

**COMPANIES TRIBUNAL**

**REPUBLIC OF SOUTH AFRICA**

**Case Number CT007Apr2017**

**In the matter between;**

**BLISS BRANDS (PTY) LTD**

**Applicant**

**(Registration Number 2001/009596/07)**

**And**

**MAQ QLEEN (PTY) LTD**

**Respondent**

**(Registration Number 2016/230070/07)**

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**DECISION (Reasons and Order)**

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**Presiding Member of the Tribunal: Lucia Glass**

1) This is an Application in terms of section 160 of the Companies Act 71 of 2008 (the Act). The basis of this Application is that the Respondent's name, **MAQ QLEEN (PTY)LTD** offends against the provisions of sections 11(2)(b) and (c) of the Act by incorporating a name that is confusingly similar to the Applicants' registered **MAQ** trademarks.

2) The Applicant filed this Application on form CTR 142 with the Tribunal on the 10 April 2017. It appears that there is a typographical error at paragraph 2 of the CTR142 form, where the Applicant mentions the mark “kulula” which should read “Maq Qleen”. I condone this error as a typographical error and read it as “Maq Qleen” and not “kulula”.

3) The Applicant experienced difficulty in having this application served on the Respondent. On the 13 April 2017 the Deputy Sheriff of the High court attempted to serve a copy of the application for relief, together with the supporting affidavit, on the Respondent at the registered address of the Respondent, (the only physical address available for the Respondent. The Sheriff was unable to effect service on the Respondent at the registered address as the Respondent was “unknown” at the registered address of the Respondent. A copy of this non return of service is annexed to the affidavit. The Applicant’s Investigator managed to obtain two email addresses for the Respondent and this Application was successfully transmitted by electronic mail to the Respondent by the Applicant’s Attorney. The delivery report is attached to these papers dated 3<sup>rd</sup> May 2017, confirming delivery on nashmokhou@gmail.com and g.mokhou@gmail.com. I am satisfied that this Application for relief has been adequately served on the Respondent by email, in terms of the Companies Regulations. The Sheriff received his instructions to serve the documents within the 5 day period as stipulated. Even though it was a non service, the Applicant pursued in its endeavour and finally served the papers by email which falls outside the 5 day period, which period I condone. This Application for a Default order was made on the 18 July 2017, at which stage the respondent had not responded, which is well over the 20 day period from the date of service, being the 3<sup>rd</sup> May 2017. I believe that this Application for a Default order against

Respondent, was properly served and I am happy to proceed with the merits of the Application.

4) The Deponent to the Applicant's papers is Shoaib Iqbal who avers that he is the founder and Managing Director of the Applicant and has held this position since 2001. He attaches to his affidavit, a letter of authorisation to depose to his founding Affidavit.

5) The Deponent avers that the Applicant is the registered proprietor in South Africa of various trademarks with the name MAQ, including the trademark MAQ 2002/11767, and attaches proof of registration of the trademarks MAQ, to his affidavit.

6) The Deponent attaches a Certificate of Registration of the Respondent Company wherein it is recorded that the Respondent was incorporated in 2016. I am satisfied that the MAQ trademarks had already been registered in 2002 when the Respondent became incorporated and registered in 2016.

7) The Applicant applies to this Tribunal, for an order, that Respondent is to change its name to one which does not incorporate the word MAQ or any other word confusingly and or deceptively similar to its MAQ trademarks.

8) Applicant further asks for an Order that the Respondent pay the Applicants costs of these proceedings.

## **APPLICABLE LAW**

Section 11 (2) (a) and (b) of the Act

" Sec 11 (2) *The name of a company must—*

*(a) not be the same as, or confusingly similar to—*

*(i) the name of another company, registered external company, close corporation or co-operative unless the company forms part of a group of companies using similar names;*

*(ii) a name registered for the use of a person as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960);*

*(iii) 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); or (iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;*

*(b) 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;"*

9) The Applicant seeks remedies in terms of Section 160 which reads as follows:

*"Part B*

*Rights to seek specific remedies*

*Disputes concerning reservation or registration of company names.*

*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 a 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."*

## APPLICATION OF THE COMMON LAW UNDER THE PREVIOUS COMPANIES ACT.

10) In terms of the previous Companies Act, similar cases have been decided in respect of names that are "the same or confusingly similar" and whether the name is able to "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" it is my view that it will be useful to look at these judgments even though they are not made in terms of the Act.

11) In 1948 <sup>1</sup> the courts considered it appropriate to say "*the court must not only consider the marks when placed side-by-side but must have regard to the position of a person who might at one time see or hear one of the marks and later possibly with an imperfect recollection of the mark, come across the other mark*".

12) In more recent times, 2000 in an unreported judgement <sup>2</sup> the court said: "*If one compares the name Kentron which the applicant has used and is still using with the name Kentronics which the first respondent is using, its is clear that there is a visual and phonetic differences. It is however, also obvious that there are similarities. The name Kintronics incorporates the whole of the applicants trading style Kentron.*"

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<sup>1</sup> AMERICAN CHEWING PRODUCTS CORPORATION v AMERICAN CHICLE COMPANY 1948 (2) SA 736 (A)

<sup>2</sup> DENEL (PTY) LTD AND KENTRONICS (PTY) LTD AND THE REGISTRAR OF COMPANIES TDP CASE NO 213527/2000 (unreported)

13) In 2001 the court said: <sup>3</sup> *"the decision involves a value judgment and that the ultimate test is whether, on a comparison of the two marks it can properly be said that there is a reasonable likelihood of confusion if both marks are to be used together in a normal and fair manner, in the ordinary course of business"*.

## EVALUATION

14) The dominant word in the Applicant's trademarks is **MAQ**. It is my view that the dominant part of the Respondent's company name is **MAQ** because **MAQ** appears first followed by the word QLEEN. It is my view that the word QLEEN may be understood to be an adjective describing MAQ because if a person reads aloud, the word QLEEN it is very possible that it would sound phonetically like the word CLEAN, which describes the MAQ product, which then raises the question whether the Respondent is perhaps not of the same business as the Applicant MAQ.

15) It is my view that If members of the public merely look at the names of the two different entities there will be no doubt that they will be misled by the similarity of the names.

16) Members of the public will be confused or deceived into believing that the business of the Applicant is linked to, or associated with that of the Respondent.

## FINDINGS

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<sup>3</sup> COWBELL AG V ICS HOLDINGS 2001 (3) SA 941 (SCA)

17) When the Respondent's dominant word in its name "**MAQ**" and the Applicant's trademark "**MAQ**" are compared, the dominant words in the name, are not only confusingly similar, but identical, and I am certain that the applicant will be prejudiced if I do not make an order as prayed.

18) The name "**MAQ QLEEN**" incorporates the whole of the applicants trademark "**MAQ**" which falsely implies or suggests, and reasonably misleads a person to believe incorrectly, that the respondent is part of, or associated with the applicant's trademarks, which have 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).

19) I am convinced that if the two names are compared, that there is no doubt in my mind that they are confusingly similar and there will be confusion if both names are to be used together in a normal and fair manner, in the ordinary course of business.

I proceed to make an order in the following terms;

a) The Respondent is directed to change its name to one which does not incorporate and is not confusingly and or deceptively similar to Applicant's trademark "**MAQ**".

b) The Respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name as per a) above.



c) The Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph.

d) This Determination must be served on the Applicant, Respondent and the Registrar of Close Corporations of the Companies and Intellectual Property Commission who will change the Respondent's name to its company number should the Respondent not file the notice in terms of b) above.

e) 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.

f) No order as to costs.

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LUCIA GLASS

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Dated this 31 July 2017