

**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT005DEC2014**

**In the matter between:**

**NDALO MEDIA (PTY) LTD**

**APPLICANT**

**And**

**DESTINY EXCELLENCE (PTY) LTD**

**RESPONDENT**

**Presiding Member of the Tribunal: Kasturi Moodaliyar**

**Date of Decision: 7 August 2015**

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**DECISION (Reasons and Order)**

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**INTRODUCTION**

[1] This application is in terms of section 160 of the Companies Act 71 of 2008 (the “Act”). The Applicant requests an order directing the Respondent to change its name because it does not comply with section 11 of the Companies Act.

**BACKGROUND**

[2] The Applicant is Ndalo Media (Pty) Ltd a company registered in terms of the company laws of South Africa, under registration number 2007/005856/07, with its principal place of business at Bryanston Corner, Office, 1<sup>ST</sup> Floor Block B, 18 Ealing Crescent, Bryanston, 2191.

[3] The Respondent is Destiny Excellence (Pty) Ltd, a company incorporated in terms of the company laws of South Africa, under registration number 2012/207518/07, with registered address at 74 4<sup>th</sup> Street, Booyens Reserve, Johannesburg, 2129.

## **SERVICE**

- [4] A copy of the application must be served on the Respondent at its registered address within 5 days of filing it with the Companies Tribunal as required by regulation 142(2).
- [5] The copy of the application was properly served on the Respondent by the Deputy Sherriff of Johannesburg South on 10 December 2014, who indicates that it was served on the Respondent at the given address to Belinda Walker, the General Manager of Destiny Excellence (Pty) Ltd. This service is in accordance with Rule 4 (1)(a)(v) of the High Court Rules.
- [6] No response was received from the Respondent and the Applicant, therefore, applies on FORM CTR 145 for a default order in terms of regulation 153.
- [7] The application was properly served by the Deputy Sherriff of Johannesburg South on the Respondent's principle place of business. I am consequently satisfied that the Respondent's lack of participation in these proceedings is not due to the lack of service or knowledge of the process and that this application is unopposed.

## **ISSUES**

- [8] The Applicant is the registered proprietor of the trademark "DESTINY", "THE DESTINY FORUM", "DESTINY CONNECT" and "DESTINY MAN" (which shall be referred to as the DESTINY trademarks). The trademark registration/s is in terms of the Trade Marks Act No.194 of 1993 ("Trade Marks Act").
- [9] The Applicant avers that on or about 15 August 2014, the Applicant became aware that the Respondent had registered its company name, which contains the words "DESTINY".

[10] The Applicant filed an objection to the use of the words “DESTINY” in the name of the Respondent with the Companies Tribunal on 4 December 2014 on form CTR 142 as prescribed by regulation 142(1)(a). This was filed together with a supporting affidavit as required by regulation 142 (1)(b) by Christelle Dunn, an attorney representing the the Applicant company, who was duly authorized to depose the affidavit by the Applicant by a resolution of 12 November 2014.

[11] The Applicant submits that the Respondents name DESTINY EXCELLENCE (PTY) LTD is confusingly similar to the trade marks of the Applicant being “DESTINY”, “THE DESTINY FORUM”, “DESTINY CONNECT” and “DESTINY MAN”.

[12] The Applicant avers that it has been using the DESTINY trade marks in relation to its products and services since its inception in 2007 and and it has acquired a substantial reputation and goodwill in its DESTINY trade marks.

[13] The Applicant states that it acquired THE DESTINY FORUM trademarks under class 16 and class 41. We are not told what classification or provided with any CIPC registration of the names DESTINY, DESTINY MAN and DESTINY CONNECT, save to say that DESTINY and DESTINY MAN are magazines published monthly and DESTINY CONNECT provides on-line connect and social networking.

[14] Furthermore, it is asserted that the Registration of the Respondent’s name is contrary to section 11(2)(a)(iii), (b)(iii) and (c)(i) of the Act.

[15] The Applicant submits that it is clear that the Respondent’s name DESTINY EXCELLENCE (PTY) LTD is almost identical, and hence confusingly similar to the Applicant’s registered DESTINY trademarks in sight, sound and meaning.

[16] The Applicant requests the Companies Tribunal to make an order that the Respondent change its company name because the use of the Respondent's name in commerce would constitute an infringement on the Applicant's DESTINY trademarks.

## **APPLICABLE LAW**

[17] Section 11(2) of the Act is primarily about protection against infringement of a registered company name or trademark, and the applicable sections reads as follows:

*"Section 11(2): The name of the company must:*

*a) not be the same as:*

*(i) the name of another company, domesticated company, registered external company, CC 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, 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 trademark belonging to a person other than the company, or mark in respect of which an application has been filed in the Republic for registration as a trademark or a well-known trademark as contemplated in section 35 of the Trade Marks Act, 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, except to the extent permitted by or in terms of that Act;*

*b) not be confusingly similar to a name, trademark, mark, word or expression contemplated in paragraph (a) unless:*

*(i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;*

*(ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;*

*(iii) in the case of a name similar to a trademark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trademark, or mark, or is authorised by the registered owner to use it, or*

*(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv) the use of that mark, word or expression by the company is permitted by, or in terms of the Merchandise Marks Act;*

*c) not falsely imply or suggest or be such as would reasonably mislead a person to believe incorrectly that the company –*

*(i) is part of, or associated with, any other person or entity;”*

[18] The Applicant seeks remedies in terms of Section 160 which reads as follows:

*“Section 160.*

*(1) A person to whom a notice is delivered in terms of section 12(3) or section 14(3) 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 satisfies the requirements of section 11.*

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

*(a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or*

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

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

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

*(b) may make an administrative order directing—*

*(i) the Commission to—*

*(aa) reserve a contested name for the applicant in terms of section 12;*

*(bb) register the contested name, or amended name as the name of company; or*

*(cc) cancel a reservation granted in terms of section 12, if the reserved name has not been used by the person entitled to it; or*

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

## **EVALUATION**

[19] The Companies Tribunal must evaluate whether the name satisfies the requirements set out in Section 11(2) of the Act.

