COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT005Feb2015

In the matter between:

THE SCOTT FETZER COMPANY Applicant[1]

and

KIRBY SERVICE AND REPAIR CENTRE (PTY) LTD Respondent[2]

Presiding Member	:	Khashane Manamela (Mr.)
Date of Decision	:	10 June 2015

DECISION (Reasons and an Order)

Khashane Manamela

[1] In the supporting affidavit to the application, the applicant is referred to as "the objector", but I could not find a basis for adopting such reference in the Companies Act 71 of 2008. Section 160 of the Companies Act carries the word "applicant" and the applicant may actually have come to realise this as it resorted to the reference or citation "applicant" in its application for default order.

[2] Unlike with the citation of the applicant, the supporting affidavit correctly refers to the respondent as such, but add in parenthesis the words: "Applicant for Registration". This is factually incorrect, as would clearly appear in the body of this decision. The respondent was registered as a company in 2013. See para [2] below.

[1] The applicant company is registered or exists in terms of the laws of the Delaware State of the United States of America (USA). Its principal place of business is located in Westlake, Ohio, USA. This application is about the trade mark "KIRBY" registered in South Africa in favour of the applicant in classes 09 and 37 in respect of goods and services in "*Electrical apparatus and their parts and attachments and accessories, for cleaning, washing and polishing purposes*" [class 9][3], and in "*Constructions and repair*" [class 37][4]. The KIRBY trade mark was first registered in 1951.[5]

[2] The respondent is a private company with registered office address in Glenwood, Durban.[6] It was registered and certified to start business on 17 August 2013.[7] The principal business of the respondent is not described. As it appears from the citation above, the respondent's name KIRBY SERVICE AND REPAIR CENTRE includes the word or element "KIRBY" as in the applicant's trade mark. This is the origin of the dispute in the current application.

[3] The applicant submits that the respondent's name does not satisfy the requirements of the Companies Act 71 of 2008 (the Companies Act). The applicant considers the inclusion of the word or element KIRBY in the respondent's name to render the name to be confusingly similar to its trade mark

[3] See p 1 of the extract from the Trade Mark Register dated 14 August 2014 attached to the supporting affidavit to this application.
[4] *Ibid* on p 2 thereof.
[5] *Ibid.*
[6] See annexure B to the supporting affidavit: a certificate issued by the Companies and Intellectual Property Commission, dated 14 August 2014.
[7] *Ibid.*

KIRBY (as proscribed by s 11(2)(b) of the Companies Act) and to falsely imply or suggest, or would reasonably mislead a person to believe incorrectly that, the respondent is part of, or associated with the applicant (as proscribed by s 11(2)(c) of the Companies Act). These statutory provisions read as follows in the material parts:

"(2) The name of a company must-

(a)…

(b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless -

(i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;

(ii) …

(iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark or mark, or is authorised by the registered owner to use it; or

(iv) …

(c) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company-

(i) is part of, or associated with, any other person or entity…"

[underlining added for emphasis]

[4] Ultimately it is submitted by the applicant that the respondent ought to be ordered to change its name as contemplated by s 160(3)(b)(ii) of the Companies Act. This provision (including other parts of 160 to be dealt with later herein), reads as follows:

"**160. Disputes concerning reservation or registration of company names**

(1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive name, or the registration of a company's name, or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether the name, or the reservation, registration or use of the name, or the transfer of any such reservation or registration of a name, satisfies the requirements of this Act.

[Subs. (1) substituted by s. 99 of Act 3/2011]

(2) An application in terms of subsection (1) may be made-

(a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or

(b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.

(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is the subject of the application, the Companies Tribunal-

(a) must make a determination whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

[Para. (a) substituted by s. 99 of Act 3/2011]

(b) may make an administrative order directing-

(i) …

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph."

[underlining added for emphasis]

[5] The respondent is not opposing the application. The applicant consequently filed an application for default order envisaged by regulation 153 of the Companies Regulations, 2011[8] (the Companies Regulations). It is submitted that the application (comprising Form CTR 142; supporting affidavit and annexures thereto)[9] was served on the respondent. According to the sheriff's return of service dated 13 February 2015, the main application was served by way of affixing to the post box at the respondent's registered office address.[10] I am satisfied that the application was adequately served as required in terms of reg 153(2)(b) of the Companies Regulations. The respondent did not file a response within the prescribed period of 20 business days after service of the application.

[6] Matters of procedures aside, I have a concern regarding the time lapse between the registration of the respondent's name (i.e. 07 August 2013)[11] and the date of initiation of these proceedings (i.e. 10 February 2015).[12] In terms of s 160(2), an application in respect of the dispute concerning registration of a company name has to be brought, where the applicant received a notice of

[8]The Companies Regulations were made by the Minister of Trade and Industry in terms of s 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011. Reg 153 reads as follows:

"**153. Default orders**

(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.

