IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT02541ADJ2026**

In the matter between:

AFFORDABLE POWER SOLUTIONS (PTY) LTD	Applicant
and	
APS SADC (PTY) LTD	First Respondent
COMMISSIONER OF THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent

Presiding member: Richard Bradstreet
Date of decision: 3 June 2026

DECISION (Reasons and Order)

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1. This is an opposed application brought in terms of section 160 of the Companies Act 71 of 2008 ("the Act"), in which the Applicant seeks a determination that the First Respondent ("Respondent")'s registered name, "APS SADC (Pty) Ltd", does not satisfy the requirements of section 11(2) of the Act, together with consequential relief directing the Respondent to amend its name so as to remove the element "APS", failing which the Companies and

Intellectual Property Commission ("the CIPC") is to substitute the Respondent's registration number for its name.

2. The Applicant is the proprietor of a series of trade marks filed in 2023 for the word mark "APS" and associated logo marks across a range of classes. The Respondent was incorporated on 29 August 2017, some two years before the Applicant's incorporation in 2019, and some six years before the Applicant's trade mark filings.

3. The application is opposed. The Respondent filed an answering affidavit deposed to by Ms Ramani Naidoo, to which the Applicant replied. The Applicant accordingly bears the ordinary onus of establishing that the Respondent's name does not comply with section 11. The matter was heard on 23 April 2026. Mr L Dixon appeared for the Applicant and Mr M Metcalfe for the Respondent.

THE STATUTORY FRAMEWORK AND THE TRIBUNAL'S FUNCTION

4. Section 160(1) of the Act entitles any person with an interest in a company's name to apply to the Tribunal for a determination whether the name satisfies the requirements of section 11. Upon such a referral the Tribunal must, in terms of section 160(3), decide whether the name satisfies those requirements and, if it does not, may make an administrative order of the kind sought in this matter.

5. Section 11(2) provides, so far as is presently relevant, that the name of a company must not:

5.1. be the same as a registered trade mark belonging to another person, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark (section 11(2)(*a*)(iii));

5.2. be confusingly similar to such a trade mark or mark (section 11(2)(*b*)); or

5.3. 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, another person (section 11(2)(*c*)).

6. It is necessary at the outset to be precise about the nature of the function that section 160 confers. The Tribunal's task is the discrete and essentially administrative one of determining whether a registered name conforms to the standard prescribed by section 11. It is not a court of general jurisdiction in trade mark or unlawful competition. The comparison required by section 11 therefore takes the registered trade mark as it finds it: the mark is on the register, and its validity is not a matter the Tribunal is equipped or empowered to revisit. Questions of infringement, passing-off, the strength or vulnerability of the registration, and the substantive rights of a prior user are not within the Tribunal's remit, and a party who wishes to vindicate or to impugn such rights must do so in the High Court.

7. As to the content of the inquiry into "confusing similarity", the established principles are settled and have not been brought in dispute. "Similar" in section 11(2)(*b*) means "having a marked resemblance or likeness" (*Bata Ltd v Face Fashions CC* 2001 (1) SA 844 (SCA) para 14). Whether there is a confusing similarity is a value judgment (*Cowbell AG v ICS Holdings Ltd* 2001

(3) SA 941 (SCA) para 10), to be made on the assumption that the name and the mark are used together in a normal and fair manner in the ordinary course of business.

8. The question is whether there is a reasonable likelihood that ordinary members of the public, or a substantial section of them, may be confused or deceived into believing that the goods or services of the one are those of the other, or are connected therewith (*Adidas AG v Pepkor Retail Ltd* (187/12) [2013] ZASCA 3 para 28). The Supreme Court of Appeal (in *Bata* supra at para 8, citing Plascon-Evans at 640G-I) has stated that:

> "*The only question that has to be decided in respect of the alleged infringements under s 34(1)(a) is whether the appellant has established that a substantial number of persons will probably be deceived into believing or confused as to whether there is a material connection in the course of trade between the respondents' clothing and the appellant's trade mark.*" (Emphasis added.)

