



**COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case Number: CT010MAY2015**

In the matter between:

**KGANYA BRANDS (PTY) LTD** **FIRST APPLICANT**

**KGANYA INVESTMENT HOLDINGS (PTY) LTD** **SECOND APPLICANT**

and

**KGANYA YA RONA (PTY) LTD** **FIRST RESPONDENT**  
(Registration Number: 2013/141226/07)

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

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Presiding Member : Khashane La M. Manamela (Mr.)  
Date of Decision : 31 December 2019

**Summary:** Application for default order in respect of objection to company name – whether the first respondent’s name does not satisfy the provisions of section 11(2) of the Companies Act 71 of 2008 when considered against the applicants’ trade marks “KGANYA” and “SEDI LA KGANYA” – application issued in 2015, but interrupted by settlement negotiations and deregistration process, and revived in December 2019 with trade marks expiring in the meantime in 2016 and 2017 – trade marks no longer offer protection after their expiry date – overall no likelihood of confusion or deception as the first respondent’s name is clearly distinguishable from the applicants’ trade marks.

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**DECISION (Order and Reasons)**

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**Khashane La M. Manamela**

## ***Introduction***

[1] Kganya Brands and Kganya Investment Holdings, the first and second applicants respectively in this matter, are private companies linked to the Zion Christian Church or ZCC. The first applicant (Brands) is the proprietor of the trade marks “KGANYA” and “SEDI LA KGANYA”.<sup>1</sup> Brands and Holdings (collectively the applicants) complain in terms of this application that first respondent’s name “KGANYA YA RONA” or part of the first respondent’s name does not satisfy the requirements of sections 11(2)(b) and 11(2)(c)<sup>2</sup> of the Companies Act 71 of 2008 (the Act), particularly when considered in relation to its trade mark “KGANYA”.

[2] The application is before me by way of an application for default order, as envisaged by regulation 153,<sup>3</sup> read with regulation 143,<sup>4</sup> both of the Companies Regulations, 2011 (the Regulations). The first respondent (Ya Rona) and, the Companies and Intellectual Property Commission or its Commissioner, cited as the second respondent (the CIPC), are not taking part in these proceedings. The application was served upon Ya Rona on 18 May 2015 by the Sheriff of Court<sup>5</sup> after it was issued in May 2015. Some developments ensued after the service on Ya Rona. I will deal with the

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<sup>1</sup> See par 4 of the supporting affidavit to the application on indexed pp 49-52; annexures “MH3.1”- “MH3.5 on indexed pp 68-76.

<sup>2</sup> See par 13 below, for a reading of the material part of section 11(2).

<sup>3</sup> Regulation 153 reads in the material part: “(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) ...; 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.”

<sup>4</sup> Regulation 143 reads in the material part: “(1) Within 20 business days after being served with ... an application, that has been filed with the Tribunal, a respondent who wishes to oppose the ... application must – (a) serve a copy of an Answer on the initiating party; and (b) file the Answer with proof of service.”

<sup>5</sup> See par 29 of the affidavit in support of the application for default order on indexed p 10; annexure “DLM3” on indexed p 111.

significance of these dates below. On the other hand, there is no proof of service of this application on the CIPC. This, in part, may be due to the confusion of the CIPC with this Tribunal.<sup>6</sup> Part of the relief sought in this matter has a direct bearing on the CIPC, as this Tribunal is requested to direct the CIPC to replace Ya Rona's name with its registration number in the event that Ya Rona fails to comply with the order to change its name. I hasten to point out, with respect, that in my view this Tribunal does not have jurisdiction to make the type of order or determination sought in respect of the CIPC.<sup>7</sup> Therefore, despite the absence of proof of service of the application on the CIPC, I will proceed to deal with the merits of the application.

[3] But before I deal with the merits I think it is necessary to deal with some aspects in the history of this matter, particularly after service of the application on Ya Rona in June 2015. As I have already mentioned this application was issued as far back as May 2015.

***Brief relevant background***

[4] Brands was incorporated as a private company on 03 February 2014 and Holdings, a while before on 25 July 1995, also as a private company. Both these companies hold a wide range of business interests in other companies and Holdings is

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<sup>6</sup> See par 32 of the affidavit in support of the application for default order on indexed p 10; annexure "DLM5" on indexed pp 113-114.