[20] To evaluate the meaning of the words contemplated in section 11 (2), I will rely on the guidance of the common law where applicable.

[21] Section 11(2)(b) provides that the “name of a company must not be confusingly similar to a name, trademark, mark, word or expression contemplated in paragraph (a).”

[22] The word “similar” as stipulated in section 11(2)(b) would be described as “having a marked resemblance or likeness”<sup>1</sup> and that the offending mark or name should immediately bring to mind the well-known trade mark or other name. Courts place a determination on whether the mark or names are “the same or confusingly similar” and whether the mark or name is able to “falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the [Respondent] company is part of, or associated with” the Applicant company.<sup>2</sup>

[23] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* the court held that the “This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution. The comparison must be made with reference to the sense, sound and appearance of the marks. The marks must be viewed, as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side, but also separately. It must be borne in mind that the ordinary purchaser may encounter goods, bearing the defendant’s mark, with an imperfect recollection of the registered mark and due allowance must be made for this. If each of the marks contains a main or dominant feature or idea, the likely impact made by this on the mind of the customer must be taken into account. As it has been put, marks are remembered rather by general impressions or by some significant or striking feature than by a

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<sup>1</sup> See *Bata Ltd v Face Fashions* CC 2001 (1) SA 844 (SCA).

<sup>2</sup> See *Deutsche Babcock SA (Pty) Ltd v Babcock Africa (Pty) Ltd* 1995 (4) SA 1016; *Bata Ltd v Face Fashions* CC 2001 (1) SA 844 (SCA);

photographic recollection of the whole. 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.”<sup>3</sup>

[24] The Applicant asserts that the Respondent’s name “DESTINY EXCELLENCE (PTY) LTD” and the Applicant’s registered “DESTINY” trademarks are confusingly similar in terms of the basic principles of confusingly similar.

[25] The strengthen this assertion, the Applicant directs the Tribunal to the case of *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd*<sup>4</sup> where the Twins Company marketed and distributed several products under the HOLLYWOOD trademarks. The court found that the mark HOLLYWOOD CURL constituted a passing off, where it was a reasonable likelihood that ordinary members of the public might be confused or deceived into believing that such merchandise belonged to the Twins Company. The court concluded that it was “another horse out of the same same stable”.

[26] It is uncertain from the record as to what business the Respondent has registered to trade. The Applicant provides a document having searched for the Applicant on a website called “Search Works” which does not provide any information on the nature or class of business of the Respondent. There is no evidence of any CIPC registration or trademark searches to indicate the nature of the Respondent’s business, which may be helpful in this regard.

[27] The question remains, would this lack of information regarding the Respondent preclude a reasonable person from a reasonable likelihood of associating the Applicant’s brand with the Respondent’s name?

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<sup>3</sup> 1984 (3) SA 623 (A) at 641 B-C.

<sup>4</sup> 1989 (1) SA 255 (A).

[28] The Applicants provide that in *Capital Estates and General Agencies (Pty) Ltd and other v Holiday Inns Inc*, the court held that even if parties do not appear to carry on the same business in precisely the same field, this did not mean that there will not be confusion or deception in trade.<sup>5</sup>

[29] I must reiterate that the only trade mark registration information the Applicant's provided us is for the mark "THE DESTINY FORUM" and not any further derivatives.

[30] If the Respondent's dealings were in relation to the trade mark classes by which the Respondent's names were classified, there might have been some undesirable or confusingly similar mark. Without further information on the Respondent's dealings, it is uncertain whether there is a likelihood that a member of the public will be confused with the Applicant's dealings.<sup>6</sup>

## FINDINGS

[31] I note that in the CIPC trademark registration of the Applicant, it is indicated that the "Registration of this trade mark shall give no right to the exclusive use of the word "DESTINY" separately and apart from the mark". The word DESTINY itself has a noun with ordinary meaning. According to the Oxford Dictionary "DESTINY" means: "*The events that will necessarily happen to a particular person or thing in the future*" and/or "*The hidden power believed to control future events; fate*".<sup>7</sup> The Applicant, therefore, cannot hold claim to the word DESTINY to the exclusion of the remaining words "The Forum".

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<sup>5</sup> 1977 (2) SA 916 (A). at 929.

<sup>6</sup> See *Peregrine Group (Pty) Limited v Peregrine Holdings Limited* 2000 (1) SA 187 (W).

<sup>7</sup> <http://www.oxforddictionaries.com>

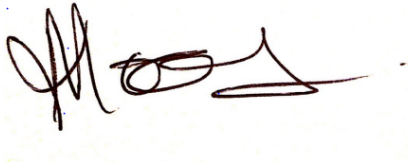


[32] The Respondents name “DESTINY EXCELLENCE (PTY) LTD” cannot reasonably be mislead to believe incorrectly that the Respondent’s company is part of or associated with the Applicant’s company.

## **ORDER**

I proceed to make the following order:

- a) The application is dismissed.
- b) There is no order of costs in relation to this application.

A handwritten signature in dark ink, appearing to be 'Kasturi Moodaliyar', written over a light blue grid background.

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**KASTURI MOODALIYAR**  
**COMPANIES TRIBUNAL: MEMBER**