9. The assessment is a "global" one, which takes into account the visual, aural, and conceptual similarities (*Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA)), and the comparison is made through the eyes of the ordinary, reasonable consumer, allowing for imperfect recollection, and the names are to be viewed as they would be encountered in the marketplace (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 640G–641E).

PRELIMINARY ISSUES

The Proper Construction of Section 11(2)

10. A question of construction was ventilated at the hearing which may be convenient to resolve before a consideration of the merits. The Respondent's

submission, drawn from this Tribunal's decision in *Mondi South Africa (Pty) Ltd v Mondi LL (Pty) Ltd* (CT01288ADJ2023) [2023] COMPTRI 62 ("*Mondi*") (see paras 42 to 48), was that an applicant under section 11 must establish three cumulative requirements – that the name is the same as the mark, that it is confusingly similar, and that it falsely implies an association – and that a failure to establish any one of them is fatal to the application.

11. I cannot agree with this interpretation, although – since the requirements are framed in the negative (what the name may *not* be) – one might say that they all must be satisfied in the sense that the name must meet all of these negative requirements. The provision does not set out a list of elements which an applicant must prove in the affirmative. It states the conditions which a name must satisfy in order to be permissible: a name "must not" be the same as a registered mark; it "must not" be confusingly similar to such a mark; it "must not" falsely imply an association. These are cumulative requirements of compliance, not cumulative requirements of proof. It follows that a name fails to comply with section 11 if it offends against any one of the sub-paragraphs; it need not offend against all of them.

12. The Applicant accordingly succeeds upon establishing disqualification under any one of the subsections of section 11(2). That this is the correct reading is confirmed by the structure of the subsection as a whole. Section 11(2)(*d*) prohibits a name that includes an expression amounting to propaganda for war, the incitement of imminent violence, or the advocacy of hatred. A cumulative-proof construction would have two necessary implications: first, no company name would be impermissible where an objection is based purely on likeness, unless it were also a name of the nature contemplated in subsection

(*d*) involving war propaganda, violence or hatred; and secondly, a name that is objectionable on the latter basis would only be prohibited if it also met the requirements in subsections (*a*) to (*c*). Those consequences provide a sufficient answer to the proposed construction.

The Scope Of The Enquiry And The Respondent's Substantive Defences

13. The Respondent advanced, with considerable care, two principal lines of defence directed not at the comparison itself but at its right to retain its name notwithstanding the comparison. The first was a defence of common-law protection through prior use, founded upon a series of invoices said to evidence continuous trading under the name "APS SADC" since 2018. The second was a defence of statutory protection under the Trade Marks Act 194 of 1993 based on *bona fide* prior use of a mark. The submission, in essence, was that an entity which has traded under a name for some years before the registration of a conflicting trade mark ought not to be deprived of that name by the later registration.

14. There is an evident fairness in the proposition, and it was advanced responsibly. The difficulty is that it engages rights and defences that lie outside the section 11 enquiry. The defences identified are defences to infringement under the Trade Marks Act, or to a claim in passing-off; they presuppose proceedings in which the relief sought is to restrain or to permit use of a mark, and in which the relative priority and *bona fides* of the parties' rights fall to be adjudicated.

15. Section 11, however, asks a narrower question: whether the registered name, compared with the registered mark, conforms to the statutory standard. A

name does not cease to be confusingly similar to a registered mark because its proprietor may have a good defence to an infringement action; the two enquiries are distinct, and the second is not before the Tribunal.

