

[1] The applicant brought this application on the basis of an interest it has in the registered trade mark SKYE, belonging to another entity called LA Group Limited. The applicant's interest in the trade mark is said to arise from the appointment of the applicant as a manager of the licensing of the SKYE brand and a licensed user of the SKYE trade mark. No proof of both averments is included in the papers before this Tribunal and thus the standing of the applicant to apply for the remedy sought is on rather precarious grounds. I will return later to deal with this.

[2] There are two respondents cited in this application. The first respondent is SKYE Business (Pty) Ltd or SKYE Business Holdings (Pty) Ltd¹. The second respondent is cited as the Commissioner of the Companies and Intellectual Property Office (the Commission). I will henceforth refer to the first respondent as simply the respondent and the second respondent as the Commission.

[3] The respondent appears to have been adequately served with the notice of the application, but there is no proof of service of the application on the Commission. In fact, the Commission doesn't appear to have been notified at all of these proceedings, but yet there is a prayer that, the Commission be directed to amend the respondent's name.² A finding on this will be very influential to the outcome of this application.

¹ The first respondent's name is stated differently on the citation and body of the application.

² Paragraphs 7.2 of the supporting affidavit and 5.3 of the affidavit by Debra Louise Marriott in support of the application for default order.

[4] This application is before this Tribunal as a request for default order after neither the respondent nor the Commission [in case of the Commission this is no surprise due to absence of notice of the proceedings] filed a response or answer within the prescribed time-period [**regulation 153, read with regulation 143 of the Companies Regulations, 2011** (the Regulations)] or at all.

[5] The applicant seeks an order declaring that, the respondent's name SKYE Business (Pty) Ltd or SKYE Business Holdings (Pty) Ltd or the inclusion of the word or element SKYE in the respondent's name, does not satisfy the requirements of sections 11(2)(b) and (c) of the Companies Act NO.71 of 2008 (the Act). As part of the order, the respondent will be directed to choose a different name [to be reserved and registered by the Commission] which satisfies the requirements of the Act.

[6] The respondent [and presumably its name] was registered in February 2012.³ The applicant contends that, the respondent's name is "confusingly similar" [**section 11(2)(b) of the Act**] to the SKYE trade mark or to "falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that" the respondent is "part of, or associated with" the applicant or the LA Group [**section 11(2)(c)(i) of the Act**].

³ Paragraph 3.5 of the supporting affidavit.

[7] The applicant has however not furnished proof or confirmation of existence of the respondent's name [as registered by the Commission or at all]. Normally this takes the form of a certificate issued by the Commission on which, among others, the enterprise name; address of registered office and description of the principal business of the company whose name is objected to, like the respondent herein, are reflected. This alone is very decisive of this matter, but I will proceed to deal with other issues of this application for the sake of completeness.

[8] The supporting affidavit attached to the prescribed Form CTR 142 is by Richard Dixon. Dixon introduces himself as the managing director of the applicant since 1 November 2009 and as being "*duly authorised by the Applicant to depose to this affidavit and to institute these proceedings against the Respondent on the Applicant's behalf, and my authority to do so stems from my position within the Applicant*"⁴. I find it as unnecessary to determine whether Dixon has authority by virtue of his position to bring this application. However, in the light of what is stated in respect of the applicant's standing above, I have reservations as to the authority of Dixon and even the applicant to institute these proceedings. The necessary proof by way of resolution(s) should have formed part of the papers [see ***Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)***]. This, in my view, exacerbates the already shaky ground upon which this application is based.

⁴ Paragraph 1.3 of the supporting affidavit.

[9] The subject matter of this application, being the trade mark SKYE is or was registered in various classes over varying goods or services as proprietary of the LA Group Limited. However, most (being trade marks whose extracts from the trade mark register are annexed to the founding affidavit as “AA3” to “AA8”) seem to have lapsed after a registration period of 10 years, in the absence of a renewal or any submissions regarding duration of the trade mark.⁵ This seems to be what is provided by section 37 of the Trade Marks Act NO.193 OF 1994 which reads as follows.

“37. Duration and renewal of registration.

(1) The registration of a trade mark shall be for a period of 10 years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The registrar shall, on application made by the registered proprietor of a registered trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of 10 years from the date of expiration of the original registration or of the last renewal of registration, as the case may be, which date is in this section referred to as “the expiration of the last registration”: Provided that, in the case of an application made in terms of section 63, the date of the original registration shall, for the purposes of this subsection, be deemed to be the date of lodgement of the application at the trade marks office.

(3) At the prescribed time before the expiration of the last registration of a trade mark, the registrar shall send notice in the prescribed manner to the registered

⁵ Section 37 of the Trade Marks Act NO.193 of 1994.

proprietor at his address for service of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and, if at the expiration of the time prescribed those conditions have not been duly complied with, the registrar may remove the trade mark from the register subject to such conditions, if any, as to its restoration to the register as may be prescribed.

(4) Where a trade mark has been removed from the register for non-payment of the fee for renewal, it shall, nevertheless, for the purpose of any application for the registration of a trade mark during one year next following the date of the expiration of the last registration, be deemed to be a trade mark that is already on the register: Provided that the foregoing provisions of this subsection shall not have effect where the registrar is satisfied that there has been no bona fide use of the trade mark that has been removed during the two years immediately preceding the date of the expiration of the last registration.”

[10] The rest (being those marked “**AA9**” and “**AA10**”) of the trade marks appear to have been registered after the incorporation of the respondent on the 25th May 2012.⁶ Therefore, the asserted rights of the applicant or the LA Group may not be availing the remedy sought in terms of this application.⁷ I say this rather tentatively and without necessarily finding so. The other clear

⁶ See paragraph 6 above, where the respondent’s name is stated as registered in February 2012.

⁷ Section 51 of the Trade Marks Act NO.193 of 1994

shortcomings stated above in respect of this application are sufficient to make a finding without delving into the realm of trade marks.

[11] On the basis of what is stated above, regarding the conspicuous absence of proof of standing of the applicant; lack of notice of the proceedings to the Commission, and absence of proof or confirmation of the impugned name, I feel precluded from dealing further with the other aspects of this application, including its merits. I do not consider these problems to amount to anything like technical irregularities to be condonable as contemplated by regulation 154(3) of the Regulations or to be overlooked in the adjudicative spirit with which this Tribunal seems to be inured in terms of section 180(1) of the Act. They are of a serious and substantive nature.

[12] Therefore, this application should fail and the applicant should only launch a new application for similar relief if the aforesaid problems are satisfactorily addressed in the new application.

[13] In the result:

- a) the application is dismissed.

Khashane Manamela
Member, Companies Tribunal
20th March 2014