

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA.**

CASE NUMBER: CT014Apr2016

In the matter between: -

THE HIGHLY NUTRITIOUS FOOD

Applicant

COMPANY Pty Ltd

And

EAT RIGHT CATERING SERVICES (Pty) Ltd

First Respondent

THE COMMISSIONER OF COMPANIES

Second Respondent

DECISION

Introduction

1. The applicant is a South African company and the proprietor of the unregistered trade mark **EATrite**, which the applicant has been using since around 2005.

2. The respondent is a South African company which was registered in terms of the company laws of South Africa in June 2015 under the name **Eat Right Cartering(sic) Services (Pty) Ltd**(Eat Right/

respondent).

3. The applicant unsuccessfully applied to the Companies Tribunal(the tribunal) at first instance to consider an application in terms of Section 160(1) of the Companies Act, 71 of 2008(the Act) on a default basis. The purpose of the application was to challenge the continued registration and use of the name of respondent **Eat Right Catering Services (Pty) Ltd** on grounds that the name does not satisfy the requirements of Section 11(2)(b) and 11(2) (c)(i) of the Act.

4. At first instance, the tribunal refused the application on the premise that the applicant failed to show good cause for the merits of the application to be entertained. It was the understanding of the tribunal member(the member) that adjudicated the application that, good cause meant an explanation to the satisfaction of the member regarding the delay between the date of becoming aware of the name and the date of lodging the application in terms of Section 160. The merits of the application were not considered.

5. The applicant challenged the refusal decision under judicial review in the **High Court of South Africa, Gauteng Local Division Case 91718/16: The Highly Nutritious Food Company (Pty) Ltd v The**

Companies Tribunal & 3 others, before Honourable Justice M L Twala (the Highly Nutritious Food Company review). The court reviewed and set aside this decision of first instance with a directive that the application be remitted to the tribunal for reconsideration.

6. I am thus required to reconsider whether the respondent's name does not comply with Section 11(2)(b) and 11(2)(c)(i) of the Act; and if so, I am further required to direct the respondent to choose a name which does not consist of or incorporate the mark Eat Right or any other mark which is confusingly and or deceptively similar to the applicant's EATrite trade mark.
7. For reasons that appear later in this decision, it is necessary that I pay attention to both the review process to some extent, and merits of the application remitted for reconsideration.
8. The scheme of this decision will thus first attend to the review process and then finally deal with the application at hand.

Applicable Legislative Framework to the Review Process

9. The legislative framework that required attention at review was Section 160(1) & (2) of the Act.

10. Section 160(1) of the Act entitles any person with an interest in the name of the company to apply to the tribunal for a determination whether the name reservation, the name registration or use of the name, or the transfer of any such reserved or registered of a name satisfies the requirements of the Act.

11. Section 160(2)(a) of the Act entitles a person to whom a notice of reservation of a company name is given in terms of Section 12(3) of the Act , to apply *within three months of receipt of such notice*, for a determination whether the reserved name satisfies the requirements of the Act.

12. Section 160(2)(b) of the Act entitles any other persons other than those to whom a notice of reservation of a company name is given, to make an application *at any time after the date of reservation or registration* of a company name, *on good cause shown* for a determination whether the name satisfies the requirements of the Act.

13. Applicant had not been given notice in terms of Section 12(3) of the Act, as a result, the applicable legislation to the instant review application is Sections 160(1) and 160(2)(b) of the Act.

Salient issues pertaining to the review application

14. As already stated, in my reconsideration of the application I also briefly summarise the salient issues pertaining to the review against the decision of first instance. It is necessary to do so because there are several decisions involving the interpretation of Section 160(2)(b) of the Act on the meaning of the term “good cause” which have been made by individual tribunal members and tribunal adjudication panels respectively. Those decisions illustrate uncertainty on the meaning of the term “good cause” within the tribunal.

15. In my discussion of the instant review application, I make reference to the following cases pertaining to Section 160(2)(b) whose adjudication was initiated at the tribunal:

15.1. **CT007Sept2014: Comair Limited v Kuhlula Training, Projects and Development Centre (Pty) Ltd(Comair/Kuhlula tribunal decision)**, adjudicated by a panel of three members of the tribunal(the panel);

15.2. **Case CT002Jul2015: Comair Ltd v Kalula carriers and another(tribunal Comair/ Kalula decision)**, adjudicated and decided by one member of the tribunal, the decision was later reviewed and set aside;