16. The Respondent emphasised, correctly, that it adopted its name in 2017, well before the Applicant's 2023 filings. As against a claim of infringement, that priority may be of considerable significance. But section 11(2)(*a*)(iii) and (*b*) contain no temporal qualification in favour of the earlier-registered company name: the comparison is with "a registered trade mark" or "a mark in respect of which an application has been filed", and the section does not exempt a name merely because it was registered first. The mere registration of a company name does not, in any event, confer a right to use that name where the use conflicts with the rights of another (*Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA) para 12). The temporal priority on which the Respondent relies is therefore a matter for whatever substantive proceedings it may be advised to bring or to defend; it does not convert a name that offends section 11 into one that complies.

17. The Respondent's evidence of widespread third-party use of the letters "APS" on the CIPC register, and of the existence of an unrelated solar enterprise using that acronym, was directed in substance at the strength and validity of the Applicant's registration. Whatever force those matters might carry in expungement or rectification proceedings, the Tribunal cannot go behind the Register: the mark is registered, and the enquiry proceeds on that footing.

18. It was argued, with reference to the decision in *Mondi*, that the Tribunal is nonetheless obliged to have regard to the Trade Marks Act in adjudicating an objection of this kind, and that to do so requires the substantive defences for

which that Act provides to be weighed in the balance. The premise may be accepted, but the conclusion does not follow. Section 11 itself directs attention to the Trade Marks Act, for the standard it lays down is defined by reference to a registered trade mark and to a mark for which application has been filed. To that extent the Act is not merely relevant but incorporated, and the Tribunal must consult it. But the matters so incorporated are the *existence* and *ambit* of the mark and *the comparison* the section requires; they do not extend to the defences or remedies established by the Act. To have regard to the Trade Marks Act, in the sense section 11 contemplates, is to consult it for the content of the comparison; it is not to try an action for infringement under it.

19. The distinction is one of function rather than of mere forum:

19.1. The defences of vested rights, *bona fide* own-name use and honest concurrent use operate to qualify or to defeat a proprietor's right to restrain the use of a mark; they presuppose, and answer, the question whether use already found to be infringing should nonetheless be permitted. The are essentially carve-outs where infringement exists.

19.2. Section 11 poses an anterior and different question, which is whether a name conforms to a statutory standard of registrability, and it attaches no consequence to the considerations of relative *bona fides* and priority upon which those defences turn. It also does not deal with, nor does it mention, trade mark infringement.

19.3. The narrow reference to the Trade Marks Act cannot, therefore, be construed as an invitation to read into the section defences that the

section itself does not mention, and which presuppose an enquiry that the section does not undertake.

APPLICATION OF SECTION 11(2) TO THE RESPONDENT'S NAME

Meaning of "the same as"

20. In relation to the question of whether the Applicant's mark and the Respondent's name are contrary to section 11(2)(*a*) in that they are *the same*, I have some difficulty in accepting the interpretation of the words "same" that would be required. For the Applicant to succeed on this basis, it would effectively have to establish that the "SADC" element performs no material distinguishing function.

21. For the purposes of assessing this aspect of the matter, it will be assumed – but not accepted – that "SADC" is no more than a geographical indicator, in the same way that "(Pty) Ltd" indicates the form of enterprise. On that assumption, there is a cogent argument that the two are, in substance, the same. I can see no reason, however, why the concepts of sameness and confusing similarity should overlap when they do not, in fact, mean the same thing.

22. In my view, the two should be treated as distinct, because whilst a name that is the same as another will inherently be confusingly similar to it, the converse does not follow. The inclusion of both concepts in section 11 is therefore readily explicable: the prohibition against names that are "the same as" prevents a name from escaping scrutiny merely because it is identical rather than only similar. A literal reading gives effect to that distinction.

23. It is therefore not accepted that the two are the same, but this is not sufficient on its own to defeat the Applicant's case, as already explained: the Applicant need only establish one of the disqualifying criteria specified in section 11(2) in order to succeed.

