

SOUTH AFRICA / JUDGMENT

E-Travel (Pty) Limited v Amadeus I.T. Group SA and Another (74849/16) [2017] ZAGPPHC 794 (3 November 2017) [2017] ZAGPPHC 794

COURT

North Gauteng High Court, Pretoria

BEFORE

G Rautenbach

CASE / FILE NUMBER

74849/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 74849/16

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

E-TRAVEL
(PTY) LIMITED
Applicant
(Trade
Mark Opponent)
and
AMADEUS
I.T. GROUP
SA First
Respondent
(Trade
Mark Applicant)
THE
REGISTRAR OF TRADE
MARKS Second

Respondent

In

re: An Application to Oppose Trade Mark Application No.: 2013/05747-9

A Luus E-Travet Management (Special Form) in Classes 09,
39 and 43 in the name of the Respondent

Referral

to the High Court by Registrar of Trade Marks in terms of Section
59(2) of the Trade Marks Act, 194 of 1993

JUDGMENT

Rautenbach AJ

1. In this matter the Trade Mark Opponent, Applicant is relying on the provisions of section 10 of Act 194 of 1993 in opposing the registration of a trade mark by the Trade Mark Applicant.

2. The Applicant relies specifically on sections 10(12), 10(14) and 10(17) which read as follows:

"12. A mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be contra bonis mores, or be likely to give offence to any class of person."

"14. Subject to the provisions of section 14, a mark which is identical to a registered trade mark belonging to a different proprietor or is so similar thereto that the use thereof in relation to goods or services in respect of which it sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark."

"17. A mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion, unless the proprietor of such trade mark consent to the registration of such mark."

3. Both the Applicant and the First Respondent referred me to various authorities in order to come to a decision in this matter.

4. It is common cause that the First Respondent bears the onus on the probabilities to show that the mark it seeks to register qualifies

for registration. It is in this sense that it is important to have proper regard to the sub-sections of section 10 of the Act on which the Applicant relies upon.

5. On the face of it the two trademarks are not overwhelmingly similar. The trademark of the Applicant can be described as a round figure with an arrow with an "E" in the middle with the words "Travel" beneath whereas the trade mark that the First Respondent wants to

register consists of a circle with an "a" in it followed by "E-Travel Management". The First Respondent submits that the test to be applied is whether on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both are used together in a normal and fair manner in the ordinary course of business.[1] The First Respondent further relies on the well-known judgment in *Plascon Evans Paints Limited v. Riebeeck Paints (Pty) Limited* [1984] ZASCA 51; 1984 (3) SA 623 (A). At 641 B - E it is stated that the comparison must have regard to:

"The similarities and differences in the two marks, an assessment of the impact which the defendant's mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. The notional customer must be conceived of a person of average intelligence, having proper eyesight and buying with ordinary caution. The comparison must be

made with reference to the sense, sound and appearance of the marks. The marks must be viewed as they would be encountered in a market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side but also separately. It must be borne in mind that the ordinary purchaser may encounter the goods, bearing the Defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this. If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. As it has been put marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole."

6. Although the First Respondent submitted in its Heads of Argument and during the hearing of the matter that they are not dealing with entirely the same type of product, I am satisfied that seen holistically the Applicant and the Respondents are competitors in the same field.
7. I have already pointed out that a mere placing of the two trademarks next to each other is not strikingly similar but fortunately or unfortunately depending on which side you are the enquiry does not end here. In *Adidas AG v. Pepcor Retail Limited* (187/12) (2013] ZASCA 3 the following was stated by the SCA:

"The more distinctive the mark is or the greater its reputation, the greater the likelihood that there will be deception or confusion where a similar mark is used on competing products. Purchasers who are used to seeing the First Appellant's trademarks will still experience imperfect perception or imperfect recollection and will be far more likely to conclude that the similar mark is the First Appellant's trademark or is associated with the First Appellant's trademark and consequently that the competing products came from the same source."

8. In *American Chewing Products Corporation v. American Chicle Co.* 1948 (2) SA 736 (A), the Appellate Division approached the matter on a similar basis where it remarked on page 744 as follows:

"It must also be remembered that in coming to a conclusion on the question in issue, the Court must not only consider the marks when placed side by side, but must have regard to the position of a person who might at one time see or hear one of the marks and later, possibly with an imperfect recollection of that mark, come across the other mark."

9. The reputation that the Applicant enjoys in the market has not seriously been contested by the First Respondent and the First

Respondent emphasized the fact that the word "E-Travel" can never be claimed as the property of anyone.

10. The First Respondent also relies on the fact that the products of both parties to which the trademarks are applied have coexisted in the marketplace with no confusion to date. I do not place a lot of importance on this fact. It is on many occasions unknown to what extent confusion took place and is still taking place on a daily basis. To me having regard to the sections 10(12), 10(14) and 10(17) the biggest risk is the fact that, as was pointed out in the Adidas case above, is that purchasers who are used to seeing the First Respondent's trademark may well experience imperfect perception or imperfect recollection and will be far more likely to conclude that the mark that is similar to the Applicant's trademark is associated with the Applicant's trademark and that consequently the competing products come from the same source.
11. It is also quite significant that the trademark that the First Respondent wants to register use the letter "a" and then "E-Travel Management." The question I ask myself was why not did the First Respondent in order to distinguish itself properly from the trademark of the Applicant and to prevent confusion, deception, etc. used the word "Amadeus E-Travel Management"

or something similar. In my view the First Respondent has not succeeded in its onus on the probabilities to show that its trademark

qualifies for registration and does not fall foul of the provisions of section 10 of the Act and more particularly sections 10(12),

10(14) and 10(17).

12. In respect of the papers before me the Applicant has referred to the matter of Swissborough Diamond Mines (Pty) Limited and Others v. the Government of the Republic of South Africa and Others.[2] I agree that it is impermissible to annex documentation to an Affidavit and ask the Court to have regard to it without dealing with portions of those documents specifically in respect of its relevance to the merits of its case. I thus did not consider the annexures which were so annexed in any detail and I did not expect from the First Applicant to have done so in drafting its papers in opposition to the application of the First Respondent.
13. In the circumstances I grant the following order:

1. The Second Respondent is ordered to refuse to register the trade mark application numbers 2013/05747-9 in respect of a E-Travel Management in the name of the First Respondent.
2. The First Respondent is ordered to pay the cost of this opposition/application.

J G Rautenbach

Acting Judge of the High Court

Gauteng Division

Pretoria

74849/2016

HEARD ON:

FOR THE APPLICANT:

INSTRUCTED BY:

FOR THE RESPONDENT:

[1] Cowbell AG v. ICS Holdings 2001 (3) SA 941 (SCA) 947 H - 948 D.

[2] 1999

(2) SA 279 (T).

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Prepared on 11 October 2026 · Esheria