

SOUTH AFRICA / JUDGMENT

Oracle International Corporation and Another v Black Oracle Consortium (Pty) Ltd and Others (26133/2020) [2023] ZAGPPHC 2062 (10 October 2023)

[2023] ZAGPPHC 2062

COURT

North Gauteng High Court, Pretoria

BEFORE

Flatela Luleka

CASE / FILE NUMBER

26133/2020

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO:26133/2020
1. REPORTABLE: YES
2. OF INTEREST TO
OTHER JUDGES: YES
3. REVISED: NO
10 October 2023
In

the matter between:

ORACLE
INTERNATIONAL CORPORATION
First Applicant
ORACLE
CORPORATION (SOUTH AFRICA) (PTY) LTD
Second Applicant
and
BLACK ORACLE
CONSORTIUM (PTY) LTD
First Respondent
BOUTSHISWE PREDDY
MOTHOPENG MSIELENG
Second Respondent
COMMISSIONER OF THE
COMPANIES
AND INTELLECTUAL
PROPERTY COMMISSION
Third Respondent
ZA CENTRAL REGISTRY
NPC
Fourth Respondent

JUDGMENT

Flatela J

[1] This application concerns trade mark infringement. At issue is whether there has been a trade mark infringement of the Applicant's registered trade mark by the first and second respondent. The trade mark in issue is the Applicant's well known trade mark name "ORACLE" which is registered in terms of the Trade marks Act 194 of 1993 (the Act) in respect of goods and services described in classes 9, 16,41 and 42.

[2] Oracle International Corporation ("Oracle International") complains that the respondents, Black Oracle Consortium (Pty) Ltd ("Black Oracle"), a company incorporated under the company laws of the Republic of South Africa and its sole director

Boutshiswe Preddy Mothopeng Msieleng ("the Respondents") infringes their registered trade mark in terms of section 34(1)(a)[1] of the Act in that the Black Oracle Consortium (PTY) Ltd trade name, company name and style, and domain name is identical to or

alternatively so closely resembling the Applicant's ORACLE trade mark so as to be likely to deceive or to confuse.

[3] The Applicant is seeking a final interdict against the Respondents on the grounds of trade mark infringement, passing off its trade mark, and unlawful competition. Furthermore, the Applicant seeks an order in terms of section 11(2) of the Companies Act No. 71 of 2008 for the First Respondent to change its company name on the Companies Register as well as a declaratory order declaring the domain name "blackoracle.co.za" as an abusive registration

based on the First Applicant's well known ORACLE mark and for it to be transferred to the Applicant.

- [4] The issue for determination is whether applicant has proven on a balance of probabilities that the Black Oracle Consortium (Pty) Ltd trade name, company name and style, and domain name are identical to or alternatively so closely resembling the First Applicant's ORACLE trade mark so as to be likely to deceive or to confuse. Thus, the issue turns on the application of section 34(1)(a) of the Act and on section 11(2)[2] of the Companies Act No. 71 of 2008 (as amended by Act 3 of 2011).

The Parties

- [5] The First Applicant is Oracle International Corporation ("Oracle International"), a corporation incorporated under the laws of the State of California with its registered offices in California, United States of America. The First Applicant is the second largest software company by revenue and market capitalization in the world. It carries on business in the field of computer technology and sells database software, technology, cloud engineering systems and enterprise software.
- [6] The First Applicant is the proprietor of the "ORACLE" trade mark registered under the Trade marks Act 194 of 1963. It's registered under trade mark numbers 1982/05501-2, 2012/11162, 2012/13283-5 and 2015/18752 and registered in classes 9, 16, 41 and 42.
- [7] The Second Applicant is Oracle Corporation (South Africa) (Pty) Ltd "Oracle South Africa", a company incorporated under the company laws of the Republic of South Africa with its registered offices in South Africa. It has Oracle Nederland B.V a company incorporated in the Netherlands as its immediate holding company. The First Applicant is the ultimate parent of this group of companies.
- [8] The Second Applicant is the First Applicant's exclusive licensee in South Africa to use the First Applicant's trade marks including its well-known "Oracle" trade mark. The Second Applicant is responsible for promoting, conducting, and operating the multinational nature of Oracle's business within the South African trade.
- [9] The First Respondent is Black Oracle Consortium (Pty) Ltd a company incorporated under the company laws of the Republic of South Africa with registered offices in Johannesburg. The First Respondent is an association of black-owned small and medium sized Information Technology (IT) businesses in South Africa. It is affiliated with the Black IT Forum which will be fully described hereunder.
- [10] The Second Respondent is Boutshiswe Predy Mothopeng Msieleng, the First Respondent's sole director and chairman. The Second Respondent is also the chairman of the Black IT Forum.
- [11] For convenience I shall refer to the First and Second Applicants as "the Applicants" and the First and Second Respondent as "the Respondents".

[12] The third respondent is the Commissioner of the Companies and Intellectual Property Commission (“CIPC”) situated at the DTI campus, 77 Meintjies street, Sunnyside, Pretoria. The third respondent is cited as the custodian of South African

Companies Register.

[13] The fourth respondent is ZA, a Central Registry and PC, a nonprofit company organized and existing under the laws of the Republic of South Africa under registration number 1988/004299/08 with registered address at COZA house, Gazelle Close, Corporate Park, Midrand, Gauteng. The fourth respondent is cited as a custodian of domain names in the.co.za namespace of the internet.

The Applicant’s trade marks.

[14] The First Applicant’s trade marks that are subject of this application are as follows:

- a. Trade mark Registration no.1982/05501 ORACLE in class 9 in respect of “Electrical and electronic apparatus, Instruments and equipment, apparatus, instruments, and equipment for handling, storing, processing, retrieving, receiving, and transmitting data, computers, micro. computers, calculators, word processors, microprocessors and visual display apparatus, computer software included in this class, parts, fittings, and accessories for all the foregoing goods.
- b. Trade mark Registration no.1982/05502 ORACLE in class 42 in respect of “technical and technological advisory, consultative research and management services, computer services including data processing, data communications, computer programming and computer consultancy services, including computer bureaux, sale, design, installation, implementation and operation of data processing equipment and systems, including computers, microcomputers, word processors and microprocessors.
- c. Trade mark Registration no.1984/03372 ORACLE in class16 in respect of “paper, cardboard and goods made from these materials, not included in other classes, printed matter, newspapers, newsletters, periodicals, and books, including manuals and guides for the operation of computerized database management systems, stationery, computer software included in this class.
- d. Trade mark Registration no.2012/1162 ORACLE in class 41 in respect of “education, providing of training, entertainment, including entertainment services in the nature of sailboat racing and exhibitions, sporting and cultural activities.
- e. Trade mark Registration no.2012/13283 ORACLE in class 9 in respect of “scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments, apparatus and instruments for conducting, switching, transforming, accumulating, regulating, or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers, recording discs, automatic vending machines and

mechanism for coin operated apparatus, cash registers, calculating machines, data processing; equipment and computers, computers, computer hardware, computer peripherals, computer data storage devices, computer data storage systems, tape drives, flash drives, disk drives, optical drives, data storage media, data storage tape, data storage disks, disk subsystems, Integrated computer hardware and software systems, computer hardware with preinstalled software, computer servers, computer network devices, data communications devices, computer processors and memory, microprocessors, central processing units, circuits boards and integrated circuits, a full line of computer software to manage, analyze, retrieve, monitor, maintain, report on, structure, model, forecast, present and display data and information from computer databases, applications, and the internet, and for the development, analysis, management, integration, deployment, virtualization and maintenance of computer software and hardware, web services software, application server software, database software, business intelligence software, Internet and intranet portal software, data warehousing software, wireless communications software, operating systems software, computer utility software, computer networking software, security and identity management software, virtualization software, cloud computing software, voice at apt software, and computer programs for use in developing and executing other computer programs on computers, computer networks and global communications networks, Computer software application in the fields of marketing, sales, customer service., contracts, human resources, clinical research, healthcare, commerce, health sciences, education, communications and telecommunications, call centers, customer relationship, management, public sector administration, public and private utilities,

transportation, insurance, processing, and places and management of financial transactions, governance, risk and compliance management,

management of supply chains, orders procurement, inventory, assets, projects and manufacturing business process. outsourcing, business

consolidation, management, business quality management, business, project management, business stakeholders, shareholder relationship

management and strategic business, simulation, enterprise and resource planning.