<sup>7</sup> See, among others, the decisions of *Growthpoint Properties Ltd v CIPC & Growth Point Media & Events (Pty) Ltd* under case number: CT026OCT2018, dated 29 March 2019 at par 15 and *Agility Holdings (RF) (Pty) Ltd v Neo Computers (Pty) Ltd* under case number: CT008FEB2018, dated 30 April 2018 at par 20. For more decisions in this regard access [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

said to be holding company for the subsidiary companies. Collectively, the subsidiary companies and Brands and Holdings constitute the so-called Kganya Group.

[5] The trade marks “KGANYA” and “SEDI LA KGANYA” were registered in Brands name on 12 August 1997 and 10 October 2006, respectively.<sup>8</sup> Brands assigned the rights to the use of the trade marks to Holdings on 04 December 2014.<sup>9</sup> It is submitted that Brands’ name was incorrectly recorded in the trade mark register as KHANYA BRANDS (i.e. with an “H”, as underlined) instead of KGANYA BRANDS (i.e. with an “G” as underlined), but nothing would turn on this for current purposes.

[6] Ya Rona was registered as a private company by the CIPC on 14 August 2013. The same date is said to be its “Business Start Date”.<sup>10</sup>

[7] The applicants are said to have become aware of the existence of Ya Rona during March 2014 “following the publication of the [Ya Rona’s name] in the Government Gazette, as the Applicants had not encountered [Ya Rona] in trade”.<sup>11</sup> In May 2014, the applicants, through their attorneys, sent a letter of demand to Ya Rona. The letter was delivered by the sheriff in June 2014. Although, Ya Rona reacted to the letter and even asked for more time to fully respond to the letter, nothing tangible came from these interactions.

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<sup>8</sup> See par 4.1 of the supporting affidavit to the application on indexed pp 49-51; annexures “MH3.1”-“MH3.5 on indexed pp 68-76.

<sup>9</sup> See par 4.2 of the supporting affidavit to the application on indexed pp 51-52; annexure “MH4” on indexed p 77.

<sup>10</sup> See par 8.1 of the supporting affidavit to the application on indexed p 60; annexure “MH1” on indexed pp 64-65.

<sup>11</sup> See par 8.1 of the supporting affidavit to the application on indexed p 60.

[8] As already stated this application was issued over a year later on 19 May 2015 and served on Ya Rona on 15 June 2015. In July 2015 the applicants advised this Tribunal that the parties were engaged in settlement negotiations and, further, that

“[we] will, therefore at this stage, not be filing a CTR 145 Application for default order in this matter.

Please however, do not close your file in matter [sic], in case the negotiations are not successful.

We will keep you apprised of the progress of the negotiations.”<sup>12</sup>

[9] On 10 February 2016, being a period of about seven months after the above communication to the Tribunal, the applicants advised the registry of this Tribunal that Ya Rona has gone into the process of deregistration due to its failure to file with the CIPC the necessary annual returns. The applicants “reserved” their rights to “reignite” the proceedings in the event Ya Rona does return to business.<sup>13</sup> There is no record of the response by the registry of this Tribunal.

[10] Nothing significant appears to have happened after the communication of 10 February 2016 until during October/November 2019 when the applicants advised that they would proceed with an application for default order should Ya Rona still fail to file an answer to the application. This communication also did not yield the desired outcome, hence the application for default order.

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<sup>12</sup> See annexure “DLM5” on indexed pp 113-114.

<sup>13</sup> See annexure “DLM6” on indexed p 115.

*Applicant's case*

[11] The delay in the pursuit of this matter is concerning, to say the least. Section 160 of the Act is crafted in such a manner that time is evidently of the essence and, therefore, matters should not be left pending at the sole discretion of one of the contending parties once the application has been issued. Although, I have nothing indicating its role in this regard, I nevertheless state – with respect – that the registry of this Tribunal does not have the power to “stay proceedings”, including for purposes of allowing the parties to enter into settlement negotiations. Even if this was possible it cannot be left open-ended in terms of time and completely at the discretion of the applicants. This ought not to be understood to mean that this Tribunal does not encourage parties to enter into settlement discussions, but when parties decide to do so after initiating proceedings, they will need to explain in sufficient and cogent manner the causes of the delay or interruptions. There is very little material in this matter explaining why it took the applicants over four years (since June 2015) to take the appropriate steps to bring this matter to finality. I have only noted isolated events in the explanation given by the applicants in this matter, some at an interval of more than a year. Should the correct interpretation of the situation be that the applicants are allowed to take their time in bringing the matter to finality, in my view, they ought to run the risk of the basis or grounds of their claim being affected, perhaps even adversely, by the lapse in time. I will revert to the latter issue, below.

