



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00855ADJ2021

In the matter between:

Dr. Ing. h.c. F. Porsche AG

Applicant

and

Porsche Sound and Entertainment 66 (Pty) Ltd

First respondent

Companies and Intellectual Property Commission

Second respondent

Presiding Member of the Tribunal : PA Delport

Date of Decision : 22 February 2022

DECISION

INTRODUCTION

- [1] The applicant applies for a default order because the name of the first respondent does not comply with section 11(2)(a)(b)(iii) and (2)(c)(i) of the Companies Act 71 of 2008 ("Companies Act" / "Act").

- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”) *inter alia* regulate an application to the Companies Tribunal (“Tribunal”) as well as the application for a default order under certain circumstances.
- [3] The jurisdiction of the Tribunal in this matter is as determined in section 160(1) of the Companies Act.

BACKGROUND

- [4] The applicant is Dr. Ing. h.c. F. Porsche AG, a German company having its registered office at Porscheplatz 1, Stuttgart, DE-BW, 70435, Germany.
- [5] The first respondent is Porsche Sound and Entertainment 66 (Pty) Ltd (2018/568959/07), a company incorporated in terms of the Companies Act.
- [6] The second respondent is the Companies and Intellectual Property Commission, as established under, and with the functions, in Part A of Chapter 8 of the Companies Act.
- [7] The application is authorised by the applicant and is brought by Ms. Michaela Stoiber and Mr. Andreas Kirchgässner, who certify that the applicant “has resolved to make an application” and that they have the authority to act for and on behalf of the applicant.
- [8] The applicant became aware of the registration of a company with the name Porsche Sound and Entertainment 66 (Pty) Ltd in March 2021.
- [9] The applicant corresponded with the first respondent and required that it ceases to use the name Porsche Sound and Entertainment 66 (Pty) Ltd. The reaction of the

first respondent was apparently that it will sell the name to the applicant. The applicant declined this offer by the first respondent.

- [10] The applicant then lodged CTR 142 and supporting affidavits with the Companies Tribunal on 15 November 2021.
- [11] A copy of the CTR 142 and supporting affidavits (“notice”) were then served by the Sheriff on a Ms Nontokozo Mtshweni (apparently the daughter of the “owner” of the first respondent) on 16 November 2021 at the registered address of the first respondent as per the records held by the second respondent.
- [12] The notification to the first respondent as above was within the period of 5 business days from lodgement with the Tribunal as prescribed by regulation 142(3) and in a manner allowed in terms of Table CR 3 of Schedule 3 of the regulations.
- [13] The notice clearly came to the knowledge of the first respondent as there was subsequent communication between the first respondent and the attorneys of the applicant in respect of the notice.
- [14] The second respondent was served with the notice by email on 15 November 2021 within the period of 5 business days from lodgement with the Tribunal, which was in a manner in terms of Table CR 3 of Schedule 3 of the regulations and the second respondent acknowledged receipt of the notice on the same day.
- [15] The Tribunal is satisfied that the applicant has served the application “adequately”, as required by regulation 153(2)(b).
- [16] The relief in respect of the name of the first respondent sought by the applicant in the CTR 142 is:
 - “1. that the First Respondent's name does not comply with Sections 11(2)(b)(iii) and 11(2)(c)(i) of the Companies Act 71 of 2008 (‘the Act’);

2. that the First Respondent is directed to choose a name which does not consist of, or Incorporate, the mark PORSCHE, or any other mark which is confusingly and/or deceptively similar to the Applicant's PORSCHE trade mark;
3. that the Companies and Intellectual Property Commission, the Second Respondent, in terms of Section 160(3)(b)(ii) read with Section 14(2) of the Act, be directed to change the name of the First Respondent to its registration number, in the event of the First Respondent not complying with paragraph 2 above within 60 days from the date of this order; and
4. an order as to costs in favour of the Applicant should the First Respondent oppose the relief sought.”

ISSUES and APPLICABLE LAW

[17] Section 160, which determines the jurisdiction of the Companies Tribunal, 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 ... 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.”

[18] The relevant provisions of section 11 provide:

“(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

...

(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..."

...

“(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

[19] Section 160, as quoted above, provides that "...any other person with an interest in the name of a company" can bring an application..."

and further that :

“(2) An application in terms of subsection (1) may be made—

...

