



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 595/08

In the matter between :

POLARIS CAPITAL (PTY) LTD

Appellant

and

THE REGISTRAR OF COMPANIES

First Respondent

POLARIS CAPITAL MANAGEMENT INC

Second Respondent

Neutral citation: *Polaris v The Registrar of Companies* (595/08) [2009]
ZASCA 131 (30 September 2009)

Coram: STREICHER, BRAND, SNYDERS JJA, LEACH and
BOSIELO AJJA

Heard: 25 AUGUST 2009

Delivered: 30 SEPTEMBER 2009

Summary: Companies Act 61 of 1973 – s 45(2) – new company name will
cause confusion – name undesirable.

ORDER

On appeal from: High Court, Cape of Good Hope (Brusser AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

STREICHER JA (BRAND, SNYDERS JJA, LEACH and BOSIELO AJJA concurring)

[1] On 26 May 2003 the appellant, a South African registered company, formerly known as African Harvest Growth Asset Managers (Pty) Ltd, by special resolution, changed its name to Polaris Capital (Pty) Ltd. The Registrar of Companies, the first respondent, registered the name change on 3 June 2003 but the second respondent, Polaris Capital Management Inc, a corporation incorporated in the USA, in terms of a letter dated 29 January 2004, objected to the name change. On 14 October 2005 the registrar upheld the objection and ordered the appellant to change its name within 60 days. The appellant thereupon applied to the High Court, Cape of Good Hope Provincial Division, for the setting aside of the registrar's order. Brusser AJ dismissed the application but granted leave to the appellant to appeal to this court.

[2] In terms of s 44(1) of the Companies Act 61 of 1973 any company may by special resolution change its name to a name which is not, in the

opinion of the registrar, undesirable. Provision is then made in s 45(2) for an objection against such a name change. The section provides as follows:

‘If within a period of one year after . . . the date of . . . a certificate of change of name . . . any person lodges an objection in writing with the Registrar against the name contained in . . . the last-mentioned certificate, on the grounds that such name . . . is calculated to cause damage to the objector or is undesirable, the Registrar may, if he is satisfied that the objection is sound, order the company concerned . . . to change the said name . . .’

[3] The second respondent objected to the name change on the ground that it is both undesirable and calculated to cause it damage as contemplated in s 45(2). The registrar upheld the objection on the ground that the name is undesirable. In reasons for his decision subsequently furnished by the registrar, he stated that the name of the second respondent is wholly incorporated into the appellant’s name and that its business activities are identical to the business of the second respondent. He stated, furthermore, that the second respondent had built a reputation and goodwill to its name since 1996, long before the appellant adopted its name Polaris Capital in 2003. He concluded that ‘since the names are almost identical, and since the parties are engaged in the same activities, confusion is likely to occur’ and ordered the appellant to change its name.

[4] The appellant thereupon applied in terms of s 48 for the registrar’s order to be set aside. The section provides that any company or person aggrieved by an order of the registrar in terms of, amongst others, s 45(2), may ‘within one month after the date of such . . . order apply to the Court for relief, and the Court shall have power to consider the merits of any such matter, to receive further evidence and to make any order it deems fit’. The registrar did not oppose the application.

[5] Being an application for final relief the *Plascon Evans*-rule applied and the matter had to be decided on the facts stated by the second respondent and the facts stated by the appellant in so far as those facts were admitted by the second respondent or not denied in a manner that raises a real, genuine or *bona fide* dispute of fact. Approached on this basis the facts on which the application had to be decided are as follows.

[6] On 3 June 2003 the appellant resolved to change its name from African Harvest Growth Asset Managers (Pty) Ltd to Polaris Capital (Pty) Ltd and in July 2003 it commenced trading. The appellant carries on business within South Africa. It provides an investment service for a predominantly South African clientele consisting of institutional clients, private companies, public companies and individuals. It advises South African investors and invests their funds both within South Africa and overseas. It is licensed as a Financial Services Provider in terms of s 8 of the Financial Advisory and Intermediary Services Act 37 of 2002. The second respondent became aware of the appellant's use of the name Polaris Capital during September 2003 and discussed the matter with the appellant but the appellant persisted in using the name. The second respondent thereupon lodged an objection with the registrar on 29 January 2004.