- f. Trade mark Registration no.2012/13284 ORACLE in class 41 in respect of “education, educational services, including seminars, courses and workshop in the following fields, computers, computer hardware, computer programming and computer software, design, development, analysis, implementation, management,

integration, deployment, maintenance, updating, and repair of computer hardware and software, technical support services for computer hardware and software, testing, analysis and evaluation of goods, and services of others for the purpose of certification, computer databased development, design creation, hosting, maintenance, operation and management of internet websites, online trading to facilitate the sale and purchase of goods and services by others. Providing a wide range of general interest information via internet, providing of training,

entertainment, sporting and cultural activities.

- g. Trade mark Registration no.2012/13285 ORACLE in class 42 in respect of scientific and technological services and research and design rating, industrial analysis and research services, design and development of computer hardware and software, computer services, including consultation in the field of computer software, computers and computer hardware, programming, designing development, analysis implementation, management, integrated integration, deployment, maintenance, updating and repair of computer software for others, dissemination, leasing and rental of computer software, leasing access to non-downloadable computer software, hosting of computer software, technical support services for computer software, testing, analysis and evaluation of the goods and services of others. For the purposes of certification,

computer database development services, creating websites for others, consultation services, and providing technical assistance related to design, creating, host, maintenance., operation and management of websites for others, and;

- h. Trade mark Registration no.2015/18752 ORACLE in class 42 in respect of “hosting of computer software, leasing and rental of computer hardware and computer peripherals, listen access to computer hardware and computers, peripherals, computer services including providing access to non-downloadable computer software, computer services including providing computer software, platforms, infrastructure, database, and data as a service, computer services, including providing cloud computing services in the following fields: A full line of computer software to manage, analysis, retrieve, monitor, maintain, report on, structure, model, forecast, present and display data and information from computer databases, applications and internet, and for the development, analysis, management, integration, deployment, virtualization and maintenance of computer software and car hardware, database software to manage, monitor, track and organize data, computers. Software applications to manage, monitor, track and organize data, including web services software, application server software, business intelligence software, internet and intranet portal software, computer software to automate software, operating systems software, computer utility, software command, wireless communications software, operating system software, Computer little utility software, computer networking software, security and identity management software, visualization software, cloud computing software, voice and enablement software, and computer programs for use in developing. And executing other computer programs on computers, computer networks, and global communications networks, computers. Software applications to manage, monitor, track and organise data in the fields of marketing, sales, customer services, contracts, human resources, clear cut research, healthcare, healthcare sciences, education, communications and telecommunications, school centers, customer relationships management, public sector administration, public and public private. utilities, transportation, insurance, financial transactions processing, analysis, and management. Governance, risk and compliance, management. Management of full supply chains, orders, procurement,

inventory, assets, projects and manufacturing, business processes outsourcing, Business consolidation, management, Business quality management, business project management, Business

stakeholder, shareholder relationship and management, and strategic business, simulation, enterprise, and resource planning.

The Respondents' offending conduct

[15] During May 2019, the Second Applicant became aware of the existence of the Second Respondent's company in South Africa trading under the name of Black Oracle Consortium Pty Ltd. A flyer which contained the information about the First Respondent was attached to the founding affidavit. According to the contents of the flyer, Black Oracle Consortium (PTY) Ltd is affiliated with the Black IT Forum, a forum that represents the interest of Black students, professionals, and businesses in the ICT sector. Its main purpose "is the formulation of transformational programs and economic inclusion of all its members in the ICT sector, to advocate for transformation of the ICT industry by providing policy inputs, to facilitate access to SMME development programs and SMME's, to facilitate access to skilled development programs to graduates and unemployed youths, to facilitate access to professional opportunities and professionals, to provide in depth research for the ICT industry, to provide access to key stakeholders in the ICT industry, and to provide thought

leadership programs for its members."

[16] On 11 April 2019, the Second Respondent caused Black Oracle Consortium (Pty) Ltd to be incorporated under its name. Then on 18 April 2019, the Second Respondent registered the domain name blackoracle.co.za.

[17] Under the heading SMME's Submissions, the flyer requires participants to provide "an affidavit that declares an SMME shall employ an "ORACLE "skilled person that shall operate an internship with focus on unemployed youth." The First Respondent is not registered in the Oracle Partner Network (OPN) and is not associated with the Applicant. The OPN network is an ecosystem of organizations who participate in the Oracle Channel Partner Program that provides resources and benefits for valued added resellers, independent software vendors and other businesses that want to collaborate with Oracle International Corporation.

[18] The Applicant contends further that the Respondents' use the name "Black ORACLE" more frequently than they use "Consortium", and the letters "B" and "O" are used in close proximity to the name Black Oracle Consortium, which is no doubt intended to designate the name Black Oracle. The First Respondent sometimes uses Black Oracle instead of Black Oracle Consortium

- [19] The Second Applicant became concerned that the use of its ORACLE mark by the First Respondent which is operating business in the same technology space as the Applicants would confuse consumers as they are likely to mistakenly associate the Applicants with the First Respondent.
- [20] The Applicants appointed a private investigator to investigate the Respondents business, and the use of the name “Oracle/Black Oracle/Black Oracle Consortium” in the course of their activities. The investigator used the flyer provided to them by the Applicant as reference. Having conducted physical and online searches on the Respondents, the investigation did not produce much apart from the contact details and personal information of the Second Respondent. In addition, the investigator also conducted a credit check on the Second Respondent. The credit records showed at least three default judgments against the Second Respondent obtained by Standard Bank of South Africa Limited, Nedbank Limited, and Edcon Limited. Furthermore, the Second Respondent was identified as the sole director of the First Respondent, with the registration address of Black Oracle Consortium being 88 Marshall St. Marshalltown, Johannesburg. The investigator looked at these premises and discovered a signboard that listed a range of computer services that are offered by the First Respondent, such as “cloud computing, cloud training and similar general IT services”.
- [21] Upon receipt of the investigator’s Report, the Second Applicant became more concerned that the use of its mark might create a false impression of association with the Respondents. It saw this as trade mark infringement perpetuated by the Respondents. The Second Applicant instructed its attorneys of record to dispatch a cease-and-desist letter to the Respondents demanding that they respect the Applicants rights of the Oracle mark and to change their name Black Oracle/ Black Oracle Consortium to a name which does not infringe on the Applicants rights.
- [22] On 23 August 2019, the Applicants attorneys dispatched the cease and desist letter of demand to the Respondents wherein it inter alia requested that the Respondents cease the use of its famous mark “Oracle”, to undertake to permanently refraining from its future use, and to change the name Black Oracle Consortium, its domain name, social media handle and any other source identifier in connection with the goods and services in the fields of IT, Computer and related computer services to a name that does not infringe on the Applicants trade mark. The Respondents were given until 6 September 2019 to respond.
- [23] On 6 September 2019, the Applicants attorneys received a response from the Respondents advising them that they were seeking legal advice on the use of name “Oracle”. They also sought a meeting with the Applicants to meaningfully engage on the matter with the aim of resolving the issue amicably.
- [24] On 12 September 2019, the Applicants attorneys responded to the Respondents’ request for a meeting and advised that the Applicants were not interested in the proposed meeting at the time. However, the Respondents were given an extension to obtain legal advice regarding the use of the Applicants’ “Oracle” trade mark.

