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**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT01106ADJ2022**

**In the matter between:**

**AFRICAN UNITY GROUP (PROPRIETARY) LIMITED**

First Applicant

(Reg No. 20[....]07)

**AFRICAN UNITY CONSULTING (PROPRIETARY) LIMITED**

Second Applicant

(Reg No. 20[....]07)

**AFRICAN UNITY LIFE (PROPRIETARY) LIMITED**

Third Applicant

(Reg No. 20[....]06)

**and**

**AFRICAN UNITY HOLDINGS (PTY) LIMITED**

Respondent

(Reg No. 20[....]07)

Presiding Member of the Companies Tribunal: N. CAWE

Date of Decision: 31 March 2023

**DECISION** (Reasons and an Order)

## **1. INTRODUCTION**

1.1. The First Applicant is AFRICAN UNITY GROUP (PROPRIETARY) LIMITED (registration number 20[....]07), a private company with limited liability, duly incorporated in terms of the Act with its registered address at African Unity House, Springfield Park, 109 Jip de Jager Drive, Bellville, Western Cape, 7530.

1.2. The Second Applicant is AFRICAN UNITY CONSULTING (PROPRIETARY) LIMITED (registration number 20[....]07), a private company with limited liability, duly incorporated in terms of the Act with its registered address at 1<sup>st</sup> Floor, Riesling House, The Vineyard Office Estate, Bellville, Western Cape, 7530.

1.3. The Third Applicant is AFRICAN UNITY LIFE (PROPRIETARY) LIMITED (registration number 20[....]06), a public company duly incorporated in terms of the Act with its registered address at African Unity House, Springfield Office Park, 109 Jip de Jager Drive, Bellville, Western Cape, 7530.

1.4. The Respondent is AFRICAN UNITY HOLDINGS (PTY) LIMITED (registration number 20[....]07), a private company with limited liability, duly incorporated in terms of the Act with its registered address at 1513 Rammolutsi, Viljoenskroon, Free State, 9520. The nature of the Respondent's business is unknown to the applicants.

## **2. BACKGROUND**

2.1. On 23 May 2022 the Applicant submitted their application for relief to the Companies Tribunal by email seeking the following relief;

2.1.1 declaring that Respondent's name does not satisfy the requirements of the Companies Act 71 of 2008 ("the Act"), as contemplated in Section 160(1)

2.1.2 directing that the Respondent choose a new name;

2.1.3 directing the Respondent to file a notice of amendment to its Memorandum of Incorporation, within thirty (30) days from the date of the Companies Tribunal's

Order, reflecting the new name chosen for the Respondent and

2.1.4 reserving the name AFRICAN UNITY HOLDINGS for the Applicant.

2.2. A copy of the stamped Application for Relief was served on the Respondent on the 15 June 2022 by the sheriff.

2.3. The reasons for the application are set out in detail in the founding Affidavit, deposed to by Johannes Stephanus Spamer of Spamer Triebel Attorneys (Spamer), on 13 June 2022, attorney for the Applicant as follows:

2.3.1 In terms of Section 11(2)(b)(i) of the Act the Respondent's name is confusingly similar to the Applicant's name and its trade mark 'AFRICAN UNITY'

2.3.2 In terms of Section 11(2)(c) of the Act the Respondent's name implies or suggests, or would reasonably mislead a person to believe, incorrectly, that the Respondent is part of, or associated with, the Applicant.

2.4. Paragraph 9 of Spamer's Affidavit states; The Applicants forms (*sic*) part 9f companies ("**the African Unity Group**"), which group operates and conducts the business of providing value adding financial products and services to their wide range of clients, including but not limited to life insurance, health insurance, credit insurance and other financial products.

2.5. In paragraph 15 of his Affidavit, Spamer avers that the rights relied upon by the Applicants are two-fold: 15.2 ". the Applicants rely on their protected rights in the registered marks AFRICAN UNITY (2016/32499) and AFRICAN UNITY (2016/32505), which is owned by First Applicant. 15.2 Secondly, the Applicants rely on the pending trademark applications AFRICAN UNITY (logo) (2016/32506) and AFRICAN UNITY (logo)(2016/32508). 15.3. Thirdly, the Applicants also rely on the Applicants' right in and to their company names, which were registered with the Companies Registrar in and during 2003 and 2004 respectively.

2.6. Spmar avers, further, that Applicant attempted, on 12<sup>th</sup> May 2022, to reserve the name 'AFRICAN UNITY HOLDINGS' but the reservation was refused as a result of the Respondent on the register. Respondent was registered on or about 12<sup>th</sup> July 2021(JSS -2 of Applicant's annexures). Spamer concludes the Affidavit by reiterating

the Applicant's prayers for relief as set out above (in paragraphs 2.1.1 to paragraph 2.1.4).

2.7. The Respondent did not file an answering affidavit to the application within twenty (20) business days, following which, on 03 October 2022, the Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the Regulations).<sup>1</sup>

Applicant's Attorney, Sune Willem Venter (a director at Spamer Triebel) deposed to an affidavit in support of the application for default judgment with the same prayer as set out in paragraphs 2.1.1 to paragraphs 2.1.4 in the main application.

### **3. ISSUES to be decided**

3.1 Applicant requests this Tribunal to make a finding that First Respondent's name does not satisfy the provisions of S11(2) of the Act. It submits that the inclusion of the word 'HOLDINGS' in the Respondent's name infringes its registered trademarks.