Similarity and Mistaken Association

24. With regard to establishing a confusing similarity and the likelihood of confusion for the purposes of section 11(2)(*b*), and whether the name is such as would reasonably mislead a person into inferring an incorrect association for the purposes of section 11(2)(*c*), the considerations informing both inquiries are largely the same. The separate formulations in the parties' argument will, therefore, not be treated as distinct inquiries for the present purposes; what follows is a comparison of the Applicant's mark, and the Respondent's name in the light of the applicable legal principles and the parties' submissions, undertaken to establish whether the Respondent's name falls foul of either of those negative requirements.

25. A name is confusingly similar to a mark if its resemblance to the mark gives rise to a reasonable likelihood that a substantial number of ordinary members of the relevant public will be deceived or confused. The test, as both parties accepted, is the global assessment described in *Cowbell* (supra), which has regard to the visual, aural and conceptual impressions conveyed by the competing names, and which is conducted from the standpoint of the ordinary consumer of the goods or services in question. The names must be compared as wholes, but a global comparison does not require that each element be accorded equal weight; the impression created by a composite name is frequently dominated by one of its components.

Submissions Bearing on Similarity and Mistaken Association

26. Mr Dixon submitted that "APS" is the dominant feature of the Respondent's name, and that the public characteristically identifies a business by its dominant or leading element (S*tandard Bank of South Africa Ltd v United Bank Ltd* 1991 (4) SA 780 (T)); that the element "SADC" is a geographical descriptor which does not serve to distinguish, and which (on the authority of *Century City Apartments Property Services CC v Century City Property Owners' Association* 2010 (3) SA 1 (SCA)) cannot cure a resemblance founded upon an identical dominant component; and that the comparison must be conducted in the context of the specific industry in which the parties operate and of the ordinary consumer of those particular goods or services.

27. The Applicant invoked *Lucky Star Ltd v Lucky Brands (Pty) Ltd* 2014 BIP 381 (WCC) for the proposition that similarity is not assessed in the abstract but against the specific market and its ordinary consumer, with the consequence that where the parties trade in the same sector and region the threshold for confusion is correspondingly lowered.

28. In opposition to this line of argument, Mr Metcalfe submitted that "APS" is an inherently weak element, being a three-letter acronym unconnected to the Applicant's registered name and shared by a large number of unrelated entities. Support for this contention can be found in the Respondent's answering affidavit, which records that a search of the companies register reflects more than two hundred names incorporating "APS", including at least one enterprise in the solar sector.

29. It was argued, with reference to *Lucky Star* (supra) that where the distinctive content of a mark is slight, similarity in the field of activity will not by itself establish a likelihood of confusion. Mr Metcalfe also pointed to the differences in get-up (contrasting fonts, lettering and logos employed by the parties) as displacing any visual confusion, and submitted that the Applicant had adduced no evidence of actual confusion.

Discussion

30. The Respondent's strongest point is that "APS" is a weak, widely-shared acronym entitled to narrower protection. That may be accepted, but it does not assist the Respondent in that the dilution relied upon is among businesses in unrelated fields, which does not weaken the mark within the solar and power market in which both parties in fact trade; and the mark is taken as it stands upon the register. *Lucky Star*, cited by both sides, confirms that similarity is judged in the context of the specific industry and its ordinary consumer. The Supreme Court of Appeal has held similarly that "*[t]he marks must be viewed as they would be encountered in the marketplace and against the background of relevant surrounding circumstances*" (*Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 641).

31. The likelihood of confusion in the market in which the parties operate is not negated by the existence of unrelated traders using the same or similar mark in different fields of activity where no realistic possibility of confusion arises. Thus, the fact that the acronym "APS" may be used by unrelated entities in other industries does not diminish the likelihood of confusion between parties using it in relation to the same or closely related services.

32. The names share, as their dominant and memorable feature, the identical element “APS”, which on the *Standard Bank* principle is the element by which the ordinary consumer will identify and recall the business. The additional element “SADC” does not distinguish the Respondent’s name but, being a familiar regional descriptor, tends if anything to reinforce the impression of a connected undertaking operating across the region; on the *Century City* approach, a descriptor of that kind cannot cure a resemblance founded upon an identical dominant component.

