

SOUTH AFRICA / JUDGMENT

Sasol Ltd v Seasol Industry (Pty) Ltd (CT011Jan2015) [2015] ZACT 64 (14 July 2015) [2015] ZACT 64

COURT

Competition Tribunal

BEFORE

Lizelle Haskins

CASE / FILE NUMBER

CT011Jan2015

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IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA (PRETORIA)

Case No.: CT 011JAN2015

In the matter between:

SASOL LTD

Applicant

and

SEASOL INDUSTRY (PTY) LTD

First Respondent

DECISION

INTRODUCTION

[1] This is an application requesting a default order against the Respondent in terms of section 11(2) and section 160 of the Companies Act 71 of 2008 (the “Companies Act”) read with Regulation

153 of the Companies Act (GNR 351 of 265 April 2011) (the “Companies Regulations”).

[2] The Applicant requests the following order to be made:

[2.1] That the Respondents name does not comply with section 11(2)(b)(ii) and section 11(2)(c)(i) of the Companies Act;>

[2.2] That the Respondent is directed in terms of section 160(3)(b)(ii) to choose a name that does not consist of or incorporate the mark Seasol or any other mark which is confusingly and / or deceptively similar to the Applicants Sasol trademark; and

[2.3] An order as to costs in favour of the Applicant in terms of Regulation 156 of the Companies Regulations.

PARTIES

[3] The Applicant is Sasol Limited, a company with registration number 1979/003231/06, having its principal place of business situated at 1 Strudee Avenue, Rosebank, Johannesburg, Gauteng.

[4] The Applicant is the registered proprietor of the well-known trademark "SASOL" which was registered under various classes.

[5] The Respondent is Seasol Industry (Pty)(Ltd), a company with registration number 2012/213063/07, having its registered address 86 Karen Road, Illiondale, Edenvale, Gauteng.

PROCEDURE

[6] Before an Applicant can bring an application for a default order, the Applicant must comply with Regulation 142 and Regulation 143 of the Companies Regulations.

[7] In accordance with Regulation 142 of the Companies Regulations, the Applicant is obliged to serve a copy of the application and the affidavit on the Respondent within 5 business days after filing it with the Tribunal.

[8] The Applicant, represented by Ayesha Dollie who has been authorized to depose of the affidavit on behalf of the Applicant by virtue of a Letter of Authority, filed its application and supporting affidavit with the Tribunal on 26 January 2015 and served the application on the Respondent on 29 January 2015. The application was filed by the Sheriff at 86 Karen Road, Illiondale, Edenvale, Germiston North.

[9] From the Sheriff's return of service, the application was served by affixing it to the principal door at Respondent's

registered address as the premises was found locked.

[10] In light of the above, I am satisfied that there has been substantial compliance of Regulation 142 of the Companies Regulations by the Applicant.

[11] The Respondent has to date not filed opposing or answering papers.

- [12] As a result, the Applicant has brought an application for a default order in terms of Regulation 153(1) of the Companies Regulations. In terms of Regulation 153(1), if the Respondent has not filed a response within the prescribed period, the Applicant may apply to have the order, as applied for, issued against the Respondent by the Tribunal.
- [13] The Applicant attempted to file the application for a default order on the Respondent at its registered business address by registered post.
- [14] Finally, Regulation 153(2)(b) of the Companies Regulations also states that the Tribunal may make an appropriate order, if it is satisfied that the notice or application was adequately served.
- [15] In the circumstances, I am satisfied that the application for a default order by the Applicant was adequately served.

BACKGROUND

- [16] The Applicant is also the holding company of the Sasol Group of companies and coordinates all group activities and operates in more than 30 countries.
- [17] The Applicants main products are fuel components, chemical components and co-products.
- [18] The Applicant also owns and operates a network of about 400 service stations throughout South Africa displaying the Applicants Sasol trademark at each station.
- [19] The Applicant indicates in its application that through constant marketing and promoting of its name, trade marks, goods and services, it has established a substantial reputation and goodwill and therefore owns in addition to its statutory rights, common law rights in its Sasol trade mark. In this regard the Applicant has stated that it has allocated and spent a considerable amount of money on its marketing and promotion thereof.
- [20] Consequently the Applicant further states that the Sasol trademark has become an asset of what it calls its commercial value and importance.
- [21] With regard to the Respondent, from the information provided the description of the Respondent's business is not listed nor has the Applicant been able to obtain information regarding the nature of the Respondents business.
- [22] The Applicant relies on the following grounds in support of its application:
- [22.1] The dominant and memorable element in the Respondents name is Seasol that is visually and phonetically confusingly similar to the Applicants well-known trademark, Sasol.
- [22.2] The word Industry is descriptive and does not serve adequately to distinguish the Respondents name from the Applicants.

