REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 3911/2010

In the matter between:

NEIL MACLEOD First Applicant

and

JOHAN VAN TONDER First Respondent

NEIL MCLEOD SAFARIS (SOUTH AFRICA) CC Second Respondent

SAFARISWISE CC Third Respondent

Judgment by	M J Fitzgerald, AJ
For the Applicants	Adv. T Smit
Instructed by	Niccifergusón Attorneys- N du Plessis Level C, The Adderley, 25 Adderley Street, Cape Town
For the Respondents	Adv. N Visser
Instructed by	De Klerk & Van Gend Attorneys- A Human Absa Building, 132 Adderley Street Cape Town
Date(s) of Hearing	Tuesday, 14 September 2010
Judgment delivered on :	Tuesday, 21 September 2010

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JOHAN VAN TONDER	First Respondent
NEIL MacLEOD SAFARIS (SOUTH AFRICA)	Second Respondent
SAFARIWISE CC	Third Respondent

JUDGMENT

FITZGERALD AJ

In this matter applicant initially sought an order in the following terms:

1. That the second respondent be placed under a provisional winding up order;

2. That the powers of the independent liquidator appointed by the Master be extended to investigate and report on the legitimacy, origin and source of any loan

accounts held by the first respondent with the second respondent; and

3. Thai the third respondent be directed to change its name within 30 days of the granting of a final order.

At the commencement of the hearing, and in light of the fact that a full set of affidavits had been filed and, more significantly, that the second respondent has no creditors, it was agreed by the parties that if a winding up order were to be granted a final order was warranted.

During the course of her argument counsel for the applicant, however, indicated that the applicant no longer sought an order placing the second respondent under a winding up order. Applicant also abandoned the relief relating to the extension of the powers of the duly appointed liquidator.

It was thereafter further agreed between counsel that an order be granted by agreement pursuant to which applicant would purchase the 65 per cent member's interest of the first respondent in the second respondent.

After further discussion, counsel undertook to prepare a draft order providing for the mechanism in terms of which applicant would acquire such 65 per cent member's interest. The order which I make hereunder records that agreed mechanism in paragraphs 1 - 9 inclusive..

In the circumstances, the only live issue which required my determination related to the change of name of third respondent. In this regard. I point out that written notice of

the intended application to court for such change of name was given to the Registrar of Close Corporations.

This relief, so counsel for the applicant contended, was authorised by section 20(2)(b) of the Close Corporation Act No. 69 of 1984 ("the Act**) which reads as follows:

"2. Any interested parry may -

(a) .....

(b) within a period of two years after the registration of the founding statement apply to a court for an order directing the corporation to change its name on the ground of undesirability or that such name is calculated to cause damage to the applicant, and the court may on such application make such order as it deems fit".

It was suggested in argument by counsel for the respondents that the applicant was not an interested person as contemplated by section 20(2) of the Act insofar as the close corporation under which he carries on business in Namibia was not a party to this application and that he was purportedly the applicant in his personal capacity.

This submission overlooks the fact that in paragraph 1 of his founding affidavit, the applicant expressly stated that he held a 35% member's interest in the second respondent and, indeed in paragraph 69.1 thereof confirmed that the alleged breach of the fiduciary duty by first respondent necessitated him "having to bring this application on behalf of the South African CC"..

Moreover, in paragraph 52 of his founding affidavit with reference to the trademark application to which I refer hereunder, the applicant stated that he was "advised by my

attorneys that I cannot apply to Cipro for the deregistration of nor for an order that the first respondent change the name of the third respondent as I ironically require the first respondent's consent to bring an application on behalf of the South African CC, as he is the majority' member".

In light of the fact, accordingly, that without the consent of the first respondent, the applicant is unable to commence proceedings in terms of section 20 of the Act in the name of second respondent, and further that applicant is indeed a 35% shareholder of such close corporation it seems to me that it would be unduly technical and formalistic to non suit him in these circumstances.

I accordingly find, qua minority member of the second respondent, that applicant is indeed an interested party as required by section 20 (2) of the Act.

Counsel for the applicant submitted that the affidavits established that there was a close association between the phrase "SafariWise" and the second respondent.

Counsel for the respondents, conversely, denied any such association albeit that in official documents, including the application to the Registrar of Trademarks, the phrase "Safari Wise" was clearly identified with the second respondent.