33. As to the evidence relating to the branding and trading names, such as the use of “APS Solar” and “APS Ardent Solar” on signage and vehicles, the Tribunal has confined its attention to the registered name. The manner in which the Respondent presents itself in commerce may be of relevance to a complaint of passing-off in another forum, but the object of the section 11 enquiry is the registered name, and the Tribunal’s conclusion rests upon the comparison of that name with the registered mark, and not upon the Respondent’s trading styles. As far as evidence of actual instances of confusion is concerned, although this might be a relevant consideration, there is no requirement that the Applicant establish actual confusion to succeed.

34. Considering the Applicant’s mark as it stands, and conducting the global comparison that the authorities require, restricted to the single market (the solar and power-solutions sector in the same region) in which both parties are shown to operate, and in which the threshold for confusion is correspondingly reduced, the mark “APS” and the name “APS SADC” convey the same commercial origin, and the likelihood of deception or confusion is, in my view, established.

35. Having found the Respondent's name to be confusingly similar to the Applicant's registered mark within the meaning of section 11(2)(*b*), in the circumstances, and for the reasons just described, it would seem to follow that section 11(2)(*c*) is also contravened in that the use of a name confusingly similar to a mark used in the same market, with the only distinguishing element being a geographical indicator appearing after the mark, would almost certainly also imply some association between the parties.

THE SETTLEMENT CORRESPONDENCE AND COSTS

36. The Applicant placed before the Tribunal a settlement offer in which the Respondent had indicated a willingness to change its name upon payment of a sum of R65 000, and submitted that the offer amounted to a tacit admission that the name is problematic, and an attempt to hold the Applicant's rights to ransom. The Respondent explained that the offer was made without any admission of liability, in a *bona fide* attempt to curtail the costs of litigation.

37. The Tribunal does not treat the offer as an admission. The question whether the Respondent's name complies with section 11 is one to be determined upon the Tribunal's own assessment of the name against the mark and the applicable law, and not upon any concession, express or implied, that the parties may have made in the course of seeking to compromise the dispute. The offer has accordingly been left out of account in the determination of the merits.

38. The Applicant asked for costs on a punitive scale, founding that submission in part upon the inference it sought to have the Tribunal draw from the settlement offer, and the Respondent submitted that no order as to costs should be

made, even in the event that it was unsuccessful, emphasising that it had adopted and used its name in good faith, had traded under it for a number of years, had advanced its defence responsibly, and had sought to resolve the matter by agreement.

39. The Tribunal is not persuaded that a punitive order is warranted. The making of a settlement offer, including one that proposes a payment towards the costs of a name change, is a legitimate incident of litigation, and is at least as consistent with a *bona fide* desire to curtail expense as with any improper motive. The Tribunal is unable, on the material before it, to characterise the offer as an abuse, and it follows that the offer affords no foundation for a special order as to costs.

40. The matter being one in which the Respondent advanced an arguable defence in good faith, the Tribunal considers that the just order is that each party should bear its own costs. There will accordingly be no order as to costs.

ORDER

41. In the result, I make the following order:

(a) It is determined that the name “APS SADC (Pty) Ltd” does not satisfy the requirements of section 11(2)(*b*)(iii) of the Companies Act 71 of 2008.

(b) The First Respondent is directed to:

(i) change its name to one which does not incorporate the element “APS” or any confusingly similar mark, and

(ii) file a notice of amendment to its Memorandum of Incorporation within 3 (three) months of the date of this order.

(c) In the event that the First Respondent fails to comply with paragraph (b) above, the Second Respondent is directed to substitute the First Respondent's registration number as its interim company name.

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Richard Bradstreet
Member of the Companies Tribunal

3 June 2026