

EMPLOYMENT RELATIONS TRIBUNAL

JUDGMENT

ERT/RN 122/17

Before

Rashid Hossen	- President
Vijay Kumar Mohit	- Member
Eddy Appasamy	- Member
Parmeshwar Burosee	- Member

In the matter of:-

ERT/RN 122/17 – Landscape (Mauritius) Ltd Employees Union (Appellant)
And
Registrar of Associations (Respondent)

I.P.O: Landscape Mauritius Ltd Staff and Workers Union (Co-Respondent)

This is an appeal against a decision of the Registrar of Associations to register a change of name of a Trade Union by virtue of Section 12 (8) of the Employment Relations Act 2008, as amended.

The Respondent and Co-Respondent are resisting the application.

In its Statement of Case Applicant avers that:

- 1. It is a bargaining agent initially registered with the Respondent on 17 March 2015 under the name of Business Parks of Mauritius Ltd Employees Union.*

2. *It is the sole bargaining agent of that component of the bargaining unit of the Landscape (Mauritius) Ltd, which, prior to the integration of a number of organisations managing the public sector real estate assets into a single institution to be known as Landscape (Mauritius) Limited, served under Business Parks of Mauritius Limited.*
3. *Following the creation of Landscape (Mauritius) Ltd, Business Parks of Mauritius Ltd Employees Union applied to Respondent for a change of its name into that of Landscape (Mauritius) Ltd Employees Union.*
4. *Respondent approved the application for the change of name of Business Parks of Mauritius Ltd Employees Union into Landscape (Mauritius) Ltd Employees Union and issued a Certificate of Registration of Change of Name of Trade Union number TU 734 on 27 February 2017.*
5. *Applicant took notice in the L'Express Newspaper of 14 August 2017 of the State Property Development Company Limited Employees Union, to change its name into that of Landscape Mauritius Ltd Staff and Workers Union.*
6. *Applicant avers that the name of Landscape Mauritius Ltd Staff and Workers Union, albeit not identical, bears close resemblance with the name of Landscape (Mauritius) Ltd Employees Union.*
7. *Applicant avers that there is a strong presumption that the close resemblance in the names of Landscape (Mauritius) Ltd Employees Union and Landscape Mauritius Ltd Staff and Workers Union will create confusion among members of both unions and in the mind of management of Landscape (Mauritius) Ltd. Applicant equally avers that the new name of*

Landscape Mauritius Ltd Staff and Workers Union may deceive and mislead the public both when used in its actual spelling or in its acronymic form.

8. *Applicant avers that prior to delivering a Registration Certificate for change of the name of State Property Development Company Limited Employees Union into that of Landscape Mauritius Ltd Staff and Workers Union, Respondent failed to make a proper and reasonable appreciation of the close resemblance of the names of Landscape (Mauritius) Ltd Employees Union and Landscape Mauritius Ltd Staff and Workers Union for the confusion that these names would create in the minds of the public, members of both trade unions and management.*
9. *Applicant avers that at no point in time prior to Registration Landscape Mauritius Ltd Staff and Workers Union was it notified by Respondent that State Property Development Company Limited Employees Union had applied for a Registration for the change of its name into Landscape Mauritius Ltd Staff and Workers Union. Applicant further avers that Respondent did neither properly direct its mind nor did it properly assess the weight of his decision and of its adverse impact on the smooth running of Landscape (Mauritius) Ltd Employees Union as the latter and Landscape Mauritius Ltd Staff and Workers Union are now potential bargaining agents for the same bargaining unit.*
10. *Applicant prays the Tribunal for an order of revocation of the decision of the Respondent.*

Respondent denies any close resemblance in the present matter and avers:

- It is common for several unions from the same employer to differentiate themselves by the use of words such as “Employees”, “Workers” and “Staff”.
- Both names are differently constituted both in words and in the acronymic form; and
- The name of the employer “Landscape (Mauritius) Ltd” and the word “Union” are common words to form part of the names of the trade unions.

As regard the Co-Respondent, it objects to the prayer of the Disputant before the Tribunal to revoke the decision of the Respondent on the ground that (i) the name of the Co-Respondent is not identical and does not bear any close resemblance to that of the Disputant, (ii) nor will it create any confusion nor mislead the public.

Mr Gopee representing the Appellant deposed before the Tribunal. He stated that the gist of the dispute is the close resemblance between the names of the two unions i.e. Landscape (Mauritius) Ltd Employees Union and Landscape Mauritius Ltd Staff and Workers Union. According to him, this may create confusion in the public and among postmen in particular. He reconciled with the fact that where names of unions appear almost similar, objections ought to be have been taken. He added that in the present case, there have been on several occasions mails that have been misdirected to their office as a result of confusion arising out of names that bear close resemblance. While contesting the existing procedure in law, he concedes that the middle part of the two names in the present matter bear no resemblance at all. He suggested that the law should bring a change in the procedure. The Respondent and Co-Respondent did not adduce evidence.

It is the pertinent to refer to the following two cases although they deal with trade mark issues:-

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“From a study of the case law relating to the English Trade Marks Act 1938 it appears that confusion as to the source of the goods and services bearing the offensive mark is of the utmost importance. And in determining whether the marks are too similar the Court will take into account a number of factors:

*In **Aristoc v. Rysta [1945] AC 68**, the Court made allowance for “imperfect recollection and the effect of careless pronunciations and speech.” It was held that “Rysta” was similar to “Aristoc”, considering that there was evidence that a considerable number of persons pronounce the word “Aristoc” with emphasis on the middle syllable. The similarity between “Rysta” and “Ristoc” was held to be fairly obvious. A passage from Luxmoore L.J., one of the Judges who sat in the Court of Appeal, was cited with approval by the House of Lords.:*

“The answer to the question whether the sound of one word resembles too nearly to the sound of another so as to bring the former within the limits of Section 12 of the Trade Marks Act 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word and has perhaps an imperfect recollection of it who is likely to be deceived or confused. Little

assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants."