[12] Also it does not appear that the application was reserved on Ya Rona, despite the fact that there are averments contained in the default order application necessitating the exercise of the right of reply by Ya Rona. This material ought to have been contained in a

supplementary affidavit to the main application, which ought to have been served on Ya Rona. Mere correspondence does not suffice in this regard. But I will still proceed to deal with the merits of the application.

[13] To recap the applicants' complaint is that the name "KGANYA YA RONA" or the inclusion of the word "KGANYA" in Ya Rona's name does not satisfy the requirements of sections 11(2)(b)(i) and 11(2)(c)(i) of the Act when considered against the applicants' trade mark "KGANYA". Therefore, the determination sought herein is located in the provisions of section 11(2) of the Act, which read in the material part:

- “(2) The name of a company must-
- (a) not be the same as -
    - (i) the name of another company, domesticated company, registered external company, close corporation 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 (Act No. 27 of 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 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 trademark 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; 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 be confusingly similar to a name, trade mark, 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 trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark 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, 1941;  
(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 ...”

[14] I consider it appropriate to quote from some of the applicants’ submissions made in support of their case, as follows:

“6.5 The First Respondent’s company name **KGANYA YA RONA (PTY) LTD** wholly incorporates the KGANYA trade mark. The dominant and memorable feature of the First Respondent’s name is the word, KGANYA, as the remaining phrase “YA RONA” is secondary, and loses its aural impact after the initial pronunciation of the First Applicant’s trade mark. The phrase “YA RONA”, which simply means “is us” therefore does not serve to distinguish the First Respondent’s company name from the First Applicant’s trade mark. This is particularly true when one takes into account the tendency of members of the public to imperfectly recall names and trade marks, and to only recall the dominant element of a long trade mark and/or name.

6.6 The Second Applicant has a large number of subsidiary companies, and these companies offers [sic] a wide variety of services. It is therefore likely that members of the public will be confused or deceived into believing that the First Respondent is yet another company within the Second Applicant’s group of companies, or that a connection otherwise exists between the Applicants and the First Respondent, when there is factually no such connection.



6.7 I am advised that in terms of the Trade Mark Act 194 of 1993, the registration of the First Applicant's KGANYA trade marks effectively affords it protection against the unauthorised use of any trade mark which is confusingly or deceptively similar to it. In terms of section 34 of the Trade Marks Act 194 of 1993, the First Applicant's rights acquired through registration are infringed by the unauthorised use of an identical name or mark so nearly resembling it as to be likely to deceive or cause confusion.

6.8 Further, as the First Applicant's trade mark qualifies as a well-known trade mark, any unauthorised use of an identical or similar mark where such use is likely to take advantage of or be detrimental to the distinctive characteristic or repute of the KGANYA trade mark, will amount to trade mark infringement in terms of Section 34(1)(c) of the Trade Marks Act 194 of 1993, *notwithstanding* the absence of confusion or deception."<sup>14</sup>

[15] I find it remarkable that the deponent of the applicants' supporting affidavit, introduced simply as the managing director of both applicant companies, has the necessary capacity to make submissions on the pronunciation; "aural impact" and meaning of the words "KGANYA YA RONA". The deponent has not bothered to share with this Tribunal the origin or basis of these submissions. But nothing would turn on this.

[16] On the other hand, it is notable that the applicants do not claim infringement of the trade mark "SEDI LA KGANYA", but only the trade mark "KGANYA". But to the

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<sup>14</sup> See pars 6.5-6.8 of the supporting affidavit to the application on indexed pp 57-58.

extent that there may be any purported reliance on infringement of the former, I, without much ado, opine that such reliance will be without merit as both Ya Rona's name and the trade mark "SEDI LA KGANYA" contain sufficient material to be distinguishable from each other. There is clearly no reasonable likelihood or probability of deception or confusion in this regard.