3.2 The Applicants seek to register a company with the name AFRICAN UNITY HOLDINGS which will be the holding company of the shares of all companies in the African Unity Group. The Respondent's name prevents the Applicants from reserving and/or registering such name.

3.3 The Respondent's offensive name came to the Applicants, knowledge on 12 May 2022, when the First Applicant submitted a request to the Companies Register to reserve the name 'AFRICAN UNITY HOLDINGS'. The request was refused with the Registrar citing the fact that a company by a similar name existed i.e. the Respondent.

3.4 The use of the word 'HOLDINGS' in the Respondent's name, is misleading as it falsely implies or suggest (and will be understood by the members of the public as such) that the Respondent is a "holding"/or "parent" company of the Applicants, alternatively that the Respondent is associated with the African Unity Group, both of which it is not.

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<sup>1</sup> GN R351 in GG 34239 of 26 April 2011.

3.5 Applicant, argues further, that its application for the registration of AFRICAN UNITY HOLDINGS was filed in November 2016 which precedes the registration of the Respondent, which was registered on or about 12 July 2021, according to the CIPC record of the Respondent.

#### **4. APPLICABLE LAW**

**4.1 Section 11** of the Act provides as follows: “11. **Criteria for names of companies.** —

(1)....

(2) *The name of a company must— (a) not be the same as—*

*(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 Name Act, 1960 (Act No. 27 of 1960), unless he 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 Mark 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, trademark, 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;”*

4.2 **Section 160** of the Act deals with **disputes concerning reservation or registration of company names** (my emphasis) and enunciates the jurisdiction of the Companies Tribunal 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.*** (emphasis is mine)

*(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** (my emphasis) 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.”*

4.3 Companies Regulation 153 of 2011 provides for default orders:

*(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.*

## **5. EVALUATION of Evidence**

5.1 I am convinced that Applicant has made out a case for the main application to be considered on a default basis and proceed to deal with the merits of the case.

5.2 “Confusingly similar” in Section 11(2)(b) has to be examined carefully to determine if this is in fact so in the instant case. The Applicant has to demonstrate the likelihood to cause confusion in the sense that that members of the public would believe that there is a connection or association between the Applicants and the Respondent. The main function, I believe, of a name or trademark is prevent competitors from using similar marks that result in the consumer being confused.

5.3 [11.5] J B Cilliers “Similar company names; A comparative analysis and suggested approach” 1998 THRHR 528 and 1999 THRHR 57, summarised the views of the courts with regard to the concept of ‘undesirability’, as follows:

“It is undesirable to register the new or amended name, if there is a likelihood of

confusion or deception. It is a question of fact and degree whether or not a likelihood of sufficient confusion has been established to justify a change of name. Thus where the deception or confusion of the public is not manifest, the court must determine the likelihood of confusion or deception, not by looking at the names in isolation, but by considering all the circumstance. The following should be taken into account in determining whether a company name is desirable because of its similarity to another company name; the likelihood of the names being abbreviated and the form of abbreviation; evidence of actual confusion or deception; the degree of confusion and its consequences including inconvenience caused; whether a name could or might itself mislead the public or a recognized section of the public in any particular locality, or would be likely to cause confusion in the sense that the public would think that there is some actual connection or association between the companies; whether avoidable confusion has been created by the similarity of company names, which is undesirable; the Registrar's Directive of company names; the commercial environment in which the companies compete; the geographical environment in which the companies operate; whether the companies compete in the same market place; the importance of first impressions; the specialist nature of the companies' goods or services and the correlative ability of the customers to differentiate; whether the market place can arguably deal with any confusion; whether the name resembles a trade mark; and the nature of the names."

5.4 It can, therefore, also be accepted that the word 'AFRICAN UNITY' in First Respondent's name will reasonably mislead the reasonable person to believe, incorrectly, that there is an association between AFRICAN UNITY HOLDINGS, the Respondent, with the AFRICAN UNITY (PROPRIETARY) LIMITED, AFRICAN UNITY CONSULTING (PROPRIETARY) LIMITED and AFRICAN UNITY LIFE (PROPRIETARY) LIMITED, the Applicants.

## **6. CONCLUSION**

6.1 I find that the use of the word "HOLDINGS" in the Respondent's name is misleading as it falsely implies or suggests that the Respondent is a "holding/parent" company of the Applicants, alternatively that the Respondent is associated with the



African Unity Group.

6.2 Applicant has shown that Respondent has transgressed Sections 11(2)(b) and (c): its name is confusingly similar and falsely implies, or could reasonably mislead a person to believe incorrectly, that Respondent is part of, or associated with the Applicants. Hence it is entitled to an order as claimed under Section 160 of the Act.

6.3 The Applicant's application is granted as set out below.

## **7. ORDER**

7.1 An administrative order is made in terms of Section 160(3)(b)(ii) that Respondent change its name to one which does not incorporate the word 'AFRICAN UNITY HOLDINGS' or any other name that is confusingly similar to the Applicants' names as it is in contravention of Sections 11(2)(b)(iii) and (c)(i) of the Act.

7.2 The First Respondent is hereby ordered to change its name within 60 (calendar) days of date of receipt of this order.

7.3 The Respondent is ordered, further, to file a notice of amendment of its Memorandum of Incorporation 60 days after receipt of this Order

7.3 It is ordered, further that CIPC reserve the name "AFRICAN UNITY HOLDINGS" for the Applicants.

7.4 There is no order as to costs

**N. CAWE**