



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT014May2015

In the matter between:

KGANYA BRANDS (PTY) LTD

First Applicant

KGANYA INVESTMENT HOLDINGS (PTY) LTD

Second Applicant

and

**LESAKGANYA TRADING (PTY) LTD
(2013/100401/07)**

First Respondent

**COMMISSIONER OF THE COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION**

Second Respondent

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 02 September 2015

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The first applicant is a wholly-owned subsidiary of the second applicant and the proprietor of the trade marks KGANYA and SEDI LA KGANYA. The trade marks are registered in 5 classes over a variety of services and goods (the trade mark KGANYA or the KGANYA trade mark or the trade mark).¹ The first and second applicants (the applicants) belong to the KGANYA group of companies², with a wide range of business interests. Members of the KGANYA Group are licensed or authorised to use the KGANYA name and trade mark.³ The ultimate shareholder in the KGANYA Group is the Zion Christian Church (the ZCC). The ZCC is a religious organisation comprising more than 4 million members over South Africa and southern Africa.

[2] It is submitted that the KGANYA trade mark has acquired widespread reputation and goodwill due to its expanded long term use since 1995 and as a result of its knowledge by a substantial number of people, it qualifies as a well-known trade mark as contemplated in section 34(1)(c) of the Trade Marks Act 194 of 1993.⁴ KGANYA is also registered as defensive company name.⁵

¹ See para 4 of the application on indexed pp 14 – 16; and annexures “MH3.1” – “MH3.5” to the application on indexed pp 31-39. It is stated that the trade mark is currently incorrectly recorded in the trade marks registry as belonging to KHANYA Brands (Pty) Ltd and not KGANYA Brands (Pty) Ltd [note the difference of “H” and “G” in the first syllable of both names) although the correction is still been attended to, at least as at the date of issuing the application on 13 May 2015. See further para [8] below.

² There are at least 5 other companies than the applicants in the KGANYA Group. See para 2.5 of the application for default order on indexed pp 3 - 4.

³ See para 2.5 of the application for default order on p 3 and para 2.5 of the application on indexed pp 12-13.

⁴ Section 34(1)(c) of the Trade Marks Act reads as follows in the material part: “*the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception...*” [Italics added] See also section 35 of the Trade Marks Act and section 11(2)(a)(iii) of the Companies Act 71 of 2008.

[3] The applicants are dissatisfied with the use or inclusion of the word or element LESAKGANYA in the first respondent's registered company name LESAKGANYA TRADING (PTY) LTD.⁶ The first respondent was registered on 18 June 2013.⁷

[4] The application was launched in terms of section 160, read with section 11(2),⁸ both of the Companies Act 71 of 2008 (the Act). The applicants submit that the first respondent's name is confusingly similar⁹ to the applicants' KGANYA trade mark or falsely implies or suggests or is such as would reasonably mislead a person to incorrectly believe that the first respondent is part of or associated with the applicant.¹⁰ They therefore apply that the first respondent should be ordered to change its name to another name which satisfies the requirements of the Act.

[5] Both the first and second respondents are not opposing the application and it is therefore one for a default order.¹¹ I am satisfied that the first respondent

⁵ Under registration number 13/26003DN. See para 5.11 of the application on indexed p 19 and further section 12 of the Companies Act 71 of 2008.

⁶ See annexure "MH1" (a certificate issued by the Companies and Intellectual Property Commission dated 02 April 2015) to the application on indexed p 28.

⁷ *Ibid.*

⁸ See footnote 10 below.

⁹ As contemplated in section 11(2)(b) of the Companies Act 71 of 2008 (the Act).

¹⁰ As contemplated in section 11(2)(c)(i) of the Act. Both sections 11(2)(b) and 11(2)(c)(i) read as follows in the material part: "(2) The name of a company must-

(a)...

(b) not be confusingly similar to a name, trade mark, mark, word or expression...

(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..."

¹¹ The application for default order is in terms of regulation 153 of the Companies Regulations, 2011. The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of

was adequately served with the application.¹² There is no proof of service of the application on the second respondent. Although it is submitted that no relief is sought against the second respondent,¹³ I am yet requested to direct the second respondent to change the first respondent's name in case the first respondent fails to do so within 3 months from date of the order made herein. In my view, this makes the second respondent to have an interest in this matter warranting that it should have been served and not merely cited. I will – for a moment - overlook this shortcoming and move over to other aspects of the application.

[6] Henceforth, I refer to the first respondent simply as the respondent and to the second respondent as the Commission.

[7] As stated above, it is submitted by the applicants that the respondent's name does not meet or satisfy the requirements of the Act. The reasons given for this challenge on the respondent's name are, in the main, the following. Firstly, due to the name incorporating the applicants' trade mark KGANYA. Secondly, as the applicants consider the dominant and memorable feature of the name to be the word KGANYA and the other parts of the respondent's name to be either

the Companies Act and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations)."

¹² See Regulation 153 of the Companies Regulations which reads as follows:

(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.

