

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

(“The Tribunal”)

CASE NO: CT023Nov2016

In an Application in terms of Section 160 of the Companies Act 71 of 2008 (“the Act”) for a determination that the name that the company name RED CARPET INTERIORS (PTY) LTD Reg. No: 2015/290196/07 does not satisfy the requirements of Section 11(2) (a) and (c) of the Act

In the matter between:

EDCON LTD

APPLICANT

AND

RED CARPET INTERIORS (PTY) LTD

RESPONDENT

Coram: Khatija Tootla

Decision handed down on 24 March 2017

DECISION

INTRODUCTION:

[1] The Applicant, is Edcon Ltd, a company duly incorporated in accordance with the company laws of the Republic of South Africa, having its registered office at Edgardale, 1 Press Avenue, Crown Mines, and Johannesburg. Gauteng, S. Africa brings an application in terms of Sections 11 (2) (a) (ii); 11 (2) (b) and 160 of the Companies Act 2008 (“the Act”) read with Regulation (Reg.) 153 for an order that the Respondent change its name so that

it does not incorporate its trademark RED CARPET which is confusingly similar to the Applicant's RED CARPET trade mark.

- [2] The Respondent is Red Carpet Interiors (Pty) Ltd, a company incorporated in terms of the Companies Act, bearing registration number 2015/290196/07 and having its registered address at Plot 49, Welteverde, Koppies, Free State, 9540.

PROCEDURE:

- [3] The Applicant served form CTR 142 and the supporting papers on 20 December 2016 via the Sheriff of the Court on the Respondent's employee, Gerswin Kaas in terms of Rule 9(3) (b) of the High Court rules which is acceptable to the Tribunal.
- [4] More than 20 court days have expired since the date of delivery; and no response has been received by the Applicant; nor has any opposition been filed by the Respondent with the Tribunal. The Applicant subsequently filed its application for default on 9 February 2017 on form CTR 145.
- [5] Since the Tribunal is satisfied that the application has been properly served, the Tribunal is obliged to examine whether "good cause" has been shown in terms of Section 160 (2)(b), before examining the merits of the matter.
- [6] In September 2015, the Applicant became aware of the advertisement of the Respondent's company name which was registered on 17 August 2015 as a result of being advised by its Attorneys, Adams and Adams. On 29 November 2016 the Applicant served the application on the Tribunal.

EVALUATION:

- [7] Considering that almost 15 months had endured since the date of knowledge by the Applicant, one would have expected the Applicant to instruct its attorneys Adams and Adams to proceed with an application to the Companies Tribunal or to the High Court

immediately on being advised. However, to address a letter of demand on 28 October 2015 does not assist the cause of the Applicant.

- [8] There is a lapse of a period of 14 months from the date of the letter of demand and there is no explanation as to why this was permitted to occur. It seems that the Applicant either omitted to make an application or abandoned its application for some unknown reason. Immediate action within a reasonable period is required by virtue of an administrative application to the Tribunal or an application to interdict the Respondent's alleged use of their trade mark in the High Court. Instead it chose to issue a letter of demand which it did not follow up with a legal process. By virtue of its conduct, the Applicant continued to permit the existence of the Respondent's name. The rationale of pursuing a letter of demand is indeed not befitting in the circumstances.
- [9] Surely the Applicant after providing the Respondent with a final date of 13 November 2015 to respond to its letter of demand would have realised that in order to protect its rights, it would have no choice but to commence legal proceedings. It is well-known that there is no guarantee that a letter by registered post would be collected by the Respondent's director and hence come to his knowledge. The letter of demand it is clear simply delayed the process before an application was made by the Applicant and served in November 2016 on the Companies Tribunal.
- [10] The papers were served on the Tribunal almost 15 months after date of knowledge on 29 November 2016. The delay on the part of the Applicant in bringing an application before the Tribunal shortly after or within a reasonable period of time is due to the fact that the Applicant wrongly believes that it can unnecessarily issue a letter of demand and then simply delay the matter until 29 November 2016 which is clearly an unreasonable delay. It is clear that the Applicant was intent on saving the costs and effort of bringing an application and in the process lost sight of its obligation to record its objection to the name registration within a reasonable period and that ought to have been its priority.
- [11] Despite the unreasonable and unexplained delay, Mr Vikisi on behalf of the Applicant in his explanatory affidavit contends that good cause has been shown due to the fact the letter

of demand was returned unclaimed to its attorneys; but the Tribunal has not been advised as to the approximate date when this occurred.