[17] This then leaves for determination the trade mark "KGANYA". This trade mark was registered on 12 August 1997.<sup>15</sup> And in terms of the extract from the trade mark register, included in support of the application, the expiry date for the trade mark in all its respective classes of goods and/or services is 12 August 2017.<sup>16</sup> The same applies to the trade mark "SEDI LA KGANYA", registered on 10 October 2006, which expired on 10 October 2016.<sup>17</sup> Therefore, the applicants' trade marks are no longer in force as they expired in 2016 (in respect of the "SEDI LA KGANYA" trade mark) and 2017 (in respect of the "KGANYA" trade mark).

[18] I have recorded above – at great length - my lamentation regarding the length of time it took for this application to be brought to finality. Part of my concern was borne by the fact that the expiry dates of the applicants' trade marks passed during the lull in activities after the service of the application on Ya Rona from June 2015. Noble as the intention underlying part of the activities may be, this Tribunal has to determine the matter against all material facts as at the date of the decision. The application for default

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<sup>15</sup> See par 4.1 of the supporting affidavit to the application on indexed pp 49-51; annexures "MH3.1"- "MH3.4 on indexed pp 68-75.

<sup>16</sup> *Ibid.*

<sup>17</sup> See annexure "MH3.5 on indexed p 76.

order was received by the registry of this Tribunal on 17 December 2019. By then the proverbial horse has already bolted. This Tribunal cannot do justice in the matter by ignoring that the trade marks relied upon have since expired, despite the fact that the main application was issued in May 2015. I find it notable that no submissions are made in the application for default order as to whether the trade marks were renewed or the reason why they are considered to be still in force beyond the aforementioned expiry dates. But, for the aforementioned reasons, I find that there is no breach of the applicant's trade marks by Ya Rona when considered in terms of section 11(2) of the Act.

[19] The applicants appear to have also based their case on the fact that the trade mark “KGANYA” constitutes a well-known trade mark in terms of the provisions of section 35 of the Trade Marks Act 194 of 1993.<sup>18</sup> But, nothing of significance is proffered to support this bald contention.<sup>19</sup> Therefore, I also find this submission to be wanting of merit.

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<sup>18</sup> Section 35 of the Trade Marks Act 194 of 1993 reads in the material part, including its caption: “**35. Protection of well-known marks under Paris Convention.** (1) References in this Act to a trade mark which is entitled to protection under the Paris Convention as a well known trade mark, are to a mark which is well known in the Republic as being the mark of— (a) a person who is a national of a convention country; or (b) a person who is domiciled in, or has a real and effective industrial or commercial establishment in, a convention country, whether or not such person carries on business, or has any goodwill, in the Republic. (1A) In determining for the purposes of subsection (1) whether a trade mark is well-known in the Republic, due regard shall be given to the knowledge of the trade mark in the relevant sector of the public, including knowledge which has been obtained as a result of the promotion of the trade mark. (2) A reference in this Act to the proprietor of such a mark shall be construed accordingly. (3) The proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark is entitled to restrain the use in the Republic of a trade mark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the well-known trade mark in relation to goods or services which are identical or similar to the goods or services in respect of which the trade mark is well known and where the use is likely to cause deception or confusion.”

<sup>19</sup> In terms of section 35(1A) of the Trade Marks Act it is required that in “determining ...whether a trade mark is well-known in the Republic, due regard shall be given to the knowledge of the trade mark in the relevant sector of the public, including knowledge which has been obtained as a result of the promotion of the trade mark”.<sup>19</sup>.

[20] I also consider it necessary to point out that I find the first respondent's name KGANYA YA RONA to possess sufficient distinguishable material to reasonably obviate any possible confusion or deception. For to decide otherwise will be to grant the applicants monopoly on the word "KGANYA". Therefore, the applicants' case will fail.

***Conclusion***

[21] On all its legs, I find the applicants' case to be without merit on the basis of what I have stated above. An order confirming this outcome is made below.

***Order***

[22] In the sum, the following order is made:

- a) the application is dismissed.

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**Khashane La M. Manamela**  
**Member, Companies Tribunal**  
**31 December 2019**