In Cordova v. Vick Chemical Co [1951] 68 RPC 103, a judgment of the Privy Council on appeal from the Court of Appeal of Jamaica, the importation and sale of jars of ointment marked "Karsote Vapour Rub" was held to be an infringement of two trade marks registered in Jamaica (one containing, and the other consisting of, the word "VapoRub"). It was held that the word "VapoRub" was an essential feature of the first registered mark "Vicks VapoRub Salve" and that the words "vapour rub" in the appellant's mark so closely resembled the work "VapoRub" as to be likely to deceive so that the respondent's mark has been infringed. Lord Radcliffe remarked that a trade mark was undoubtedly a visual device; but it was well-established law that the ascertainment of an essential feature was not to be by ocular test alone. Since words could form part, or indeed the whole, of the mark, it was impossible to exclude consideration of the sound or significance of those words. He further made the following pertinent observations:

"The likelihood of confusion or deception in such cases is not disproved by placing the two marks side by side or demonstrating how small is the chance of error in any customer who places his order for goods with both the marks clearly before him, for orders are not

placed, or are often not placed, under such conditions, it is more useful to observe that in most persons, the eye is not an accurate recorder of visual detail and that marks are remembered rather by general impressions or by significant detail than by any photographic recollection of the whole”

[Weetabix v Chue Wing Co Ltd 2004 SCJ 223]

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“The second issue on which the opinion of this Court is being sought relates to whether the Tribunal has not erred when it held that the mark which the Respondent is seeking to register in its name is not identical with or confusingly similar to the registered trade mark of the appellant.

Now the relevant provisions of the Act reads as follows:

“36. Acquisition of executive right to a mark

(1)

(2) No mark shall be registered, where it –

(a)

... ..

(e) is identical with, or confusingly similar to, or constitutes a translation of, a mark or trade name which is well known in Mauritius for identical or similar goods or services or another enterprise.

(f)

(g) *is identical with a mark belonging to a different proprietor and already on the Register, or with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services, or where it so nearly resembles such a mark as to be likely to deceive or cause confusion”*

In relation to that second issue, the above-quoted provisions raise, essentially two questions: first, whether the goods covered by the respective mark of the respondent and of the appellant are identical or similar; and, secondly, whether the respondent’s mark is “identical with or confusingly similar to” the appellant’s well-known mark [section 36(2) (e)] or “identical” to that of the appellant or “so nearly resembles” it “as to be likely to deceive or cause confusion” [section 36(2)(g)].

With regard to the first question, registration of the respondent’s trademark is, as indicated above, sought in respect of goods listed in class 9 and class 28. We note that, under the Nice Agreement, class 9 expressly excludes “clocks and watches and other chronological instruments”. It is clear therefore that the respondent’s trademark is neither “for identical or similar goods” [section 36(2)(e)] nor “in respect of the same goods ... or closely related goods” [section 36(2)(g)] as those of the appellant’s trademark. We hold accordingly.

We now turn to the second question. It is not disputed that the condition of similarity or identity of the marks requires the existence, in particular, of elements of visual, aural (or phonetical) or conceptual similarity: Sabel v Puma [1997] E.C.R I-6191.”

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*We bear in mind the test outlined by LJ Luxmoore, which was quoted with approval by the House of Lords in **Aristoc v. Rysta** [1945] RPC 45, which makes it clear that, so far as the marks alone are concerned, the test of confusability is one of first impression, making due allowance for imperfect recollection. The House of Lords in the **Rysta** case (*supra*), discussed the doctrine of imperfect recollection and the importance of the first impression as follows:*

“The answer to the question of whether the sound of one word resembles too nearly the sound of another ... must nearly always depend on the first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.

The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on

the part not only of the person seeking to buy under the trade description but also of the shop assistant ministering to that person's wants."

*However, while bearing this doctrine in mind, it must be remembered that the House of Lords, also in the **Rysta** case, pointed out that this factor must not be too strongly emphasized. It is apposite to refer to the words of Lord Greene MR at page 105:*

"The doctrine of imperfect recollection must not be carried too far, in considering its application not only must the class of persons likely to be affected be considered, but no more than ordinary possibilities of bad elocution, careless hearing or defective memory ought to be assumed."

*Even making allowance for imperfect recollection of the average consumer, we are of the view that the two marks are not phonetically confusingly similar. The average Mauritian consumer is more likely to read the mark "NeΩmega" as "Neomega" with a fairly forceful and distinctive prefix, namely "Neo". We find support in the case of **London Lubricant (1920) Ltd (1924) 42 RPC 264** in relation to the marks "Tripcastroid" and "Castrol" where it was held that the first syllable was the most important for the purpose of the distinction.*

In the circumstances, we take the view that the two marks are not confusingly similar."

[**Omega SA v Omega Fitness Ltd 20147 SCJ 280**]

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In the present matter, we do not find sufficient evidence of the two names being “phonetically similar”. Indeed, we find the names **Landscape (Mauritius) Ltd Employees Union** and **Landscape Mauritius Ltd Staff and Workers Union** to have different acronymic forms.

The appeal is dismissed.

SD Rashid Hossen
President

SD Vijay Kumar Mohit
Member

SD Eddy Appasamy
Member

SD Parmeshwar Burosee
Member

26th January 2018