- [25] On 18 October 2019, the Second Respondent and his colleague attended a meeting with the Second Applicant's Director and Corporate Company Secretary, Sandhya Ramdhany ("Ramdhany") which was held at the Second Applicant's offices in Johannesburg. In this meeting the Second Respondent informed the Ramdhany that he had commenced the process of registering the First Respondent in the Oracle Partner Network. When prompted on whether they have undertaken any steps to change their name as demanded by the Applicants' attorneys of record, the Second Respondent informed the Ramdhany that they are not changing their name. The Second Respondent's colleague suggested that if Oracle International wants the name Black Oracle, the Respondents were willing to sell it to them.
- [26] Ramdhany then informed the Second Respondent and his colleague that they cannot continue with the meeting as long as the Respondents are still operating under the name Black Oracle Consortium. They were also informed that they would not be able to join the OPN network whilst still using the name Black Oracle
- [27] The meeting deteriorated. The Second Respondent started questioning the BBEEE status of the Second Applicant. He then accused the Applicants of being oppressive towards smaller organizations like the First Respondent. He also vowed to investigate the Second Applicant's sudden compliance with the BBEEE requirements from level 8 to 1 in a short space of time and furthermore threatened to expose the Second Applicant.
- [28] After the meeting, the Applicants instructed their attorneys to send a letter to the Respondents advising them that the Applicants considered the name Black Oracle as an infringement of its trade mark and that the Applicants would not engage the Respondents any further until such time, they change their name. On 18 October 2019 a letter was sent to the Respondents by the Applicants' attorneys to that effect. No response was received from the Respondents. There was a lull in the matter for the remaining months of 2019.
- [29] In the meantime, the Second Applicant Company Secretary engaged the Applicants Ethics and Compliance function committee and found that no records could be found regarding the Respondents' attempt to join the OPN network. Ramdhany submits that the Second Respondent lied to her about attempting to register the First Respondent in the OPN network. The Second Respondent disputes this and in his answering, affidavit produced a registration number of the First Respondent's application to join the OPN network. Ultimately, the First Respondent was not admitted to the Applicants' OPN network due to the ongoing dispute about the use of the Applicants' trade mark. I accept that the Second Respondent attempted to register the First Respondent in the OPN network.
- [30] On 13 March 2020, the Respondents addressed a letter titled "Request for ORACLE Intervention and Partnership" to various entities including the Chairperson, Chief Executive Officer, and Executives of Oracle Corporation alleging misconduct, poor governance, unfair treatment, poor leadership, noncompliance, nepotism, and arrogance on the part of the Second Applicant's

Company Secretary, Ramdany. Furthermore, the letter alleged that the attitude of the Directors of the Second Applicant would negatively

affect ORACLE's goodwill received from both the government and the private sector. The Applicants deny this and aver that since the incorporation of the Second Applicant in South Africa it has enjoyed profitability. Another allegation made by the Respondents is that the Second Applicant may be in trouble for claiming that its Black Economic Empowerment status went from level 8 to level

1. Similarly, the Second Applicant denies this allegation. It confirmed that its status was awarded to them at the conclusion of independent audits conducted by the Independent Verification Agency. Thirdly, the Respondents alleged that the Second Applicant prioritized the "insourcing of non-South Africans above Africans in Africa, particularly in South Africa". The Second Applicant denies this and states that its headcount consists of a majority of South Africans.

[31] On 24 June 2020, the Applicants launched the present proceedings, seeking inter alia an interdict on the cause of the Respondents' trade mark infringement of their name, passing off, unlawful competition and ancillary reliefs.

Common Cause Facts

[32] The following facts are not disputed.

- a. that the First Applicant is the registered proprietor of the Oracle trade mark, registered in classes 9, 16, 41 And 42 of the Act.
- b. That the First Applicant is the second largest software company by revenue and market capitalization in the world. It carries on business in the field of computer technology and sells database software, technology, cloud engineering systems and enterprise software.
- c. The Second Applicant is the First Applicant's exclusive licensee in South Africa authorized to use of the First Applicants' trade mark.
- d. The First Applicant first used the ORACLE mark from 1979 for a wide variety of computer related goods and services. As a result, the Applicants' have developed and acquired substantial goodwill in their ORACLE brand both internationally and in South Africa.
- e. Oracle is a well-known trade mark in the South African Information Communication Technology (ICT) industry.

[33] It is also common cause that the First Respondent operates in the "technology space" and its services include design and manufacturing of computer software, cloud computing, computer training and general IT services.

[34] The Respondents concede that they are using the Oracle trade mark in Black Oracle and Black Oracle Consortium business trade as their trading company name and also in their domain name without authorization from the Applicants. However, the respondents denied that the goods are identical /similar to those of the applicant's trade mark; alternatively, so closely resembling their trade mark as to be likely to deceive or confuse.

Applicants'

submissions

[35] The Applicants contend that section 34(1)(a) of the Act is applicable to this matter as the Respondents conceded that they are using Black Oracle and Black Oracle Consortium as their trading company name and their domain name blackoracle.co.za in relation to identical goods and services in respect of which the First Applicant has registered trade marks.

[36] It was submitted on behalf of the Applicants that the marks or names to be compared are.

- a. "Oracle" versus "Black Oracle".
- b. "Oracle" versus "Black Oracle Consortium".

[37] The Applicants aver that the dominant element in the trade mark in issue is the word ORACLE. The use of the words "Black Oracle"/ "Black Oracle Consortium" do not serve to distinguish between the Applicants and the First Respondent. The Applicants argue that the Respondents' use of the word "Black" denotes race and nothing further than that whereas the term "Consortium" is descriptive and is in reference to the association of black-owned, small, and medium sized IT businesses to which the Respondents belong too. Neither "Black" nor "Consortium" have any significance in relation to the IT industry and as such have no trade mark value. The First Respondent conceded that "it identified itself as an association of black-owned, small and medium sized IT businesses. And also that it is affiliated with the Black IT Forum, which is a forum that represents the interest of black students, professionals and businesses in the ICT sector." As such, the word "black" is accordingly a generic or descriptive word that any trade mark appropriator is entitled to use in combination with its trade mark to either indicate the race of people, or the colour black.

[38] The Applicants contend that they are also notionally entitled to use the descriptive word black in accordance combination with their Oracle trade mark. The same applies to the word "consortium". It too is a descriptive word that firstly, does not serve to distinguish and secondly, is a word that the Applicants are entitled to notionally use in the context of its descriptive meaning, in combination with their Oracle trade mark.

[39] In this respect, the Applicants rely on *PepsiCo Inc v Atlantic Industries*[3]; *Medion AG versus Thompson Multimedia sales, Germany and Australia GmbH*; and *EON.EG versus Hyundai Motor Company*. In *PepsiCo*, the Court refused registration of the mark "PEPSI TWIST"

because it would be confusingly too similar to an already registered TWIST trade mark. In Medion, the trade mark “THOMSON LIFE” was found to be confusingly similar to the registered trade mark LIFE despite the addition of the distinctive name “THOMSON”. In E.ON the trade mark “HYUNDAI EON” was found to be confusingly to similar to the registered trade mark E.ON. The Applicants contend that that the Respondents marks are visually, conceptually and phonetically, deceptive and confusingly to similar to theirs.

[40] In the Pepsico judgement, the SCA considered the importance of the dominant feature when comparing trade marks for the purposes of determining whether the likelihood of deception or confusion arises from the similar trade marks and held that:

‘In testing for deception and confusion, the Court must identify the dominant features of the respective marks. Should they share a dominant feature, then the Court deems that there is “ordinarily a greater likelihood of deception or confusion”. The Court further held that the marks must be ‘...assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components’.[4]

[41] The Applicants contend that the reason or true motive behind the appropriation of their trade mark by the Respondents is that the Respondents undoubtedly seeks to invoke in the mind of the consumer an association, or connection link with the Applicants so as to deceive and confuse the consumer as to the origin of the goods and services offered as either being those of the Applicant or associated therewith.

[42] In support of this contention, the Applicant stressed that:

- a. The First Respondent’s flyer expressly requires participants to provide an affidavit that declares that an SMME shall employ an “Oracle” skilled person and that shall operate an internship with focus on unemployed youth;
- b. The Second Respondent tried to register the First Respondent in the Oracle Partnership Network so that it could participate in the Oracle Channel Partner Program that provides resources and benefits for businesses that want to collaborate with the Applicants; and
- c. The Respondents participated in a multi-billion-rand tender for the State Information Technology Agency (SITA) for the establishment of a panel of Oracle Specialised Partners. (In the Respondents own version, they are part of the SITA tender which specifically requires Oracle Specialized Partners for the implementation of the Integrated Financial Management System for National Treasury for a period of three years).

The Respondents’

submissions

[43] The Respondents deny the trade mark allegation infringement in terms of section 34(1)(a) of the Act. The Respondents contend that the Applicants have failed to make out a proper case for the relief sought in that Applicants have not proven the following:

- a. That the First Respondent extensively uses the mark(s) in its business trading activities; and
- b. neither have they proven that the services rendered by the First Respondent are identical to the services covered by the First Applicant's trade marks; and further that,
- c. the First Respondent uses the mark in the course of trading; and further that,
- d. the First Respondent's use of the mark is unauthorized.