[7] The second respondent was incorporated in 1993 in the USA and is registered as an investment advisor with the US Securities and Exchange Commission. It has been trading continuously since 1995 as a global and international equity manager. Since 1996 it has marketed itself and made sales representations in South Africa to numerous major commercial banks, investment and merchant banks, asset management funds, life assurance companies, public companies, attorneys firms, the South African Reserve Bank, national airlines, government departments and auditing firms. Mr Bernard Horn jr, the president and portfolio manager of the second

respondent attended an international investors' conference organised by Deutsche Bank Securities in Cape Town and Johannesburg during which he met with various representatives of South African companies and after the conference he made representations to them on behalf of the second respondent. Since 1996 the second respondent's representatives have on numerous occasions been contacted telephonically and via e-mail by South Africans interested in equity management.

[8] The second respondent was one of the managers of the Iscor Pension Fund in South Africa from 1996 until 2000, a fact that was publicised in a publication 'Pensions and Investments' on 29 September 1997 and 3 April 2000. In December 2000 it concluded an investment advisory agreement with Oasis Global Management Company (Guernsey) Limited in terms of which it was appointed to manage the interests of that company's South African clients. In March 2003 it concluded a further investment advisory agreement with the South African registered company Oasis Asset Management Limited and two related Irish companies.

[9] Since the commencement of its business in 1995 the second respondent has featured extensively in the international financial press in articles available to South African readers.

[10] Included in equity funds managed by the second respondent are substantial shareholdings in South African companies traded on the Johannesburg Stock Exchange. Second respondent's current holdings include Sappi, Sasol, Impala Platinum, Metorex and BHP Billiton.

[11] The second respondent contends that as a result of the foregoing it became known in the Republic to those interested in equity investment and to equity managers. The appellant denies that that is the case and attached

affidavits by a number of people interested in equity investment to the effect that the second respondent is unknown to them. However, there may well be many people who do not know about the second respondent but it does not follow that there are not many to whom it is known. If the evidence of contacts made with South Africans is accepted, as it has to be, the second respondent must be known to many South Africans and South African companies, more so in the light of its contracts with Iscor and the Oasis companies.

[12] 'Polaris Capital' is the dominant part of the second respondent's name and that is the name by which it became known. Although the appellant denies that it knew about the existence of the second respondent at the time when it changed its name, a simple internet search would have revealed its existence. The second respondent's web-site is frequently accessed by South Africans and such access frequently results in South Africans making use of the services provided by the second respondent. As a result of the internet, customers and potential customers in South Africa have direct access to details of the second respondent's products and services, details of the performance of the second respondent's various funds and to management reports in respect of second respondent's various funds.

[13] The court below held that a risk of confusion could not reasonably be discounted and that it could for that reason not be concluded that the registrar improperly exercised his discretion in terms of s 45. However, the question that had to be decided by the court below was not whether the registrar had exercised his discretion correctly. In terms of s 48 the court to which application is made has power to consider the merits of the matter, to receive further evidence and to make any order it deems meet. The court

below, therefore, had the power to deal with the matter as a court of first instance ie the proceedings before it was in the nature of a rehearing.¹

[14] In an article by JB Cilliers entitled *Similar company names: A comparative analysis and suggested approach – Part 2* 1999 (62) *THRHR* 57 at p 68 – 69 the author states:

‘In terms of sections 45(2A) and 48 of the Companies Act 1973 (SA), the court must decide the matter *de novo*, unfettered by the decision reached or opinion formed by the Registrar. The merits to be considered by the courts are whether, on a balance of probability and on the evidence before it, the existing company has such vested rights in its name or particular words in its name that the registration of the new company or the amended name of another company is undesirable, or whether the existing company has shown not only that confusion or deception is likely, but that if either ensues it will probably cause it damage. This distinction clearly delineates the two pillars of the protection against the registration of similar company names under the Companies Act 1973(SA).’

The suggested approach was adopted by this court in *Peregrine Group (Pty) Ltd and others v Peregrine Holdings Ltd and others* 2001 (3) SA 1268 (SCA).

