



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA  
("THE TRIBUNAL")**

**CASE NUMBER: CT003MAR2019**

**In the matter of:**

**COMAIR LTD**

**APPLICANT**

**and**

**KULULA SOUTH AFRICA (PTY) LTD**

**FIRST RESPONDENT**

**and**

**COMMISSIONER OF THE COMPANIES**

**SECOND RESPONDENT**

**Coram: PJ Veldhuizen**

**Date of Hearing: Not Applicable – Default Order**

**Order delivered: 17 April 2019**

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**DEFAULT ORDER & REASONS**

**A. INTRODUCTION**

**1. THE PARTIES**

1.1. The Applicant is **COMAIR LTD**, ("the Applicant") a public company duly incorporated in terms of the company laws of the Republic of South Africa with its registered office at No. 1 Marignane Drive, Corner Atlas Road, Bonaero Park, Gauteng, 1619, South Africa.

1.2. The First Respondent is **KULULA SOUTH AFRICA (PTY) LTD** (Registration number 2018/508910/07) ("the First Respondent"), a private company incorporated in terms of company laws of the Republic of South Africa with its registered office address at No 2905, Section I, Palm Springs, Gauteng, South Africa.

1.3. The Second Respondent is the **COMMISSIONER OF THE COMPANIES** ("the Second Respondent"), appointed in terms of Section 189 of the Companies Act 71 of 2008 ("the Act"), who is cited in his official capacity as the person responsible for the function of the Commission in terms of the Act.

**B. THE APPLICATION**

2. This is an application for:

2.1. a default order and costs against the First Respondent;

- 2.2. a directive to be issued to the Second Respondent to change the name of the First Respondent to its registration number, in the event that it does not comply with the default order, as prayed for, within 60 days of such default order being granted.
3. The application is based on Sections 11 and 160 read with Regulation 153 of the Act.
4. The Applicant is the registered proprietor in South Africa of the well-known “**KULULA**” trade marks and marks incorporating “**KULULA**” which it has registered in various classes covering a wide range of goods and services.
5. The Applicant comprehensively set out details of its trade marks and marks in its founding affidavit, deposed to by **DEREK HENRY BORER**, the company secretary and a director (alt) of the Applicant.
6. Some of the Applicant’s registered trade mark rights predate the First Respondent’s company registration by more than 17 years.
7. It appears that the Applicant has made extensive and considerable use of its registered trade marks for many years.
8. The Applicant alleges that:
  - 8.1. since inception the **KULULA** brand has been a success and has been

recognised as such earning several awards;

8.2. as a consequence of constant marketing and promoting of its trade marks it has developed a reputation and goodwill related to the use thereof and the brand is well-known to the public at large.

8.3. unauthorized use of these trade marks or confusingly or deceptively similar marks is damaging to the business of the Applicant.

9. As indicated above, the Applicant seeks an Order directing that the First Respondent choose a new name which meets the requirements of the Act and if it fails to do so, that the Second Respondent be directed to change the First Respondent's name, to its registration number.

**C. PROCEDURAL POINTS FOR DETERMINATION**

10. Were the Tribunal's procedural requirements met?

10.1. Applicant is required to establish good cause in terms of section 160(2)(b) as to why there has been a delay in bringing this application after becoming aware of the First Respondent's registration.

10.2. The Applicant has not unreasonably delayed pursuing its objection to the First Respondent's company name. The Applicant has convincingly set out all of the steps it has taken to protect and enforce its rights in its registered trade marks.

10.3. Accordingly, the Tribunal accepts that the Applicant has satisfied the requirement contemplated in section 160(2)(b).

11. Service / Jurisdiction.

11.1. The Applicant has served the papers in accordance with Act and the First Respondent has failed to answer within the required time period.

11.2. The Tribunal enjoys jurisdiction to hear the matter and to grant certain of the relief sought. The extent of the Tribunal's authority to grant the relief sought is apparent from E, below.

**D. EVALUATION OF EVIDENCE**

12. The Tribunal accepts that the use of the Applicant's registered trade marks by the First Respondent in its company name is in contravention of Section 11(2)(a)(i) Section 11(2)(a)(iii), Section 11(2)(b)(i), Section 11(2)(c)(i) of the Act.

13. The First Respondent has been provided an opportunity to be heard and has not filed any papers in this matter.

14. The Tribunal therefore accepts the uncontested version put up by the Applicant and grants the relief, in respect of the First Respondent, as set out in E below.

15. The Second Respondent has similarly not filed any papers in this matter and presumably abides the decision of the Tribunal. Unfortunately, while the Tribunal

would wish to assist the Applicant in the relief sought against the Second Respondent, it is not vested with the power to direct the Second Respondent to change the First Respondent name to its registration number should it not comply with the default order, as prayed for, within 60 days of such default order being granted.

**E. DECISION**

16. The Applicant is granted a Default Order in terms of Section 160(3) of the Companies Act 71 of 2008 and Regulation 153 of the Companies Regulations of 2011 in the following terms:

16.1. It is determined that the First Respondent's company name does not satisfy the requirements of the Act.<sup>1</sup>

16.2. An administrative order is issued directing the First Respondent to choose a new name, and to file a notice of amendment to its Memorandum of Incorporation within 30 days of this administrative order.<sup>2</sup>

16.3. The First Respondent is ordered to pay the costs of this application.<sup>3</sup>

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<sup>1</sup> Section 160(3)(a) of the Act

<sup>2</sup> Section 160(3)(b)(ii) of the Act

<sup>3</sup> Regulation 156(1) of the Act

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**PJ VELDHUIZEN**

**MEMBER OF THE COMPANIES TRIBUNAL**

**CAPE TOWN**

**Companies Act, 2008**

- **Section 11 and 160**
- **Regulation 142 and 153**

**Criteria for names of companies**

11. (1) Subject to subsections (2) and (3), a company name—

(a) may comprise one or more words in any language, irrespective of whether the word or words are commonly used or contrived for the purpose, together with—

- (i) any letters, numbers or punctuation marks;
- (ii) any of the following symbols: +, &, #, @, %, =;
- (iii) any other symbol permitted by the Regulations made in terms of subsection (4); or
- (iv) round brackets used in pairs to isolate any other part of the name,

alone or in any combination; or

(b) in the case of a profit company, may be the registration number of the company together with the relevant expressions required by subsection (3).