[44] Regarding the comparison of the Applicants' ORACLE mark to the Respondents' company name Black Oracle Consortium, the Respondents contended that:

- a. Black ORACLE Consortium (PTY) Ltd does not wholly incorporate the Applicants' mark alone.
- b. Visually, the logos of Oracle International Corporation and Black Oracle Consortium do not look the same and neither are they similar. The First Respondent's mark is black and stated in a clearly distinguishable font and form.
- c. Audibly, Oracle International Corporation and Black Oracle Consortium do not sound the same or similar to the extent that the Applicants allege.
- d. The alleged dominant feature of the mark of the Applicants' Oracle trade mark, is a word that is germane to the English language.
- e. The name of the First Respondent and its use are clearly distinguishable from that of the Applicants in that the word Oracle is used in conjunction with a prefix and a suffix, and that does not amount to an infringement of the Applicants' registered trade mark.
- f. Conceptually, the marks do not convey the same idea.

What is a trade mark?

[45] A "trade mark", other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.[5]

[46] Furthermore, in order for a trade mark to be registrable, it should be (the Act used the word "shall") capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either generally, or where the trade mark is registered or proposed to be registered, subject to limitations in relation to use within those limitations.[6]

Assessment of the alleged infringement

[47] The Applicants primarily rely on the provisions of section 34(1)(a) of the Trade Marks Act. Sec 34(1)(a) provides that:

Infringement of registered trade mark

34.

- (1) "The rights acquired by registration of a trade mark shall be infringed by—
- a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

[48] In an article published in a South African Mercantile Law Journal 1990

- (2) under the heading "Misappropriation of the Advertising Value of Trade Marks, Trade Names and Service Marks" by BR Rutherford, the author explained the need for protection against comparative advertising in the following terms:

"The preservation of the reputation and unique identity of the trade mark and the selling power which it evokes is of vital importance to the trade mark proprietor to protect and retain his goodwill. Other traders will frequently wish to exploit the selling power of an established trade mark for the purpose of promoting their own products. The greater the advertising value of the trade mark, the greater the risk of misappropriation. Any unauthorised use of the trade mark by other traders will lead to the gradual consumer disassociation of the trade mark from the proprietor's product. The more the trade mark is used in relation to the products of others the less likely it is to focus attention on the proprietor's product. The reputation and unique identity of the trade mark will become blurred. The selling power becomes eroded, and the trade mark becomes diluted."

[49] To succeed in establishing the alleged trade mark infringement in terms of section 34(1)(a) of the Act, the Applicants must establish the following factors in respect of the trade marks registered in respect of their services or goods:

1. The unauthorised use
2. in the course of trade,
3. in relation to the goods or services in respect of which the trade marks are registered,
4. of an identical mark; or
5. of a mark so nearly resembling it as to be likely to deceive or cause confusion.

[50] The legal principles applicable in determining trade mark infringement in terms of this section were neatly summarised in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[7] by Corbett JA where he said at 640G-641D:

- a. In an infringement action the onus is on the plaintiff to show the probability or likelihood of deception or confusion. It is not incumbent upon the plaintiff to show that every person interested or concerned (usually as customer) in the class of goods for which his trade mark has been registered would probably be deceived or confused.
- b. It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused.
- c. 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, i.e. 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.
- d. The determination of these questions involves essentially a comparison between the mark used by the defendant and the registered

mark and having 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.

- e. This notional customer must be conceived of as a person of average intelligence, having proper eyesight, and buying with ordinary caution.
- f. 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 the marketplace and against the background of relevant surrounding circumstances.
- g. 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 goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this.
- h. If each of the marks contain 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 rather than by a photographic recollection of the whole.
- i. And finally, consideration must be given to the manner in which the marks are likely to be employed as for example, the use of name marks in conjunction with a generic description of the goods.'

[51] In *Century City Apartments Property Services CC & another v Century City Property Owners' Association* [8] Harms DP said:

‘The Trade Marks Act 194 of 1993 recognizes three types of trade mark infringement. The first is the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion (s 34(1)(a)). The second is the unauthorized use of a mark, which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered,

that in such use there exists the likelihood of deception or confusion (s 34(1)(b))...’[9]

[52] In *Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd*[10] Wallis JA said the following:

‘In terms of s 34(1)(a) the three marks would be infringed by the unauthorised use in the course of trade in relation to the goods referred to in those classes of an identical mark or one so nearly resembling it as to be likely to deceive or cause confusion. That highlights both the scope and the limits of the protection provided by registration of the mark. It is prohibited to use an identical, deceptive, or confusingly similar mark in relation to goods falling within those classes. But the use of the same mark on other goods or services, falling outside the class of goods or services covered by the registration, does not amount to an infringement under this section.’[11]

[53] These trade mark infringement principles have since been developed over the years. Not exhaustively though, the prevailing

jurisprudential development can be summarized as follows:

- a. The deception or confusion need only last a fraction of the time and only one of the people involved need to be deceived or confused.[12]
- b. The likelihood of initial confusion or deception, even if capable of being cleared up, is sufficient.[13]
- c. If the mark has a dominant feature, the comparison should be made between the main idea or impression left on the mind of each of the marks, having specific regard to any striking features of each.[14]
- d. Likelihood of deception or confusion in any of the characteristics of sense, sound, or appearance will be sufficient to give rise to an infringement.[15]

[54] In assessment whether there has been an infringement to the Applicants’ trade mark, I align myself with the sentiments expressed by Thring J in *New Media Publishing (Pty) Ltd v Eating Out Web Services CC*[16] where he said at 394C–F:

“The enquiry in this matter consists of two separate but closely interrelated questions: first, are the two marks identical or sufficiently similar to one another; and secondly, is the respondent’s mark being used unauthorisedly in the course of trade in relation to services which are so similar to the applicant’s goods in respect of which its mark is registered that in such use there exists the likelihood of deception or confusion? There is no question here but that the respondent is using its mark without the

applicant’s authority and is doing so in the course of trade. There is, it seems to me, an interdependence between the two legs of the inquiry: the less the similarity between the respective goods or services of the parties, the greater will be the degree of resemblance required between their respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark, and vice versa. Of course, if the respective goods or services of the parties are so dissimilar to each other that there is no likelihood of deception or confusion, the use by the respondent even of a mark which is identical to the applicant’s registered mark will not constitute an infringement; also, if the two marks are sufficiently dissimilar to each other no amount of similarity between the respective goods or services of the parties will suffice to bring about an infringement. I respectfully agree with the learned authors of Webster and Page, South African Law of Trade Marks 4th edition, para 12.23 (at 12-41), where they say, with reference to section 34(1)(b) of the Act:

‘(O)n a proper interpretation of the South African section the degree of resemblance between the goods or services must be such that their combined effect will be to produce a likelihood of deception or confusion when that mark is used on those goods or services.’

[55] The Second Respondent concedes that the First Respondent business trading is in the same offering of goods and services as that of the Applicant and by their own admission, the use of the Applicants’ registered trade mark name “Oracle” has not been authorized by the Applicants. It is in the provision of these goods and services, and this need not be too greatly to the same degree, that in the open market, the Applicants and the Respondents are business and service provider and/or supplier competitors. The trade mark infringement is founded exactly on this fact. The addition of the pre-fix “Black” and suffix “Consortium” in the First Respondent’s company name and style to the Applicants’ brand signature trade mark “Oracle”, of which up until now they have enjoyed exclusive use of in the course of their trade in the registered trade marks classes, is nothing short of a superficial colouring by the Respondents. I find that the first three elements in section 34(1)(a) necessary to establish trade mark infringement by a defendant are self-evident breaches.

[56] The next issue to be determined is whether the names Oracle and Black Oracle Consortium are identical or nearly resemble the Applicants’ registered trade mark in terms of section 34(1)(a) of the Act.

[57] In terms of section 14 of the Act, registration of a mark is prohibited if it is:

‘... identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereto in relation to goods or services in respect of which it is 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’

[58] The Applicants submit that the names Black Oracle/Black Oracle Consortium is similar to their Oracle trade mark and that the use of words “Black Oracle”/ “Black Oracle Consortium” do not serve to distinguish from the word ORACLE. The Applicants argue that word “Black” is descriptive and denotes race or colour and nothing further than that. And that the term “Consortium” is also descriptive and used in reference to the association of black-owned, small, and medium sized IT businesses.