[15] The appellant submitted that its name is not undesirable, that the registrar erred in finding it to be undesirable and that the registrar’s decision should for that reason be set aside. As to the circumstances under which a company name may be found to be undesirable, this court, in the *Peregrine*-case, approved the following statement by Lazarus AJ in his judgment against which the appellant in that case appealed:²

‘In my view it is inappropriate to attempt to circumscribe the circumstances under which the registration of a company name might be found to be “undesirable”. To do so would negate the very flexibility intended by the Legislature by the introduction of the undesirability test in the section and the wide discretion conferred upon the Court to

¹ See *Krediet Bank van Suid-Afrika Bpk v Registrateur van Maatskappye en andere* 1978 (2) SA 644 (W) at 650C-D.

² At 1274C-G par 8.

“make such order as it deems fit”. For the purposes of the present matter it suffices to say that, where the names of companies are the same or substantially similar and where there is a likelihood that members of the public will be confused in their dealings with the competing parties, these are important factors which the Court will take into account when considering whether or not a name is “undesirable”.’

[16] In *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600 (CA) at 605(10) the New Zealand court of appeal, per Cooke P stated in respect of a company name that was contended to be undesirable:

‘[A] serious risk of confusion of the public or a section of the public is well recognised as a head of undesirability when the registration of a company name is in issue: see the judgment of McGregor J in *South Pacific Airlines of New Zealand Ltd v Registrar of Companies* [1964] NZLR 1, 5, a passage which has been followed more than once in the High Court and should now, we hold, be approved by this Court.’

[17] In *Deutsche Babcock SA (Pty) Ltd v Babcock Africa (Pty) Ltd and another* 1995 (4) SA 1016 (T) at 1022G-1024G Mynhardt J referred to South African cases in which the likelihood of confusion was considered to render the registration of a new company name undesirable. He also referred to New Zealand cases including the *Vicom*-case and concluded at 1024H:

‘From the foregoing review of cases it appears that when there is a likelihood that the public, or a section thereof, might be misled by the similarity of the names under consideration, or that there is “a serious risk of confusion of the public”, then it ought to be held that a name is undesirable.’

[18] It would seem that the phrase ‘a serious risk of confusion’ was meant to mean no more than a probability of confusion. That would be in line with the South African cases referred to by Mynhardt J which he would seem to approve. He himself said at 1025D:

‘If the similarity between the two names is likely to lead to confusion of customers or potential customers of either the applicant or the first respondent, then the change of name cannot be permitted . . .’

If that is how ‘a serious risk of confusion’ is to be understood I agree save that I would add that the degree of confusion will no doubt be a factor to be taken into account in deciding in terms of s 48 whether or not a company name is undesirable. A company name will be confusing when, in doing business with the company, the public or a section of the public would be confused into thinking that they are doing business with another company or would be confused into thinking that the company is associated in some way with the other company.

[19] The dominant part of the second respondent’s name is Polaris Capital. It is not merely a descriptive name. Until the appellant changed its name to Polaris Capital, no company had been registered in South Africa by that name and although there are other companies registered in South Africa with the word ‘Polaris’ as part of their names, ‘Polaris Capital’ cannot be said to have lost its distinctiveness as part of a company name. None of these other companies with the word ‘Polaris’ as part of their names trades as equity managers. Being the first company to use the name Polaris Capital it must be accepted, in the light of the evidence referred to above, that the second respondent became known to a substantial number of influential people in South Africa ie that the second respondent acquired a reputation in South Africa as an international equity manager. Having established that reputation in South Africa the second respondent acquired vested rights in its name entitling it to object against the adoption of the name Polaris Capital by the appellant.

[20] The appellant contends that although it adopted the dominant part of the second respondent’s name as its name such adoption has not and will

not lead to confusion because ‘the appellant’s customer base falls within a limited and educated group of financial services experts.’

[21] It is clear that in determining whether there would be confusion regard has to be had to the nature of the business and customer base of the respective companies.³ Both the appellant and the second respondent trade as equity managers but the one conducts its business in the USA and the other conducts its business in South Africa. Both of them invest in South African equities and foreign equities.

[22] The appellant’s submission that its customer base consists of an educated group of financial service experts is not correct. In a supplementary affidavit filed by the appellant it is stated that the appellant invests in South African equities on behalf of, amongst others, individuals. There is no reason to assume that the individuals concerned are financial services experts.