(2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order—

(a) after it has heard any required evidence concerning the motion; and

(b) if it is satisfied that the notice or application was adequately served.

(3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party." [underlining added for emphasis]

¹³ See para 2.9 of the application for default order on indexed p 4.

descriptive (i.e. “Trading”) of the enterprise or to have no meaning or significance or not to distinguish the name from the trade mark KGANYA (i.e. “LESA” part of LESAKGANYA).¹⁴ Thirdly, due to the fact that the second applicant has a large number of subsidiaries, offering a wide variety of services, which may likely confuse or deceive members of the public into believing that there is a connection between the applicants and the respondent, when this is not so. Also, as companies, in general, are no longer required to disclose their principal business upon incorporation, the respondent’s business may be expanded to include services or goods identical to those of the applicants. Additional to the aforesaid grounds, there are other grounds raised by the applicants in challenging the respondent’s name based on provisions of the Trade Marks Act.¹⁵ I do not consider this Tribunal competent to make findings in this area of law, so I will refrain from delving further.

[8] The applicants state that they became aware of the existence of the respondent in April 2014 following the publication of the respondent’s name in the government gazette.¹⁶ A copy of this gazette is conspicuous by its absence from the papers. Therefore, a period of about 10 months from the date of incorporation of the respondent has passed when the applicants gained knowledge of the registration of the respondent’s name. The applicants thereafter caused a letter of demand to be served by the sheriff on the respondent in July 2014. Manifestly, the respondent did not favourably respond to the letter of

¹⁴ See para 6.5 of the application on indexed pp 21 - 22.

¹⁵ See paras 6.7 and 6.8 of the application on indexed p 22.

¹⁶ See paras 8.1 of the application on indexed p 25.

demand, hence this application.¹⁷ This application was issued on 13 May 2015. This was another 10 months after the letter of demand. The explanation given for the delay in bringing this application by the applicants is that they were correcting the name of the proprietor of the KGANYA trade mark to justify the applicants' *locus standi*. I hasten – with respect - to point out that I find these submissions to be rather contradictory. Annexure “MH4” to the application reflects the assignor to be Kganya Investment Holdings (Proprietary) Limited and the intended assignee to be Kganya Brands (Proprietary) Limited. This document is dated 04 December 2014.¹⁸ I have already stated above¹⁹ that, the applicants submit that the trade mark did not correctly reflect the name of the proprietor, at the time of bringing this application.²⁰ I understand these to mean that the changes were not yet effected at the time of launching this application, which was 5 months after date of annexure “MH4” (i.e. 04 December 2014). There is no explanation as to how the name correction could have delayed this application or if it did why the trade mark is still not registered in the correct name. However, I will avoid any further detention by this.

[9] It is necessary to also mention that I am further referred to previous decisions of this Tribunal which dealt with the trade mark KGANYA wherein

¹⁷ See paras 8.2 and 8.3 of the application on indexed p 25.

¹⁸ See indexed p 40.

¹⁹ See footnote 1 above.

²⁰ See para 4.2 of the application on indexed p 16.

favourable decisions to the first applicant were handed down.²¹ I will return to deal with this in a moment.

[10] I now deal with the submissions grounding the application stated above. Regarding the fact that the respondent's name incorporates the applicants' trade mark KGANYA, I find that this is only when the respondent's name is broken up into two portions, being LESA and KGANYA and also when not considering the whole name. There is no basis for this segmentation and I find it not justified. The other ground or submission is that the dominant and memorable feature of the name is the word KGANYA and that the word or element LESA has no meaning or significance or does not distinguish the name from the trade mark KGANYA. There is no basis for this submission or conclusion. The deponent to the founding affidavit to this application has not disclosed the source of his knowledge or expertise²² for the aforesaid conclusions or submissions, in particular on matters of languages or phonetics. Against the aforesaid backdrop, I find that there is respondent's name is not confusingly similar to the KGANYA trade mark or likely to confuse or deceive members of the public into believing that there is a connection or association between the applicants and the respondent.

²¹ See paras 7.2 and 7.3 of the application on pp 24 – 24. See further Kganya IT Enterprises (Pty) Ltd (Ref: CT005APR2014); Kganyakgadi General Trading (Pty) Ltd (Ref: CT006APR2014); Kganyanaledi Trading and Projects (Pty) Ltd (Ref: CT002JAN2014); Lesedi le Kganyang Trading (Pty) Ltd (Ref: CT020JUN2014).

²² See para 3 of the application on indexed pp 13 – 14.

[11] I have stated above that I was referred to previous decisions of this Tribunal involving the KGANYA trade mark.²³ I am grateful for these submissions. I have studied the reasons for the findings in those decisions, but do not feel swayed to arrive at a contrary finding in this application from the one made above. The facts and evidence of this matter render it clearly distinguishable from those in the previous decisions of this Tribunal. I find that there is no basis for this application.

[12] Therefore, I make the following order:

- a) the application is refused.

Khashane La M. Manamela
Member, Companies Tribunal
02 September 2015

²³ See para [9] above and its accompanying footnote 21.