More particularly, counsel for the respondents submitted that in the public eye the phrase was associated in Namibia with the applicant whereas, in South Africa, it was associated with him personally.

I am not persuaded that the distinction which counsel for the respondents sought to emphasize is well founded.

It must, in any event, be remembered that at all material times when first respondent made use of the phrase "Safari Wise" he did so qua member of second respondent and, as appears from annexure RNM16 to which I refer hereunder, in documentation bearing its registration number.

Further in this regard, it is indeed common cause that the application made to the Registrar of Trademarks for registration of "SafariWise" was made on behalf of, and in the name, of the second respondent.

Although counsel for the respondents suggested that that trademark application had lapsed it is relevant that as recently as late last year applicant's attorneys of record received correspondence from the Registrar of Trademarks referring to "the pending application".

Further, and according to the applicant, the second respondent has traded as SafariWise since 2002 and the name SafariWise has therefore been associated, and is synonymous, with second respondent for the past eight years.

Various documents annexed to the replying affidavit, moreover, also, in my view*, refute this submission made on respondents' behalf.

Although they were annexed for the first time to the replying affidavit there was no application by respondents to file a fourth set of affidavits in response thereto nor was there any application to strike out any of this matter.

I do not necessarily subscribe to the view that these documents constitute new matter. Even if they were, in the circumstances postulated, they remain part of the admissible matrix of evidence against which a decision falls to be made.

Amongst these documents is a document headed SafariWise which has along its left border the words "South Africa" in capitals. It refers to set departure dates for 2004 and on that basis must have been prepared in 2004 or prior thereto.

It concludes with the names Johan and Neil - the Christian names of the applicant and first respondent respectively - and at the foot thereof the following is stated:

"Neil MacLeod Safaris CC (CK2000/069611/23) T/A SafariWise"

This, it is common cause, is a reference to the registration number of second respondent.

Moreover, on 18 June 2002 Safari and Tourism Insurance Brokers, a division of Glendrand MIB Namibia (Pty) Limited addressed a letter to "SafariWise Namibia and South Africa" with regard to insurance cover.

A further relevant document is attached to the replying affidavit marked "RMN14". It is headed "SafariWise Tours and Safaris in Southern Africa: About us" and is said to be a copy of SafariWise's homepage. It reads, inter alia as follows:

"From a humble beginning in 1992, with a just a pair of binoculars between us, we have developed a solid reputation for high quality, intimate tours and safaris. Many of our clients return as friends to discover more of the diversity and beauty of Africa with us.

In no particular order, SafariWisc is owned and managed by two of Southern Africa's leading naturalists: Neil McLcod and .lohan van Tondcr.

Growing up in the Western Cape, .lohan spent his youth outdoors absorbing the names and habits of birds, animals and plants. A short detour took him into engineering before he returned to his first love - and Neil's sister ! In 1999 Neil and .lohan joined forces and launched SafariWise".

One further document bears mentioning. This is annexure RNM16 to the replying affidavit which is a recent advertisement placed by first respondent on the internet. It is headed "SafariWise - Worcester. Western Cape, South Africa'" and includes a specific reference to the aforesaid registration number of second respondent.

A perusal of these documents demonstrates that the objecti ve ("acts do not establish the distinction between the South African and Namibian businesses which counsel for the respondents sought to assert nor, in particular that the phrase "SafariWise" is associated only with first respondent personally and not second respondent.

It follows, in my view, that the submission in the affidavits made by applicant that the

second respondent has since 2002 traded as SafariWise and that it has build up goodwill in respect thereof is, on the probabilities, well founded.

Does its use by third respondent, in the circumstances, however, make it undesirable in terms of the Act?

The authorities make it clear that it is inappropriate to prescribe what is meant by the term "undesirability"inscction20(b)of the Act. (Sec: Peregrine Group < *Ptv)* Limited v Peregrine Holdings 2001 (3) SA 1268 (SCA) at 1274C-G; Azisa fPtv) Ltd v Azisa Media CC and Another 2002 (2) SA 377 (C) at 396C).

The Supreme Court of Appeal held in Peregrine, supra at 1274H with regard to the second leg of the section, "calculated to cause damage", that this leg usually resolves itself in the same inquiry, namely the likelihood of confusion or deception.

In my view the trading name of second respondent namely "SafariWise" is sufficiently similar to the trading name of the third respondent, namely "SafariWise CC" to cause confusion between the business activities of the second respondent and that of the third respondent.