[59] In assessing the similarities between the marks our courts have followed the dictum set by the European Court of Justice in LTJ Diffusion SA v Sadas Vertbaudet SA[17] where the court said:

The criterion of identity of the sign and the trade mark must be interpreted strictly. The very definition of identity implies that

the two elements compared should be the same in all respects.[18]

There is therefore identity between the sign and the trade mark where the former reproduces, without any modification or addition, all the elements constituting the latter.[19]

[60] The court continued at paragraph 52 and stated that:

However, the perception of identity between the sign and the trade mark must be assessed globally with respect to an average consumer who is deemed to be reasonably well informed, reasonably observant, and circumspect. The sign produces an overall impression on such a consumer. The consumer only rarely has the chance to make a direct comparison between science and the trade marks and must place his trust in the imperfect picture of them that he has kept in his mind.

[61] I readily concede to the fact that because of the dominant tying feature between the two marks, and that being the name Oracle, may very well incline the average consumer to draw an inference that these two market competitors are associated to each other in one way or the other. However, be that as it may, I would be hard-pressed to say that the two marks are identical to each other. They physically, simply are not.

Is there a likelihood of confusion between Black Oracle Consortium / Black Oracle and ORACLE?

Test for the likelihood of Confusion and Deception

[62] The Applicants must also prove that the offending party's misrepresentation is likely to cause confusion amongst purchasers or potential purchasers. Whether there is a likelihood of such confusion arising is a question of fact, which must be determined by the court in the light of the circumstances of each case.[20]

[63] The likelihood of confusion was neatly summarized in *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch) where Laddie J said this at paras 24-25:

'24 The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question. That customer is to be taken to be reasonably well informed and reasonably circumspect and observant, but he may have to rely upon an imperfect picture or recollection of the marks. The court should factor in the recognition that the average consumer normally perceives a mark as a whole and does not analyse its various details. The visual, aural, and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. Furthermore, if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion.

[25] Applying those considerations to the facts of this case, there can be little doubt that a likelihood of confusion exists between the Defendant's use of the sign or mark COMPASS LOGISTICS in relation to its business consultancy services and the notional use of the mark COMPASS used in relation to business consultancy services, including those in relation to which the Defendant specialises. The dominant part of the Defendant's mark is the word compass. For many customers, the word logistics would add little of significance to it. It alludes to the type of area of consultancy in which the services are carried out.'

[64] Our courts have considered the test for likelihood of confusion and deception in a number of cases. In *Sabel BV v Puma*[21] it was said that the "likelihood of confusion" must be appreciated globally and that the "global appreciation of the visual, aural or conceptual similarity of the marks must on the overall impression given by the marks bearing in mind in particular, their distinctive and dominant components".[22].

[65] The determination of whether there is a likelihood of deception or confusion is a matter of fact. The Applicant must adduce evidence that the two marks are sufficiently similar to each other such that an average consumer would be confused in reasonably disassociating the two suppliers from each other. In other words, without labouring into marking distinctive differences and similarities between the two marks, the consumer could confuse one proprietor for the other, or draw linkage inferences between their goods and services, thus invariably making an association of some sort between the two proprietors in relation to their goods and services.

[66] In Yuppie Chef the court stated that “what is required is a value judgment on the question of the likelihood of deception or confusion based on a global appreciation of the two marks and the overall impression that they leave in the context of the underlying purpose of a trade mark, which is that it is a badge of origin. The value judgment is largely a matter of first impression and there should not be undue peering at the two marks to find similarities and differences.[23] It is nonetheless not sufficient for judges merely to say that their impression is that the alleged infringing mark is, or is not, likely to deceive or cause confusion. There is an obligation to explain why the judge holds that view.”[24]

[67] In Roodezandt Ko-operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd & another[25] Brand JA elaborated on the meaning of the value judgment to be made (in the context of an application to remove a trade mark from the register). He said at para 5:

‘Considerations that could assist in the exercise of this value judgment have been proposed in numerous decided cases. One of these cases is Laboratoire Lachartre SA v Armour-Dial Incorporated 1976 (2) SA 744 (T) in which Colman J sounded the following note of caution (at 746B-E):

“We have had ample time for full consideration and close comparison of the two trade marks with which we are concerned. These advantages,

however, carry their own dangers. They have caused us to look at the trade marks with far greater care than they would be looked at by the members of the public whose probable reactions we are required to assess, and with a far keener awareness of similarities and dissimilarities than such people would probably have as they go about their daily lives.

What we have now to do is, therefore, to transport ourselves, notionally, from the court room or the study, to the market place. We must try to look at the marks as they will be seen, if they are both in fair and normal commercial use, by the hypothetical consumers of [wine]. Those will be people of many races and degrees of education, having varied gifts, interests, and talents. We are not to postulate the consumer of “phenomenal ignorance or extraordinarily defective intelligence” ... We are to consider a person of average intelligence and proper eyesight, buying with ordinary caution.”

[68] Brand JA then listed the principles of comparison that have been developed in order to reach the value judgment. He said at para 6:

‘Most, if not all, of these considerations seem to find application in the present context. Other principles of comparison which have become crystallised in earlier decisions of this court which I find to be pertinent, include the following:

- (a) A likelihood of confusion does not only arise when every person interested or concerned in the class of goods for which the trade mark has been registered could probably be deceived or confused. It also arises if the probabilities establish that a substantial number of such persons will be deceived or confused.

- (b) The concept of deception or confusion is not limited to inducing in the minds of these interested persons the erroneous belief or impression that the two competing products are those of the objector or that there is a connection between these two products. A likelihood of confusion is also established when it is shown that a substantial number of persons will probably be confused as to the origin of the products or the existence or non-existence of such a connection.
- (c) The determination of the likelihood of confusion involves a comparison between the two competing marks, having regard to the

similarities and differences in the two and an assessment of the impact it would have on the average type of customer who is likely to purchase the kind of goods to which the marks are applied.

- (d) The marks must not only be considered side by side, but also separately.
 - (e) It must be borne in mind that the ordinary purchaser may encounter goods bearing one mark with an imperfect recollection of the other.
 - (f) If each of the competing marks contains a main or dominant feature or idea, the likely impact made by this dominating feature on the mind of the customer must be taken into account. This is so because marks are remembered by some significant or striking feature rather than by the photographic recollection of the whole.
- [69] It was submitted on behalf of the Applicants that the word ORACLE maintains its dominance in the respondents Black Oracle and Black Oracle Consortium, trading name or style, company name and domain name. It was further submitted that the marks are visually, conceptually, and phonetically, deceptively, and confusingly similar. And if the two marks are confusingly and deceptively similar, on any of these levels of comparison, then it is sufficient i.e., it is not a requirement that the trade mark be similar on all three levels of comparison.
- [70] It was further argued on behalf of the Applicants that the Respondents actual use of the Applicants' ORACLE trade mark undoubtedly seeks to invoke in the mind of a consumer an association with or a connection with the Applicants. The following was pointed out to me:
- a. In the flyer, the First Respondent required the participants to provide an affidavit declaring that an SMME shall employ an "Oracle" skilled person and that shall operate an internship with focus on unemployed youth.
 - b. The First Respondent tendered in a multibillion-rand tender for the State Information Technology Agency (SITA) for the establishment of a panel of "ORACLE" Specialised Partners.
 - c. The Second Respondent's attempt to register the First Respondent in the Oracle Partner Network was so that it could

participate in the Oracle Chandel Partner Program that provides resources and benefits for business that want to collaborate with the Applicants.

[71] Ordinarily, had the First Respondent's signage been distinguishable from that of the Applicants, the average consumer

would have no difficulty in disassociating the between the Applicants and the First Respondent for what they are, and that is they are market competitors in the supply of the same goods and services which are identical to one another. But for the name "Oracle"

in the company name and style of the First Respondent, it cannot be gainsaid that the ordinary consumer would no doubt or at the very least, be likely to associate the two as linked to each other.

[72] Having considered the facts, I am satisfied that a likelihood of confusion exists between the Respondents use of the trade/company name Black Oracle /Black Oracle Consortium in relation to Computer and IT services in the course of trade of the First Respondent with those of the Applicants. The prominence of the signature feature, Oracle, and that it being the household brand of the Applicants would lead to an impression or at the very least, the likelihood of an inference by the average consumer that the two marks associate the Respondents to the Applicants.

[73] But not only do I find in favour of the Applicants' contention that the Respondents' company name and style is likely to confuse the average consumer by associating the two; put differently, that the consumer would not ordinarily disassociate a link between the two respective companies, I am also inclined to agree with the Applicants that there is malice in the appropriation of their registered trade mark name, Oracle by the Respondents. The malice I detect is an intention to deceive. My reasons follow.

