



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

(“The Tribunal”)

CASE NO: CT030Mar2015

In the matter between:

RAMADA INTERNATIONAL INC.

THE APPLICANT

AND

RAMADA INVESTMENTS (PTY) LTD

THE RESPONDENT

(2013/185610/07)

Coram K. Tootla

Decision delivered on 22 July 2015

DECISION

INTRODUCTION:

- [1] The Applicant is Ramada International Inc., a company incorporated in Delaware under the “company laws of the United States of America” brings an application in terms of Sections 11 (2) and 160 of the Companies Act 2008 (“the Act”) read with Regulation (Reg.) 153 for an order that the First Respondent change its name be ordered to change its name because it does not comply with sections 11 (a) (iii) , or Section 11(2)(b) (iii) and 11(2)(c)(i) of the Companies Act.

- [2] The Respondent is RAMADA INVESTMENTS (PTY) LTD, a company incorporated in terms of the Companies Act having its registered place of business at address at 297 Makwarela, Sibasa, Limpopo.

PROCEDURE:

- [3] The Applicant served a copy of the CTR 142 application in accordance with the rules and filed same with the Tribunal timeously. The CTR FORM 145 and accompanying affidavit was also served and filed.
- [4] The Respondent did not serve or file any notice to oppose the Applicant's application nor served or filed any answering papers to the Applicant's claim despite having received the letter of demand and having responded to the email of the Applicant requesting it to change its company name.
- [5] However, the Applicant has not indexed the papers sequentially and in a proper manner to assist the Tribunal. It would be preferred that the procedure used in the High Court be used for future purposes. The papers have not been served on the Companies and Intellectual Commission (CIPC) as second Respondent nor has the Applicant requested an order in accordance with Section 160 (3) and Section 14(2) of the Act. This is required to ensure that the name is changed by CIPC if the Respondent does not do so.
- [6] In addition, the Applicant's papers are uncoordinated in that the orders requested for in CTR 145 and the affidavits are differing and also unclear and certainly not in the interest of the Applicant. Much of the evidence is scattered in various affidavits without proper coordination. The Applicant's attorney has gone to great lengths to set out the case law which is useful and relevant. However, with due respect the application of the law to the facts of its case has not been properly done nor justified. The Tribunal is accordingly at pains to find reasons to justify the claims of the Applicant.

- [7] Finally, the Applicant's attorney has confused Section 34 (1) and Section 35 of the Trade Marks Act in its application, the former is applicable to trade mark infringement and is solely within the jurisdiction of the High Court, whilst the latter is applicable to well – known trademarks as contemplated in Section 11(2) (a) (iii).

BACKGROUND:

- [8] The Applicant claims that its trade mark RAMADA has been in existence since 1958 in various countries in the hotel and restaurant business; and was subsequently registered in South Africa in 1984 and has been in existence since that date.
- [9] The Applicant also claims common law rights in the name "RAMADA" due to its "wide spread and extensive use" thereof since 1958. Currently the use of the trademark is used in 900 RAMADA hotels in the United States and in more than 60 countries in the world. It can be noted that the registration of the Respondent took place in 2013 after registration of the RAMADA trademark and has no consent to use the trademark as its name from the Applicant.
- [10] The Applicant contends that it has spent a considerable amount of money and time in promoting and advertising goods under the RAMADA trade mark and that the unauthorized use of the said trademark or of confusingly similar marks is damaging to the business of the Applicant.
- [11] Finally, the Applicant contends that use of the name RAMADA takes unfair advantage of the extensive goodwill and reputation subsisting in the RAMADA trade mark.
- [12] It also contends that the Respondent's company name is "confusingly similar to its trademark and that it offends against the provisions of Section 11(2) (b) of the Act.

- [13] An order is thus sought for the Respondent to change its name by virtue of the provisions of Section 11(2) (c) (i) on the basis that it falsely implies or suggest or is otherwise reasonably likely to mislead a person to believe, incorrectly, that the Respondent is part of, or associated with the Applicant. An order is also sought in terms of Section 11 (2) (a) (iii) alternatively Section 11 (2) (b) (iii) and Section 11 (2) (c) (i).

APPLICABLE LAW:

- [14] For the purpose of brevity Section 11 of the Companies Act and Reg 142 (applies where relevant) will not be set out in detail herein.
- [15] Note the applicable portion of Section 11 (2)(a)(iii) provided, *inter alia*, that the name of the company must not be the same as 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;
- [16] Note the applicable portions of s 11(2) (b) of the Companies Act provides *inter alia* that the name of a company must not be confusingly similar to a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed.
- [17] Note also the applicable portions of s 11(2)(c)(i) of the Companies Act provides *inter alia* 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 or entity.