[22.3] Even though the Respondents principle business has not been stated, the Respondents activities may also involve the goods and / or services covered by the Applicants trademark registrations for the Sasol mark.

[22.4] The use of the Respondents name could therefore amount or will amount to trade mark infringement in terms of section 34(1)(a) or alternatively section 34(1)(b) of the Trade Marks Act.

[22.5] The use of the company name Seasol Industry by the Respondent will take unfair trade advantage of the Applicants Sasol trade mark as a result of the distinctive character and repute of the Sasol trade mark and give the Respondent a springboard advantage because of its identity to th

[22.6] The use of the company name by the Respondent would be detrimental to the distinctive character and repute of the Applicants Sasol trademark and will result in a diminution or dilution of the Applicants rights in its Sasol trademark.

[22.7] The Applicant has no control over the activities of the Respondent and the quality of its products or services. Therefore products or services of an unacceptable standard or any other standard not identical to that of the Applicant could discredit or affect the good name and reputation which the Applicant enjoys in the trade.

[22.8] The use by the Respondent of its company name is not authorized by the Appellant.

[22.9] The Respondents name is therefore confusing similar to the Applicants registered trademark and therefore falls foul of the provisions of section 11(2)(b)(ii) of the Companies Act.

THE LAW

[23] The relief the Applicant seeks is in terms of section 160(1) of the Companies Act, which provides for the right to seek specific remedies in respect of disputes concerning reservation or registration of company names and the relevant parts of the section reads:

"... 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 satisfies the requirements of section 11."

[24] It is clear from this section that any person who has an interest in the name of the company can apply to the Tribunal for relief. This application has to be made in the prescribed manner and form to the Tribunal for a determination on whether the name satisfies the requirements of section 11 of the Companies Act.

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

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

[26] The powers for determination of the Tribunal are set out in section 160(3) of the Companies Act and reads:

“After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is the subject of the application, the Companies Tribunal—

(a) Must make a determination whether that name satisfies the requirements of section 11; and

(b) May make an administrative order directing—

(ii) A company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph."

[27] Section 11 of the Companies Act provides primarily for the protection against infringement of a registered company name or trademark and section 11(2) lays out the criteria for company names.

[27.1] Section 11(2)(b)(ii) provides that the name of a company must not be confusingly similar to a name, trade mark, mark, word or expression unless the company, or a person who controls the company, is the registered owner of that defensive name or business name.

[27.2] Section 11(2)(c)(i) provides that the name of a company must not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company is part of, or associated with, any other person.

[28] In section 11(2)(b), ‘similar’ is stated to mean “having a marked resemblance or likeness¹ and that the offending mark (or name) should immediately bring to mind the well-known trade mark (or other name)”.

[29] It has also been stated that a “mere similarity is not sufficient, it must be confusingly so. As to the requirement for confusingly similar, the test, as in the case of passing-off, should be ‘... a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the goods or merchandise of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in the light of the particular circumstances of the case.’”

[30] The principles set out above would also apply to section 11(2)(c), apart from the requirement of fault, it can reasonably mislead a person to hold a certain belief.

[31] To determine the test applicable in determining section 11(2)(b) and

(c) Henochsberg on the Companies Act 71 of 2008 states the following:

“In terms of the 1973 Act the only consideration was whether the name is desirable or not, irrespective of the reason for the undesirability. It is respectfully submitted that although the 2008 Act does not make use of one universal term, namely “undesirable”, it is still useful to refer to the above-mentioned cases as it provides guidelines that would be relevant when interpreting section 11(2)(a), (b) and (c). The Registrar in terms of the 1973 Act (now the Commissioner) therefore had a wide discretion to reject the choice of name of a proposed company.

Circumstances in which a name may be found to be ‘undesirable’ included those where the name: (1) would offend against public policy (e.g. it is obscene or likely to give offence);

(2) is likely to mislead or deceive the public; (3) is the same as or similar to that of another and as a result is likely to lead to confusion amongst members of the public (see Cape Town Lodge CC v Registrar of Close Corporations and Another [2008] 2 All SA 34 (C) at para 21). It is submitted that these circumstances apply mutatis mutandis to sections 11(2)(a)–(c).

The mere fact that the name of one company is similar to that of another does not, on that ground alone, justify a finding that the name is undesirable, particularly where the name is an ordinary English word and the applicant is unable to demonstrate that it has acquired a secondary meaning associated with the applicant’s business (see again the Cape Town Lodge case supra at paras 46–48 in which the Court considered that it had to be satisfied that: “on balance, a substantial number of customers of Town Lodge will be deceived or confused by the similarity between Town Lodge and Cape Town Lodge. One of the ‘right principles’ . . . is whether or not the words used in the mark consist entirely of words in everyday use which are descriptive of its services. I am very much persuaded by the correctness of the dictum in Rovex Ltd and Another v Prima Toys (Pty) Ltd . . . which runs as follows: ‘ . . . If a defendant uses an ordinary English word or words, there is no doubt the public will be less likely to regard it as a proprietary word and associate it with a similar word registered by the plaintiff than would be the case if both words were invented words or words which had no meaning appropriate to the goods in question.’”