[74] In the Second Respondent's own version, the First Respondent, like many South African companies, it alleges, does not have the capabilities of designing and developing software such as the Applicants do. Then he says that it is for this reason that the government of South Africa has requested local business to be responsible for installation services, consulting, and deployment. He then continues to contend that it then follows that local business must have Oracle skilled personnel for them to get business from the government for consulting, installing, repairs and services such as information technology, telecoms infrastructure and software.

[75] Perhaps not consciously, the admission he makes here is that in South Africa, there exists only one proprietor that meets these requirements, and that is exclusively the Second Applicant. And even where this may not be strictly the case, then the only other space in which these Oracle skilled personnel would exist in is the Oracle Partner Network of which is monopolized by the First Applicant. The Respondents are not part of this network and yet a mere 15 (fifteen) days after the Second Respondent incorporated the First Respondent, that date being 11 April 2019, on 26 April 2019, the First Respondent responded to a bid/tender

and/or participated in the SITA tender and is now part of the Panel of Oracle Specialized Partners of which the government sought to establish for National Treasury.

- [76] In an attachment submitted by the Second Respondents from the Tender Office headed “Memo: proposals received” which lists what I assume were bidders to the tender, the First Respondent is number 65 on this list. Notably in all of the 79 participants / bidders, none bear the Applicant trade mark name Oracle in their incorporated company names, except the First Respondent.
- [77] The Second Respondent then only unsuccessfully tried to register the First Respondent into the OPN network after being found out by the Second Applicant. Having come across their trade mark use by the Respondents, the Second Applicant did not demand of the Respondents to cease their trade activities, all it asked was that it excise the use of the trade mark in everywhere and wherever so appearing and being used by the First Respondent in the course of its trade activities. The Second Respondent refused, and instead proffered to the Second Applicant that it may buy its trade name if it so wished.
- [78] By his own admission, the First Respondent does not possess the capabilities of designing and developing software such as the Applicants do. And neither is it part of the Applicants OPN network. Its unsuccessful application to register in the network, as was prior informed by the Second Applicant Company Secretary, was by reason of its appropriation of the Applicants’ trade mark name, Oracle. I must stress that the application to the OPN network only came after the fact of the First Respondent having responded to the SITA tender with it being the only company bearing the Oracle name in its incorporated company name. I agree with the Applicants, it is no mistake that the First Respondent company name bears its trade mark. The timing of its incorporation by the Second Respondent, that date being 11th April 2019, then the registration the domain name, blackoracle.co.za on the 18th of April 2019, was what I am inclined to believe, a build-up of its eligibility to participate in the SITA tender by riding on the Applicants trade mark so to pass itself off as having the necessary pre-requisite of Oracle Specialized Personnel. The Second Respondent must have surely known that his incorporated company, the First Respondent being all of two weeks fresh, would have been ineligible in meeting the tender requirements. But with a bearing of the Oracle trade mark in provision of the same goods and services such as the Applicant, the inescapable conclusion is a deliberate impression to cause an association or connection with the Applicants. I find that this was calculated and therefore deceitful.
- [79] It should also be noted that the flyer advertising the First Respondent’s services used the same colour scheme as that of the Applicants.
- [80] The Applicants have established that the word “Oracle” is its distinctive trade mark of its goods and services in the ICT industry. The use of its trade mark by the Respondents is a trade mark infringement.

Passing Off

[81] The Applicants contend that the Respondents' conduct is passing off its goods and services as being that of the Applicants. This constitutes a wrongful and unlawful interference with the Applicants right to trade. This is particularly so when considered in context of acceptable criteria such as fairness and honesty in competition, which requires that regard be had to the boni mores and the general sense of justice in the community, as well as questions of public policy.

[82] Regarding the passing off claim, the Respondents deny that the First Respondent is passing off and claiming affiliation with the Applicant's brand, regard being had to the stark differences between their two respective signages.

[83] Passing-off is defined as follows:

'The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another and, in order to determine whether a representation amounts to passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.'[26]

[84] The requirements necessary for the Applicants to establish passing-off of their trade mark by the Respondents are the following:

- a. The Applicant must prove the existence of the requisite reputation; namely that its get-up or mark has become distinctive of its goods or services, in the sense that the public associate the get-up or mark with the goods or services of the Applicant.[27]
- b. There must be an express or implied representation by the offending party which is false and unauthorised.[28]
- c. The Applicant must prove that the representation made by the offending party is likely to cause confusion amongst purchasers or potential purchasers of the products as to the trade source of the product or the business connection thereof.[29]

[85] I have already held that the Respondents were deliberate in creating in the market an impression that it is somehow associated or connected thereto with the Applicant by riding of its household brand in the ICT, which is held by its registered trade mark name, Oracle. This can easily lead the consumer into thinking that the origin, or source of the goods and services are themselves off the Applicant. The Applicant has also put-up considerable evidence to prove that it has established a brand reputation in South Africa and that it enjoys a substantial amount of goodwill with its registered trade mark, Oracle as a household brand in the ICT industry.

[86] To support the contention that the Applicants have an established reputation in South Africa branded on its registered trade mark and that it enjoys substantial goodwill thereto, it put in evidence that between 4 August 2009, that date being the date of which its Facebook page was created, and 30th March 2020, it received 2, 913,503 (two million, nine-hundred and thirteen thousand, five hundred and three) likes. The @OracleAfrica

profile on its turn was created on 17th January 2011 and between then and 30th March 2020, it received 3, 917 (three thousand, nine hundred and seventeen) likes with 4, 047 (four thousand and forty-seven) third

party Facebook users following the profile. The Applicant avers that through these profiles, the Applicants have managed to reach and connect with millions of consumers worldwide, including South Africa.

[87] Agreed between the parties is the First Applicant's monopoly dominance in the ICT industry. At least this much is conceded by the Respondents. The numbers speak for themselves. To deny that the Applicants brand reputation enjoys substantial goodwill in South Africa is illogical. The continued link between the Applicants' trade mark and the false impression of association created by the Respondents erodes the Applicants uniqueness of its goods and services. But lest I be misunderstood, this is not to say that the Applicants are the only players in the ICT industry which enjoy substantial goodwill. Far from it, all I serve to point out is that there is a reason why the First Applicant is the second largest software company by revenue and market capitalization in the world. The Second Applicant is the exclusive licensee of the First Applicant that is authorized to use the Oracle trade mark in South Africa. Furthermore, the First Applicant is the ultimate parent company of the Second Applicant. The Applicants uniqueness in the ICT space, therefore, lies in those

facts.

[88] Offending Company name – the Applicants furthermore complain that the First Respondent's company name is an offending company name in that it is too closely similar or confusingly similar to the Applicants' registered trade mark.

[89] To this complaint, sections 11(2)(a), (b) and (c) of the Companies Act No. 71 of 2008 (as amended by Act 3 of 2011) are applicable. The respective sections provide:

Sec

11. Criteria for names of companies

(1) ...

(2) The name of a company must –

(a) not be the same as –

- (i) the name of another company, domesticated company name, registered external company, close corporation or co-operative.
 - (ii) ...
 - (iii) a registered trade mark belonging to another 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 by section 35 of the Trade Marks 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;
 - (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;
 - (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, associated with, any other person or entity.
- [90] In defence, the Second Respondent pleads that upon registration of the First Respondent company name, he was not advised by the CIPC that the chosen name was either misleading, offending and/or tantamount to infringement of a registered trade mark. The Applicants have an answer to this. They argue that the Registrar of Companies, in their function of reserving names do not consider or have reference to third party marks on the register of trade marks. In fact, the Registrars of Companies and Trade marks are two separate independent Registrars, without any cross-reference to each other in the registration of either company names or trade marks. This is why a situation may arise of a company name registered by the Registrar of Companies infringes on a third-party right. The Companies Act acknowledges this potentiality eventuating, hence the provision of Section 160 and the specific remedies therein.
- [91] The Respondents rely on the same point of section 160 of the Companies Act and its specific remedies and procedures available therein to an applicant who wishes to raise a dispute in relation to the registration of a company name. In terms of those sections, the Respondents submit that the Applicants had recourse to approach and bring the issue to the Companies Tribunal for adjudication. That the Applicants failed to bring the present dispute before the Companies Tribunal, a body that is empowered to adjudicate over the present dispute, precludes them from claiming relief in terms of the Companies Act. It is the Respondents contention that the High Court ought not to be approached as a forum of first instance in the

present matter, but rather as an appellate body through which the findings/decisions of the Companies Tribunal may be confirmed and/or reviewed. This is more so, especially in light of the fact that the Applicants seek final interdictory relief. So, insofar as the Respondents are concerned, the Applicants' issue is not ripe justiciability in the High Court.