EVALUATION:

- [18] Applied to the matter under consideration the question as to what is the same as a trade mark in terms of Section 11 (2) (a) (iii) is inapplicable to the situation at hand as the company name “RAMADA INVESTMENTS” is not the same as the “ RAMADA” trademark. Thus at the outset, the application fails on this ground.
- [19] The Applicant has requested an order in terms of Section 11 (2) (b) (iii) alternatively to Section 11 (2) (a) (iii). Thus, what is “confusingly similar” in Section 11 (2) (b) has to be examined carefully to determine whether this is in fact so. “Confusingly similar” means that the names are as alike in a manner that will confuse the reasonable person, being the “ordinary reasonable careful man, i.e. not the very careful man nor the very careless man as stated below in *Link’s* and *Aziza’s* case. It is clear that the ordinary reasonable careful person will be confused as mentioned in these cases merely because one word is the same and due to its side by side by use.
- [20] When referring to the case law on the subject, it is submitted that it must be as alike in a manner that will confuse the reasonable person, i.e. the “ordinary reasonable careful man, i.e. not the very careful man nor the very careless man” (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E) at 280). This reasonable man (person) should further be qualified as in *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315F-G: “A rule of long standing requires that the class of persons who are likely to be the purchasers of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception.”
- [21] In *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C) the Court found that the use of the name “Azisa Media CC” is not undesirable, but that the word “Azisa” only would in all likelihood lead to inconvenience and confusion amongst the customers.” The business spheres of the applicant and the respondent are important in respect of the Trade Marks Act No. 194 of 1993.

- [22] In *Capital Estates and General Agencies (Pty) Ltd and Other v Holiday Inns Inc. and Other* 1977 (2) SA 916 (A) at 929 E-0, the courts came to the conclusion that even if the parties do not appear to carry on business in precisely the same field, this did not mean that there will not be confusion or deception in trade.
- [23] From the Capital Estate Case (929 E-O) it can be concluded that in claiming that another corporation's name is undesirable, there is no bar to obtain relief when there is an absence of a common field of activity in a circumstance when there is a reasonable likelihood of confusion. For the reasons cited above, it is clear that there is at a reasonable likelihood of confusion due to the Applicant's well known use of the trade mark and its presence in the market as enunciated in the founding affidavit, but it could easily be much more.
- [24] In addition, the pertinent case which is relevant to the doctrine of imperfect recollection has been captured in *Standard Bank of South Africa Limited v United Bank Limited & Another* 1991 (4) SA 780 (T) 8011 to 802B, where the court said that there is a probability that a substantial number of people will be at least confused, if not deceived, given the fact that an individual does not have the two marks before him, side by side and that memory is often imperfect.
- [25] Thus it is clear from the aforementioned, that there is a reasonable likelihood of confusion if both the name and the mark are to be used together in a normal and fair manner in the ordinary course of business especially since imperfect recollection can take place as can be seen from some the cases quoted above. It is evident therefore that the name RAMADA as incorporated in the Respondent's company name falls within the ambit of only Section 11 (2) (b) (iii) of the Companies Act.
- [26] In my opinion "falsely imply or suggest" in Section 11(2) (c) (i) requires at the least the element of fault in the form of intent which has been not been proven by any evidence.

FINDINGS:

[27] The Tribunal does not have the jurisdiction to make a finding that there has been an infringement of a registered trade mark in terms of section 34 of the Trade Marks Act this falls squarely on the shoulders of the High Court.

[28] However, the Applicant has shown that use of the name is “confusingly similar” as set out in Section 11 (2) (b) (iii). Similar” as in section 11 (2) (b) would be “having a marked resemblance or likeness” and that the offending mark (or name) should immediately bring to mind the well-known trade mark or other name (Refer Bata Ltd v Face Fashions CC 2001 (1) SA 844 (SCA)). **Mere similarity is also not sufficient, it must be confusingly so.**

[29] The Applicant’s application is granted as set out below.

ORDER:

1. An administrative order is made in terms of Section 160 (3) (b) (ii) that the Respondent change its name to one which does not incorporate the word RAMADA as it is in contravention of Section 11 (2) (b) (iii).
2. This order must be served on the Applicant, Respondent and on the Registrar of the CIPC by the Tribunal’s Recording Officer (Registrar).
3. The Respondent is hereby ordered to change its name within 90 days of date of receipt of this order and to file a notice of amendment of its memorandum of incorporation.

4. There is no order of cost against the Respondent considering that the matter has not been opposed. The Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment.
5. Since the Respondent is a profit company, in accordance with Section 11 (1) (b) and (3) (a) of the Act, the Respondent is at liberty to use its registration number as its company name immediately followed by the expression “South Africa” should it not be in a position to use another name.
6. The Registrar of CIPC is directed to inform the First respondent forthwith of the decision of the Tribunal and to ensure that the name is changed within the requisite time period as aforesaid; and to invite the First Respondent to file an amended Memorandum of Incorporation using a satisfactory name.
7. Should the Respondent not comply with the order of the Tribunal within the 90 day period, the Registrar of CIPC is directed to change the Respondent’s name to its registration number without the Respondent’s consent (in accordance with Section 160 (3) and Section 14(2) of the Act.

k.y. tootla (electronically signed)

KHATIJA TOOTLA

Member of the Companies Tribunal

22 July 2015