[23] In the light of the fact that the name adopted by the appellant is for all practical purposes almost identical to that of the second respondent and the fact that the appellant and the second respondent both conduct business as equity managers I am of the view that people who know about the second respondent may well think that there is an association between the two. The appellant contended that if that was the case the second respondent should have been able to produce evidence of confusion four years after the second respondent started doing business under the name ‘Polaris Capital’ and that it failed to do so.

[24] The only evidence tendered by the second respondent as to actual confusion was an e-mail communication directed to

³ See *American Chewing Products Corporation v American Chicle Company* 1948 (2) SA 736 (A) at 743.

‘...@polariscapital.com’ (the second respondent’s e-mail address) instead of to ‘...@polariscapital.co.za’ (the appellant’s e-mail address) and an allegation by Horn that the second respondent ‘is frequently contacted by many of the South African companies whose equity funds they manage (such as Sappi, Sasol, Impala Platinum, Metorex and BHP Billiton) who are confused by the existence of the [appellant] and continuously question whether [second respondent] and the [appellant] are related or the same entity’.

[25] The sender of the wrongly directed e-mail deposed to an affidavit in which he explained that he made a clerical error by inadvertently typing the wrong e-mail address, that it was not as a result of any confusion on his part as he was at no time under the impression that Polaris Capital (Pty) Ltd was associated in any way with an entity by the name Polaris Capital Management Inc.

[26] The statement that the second respondent is frequently contacted by South African companies whose equity funds they manage such as Sappi, Sasol, Impala Platinum, Metorex and BHP Billiton cannot be correct as the second respondent did not manage equity funds of any of these companies. Horn probably meant to say that the second respondent is contacted by companies in which it has invested to enquire whether the appellant was associated with the second respondent. What the reason for the enquiries was we do not know. But the enquiries do indicate that the enquirers were at least wondering whether the appellant and the second respondent were in some way or other associated with one another. Such uncertainty is undesirable and is at least a factor to be taken into account in deciding whether a new company name is undesirable. In cases concerning trade marks, where the issue was whether a trade mark had been infringed by the use of a mark so nearly resembling a registered trade mark ‘as to be likely

to deceive or cause confusion', it has been held that infringement will be proved if there is a likelihood that a substantial number of people who are interested in the relevant product will be or are likely to be confused or deceived. Confusion would according to these cases exist when a person is confused as to the existence or non-existence of a connection between the product being marketed under the disputed mark and the owner of the registered trade mark.⁴ That is to say that confusion will exist when people wonder whether there is such a connection.⁵

[27] The fact that there had been many enquiries as to whether the appellant and the second respondent are associated with one another strengthens my view that a substantial number of people who knew about the second respondent and who associated the name 'Polaris Capital' with the second respondent would have assumed that there was an association between the second respondent and the appellant which was conducting a similar business to that of the second respondent. The second respondent would not necessarily have come to know of such people and the fact that no evidence has been tendered of instances of such confusion does not prove that there have not been such instances. My view is further strengthened by the fact that the registrar, who is experienced in the field, came to the same conclusion.⁶

[28] The position is of course not static. The second respondent's objection itself indicated that it was still interested in the South African market and that it could in the future expand its activities in South Africa. Should that happen there can be no doubt that confusion will result.

⁴ *Oude Meester Groep Bpk and another v SA Breweries Ltd; SA Breweries Ltd and another v Distillers Corporation (SA) Ltd and another* 1973 (4) SA 145 (T) at 160F-H; *Adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA 530 (T) at 533C-E.

⁵ *Hack's Application* (1941) 58 RPC 91 at 106.

⁶ *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600 (CA) at 604 (10-15).

[29] At least one of the purposes of the Act in so far as it provides that a company may be ordered to change its name if it is undesirable is clearly to protect the public from being confused as to the entity it is dealing with. In view of my finding that a substantial number of people will be so confused if the appellant is allowed to retain its name I conclude that the court a quo correctly dismissed the appellant's application for an order setting aside the registrar's decision that its name is undesirable.

[30] The appeal is therefore dismissed with costs including the costs of two counsel.

P E STREICHER
JUDGE OF APPEAL

Appearances:

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