[92] Section 160 of the Companies Act provides:

Sec

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.

[93] The Applicants disputes that to approach the Companies Tribunal as a forum of first instance is not peremptory in terms of the Act. They point out that the section says the applicant may apply to the Companies Tribunal resolution on the company name dispute. However, there is an election provided by section 156(c) of the same Act for it to seek relief in the High Court directly at first instance. The backdrop of section 156(c) reads:

Sec 156. Alternative procedures for addressing complaints or securing rights.

A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by –

- (a) Attempting to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of this Chapter;
- (b) Applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;
- (c) Applying for appropriate relief to the division of the High Court that has jurisdiction over the matter.

[94] The Applicants contend that the appearance of the word may in both sections gives an applicant election to choose to which forum it wishes prosecute its complaint in. Furthermore, the issues raised in this application are multi-faceted and some are not in the adjudication jurisdiction of the Companies Tribunal. Thus, if it were to have first approached the Companies Tribunal in respect of the issues it raises in this matter, there would be an undesirable delineation of different issues being decided in different fora but

occasioned by the same facts, and the consequence thereon, being risk of conflicting decisions in the decided aspects. I agree with the Applicants on both points put up and for another third reason of which, ironically, arises from the Respondents own answering affidavit.

- [95] I find that section 160 does not preclude the Applicants from electing to pursue seek relief in the High Court. Section 156(c) says this much, and vice-versa. Cloete J also held the same in *Global Vitality Incorporated v Enzyme Process Africa (Pty) Limited and Others*.^[30] The third reason for agreeing with the Applicants is that from my reading of section 160, the contemplation there is that the applicant whom is taking issue with the reservation or registration of a name is, 'A person to whom a notice is delivered in terms of this Act' in respect of the name in issue. It is the Second Applicant's version that it only became aware about the existence of the First Respondent in May 2019. The Second Respondent on the other hand contends that when he incorporated the First Respondent on 11th April 2019, he was not informed by the CIPC that the Applicants had registered trade marks on the name. He furthermore seems to accept that the Applicants only became aware of the First Respondent existence in about the time they allege that they did. Therefore, in both versions, neither knew of the existence of the other at the time of the First Respondent's incorporation. Thus section 160 really, does not neatly apply in this situation.
- [96] I must say however, that for reasons which have been already canvassed above, I am highly doubtful that the Second Respondent did not know about the registered trade mark name of the Applicants. To the contrary, I am of the view that the incorporation of the First Respondent's bearing of the Applicants trade mark was deliberately calculated).
- [97] The Applicants contends that they have demonstrated that the Respondents have infringed the First Applicant's registered Oracle trade mark. Therefore, they are necessarily entitled to an order compelling the First Respondent to change the company's name. And in failure of it doing so, after thirty days of the Respondents being ordered to do so, then the third respondent be ordered to unitarily change the First Respondent's company name to its enterprise registration number. I agree.
- [98] Abusive domain name – the Applicants contend that the domain name blackoracle.co.za incorporates the First Applicant's ORACLE trade mark in its entirety and the domain name is clearly used with the intention of promoting the business activities of the First Respondent and Second Respondent, the latter of whom, has failed to provide explanation for the registration of this specific domain name.
- [99] This, the Applicants contend, constitutes an abusive abusive registration as defined by the provisions of the Alternative Dispute Resolution Regulation made under section 69 of the Economic Communications and Transactions Act No 25 of 2002 ("ECTA"). They therefore seek an order directing the Second Respondent to transfer the registered domain name blackoracle.co.za to the First

Applicant.

[100] . The Respondents deny that the domain name blackoracle.co.za is abusive.

[101] In terms of the Alternative Dispute Resolution Regulations under the ECTA, an abusive domain registration is defined as follows:

‘a domain name which either –

- (a) has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the complainant’s rights; or
- (b) was registered or otherwise acquired in such a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the complainant’s rights’.

[102] Regulation 4(1) provides specific factors which may indicate that a domain name is an abusive registration. I am of the view that Regulation 4(1)(b) establishes the Applicants case in this respect. The regulation reads:

‘Evidence of Abusive or Offensive Registration

4.

(1) Factors, which may indicate that the domain name is an abusive registration include –

- (a) ...
- (b) Circumstances indicating that the registrant is using, or has registered, the domain in a way that leads people or businesses to believe that the domain name is registered to, operated, or authorised by, or otherwise connected with the complainant’.

[103] The Applicants have succeeded in proving their case that Respondents have the Applicants trade mark in several respects. The inescapable likelihood of the average consumer associating the Respondents goods and services with that of the Applicants likewise extends to the impression created by the domain too. However, this test of whether a domain name may constitute an abusive registration is premised less on the consumer drawing or inferring this association, but it rather enquires into the surrounding circumstances of that domain name registration itself. In this regard the regulation is clear. It is the conduct of the registrant of the domain name that is to be scrutinised, and that is, whether he is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated, or authorised by, or otherwise connected with the complainant. I have already opined on this substantively. I believe that the impression of this belief was intentional on the part of the Second Respondent. Here too the Applicants succeeds in its prayer for the relief sought.

[104] Unlawful competition – the Applicants contend that the affiliation made by the Respondents, both through the offending company name and in their own submissions of the Applicants trade mark use in the course of their trade without authorization by the Applicants constitutes unlawful competition vis-à-vis its competitors. The Applicants rely on the Consumer Protection Act No. 68 of 2008 (“CPA”) for this contention.

[105] The relevant sections the Applicants rely on in the CPA provide as follows:

False, misleading, or deceptive representations

Sec

41. (1) In relation to the marketing of any goods or services, the supplier must not by words or conduct-
- (a) directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer;

Sec

41. (3)(a) – without limiting the generality of subsections

- (1) and (2), it is a false, misleading, or deceptive representation

to falsely state or imply, or fail to correct and apparent misapprehension on the part of a consumer to the effect, that the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have.”

[106] The Applicants have succeeded in proving all elements of trade mark infringement save for the physical identity of the two marks. Furthermore, they have succeeded in proving on a balance of probabilities that the Respondents unauthorized use of their trade mark in their course of trade in the same supply of goods and services such as that of the Applicant is likely to deceive or confuse. I have held that both statutory breaches exist. The Applicants have furthermore succeeded in establishing that they enjoy substantial goodwill, and that the Respondents are passing-off their trade mark. The association link between the Respondents goods and services and likely confusion with as being those of the Applicants or bearing the same source or origin has been well established. I have also held that the misrepresentation is deliberate and calculated. Thus, it only logically flows that the Respondents are also guilty of unlawful competition.

[107] A last but miscellaneous point that the Respondents have raised is that they are being unfairly targeted by the Applicants with no justification. The Respondents contend that there are many entities that bear the Oracle trade mark, of which the Applicants have not sued on similar grounds. To support this contention, the Second Respondent attached a CIPC search of all entities bearing the word “Oracle” in their company names. The CIPC search revealed that a significant number of companies bearing the same Oracle trade mark in their company names. The Respondents argues that this proves both the popularity of the word

Oracle and its common use in the English language. This argument takes the Respondents defence nowhere. It is not in the mere use or borrowing of another's entity trade mark to a company's name that establishes trade mark infringement. More is required. The trade mark infringement is established in the unauthorized use of Company's A trade mark by Company B in the course of their trade which offers the same goods and services as Company A so as to be likely to confuse or deceive. The Respondent has not put up a single example where it is alleged that their same infringement is found. A simple browse through the list it provided, in my view, I do not think that they could have. For instance, "Oracle Financial Management", "Oracle Gas", "Oracle Medical" are all company names which bear the word "Oracle" in their respective company's

name and style but none of which could be confused with the Applicants' trade mark. The same applies to the rest of the examples provide by the Respondents' list.

