3.4 There are various allegations about the prior and existing relationship between Smit and Fourie, much of which may not be relevant in this matter.

3.5 The crisp point that need to be decided is whether the name of the fist respondent complies with section 11(2) of the Companies Act.

4. APPLICABLE LAW

4.1 Section 11(2) of the Companies Act provides, as far as it is relevant, 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;
> (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;
> ..."

4.2 Section 160 determines the jurisdiction of the Companies Tribunal and provides,

as far as it is relevant for the present matter, as follows:

"**160. Disputes concerning reservation or registration of company names.—**

(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) ...

(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—

...

(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."

5. EVALUATION

5.1 "Good cause" was defined as follows in in *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) (para 18) (emphasis is mine): "[t]he section requires the applicant to furnish a reasonable explanation as to *why* the application should be entertained by the Tribunal. It does not require an explanation only as to *the delay* in bringing the application... [and] the Tribunal was obliged to look at the whole matter including the merits to determine whether it was in the interests of justice to entertain the application."

5.2 The name of the first respondent is not the "same" as that of the applicant as it must be identical rather than "similar to": See eg *Williams v Janse van Rensburg* (*3*) 1989 (4) SA 884 (C); *Century City Apartments Property Services CC and Another v Century City Property Owners Association* [2010] 2 All SA 1 (SCA), but also *Global Vitality Incorporated v Enzyme Process Africa* (*Pty*) *Limited and Others* (20884/2013) [2015] ZAWCHC 111 (21 August 2015).

5.3 To be "confusingly similar" there must 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 and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013)

5.4 "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": *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

5.5 Two names only distinguished with the deletion of a hyphen (-) and addition of the letters "SA" and in respect companies apparently in the same type of business will be confusing to an ordinary person.

5.6 The test as to why the application was brought by the applicant (the merits) is therefore established. There was no delay in bringing the application and therefore both tests of *The Highly Nutritious Food Company (Pty) Ltd* case *supra* (para 5.1) have been complied with.

6 FINDING AND ORDER

6.1 The applicant is ordered to choose a new name, not incorporating "Agri" and "Boost", and to file a notice of an amendment to its Memorandum of Incorporation, within 4 weeks of the date of this ruling.

6.2 As an aside it seems to be strange that the name of the first respondent was registered in the first place and the registrar of the Tribunal should furnish this ruling to the Commissioner of the Companies and Intellectual Property Commission.

6.3 There is no proof that the CTR 142 was served on the second respondent and no order can be made in that respect, even if the relief asked for by the applicant would have possible.

7. COSTS

There is no order as to costs.

PROF PA DELPORT
COMPANIES TRIBUNAL: MEMBER