- 15.3. **High Court of Pretoria Division Case 95369/2015: Comair Ltd v The Companies Tribunal & 2 others (Comair/ Kalula high court review)** in terms of which the Comair/ Kalula tribunal decision supra was reviewed, set aside and substituted with an order granting applicant the relief sought in the first instance.
- 15.4. **High Court of South Africa, Gauteng Local Division Case 91718/16: The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal & 3 others(the instant review)** where the tribunal decision in the instant case was reviewed, set aside and referred back to the tribunal for reconsideration.
16. The main issue requiring determination at the review was the meaning of the term “*good cause*” in the context of Section 160(2)(b) of the Act(the section).
17. The member who adjudicated the present application at first instance asserted and contended that the term “*good cause*” refers to the period of time within which the applicant should launch the application.
18. The member amongst others, relied on the **Comair/ Kuhlula** tribunal decision supra, for support of this contention.
19. On the other hand, the applicant argued against the member’s approach, contending that the term “*good cause*” within the context of

Section 160(2)(b) should not be interpreted to refer to an explanation of a delay, but that it should have a wider meaning, that includes the grounds on which the application is made.

20. Amongst others, the applicant relied on the findings of the review court in the **Comair/ Kalula high court review** supra which was concerned with, amongst others, what the term “good cause” means in the context of Section 160(2)(b) of the Act. In that case, the member adjudicating the application at first instance had equated the term “good cause” with a satisfactory explanation of why the application was only launched when it was and not earlier. The court impliedly rejected this approach on review by overturning the tribunal decision and granting the relief sought in the first instance, and not remitting the application to the tribunal for reconsideration by the tribunal. The review court disposed of the case by court order only and without a written judgment.

21. Uncertainty around the meaning of the term “good cause” in the context of Section 160(2)(b) of the Act continued to exist beyond finalisation of the Comair/ Kalula high court review supra. It is this uncertainty, I believe, which led to the instant review application.

22. The Court held in the instant review that the applicable test for a finding on the existence or otherwise of good cause is the consideration of the merits of the application and not the evaluation of

evidence concerning the time lapse between becoming aware of the allegedly offending name and the application of objection against name only. This is borne out in Paragraphs 18 and 19 of the judgment quoted infra.

23. In his Judgment of the Highly Nutritious Food Company review case supra, the Honourable Justice M L Twala states:

In Paragraph 18 “*Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application ...It does not require the explanation only as to the delay in bringing the application but refer to the merits of the application as well*”. ;

In Paragraph 19 “*It is my respectful view therefor that to evaluate good cause, the Tribunal was obliged to look at the whole matter including the merits to determine whether it was in the interests of justice to entertain the application*”.

24. It is thus safe to state that the finding of Mr Justice Twala on the interpretation of Section 160(2)(b) of the Act is now settled in the following terms:

The term “good cause” does not mean reasons which justify the entertaining of the merits of the application launched in terms of section 160(1), but rather means reasons which justify the

granting of the relief sought in the application launched in terms of section 160(1).

Issue for determination in reconsideration of the application

25. I must determine whether the respondent's name does not comply with Section 11(2)(b) and 11(2)(c)(i) of the Act; and to direct the respondent to choose a name which does not consist of or incorporate the mark Eat Right or any other mark which is confusingly and or deceptively similar to the applicant's EATrite trade mark for the replacement of respondent's current name.

Factual Background(which is uncontested)

26. Before considering the merits of the application, it is necessary to set out factual background. It is already on record that the application is not opposed, thus the determination of this application is based solely on the uncontroverted evidence of the applicant and the applicable law.

27. Applicant is the proprietor of a trade mark EATrite. The applicant has at least since 2005, been making widespread and extensive use of its EATrite trade mark in respect of the offering for sale and sale of goods in retail and/or wholesale trade. The applicant operates under the

trading style EATrite, and is well known to the public at large as a supplier of a range of high quality meals and snacks for health conscious consumers.

28. The applicant's use of its EATrite trade mark includes prominent and successful advertising campaigns, including printed media campaigns.

29. At the time of launching this application, the applicant had also filed trade mark application no. 2015/15045 EATrite in class 43 in respect of "service for providing food and drink". The applicant has spent considerable amounts of money in promoting and advertising its EATrite products and trade mark.

30. The applicant's EATrite trade mark has become an asset of considerable commercial value and importance to the applicant. Any unauthorised use of this mark, or of confusingly or deceptively similar marks, is damaging to this asset and to the business of the applicant in South Africa.

31. The applicant became aware of the respondent's name in August 2015. Upon becoming aware of the existence of this, the applicant registered objection through correspondence to the respondent during September 2015 to December 2015. Further seeing that the respondent's principal business is not stated in the registration documents, the applicant conducted an investigation to establish

respondent's business. Respondent never responded to the applicant's correspondence. Applicant then lodged the Section 160(1) application in April 2016.