[108] Relying on *Golden Fried Chicken (Pty) Ltd v Soul Chicken Restaurant*[31], the Respondents closed off with that the Applicants have failed to put up a proper case for the relief sought in the Notice of Motion and that its application must be dismissed with costs. According to the Respondents own admissions to the trade mark infringement and quite pertinently, enjoying unauthorized use of the Applicants' trade mark Oracle in its company name and style, and in the same scope of commercial trading in which it is directly competing with the Applicant in the supply of the same goods and services, there is no sense in this argument.

[109] In the circumstances, I make the following order:

1. It is declared that the use by the First and Second Respondent of the name Black Oracle / Black Oracle Consortium / Black Oracle Consortium (PTY) LTD in relation to its activities as an association of black owned small and medium sized information technology (IT) businesses:

- 1.1. Infringe on the First's Applicant's registered trade mark No.s: 1982/05501-2; 1984/03372; 2012/11162; 2012/13283-5; and 2015/18752 ORACLE in terms of section 34(1)(a) and (b) of the Trade Marks Act, No.194 of 1993 ("the Act"); and

- 1.2. constitutes passing-off of the common law rights which the First Applicant owns in its well-known Oracle mark.

2. The First and Second Respondent are interdicted and restrained from infringing in terms of section 34(1)(a) and (b) of the Act the First Applicant's registered trade mark No.s: 1982/05501-2; 1984/03372; 2012/11162; 2012/13283-5; and 2015/18752 ORACLE by using in relation to any of the goods and services for which the trade marks are registered, the trade mark BLACK ORACLE / BLACK ORACLE CONSORTIUM / BLACK ORACLE CONSORTIUM (PTY) LTD, or any other mark so nearly resembling the First's Applicant's aforementioned trade mark as to be likely to deceive or cause confusion.

3. The First and Second Respondents are interdicted and restrained from passing-off itself and any of its goods and services as that of the Applicants by making unauthorized use in the course of trade of the name BLACK ORACLE / BLACK ORACLE CONSORTIUM / BLACK ORACLE CONSORTIUM (PTY) LTD.
4. The First and Second Respondents are interdicted and restrained from competing unlawfully with the Applicants by directly or indirectly expressing or implying through words or conduct any false, misleading or deceptive representations concerning a material fact (including specifically its claims and accusations outlined in paragraphs 6.27 – 6.28.3.1 of the Applicants' Founding Affidavit herein as well as that some business connection, association, endorsement, affiliation, approval, or relationship between the Applicants and the First and/or Second Respondents otherwise which do not exist) in terms of the provisions of sections 41(1)(a) and 41(3) of the Consumer Protection Act, No. 68 of 2008.
5. The First and Second Respondents are hereby ordered to remove the infringing BLACK ORACLE / BLACK ORACLE CONSORTIUM / BLACK ORACLE CONSORTIUM (PTY) LTD mark from all its material (both digital and hardcopy) and where it is inseparable or incapable of being removed from its material, such material is hereby ordered to be delivered to the Applicants for destruction.
6. The Second Respondent is hereby ordered to transfer to the First Applicant the domain name blackoracle.co.za.
 - 6.1. Should the Second Respondent fail to transfer the domain name blackoracle.co.za to the First Applicant within thirty (30) days of the date of this Order, the Fourth Respondent is hereby ordered to transfer unilaterally the domain name to the First Applicant for its acceptance thereof as Registrant.
7. The First Respondent is hereby ordered to change its name by making application to the Third Respondent as soon as possible after the date of this order by excluding the term ORACLE (or any name confusingly similar thereto) therefrom.
 - 7.1. Should the First Respondent fail to change its name within thirty (30) days of this Order, the Third Respondent is hereby ordered to change the First Respondent's name unilaterally to its enterprise registration number, i.e., 2019/186603/07.
8. It is directed that the question of the quantum of damages or a reasonable royalty in lieu of damages in terms of the provisions of sections 34(3)(b) of the Act, which the First and Second Respondent are liable to pay jointly and/or severally with one absolving the other, is postponed for investigation and determination on a date to be arranged with the Registrar of this Court.
9. Should the Applicants wish to proceed with a claim for damages, or a reasonable royalty, the present application is to stand as a Summons and the Applicants as Plaintiffs are required to serve and file Particulars of Claim upon the Respondents.

10. The First and Second Respondent are liable to pay jointly and/or severally with one absolving the other costs of suit.

FLATELA LULEKA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 10 October 2023

Counsel for Applicants: P Cirone instructed by Spoor & Fisher

Counsel for the Respondents: JDB Themane instructed by Kunene & CO

Date of Hearing: 21 February 2023

Date of Judgement: 10 October 2023

[1] Infringement of registered trade mark 34.

- (1) 'The rights acquired by registration of a trade mark shall be infringed by— (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion.'

[1] Infringement of registered trade mark

34.

- (1) 'The rights acquired by registration of a trade mark shall be infringed by—

- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion.'

- [2] 11.(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), or 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)

[2] 11.(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), or 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)

[3] PepsiCo Inc v Atlantic Industries 2017 BIP 122 (SCA).

[4] Ibid, para 20.

[5] Passage extracted from definition (xxiii) in the Trade mark Act.

[6] Section

9. (1) of the Act.

[7] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[8] Century City Apartments Property Services CC & another v Century City Property Owners' Association 2010(3) SA 1 (SCA).

[9] Id at para 7.

- [10] Yuppiefchef Holdings (Pty) Ltd v Yuppief Gadgets Holdings (Pty) Ltd (1088/2015) 2016 ZASCA 118
- [11] Id at para 14.
- [12] John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd 1977 3 SA 144(T).
- [13] Orange Brand Services V Account Works Software 970/12 2013 SCA 158. Para 13 and 16.
- [14] Searles Industrials Pty Ltd v International Power Marketing (Pty) Ltd 1982 4 SA 123 (T) 127 D
- [15] Yair Shimansky v Browns the Diamond Store [9/2014] [2014] ZASCA 214
- [16] New Media Publishing (Pty) Ltd v Eating Out Web Services CC 2005
- (5) SA 388 (C)
- [17] LTJ Diffusion SA v Sadas Vertbaudet SA [2003] ETMR 83 (European Trade Mark Reports)
- [18] Ibid, para 50.
- [19] Ibid, para 51.
- [20] Capital Estate & General Agencies (Pty) Ltd and Others v Holiday Inns & Others (supra) at 929E; Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods (supra) at 126I
- [21] Sabel BV v Puma [1998] RPC 199
- [22] Adidas AG v Pepkor Retail Ltd
- [2013] ZASCA para 21, Distell Ltd v KZN Wine and Spirits CC
- [2013] ZAKZNHC 25 para 10, Cowbell v ICS H Holdings Ltd
- [2001] JOL 8089(A)
- [23] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 641A-E; National Brands Ltd v Blue Lion Manufacturing (Pty) Ltd [2001] ZASCA 17; 2001 (3) SA 563 (SCA) (National Brands) para 6; Cowbell AG v ICS Holdings Ltd [2001] ZASCA 18; 2001 (3) SA 941 (SCA) paras 10-15; Puma AG Rudolph Dassler Sport v Global Warming (Pty) Ltd [2009] ZASCA 89; 2010 (2) SA 600 (SCA) paras 8-9 and Century City Apartments Property Services CC & another v Century City Property Owners' Association
- [2009] ZASCA 157; 2010 (3) SA 1 (SCA) para 13.
- [24] Yuppiefchef Holdings (Pty) Ltd v Yuppief Gadgets Holdings (Pty) Ltd, para 26.
- [25] Roodezandt Ko-operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd & another (503/13)
- [2014] ZASCA 173

- [26] Global Vitality Incorporated v Enzyme Process Africa (Pty) Limited and Others (20884/2013) [2015] ZAWCHC 111, para 16.
- [27] Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another
- [1998] ZASCA 44; 1998
- (3) SA 938 (SCA) at 950E-F
- [28] Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods [1992] ZASCA 113; 1992
- (4) SA 118 (A) at 122C-D
- [29] Capital Estate & General Agencies (Pty) Ltd & Others v Holiday Inns & Others (supra) at 929C-D
- [30] Global Vitality Incorporated v Enzyme Process Africa (Pty) Limited and Others (20884/2013) [2015] ZAWCHC 111, paras 77 – 79.
- [31] Golden Fried Chicken (Pty) Ltd v Soul Kitchen Restaurant (14634/2021) [2022] ZAWCHC 21; [2022] 4 All SA 768 (WCC); 2022 BIP 417 (WCC)

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