(b) on good cause shown at any time after the date of ... registration of the name that is the subject of the application, in any other case.”

[20] The remedies in section 160 are available to “any...person *with an interest*” as defined in, *inter alia*, *Ex parte Mouton and Others* 1955 (4) SA 460 (A) and *Cabinet*

of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A). The applicant is such a person.

- [21] 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 so incorporated and is therefore a “person” for purposes of section 160.
- [22] The applicant is the owner of the word “Porsche”, also registered in South Africa as a trade mark in various classes (some 16) in terms of the Trade Marks Act 194 of 1993. The applicant also avers certain possible contraventions of the Trade Marks Act by the first respondent, which is not applicable here as it is beyond the jurisdiction of this Tribunal.
- [23] In *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) the Court said at para 18 that “[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.”
- [24] “Good cause” therefore has two elements, namely the merits of the case as well as an “explanation ... as to the delay in bringing the application.”
- [25] In respect of the delay in the bringing of the application section 160 also protects the interests of the companies so registered and those of its creditors (such as the first respondents) and the possible prejudice to be suffered either by the respondent/s and/or the creditors of the respondent/s, if there is an order to change its name, must be taken into account: *The Highly Nutritious Food Company (Pty) Ltd* case *supra* para 20.

- [26] The applicant has clearly complied with the *The Highly Nutritious Food Company (Pty) Ltd* case *supra* “good cause” test in respect of the merits.
- [27] The first respondent was incorporated on 31 October 2018 and the applicant became aware of the name in March 2021, which is a period a little longer than 2 years. Whether this delay will cause the first respondent (and/or its creditors) prejudice if an order is given to change its name is not clear. There is no evidence as to this possible prejudice.
- [28] In *The Highly Nutritious Food Company (Pty) Ltd* case *supra* the Court said in respect of possible prejudice (para 20) that the...” [first] respondent was served with the application, and was fully aware of the proceeding before the Tribunal, but chose not to participate in the proceedings. Therefore, there was no reason for the Tribunal to shut the door to the applicant and not to adjudicate the application. The balance of convenience favoured the applicant at the time”. The same principles clearly apply here.
- [29] An allegation of facts set out in an initiating document that is not specifically denied or admitted in an answer must be regarded as having been admitted: regulation 143(4).
- [30] The respondent did not answer, and even if its recalcitrance is seen as a denial, “bald” denials will, as was been pointed out in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), not be sufficient (see also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) and *Ragavan v Kal Tire Mining Services SA (Pty) Ltd* 2019 JDR 1739 (GP) in respect of default judgments).
- [31] In any case, the test here is whether the name of the first respondent and the name (in the registered trade mark) used by (and registered to) the applicant are alike in a manner that the average consumer in the market place would probably be deceived

or confused by their similarity: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 6. The average consumer would then be 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).

- [32] The word “Porsche” is not an ordinary word and is well-known (In South Africa and internationally) in respect of high performance cars. The use of “Porsche”, even with ordinary descriptive words like “Sound and Entertainment 66” by another person will confuse the “average” consumer.
- [33] The elements of s 11(2)(c) are, on various grounds, different from that of s 11(2)(b) and it has a different application. However, in *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 15 the Supreme Court of Appeal said that the same test, as applicable in respect of trade mark infringement (ie confusion), is applicable to both s 11(2)(b) and 11(2)(c) of the Companies Act.

FINDING

- [34] The name of the first respondent does not comply with sections 11(2)(a)(b)(iii) and (2)(c)(i) of the Companies Act.
- [35] The first respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name to a name that does not include the word “Porsche”.

[36] If the first respondent does not comply with the order as in para 35 above, the second respondent is directed, in terms of section 160(3)(b)(ii) read with sections 11(3)(a) and 14(2) of the Companies Act, to record the first respondent's registration number followed by "(Pty) Ltd (South Africa)", as the first respondent's interim company name on the companies register. Due to the fact that such an action will have the effect that the first respondent will, for all intents and purposes, be unable to continue to operate due to statutory prescripts, such an action by the second respondent *should be preceded by adequate notice*.

[37] The name of the first respondent was, notwithstanding the registration of the "Porsche" trade mark, approved by the second respondent. Under these circumstances, even if the application as opposed, a cost order against the first respondent will be unjust, and there is no order as to costs.

SIGNATURE

PA DELPORT

COMPANIES TRIBUNAL: MEMBER