32. Lack of information on respondent's principal business would allow the respondent to engage in any business including the one in which the applicant is involved.

33. The investigation has revealed that the company was registered with the intention of operating a catering and take away business, however, the respondent is not operating any business and remains dormant.

Applicable Legislative Framework to the enquiry

34. I must have regard to the provisions of Section 11(2)(b) and 11(2) (c)(i) of the Act in order to determine whether the name of the respondent does not offend the provisions of the Act.

35. Section 11(2)(b) of the Act prohibits unauthorized registration of a company name which is confusingly similar to a name, trade mark or mark.

36. Section 11(2)(c) prohibits unauthorized registration of a company name which falsely imply or suggest, or is such as would reasonably

mislead a person to believe incorrectly that the company is part of, or associated with, any other person or entity.

Issue and Evaluation of the present application

37. The application seeks to protect an unregistered trade mark which had been in use for more than ten years. The right sought to be protected is derived from the common law.

38. Based on the uncontested evidence, the applicant's grounds of objection are the following:

39. Unauthorised use of the name: Respondent's lack of authority to use the name Eat Right which according to the applicant, is similar to the applicant's trade mark EATrite, is established from the uncontested evidence.

40. The respondent's name is confusingly and deceptively similar to the applicant's trade mark EATrite : The dominant and memorable element in the respondent's name is Eat Right. Without much ado, it cannot be doubted that the name Eat Right is phonetically and conceptually identical to the applicant's trade mark EATrite. Regarding the question whether respondent's name is visually confusingly similar to applicant's trade mark, I recognize the fact that the spelling between Eat Right and EATrite is different, in my view, this difference is more apparent than real. Taking cue from the unreported judgment of the

TPD Case number: 11745/88 Allied Technologies Ltd V Altecno (SA) (Pty)

Ltd and Another, delivered on 8 May 1988, I accordingly find that confusion and deception is likely to arise in respect of the two.

41. Use of respondent's name Eat Right in trade is likely to deceive or confuse people into believing that there is some connection between the respondent and the applicant's mark when it is not the case. It is trite law that it is sufficient for the objecting party to show the existence of reputation in some sectors of the market, but not amongst the general public, in order to succeed in obtaining the protection against passing off;- ***Pepsico Inc v United Tobacco Co Ltd (1988 2 SA 334 (WLD)***. Based on the overwhelming evidence presented on the existence of reputation and goodwill in respect of the EATrite trade mark, I am satisfied that the mark should be protected against the risk of passing off. I agree that the applicant is at risk of a likely wrong deception and confusion of existence of connection between the applicant and respondent when it is not the case.

42. Based on the above facts, I am also satisfied that continued use and registration of the name Eat Right:

42.1. Would give respondent an unfair trade advantage as a result of the distinctive EATrite mark and the reputation and goodwill it has established;

- 42.2. Would result in the dilution of the EATrite mark;
- 42.3. Could, in the event of the respondent rendering services of unacceptable standards, have a negative impact on the reputation and goodwill of the mark.

43. Possible infringements in terms of the Trade Marks Act. Evidence

points to the fact that the respondent's intention is to render services covered by the applicant's pending application in respect of trade mark in class 43. Use of the respondent's name will amount to trade mark infringement in terms of Section 34(1)(a) *alternatively* Section 34(1)(b) and Section 34(1)(c) of the Trade Marks Act once the applicant's pending application for registration is successful. It is significant to state that even if the applicant's trade mark registration were not to succeed, the trade mark would nevertheless continue to enjoy protection emanating from the common law as confirmed by Section 11 of the Act.

Conclusion:

Based on the facts and the law, I have no hesitation in finding that the applicant has shown good cause for a finding that the respondent's name does not comply with the provisions of Section 11(2)(b) and Section 11(2)(c)(i) of the Act, accordingly the applicant is entitled to be granted the relief sought.

Order:

1. It is declared that the respondent's name Eat Right Catering Services (Pty) Ltd does not comply with Section 11(2)(b) and Section 11(2)(c)(i) of the Companies Act 71 of 2008; and
2. The respondent is directed in terms of Section 160(3) of the Companies Act 71 of 2008 to choose a name which does not consist of or incorporate the mark Eat Right or any other mark which is confusingly and or deceptively similar to the applicant's EATrite trade mark.

M.J. RAMAGAGA

MEMBER OF THE COMPANIES TRIBUNAL

24 November 2017