[32] Cilliers² summarised the views of the courts with regard to the concept of “undesirability”, as follows:

“It is undesirable to register the new or amended name, if there is a likelihood of confusion or deception. It is a question of fact and degree whether or not a likelihood of sufficient confusion has been established to justify a change of name. Thus where the deception or confusion of the public is not manifest, the court must determine the likelihood of confusion or deception, not by looking at the names in isolation, but by considering all the circumstances. The following should be taken into account in determining whether a company name is undesirable because of its similarity to another company name; the likelihood of the names being abbreviated and the form of abbreviation; evidence of actual confusion or deception; the degree of confusion and its consequences, including inconvenience caused; whether a name could or might itself mislead the public or a recognized section of the public in any particular locality, or would be likely to cause confusion in the sense that the public would think that there is some actual connection or association between the companies; whether avoidable confusion has been created by the similarity of company names, which is undesirable; the Registrar’s Directive of company names; the commercial environment in which the companies compete; the

geographical environment in which the companies operate; whether the companies compete in the same market place; the importance of first impressions; the specialist nature of the companies' goods or services and the correlative ability of the customers to differentiate; whether the market place can arguably deal with any confusion; whether the name resembles a trade mark; and the nature of the names.

Each company name must be considered in the light of its individual merits or demerits. In doing the assessment, the courts use the reasonable man test, namely that of an average person with average memory and imperfect recollection, not one with an extraordinary or photographic memory.”

EVALUATION

- [33] The word SASOL is not an ordinary English noun and also not in common use. In addition, SASOL is descriptive of the services of the Applicant and is consequently "uniquely distinctive" with a potentially strong distinguishing characteristic.
- [34] Similarly, the word SEASOL is not an ordinary English noun and also not in common use. However, the Respondent's name is SEASOL INDUSTRY, with INDUSTRY being an ordinary generic word.
- [35] The Applicant has obtained in a practical and business sense, a sufficient reputation amongst a substantial number of persons who are either clients or potential clients of its business before the registration of the Respondent.
- [36] As pointed out above, there are no hard and fast rules, which could be applied, to ascertain whether a name is undesirable or not. Views might differ depending, amongst others, on the degree of similarity of the names, the likelihood of confusion and the respective present and contemplated business activities of the parties. In the instant case, the following factors should, in my view, be taken into account –
- [36.1] The name Sasol Limited was registered in 1979 and the Applicant has since that date built up a very successful business under that name.
- [36.2] The name Seasol Industry (Pty) Ltd was registered in 2008 and the Respondent has not, that I am aware of, built up a successful business under that name.
- [36.3] From the information provided it is uncertain whether the parties compete in the same commercial environment or marketplace.
- [36.4] The Applicant does not have a specific clientele some of whom would not easily be misled by the similarity in the two registered names and others who would easily be misled or be confused by the similarity.
- [36.5] The names as registered, namely “Sasol Limited” and “Seasol Industry (Pty) Ltd”, don't share an identical, although Sasol and Seasol are very similar.

[36.6] Sasol is an abbreviated word for South Africa Synthetic Oil Liquid and it's meaning is appropriate to the service and goods that it sells.

[36.7] Applying the reasonable man test, the general members of the public will in all likelihood confuse into believing that the names are similar and that the two companies might be associated.

[36.8] The Respondent will not suffer any particular inconvenience if prohibited from using the name "Seasol".

FINDINGS

[37] The name "Sasol Ltd" is confusingly similar to "Seasol Industry (Pty) Ltd" and therefore is in contravention of section 11(2)(b) of the Companies Act.

I proceed to make an order in the following terms:

- a) The Respondents name does not comply with section 11(2)(b)(ii) and section 11(2)(c)(i) of the Companies Act.
- c) The Respondent should file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order.
- d) The Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph.
- e) This Determination must be served on the Applicant, Respondent and the Registrar of Close Corporations of the Companies and Intellectual Property Commission.
- f) Any other person with an interest in the name that is the subject of this application may, within twenty (20) business days after receiving the Notice of this Determination and Administrative Order, apply to a court to Review the Determination.
- g) Each Party to pay their own costs.

ADV LIZELLE HASKINS

MEMBER OF THE COMPANIES TRIBUNAL

DATED: 14 JULY 2015

1 Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)

2 JB Cilliers "Similar company names: A comparative analysis and suggested approach" 1998 THRHR 582 and 1999 THRHR 57.

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