Given the likelihood of confusion or deception, it seems to me to follow, as a matter of logic, that the second leg of the section, namely that the use of that trading name is undesirable because it is calculated to cause damage, is also satisfied.

Moreover, and given the *dicta* of the Supreme Court of Appeal in Peregrine, supra that it is inappropriate to attempt to circumscribe the circumstances under which the

registration of a company name might be found to be "undesirable", 1 consider it further relevant that in causing the third respondent to be incorporated during December 2008, the first respondent acted in breach of his fiduciary duties vis-a-vis the second respondent (see Robinson v Randfontein Estates Gold Mining Co Ltd 1925 AD 173 at 192,242; Cohen N.O.v Sepal 1970 (3) SA 702 (W) at 706).

It is common cause that prior to the incorporation of the third respondent no disclosure of his intention to do so was made to the applicant. Moreover, the third respondent carries on business in direct competition with the second respondent.

In my view it is undesirable for a court to sanction such breach of fiduciary duty and in consequence to permit the third respondent to carry on business under a name which is confusingly similar to that of the second respondent.

In light hereof, the fact of the inconvenience to be caused to third respondent by the need to change its name is of lesser significance.

I accordingly find, on the probabilities, that applicant has established the jurisdictional factors necessary for the grant of an order in terms of section 20(2)(b) of the Act.
With regard to the question of the cost of the application, there appears to be no reason why costs should not follow the result.

It is, moreover, clear that a principal factor leading to the disintegration of the business relationship between the applicant and the first respondent was the latter's

incorporation of a rival close corporation bearing a confusingly similar name to that of the second respondent. This conduct, I have found, constitutes a breach of the fiduciary duty owed by first respondent to the second respondent.

I accordingly make the following order:

1. The applicant is directed to purchase the 65% member's interest of the first respondent in the second respondent at fair value calculated pro rata the total issued member's interest without any benefit attached to the membership interest representing a majority.

2. For the purpose of the said purchase of the first respondent's member's interest in the second respondent, the fair value of the shares shall be determined with regard to the financial position of the second respondent as at 14 September 2010 and such value shall include the value of the trade name "SafariWise".

3. In determining the fair value, the validity or otherwise of the first respondent's loan agreement to the second respondent shall be considered.

4. The parties arc directed to endeavour to agree upon the appointment of a practising chartered accountant of not less ten years' standing, who shall not be the second respondent's accounting officer, nor have been previously professionally engaged in any capacity by any of the parties, to undertake the valuation of the shares in accordance with the directions herein above and to determine the purchase consideration.

In the event of the parties being unable so to agree within ten days of the date of this order, the valuation and determination shall be undertaken by a Cape Town based practising chartered accountant of not less ten years' standing to be nominated by the President of the South African Institute of Chartered Accountants.

5. The costs of the said valuation and determination shall be borne equally by applicant and first respondent respectively; in the event of any party paying more than his share of the costs that party shall be entitled to recover the excess from the other party *pro rata.*

6. The applicant and the first respondent are directed to furnish the person appointed in terms of paragraph 4 with all such information appropriately vouched and all books of record and accounting records, as he might reasonably require in order to undertake the valuation and determination, failing which the person so appointed is authorised to make application through the chamber book to a judge for such further directions and relief as might be appropriate.

7. The persons appointed in terms of paragraph 4 shall complete the valuation and determination and furnish each of the parties with a reasoned report thereon in writing within six weeks of his appointment, or such extended period as the parties may agree to in writing.

8. The determination by the person so appointed of the value of the first respondent's interest in the second respondent shall be final and payment of that amount found to be due by applicant to first respondent shall be made within 15 days of such final determination.

9. The first respondent is ordered to deliver a signed CK. 2 resignation form in respect of the second respondent to the applicant's attorneys within 10 days of date

hereof for registration purposes.

In the event that the first respondent fails and/or refuses to sign such documentation within five days notice to him. the Registrar of this Court shall be entitled to sign such documentation on his behalf

It is recorded that notwithstanding such signature, registration of the acquisition bv applicant of the first respondent's interest in second respondent shall only take place once the determination referred to in paragraph 8 has been made.

10. Third respondent is directed to change its name from SafariWise CC to a name not using the phrase SafariWise within 20 days from the date of this order.

11. First respondent is directed to pay the costs of this application.

M.J. FITZGERALD AJ

Tuesday, 21 September 2010