- [12] In addition, Mr Vikisi states that its attorneys instructed a tracing agent to obtain the details of the Respondent. There is no indication when this occurred and why the Applicant did not deem it fit or make an attempt to serve the Application on the address which appears in the records of CIPC.
- [13] In para 24.5 of Mr Vikisi's affidavit, he contends that the tracing agent's report was received on 5 April 2016 which revealed that the Respondent's sole director was untraceable. As a result of which, the Applicant instructed its attorneys to proceed with the application. Amazingly the Applicant served the papers on the Respondent on the self-same address to which it addressed its letter of demand. It would have saved the Applicant time and money to have served the Application on the Respondent via the Sheriff in 2015.
- [14] Mr Vikisi states that the delay was occasioned by the fact that it made an effort to contact the Respondent via a letter of demand and the instructing of the tracing agent and response of the tracing agent; and that the director of the Respondent not being traceable.
- [15] To establish whether the Applicant has shown good cause, the Tribunal refers to Webster and Page- South African Law of Trade Marks, 4th ed, para 16.5.3, where the only requirement is that the applicant must explain the "delay" on good cause shown".
- [16] The Applicant has not shown why there has been a delay on "good cause" in accordance with the Law, as there has been a delay of more than a year after it came to its knowledge, save to show that it sent a letter of demand and instructed a tracing agent. It is unreasonable that one would await a tracing agent's report until April 2016, without attempting to serve a summons on the Respondent which clearly shows it has unnecessarily delayed the matter. In any event, the Respondent was finally served at the same address as reflected on the letter of demand. Hence the argument posed by Mr Vikisi on behalf of the Applicant to serve the summons almost 15 months after date of knowledge holds no water.

[17] Although the term “ good cause” has not been defined in the Act or Regulations, in **Minister of Defence and Military Veterans v Motau and Others Minister of Defence and Military Veterans v Motau and Others**, it was stated that “good cause may be defined as a substantial or “legally sufficient reason” for a choice made or action taken”.

This is a factual enquiry which would differ in each case, depending on the circumstances (*De Wet and Others v Western Bank Ltd 1977 (2) SA 1033 W-* deals with the phrase in an application for rescission of judgment). An applicant has the duty to provide facts on which the existence of good cause can be determined. The facts provided by the Applicant are unconvincing as the Applicant became the author of its misfortune by not bringing an urgent application and by delaying the matter further by its actions.

[18] By its own admissions and hoping in anticipation that the Respondent would respond and it would save costs, there is no valid reason why the Applicant delayed its application to the Tribunal by a letter of demand and a tracing agent which did not provide any results. This has led to the Applicant’s disregard for and non-compliance with Section 160 (2) (b). Thus the Applicant has caused unreasonable delay by virtue of its own actions, has ignored the provisions of the Law and hence cannot be rescued by the Tribunal.

[19] To elaborate, an applicant in terms of Section 160 (2) (b) has to show good cause why an application is made at the time it was made. The date which is material in this regard is not when the application was made, but when the applicant became aware of the disputed name and that was September 2015.

[20] Furthermore, the delay from the date of knowledge in September 2015 has compounded the issue of showing ”good cause”; and is not in accordance with Section 160 (2)(b). Thus an unreasonable delay is an insufficient reason to show good cause.

[21] Not only is the failure to show good cause a fatal one, it is also the duty of the Act to protect the registration or reservation of a company name, unless found to be contrary to the provisions of the Companies Act. It is to be noted that Section 7 of the Act clearly states that one of the objectives of the Act is to “provide a predictable and effective environment for the efficient regulation of companies”. In view thereof, it can be concluded that the Applicant’s unnecessary delay in lodging its Application in terms of Section 160 (2)(b) as swiftly as possible or within a reasonable period of time has contributed primarily to the Respondent’s company name being allowed to co-exist with the trade mark of the Applicant in the business environment without confusion.

This has occurred almost 15 months after receiving knowledge of registration and existence of the Respondent’s company name. The action of the Applicant has had the converse effect to providing a predictable and effective environment.

[22] Imagine the untold adverse effect that late applications of this nature can have years after such a name is registered. Thus the actions of the Applicant in delaying the application has led to the non- fulfilment of the requirement of “good cause” in terms of Section 160 2) (b). In the circumstances, and for these reasons, the Tribunal cannot deal with the merits of the matter, in respect of its claim that the Respondent’s name is confusingly similar to the trade mark of the Applicant in terms Section 11 (2) (a) (iii); and that it falsely implies or suggest, or would reasonable mislead a person to believe incorrectly, that the Respondent is part of, or associated with the Applicant. in terms Section 11 (2) (c) (i).

[23] The Applicant as dominus litis is obliged to show good cause in terms Section 160(2) (b) of the Act, which it has clearly failed to do. In the circumstances, it is clear that the delay of more than a year after date of knowledge in bringing an application to the Tribunal is unacceptable and unreasonable.

ORDER:

[24] The application for an order in terms of sections 11 and 160 of the Companies Act is dismissed with no order as to costs.

k. tootla (electronically signed)

KHATIJA TOOTLA

Member of the Companies Tribunal

24 March 2017