(2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order—

(a) after it has heard any required evidence concerning the motion; and

(b) if it is satisfied that the notice or application was adequately served.

(3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party."

[9] The main application was filed or issued on 10 February 2015.

[10] See annexure "LMY3" to the default order application.

[11] See para [2] above.

[12] See Form CTR 142 dated 09 February 2015 and reflecting this Tribunal's date stamp of 10 February 2015.

registration of the impugned company name (as contemplated in s 160(1)), within three months or where no such notice was received, on good cause shown at any time after the date of registration of the impugned name. I have reproduced the material part of s 160 above.[13]

[7] The applicant submits clearly that this application is in terms of s 160(2)(b).[14] It is submitted - rather belatedly in the affidavit to the application for default order and not the supporting affidavit - that, the applicant became aware of the existence of the "offending name" [which I assume to be reference to the respondent's name] in about July 2014.[15] This was almost a year after the registration of the respondent's name.[16] The submission by the attorney (in the affidavit in support of the application for default order), at best, constitutes hearsay material without confirmation from the applicant. But, even if the material is given evidential credence, it does not amount to "showing good cause" by the applicant for bringing the application disputing the registration of the respondent's name on 10 February 2015. Notably, a period of almost 18 months from the registration of the respondent's name had elapsed when the application was filed. I am aware and therefore mindful of the fact that the applicant attempted to cause the respondent to cease and desist in using the impugned name by

[13] See para [4] above.
[14] See para 3.1 of the supporting affidavit attached to Form CTR 142 and Form CTR 145.
[15] See para 4.2 of the affidavit by Jeremy Speres (Speres) dated 30 April 2015 attached to Form CTR 145. Speres described himself as an admitted attorney practising as an associate at the applicant's attorneys of record.
[16] See footnote 6 and para [6] above.

delivering a letter to the respondent.[17] My actual concern is about the lack of information on how the applicant's became aware of the respondent's name, and why only in July 2014 and not earlier.

[8] The applicant, whilst being aware of when the respondent's name was registered[18] and that the application is in terms of s 160(2)(b) of the Companies Act, ought to have been aware of the applicable statutory requirements. But there isn't even an attempt to make submissions with a shadow of resemblance to showing good cause. The failure to show good cause, in my view, is significant and decisive, as has already been held in similar matters which served before this Tribunal.[19] It is always worth emphasising that the register of company names kept by the Companies and Intellectual Property Commission has to have some level of certainty and credibility. Company names cannot be challenged at will long after they are registered or reserved. There has to be some control measures, lest registration of a company name would not afford a company the confidence to invest in its publicity or goodwill. As for those names considered to be non-satisfactory to the provisions of the Companies Act, the legislature provided 3 months to an applicant who will have been notified of reservation or registration of the offending names, and unspecified time period for those

[17] See letter dated 28 October 2014 by the applicant's attorneys of record to the respondent albeit to an address different to the respondent's registered office address.
[18] See para 2.2.2 on p 3 of the supporting affidavit.
[19] See *COMAIR Limited v Kuhlula Training, Projects and Development Centre (Pty) Limited*, an unreported Case NO.: CTR007SEP2014 (Companies Tribunal, decided on 27 February 2015) at paras [5] – [6]. A copy of the decision may be obtained from the website: www.companiestribunal.org.za.

applicants who did not receive the notice.[20] The latter group may bring the application at any time provided they show good cause.

[9] The Companies Act doesn't define or explain what is meant by showing good cause. However, [my view already stated above] is that, this would entail the applicant adducing evidence regarding when and how it became aware of the reservation or registration of an impugned company name, as well as, why an application was only made when it was made and not earlier. The Supreme Court of Appeal in ***Minister of Defence and Military Veterans v Motau and others*** [2014] JOL 32592 (CC), stated that "good cause may be defined as a substantial or "legally sufficient reason" for a choice made or action taken Assessing whether there is good cause for a decision is a factual determination dependent upon the particular circumstances of the case at hand".[21] This factual enquiry or determination dependent on the facts or circumstances of the particular matter can only begin, for example in this matter, if the applicant for relief makes appropriate and sufficient submissions in this regard.[22] The applicant has to provide the facts showing good cause. For without the facts, I cannot overlook this statutory provision or requirement, which is rooted in the enabling statutory regime.

[10] Therefore, I cannot even consider the merits or substantive issues in the application. In my view, the applicant can, if it so chooses or is advised, to consider what I have stated above and launch another application. This should

[20] See para [6] above.
[21] At para [54] and quoted without references.
[22] *Ibid.*

not be construed to mean that such an application will necessarily be meritorious by this Tribunal.

[11] I make the following order:

a) the application is refused.

_____

Khashane Manamela

Member, Companies Tribunal

10 June 2015