

# IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT017Mar2015

In the matter between:

Actom (Pty) Ltd

Applicant

and

Avast Trading (Pty) Ltd

First respondent

Companies and Intellectual Property Commission

Second respondent

Coram: Delport P.A.

Decision handed down on 2 July 2015

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## Decision

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### INTRODUCTION

- [1] The applicant applies in terms of section 160 of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulations 142 and 153 of the Companies Act (GNR 351 of 265 April 2011) (“Companies Act regulations” / “regulations”) for a default order that the first respondent (“first respondent” / “the company”) be ordered to change its name because it does not comply with sections 11(2)(b) and 11(2)(c) of the Companies Act.

### BACKGROUND

- [2] The applicant Actom (Pty) Ltd, a company incorporated in terms of the Companies Act.
- [3] The first respondent is Avast Trading (Pty) Ltd, a company incorporated in terms of the Companies Act.

- [4] The second respondent is the Commissioner of Companies. There is no such office and the reference should have been as provided for in s 189 of the Companies Act
- [5] The applicant is the registered proprietor of the AVAST trade mark in terms of the Trade Marks Act No. 194 of 1993.
- [6] The applicant served a copy of the CTR 142 application, as filed with the Tribunal on 20 March 2015, on the first respondent on 24 March 2015.
- [7] The applicant served a copy of the CTR 142 application, as filed with the Tribunal on 20 March 2015, on the second respondent on 25 March 2015.
- [8] No response by the first respondent was filed on the due date.

### **APPLICABLE LAW**

- [9] 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* or
  - a well-known trade mark as contemplated in section 35 of the Trade Marks Act.
- [10] The applicable portions of s 11(2)(c) of the Companies Act provides *inter alia* in subpara (i) 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. It is accepted that the applicant intended to refer to sub-para (i) of s 11(2)(c), but this is not stated in the CTR 142.

### **EVALUATION**

- [11] Section 11(2)(b) requires that the *name* must be “confusingly similar”. This would entail that the *name* in terms of the Companies Act and the *name, trade mark, mark, word or expression* as registered in terms of the Trade Marks Act are as alike in a manner that will confuse the reasonable person. The

reasonable person, in this context, being the “ordinary reasonable careful man, ie 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.” See also *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013); *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A); *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA); *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C).

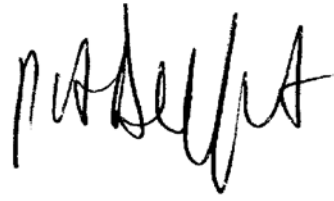
[12] The ordinary reasonable careful person as defined above will not be confused with the similarity in the names of the applicant and that of the first respondent because one word is the same: *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA); *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C).

[13] “Falsely imply or suggest” in s 11(2)(c)(i) requires, in my opinion, at least fault in the form of intent. This was not proved.

[14] The second part of s 11(2)(c)(i), ie or to “reasonably mislead” is the same test as in “confusingly similar”, but in this instance the requirement is not in respect of the name itself, but in the effect of the confusion. The mere fact that one word in the name is the same will not reasonably mislead the ordinary reasonable careful person that the first respondent is part of or associated with the applicant. This much is also patent in *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA) and *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C).

## ORDER

[15] The application is refused.

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**MEMBER OF THE COMPANIES TRIBUNAL**