(2) The name of a company must—

(a) not be the same as -

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

(ii) a name registered for the use of a person, other than the company itself or the person controlling the company, as a defensive name in terms of section 12 (9) or as a business name in terms of the Business Names Act, 1960 (Act 27 of 1960), unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company.

(iii) a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

(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) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;

(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 authorized by the registered owner to use it; or

(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;

(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;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—

(aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(bb) international organisation; and

(d) not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute—

(i) propaganda for war;

(ii) incitement of imminent violence; or

(iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.

(3) In addition to complying with the requirements of subsections (1) and (2)—

(a) if the name of a profit company is the company's registration number, as contemplated in subsection (1)(b), that number must be immediately followed by the expression "(South Africa)";

(b) if the company's Memorandum of Incorporation includes any provision contemplated in section 15(2)(b) or (c), restricting or prohibiting the amendment of any particular provision of the Memorandum, the name must be immediately followed by the expression "(RF)"; and

(c) a company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company:

(i) The word "Incorporated" or its abbreviation "Inc.", in the case of a personal liability company.

(ii) The expression "Proprietary Limited" or its abbreviation, "(Pty) Ltd.", in the case of a private company.

(iii) The word "Limited" or its abbreviation, "Ltd.", in the case of a public company.

(iv) The expression "SOC Ltd." in the case of a state-owned company.

(v) The expression "NPC", in the case of a non-profit company.

(4) The Minister may prescribe -

(a) additional commonly recognised symbols for use in company names as contemplated in subsection (1)(a)(iii); and

(b) alternative expressions, in any official language, which may be used in substitution for any expression required to follow a company's name in terms of subsection (3).

**Part B****Rights to seek specific remedies****Disputes concerning reservation or registration of company names**



160. (1) A person to whom a notice is delivered in terms of section 12(3) or section 14(3), 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 satisfies the requirements of section 11.

(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 satisfies the requirements of section 11; and

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name for the applicant in terms of section 12;

(bb) register the contested name, or amended name as the name of a company; or

(cc) cancel a reservation granted in terms of section 12, if the reserved name has not been used by the person entitled to it; or

(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.

(4) Within 20 business days after receiving a notice or a decision issued by the Companies Tribunal in terms of this section, an incorporator of a company, a company, a person who received a notice in terms of section 12(3) or 14(3), an applicant under subsection (1) or and any other person with an interest in the name or proposed name that is the subject of the application, as the case may be, may apply to a court to review the notice or decision.

## Regulations

### 142. Applications to the Tribunal in respect of matters other than complaints. –

(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer –

(a) an Application in Form CTR 142; and

(b) supporting affidavit setting out the facts on which the application is based.

(2) The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.

(3) An application in terms of this regulation must –

(a) indicate the basis of the application stating the section of the Act or these regulations in terms of which the Application is made; and

(b) depending on the context –

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(iii) set out the regulation in respect of which the applicant seeks condonation; or

(c) indicate the order sought; and

(d) state the name and address of each person in respect of whom an order is sought.

### 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 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.

### 156 Costs and taxation

(1) Upon making an order, the Tribunal may make an order for costs.

(2) If the Tribunal has made an award of costs, the following provisions apply:

(a) The fees of one representative may be allowed between party and party, unless the Tribunal authorises the fees of additional representatives.

(b) The fees of any additional representative authorised in terms of subregulation (1) must not exceed one half of those of the first representative, unless the Tribunal directs otherwise.

(c) The cost between party and party allowed in terms of an order of the Tribunal, or any agreement between the parties, must be calculated and taxed by the taxing master at the tariff determined by the order or agreement, but if no tariff has been determined, the tariff applicable in the High Court will apply.

(d) Qualifying fees for expert witnesses may not be recovered as costs between party and party unless otherwise directed by the Tribunal during the proceedings.

(e) The recording officer may perform the functions and duties of a taxing master or appoint any person as taxing master who in the recording officer's opinion is fit to perform the functions and duties signed to were imposed on a taxing master by these Regulations.

(f) The taxing master is imparted tax any balls of cost for services actually rendered in connection with proceedings in the court.

(g) At the taxation of any bill of costs, the taxing master may call for any book, document, paper or account that in the taxing master's opinion is necessary to determine properly any matter arising from the taxation.

(h) The taxing master must not proceed to the taxation of any bill of costs unless the taxing master has been satisfied by the party requesting the taxation (if that party is not the party liable to pay the bill) that the party liable to pay the bill has received due notice as to the time and the place of the taxation and that the party's entitlement to be present at the taxation.

(i) Despite subregulation (h), notice need not be given to a party –

(i) who failed to appear at the hearing either in person or through a representative; or

- (ii) consented in writing to the taxation taking place in that party's absence.
- (j) Any decision by a taxing master is subject to the review of the High Court on application.