



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00678ADJ2021

In the matter between:

Scruffy to Fluffy (Pty) Ltd

Applicant

and

Scruffy to Fluffy East Rand CC

Respondent

Presiding Member of the Tribunal : P.A. Delport

Date of Decision : 4 August 2021

DECISION

INTRODUCTION

- [1] The applicant applies for a default order because the name of the respondent does not comply with sections 11(2)(a)(iii) and 11(2)(b) of the Companies Act 71 of 2008 ("Companies Act" / "Act"), although the particular sub-paragraph of s 11(2)(b) was not mentioned.

- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”) *inter alia* regulate an application to the Companies Tribunal (“Tribunal”) as well as the application for a default order under certain circumstances.
- [3] The jurisdiction of the Tribunal in this matter is as determined in section 160(1) of the Companies Act.

BACKGROUND

- [4] The applicant is Scruffy to Fluffy (Pty) Ltd (2011/107340/07), a company incorporated in terms of the Companies Act.
- [5] The respondent is Scruffy to Fluffy East Rand CC (2005/104270/23), a close corporation incorporated in terms of the Close Corporations Act 69 of 1984. Its original name was AC Travel Solutions CC, but changed to Scruffy to Fluffy East Rand CC in 2012.
- [6] The application is brought by Carmel Lorimer, the sole director of the applicant and therefore authorised to do so in terms of section 66(1) of the Companies Act.
- [7] The applicant is the proprietor of the “Scruffy to Fluffy” trade mark in respect of the words (name) as well as a logo in terms of the Trade Marks Act 194 of 1993. For obvious reasons as are clear from section 11 of the Companies Act, only the trade mark in respect of the words “Scruffy to Fluffy” and not the logo, is relevant here (see *Henocheberg on the Companies Act 71 of 2008* page 57). Any reference to “trade mark” in this ruling will, unless expressly stated otherwise, therefore only be to the words, as explained above, and not in any other context.
- [8] The Applicant entered into an oral licence agreement with Ms Ana-Luisa Albon presumably acting for and on behalf of AC Travel Solutions CC, and in terms of the

agreement said Ms Albon could use the “Scruffy to Fluffy” trade mark on “her” packaging, advertising and promotional materials and the name of the CC, of which she was apparently the sole member was changed to Scruffy to Fluffy East Rand CC.

- [9] Apparently during 2014, as stated in para 14.2 of the applicant’s supporting affidavit, “a discussion was held with Ms Albon to the effect that should the Close Corporation be sold and that the licence to use the trade marks would terminate, the party selling the Close Corporation should change the name of Close Corporation number 2005/104270/23 from Scruffy to Fluffy East Rand CC”.
- [10] Presumably this means that there was an oral agreement that upon the sale of Scruffy to Fluffy East Rand CC, the name must be changed to something else (ie not incorporating “Scruffy to Fluffy”) and that the “license” (permission) to use the trade marks (the words as well as the logo) would terminate.
- [11] It happened that “[t]he Applicant subsequently became aware that close corporation with registration number 2005/104270/23 was sold during August 2017, at which date the licence to use the SCRUFFY TO FLUFFY trade mark terminated in terms of the agreement [as quoted in para 10 above].” (para 15 of the applicant’s supporting affidavit).
- [12] The next step was that “[t]he Applicant notified the Respondent of its rights in the trade marks on 21 August 2018 and 12 September 2018.... [and corresponded with the respondent through the attorneys of the applicant but] the Respondent has made it clear that it has no intention of changing its close corporation name despite the Applicant's demands.” (para 16 of the applicant’s supporting affidavit).
- [13] There is, according to the founding affidavit of the applicant, apparently a dispute as to whether the sale of Scruffy to Fluffy East Rand CC to the respondent included the right to use the registered trade mark of the words “Scruffy to Fluffy” and, by implication, whether the oral agreement between the applicant and Ms Ana-Luisa

Albon, the original “owner” of Scruffy to Fluffy East Rand CC, that upon sale of Scruffy to Fluffy East Rand CC, the name must be changed to something else (ie not incorporating “Scruffy to Fluffy”) applied.

[14] This is, however, a matter between the respondent and the seller of Scruffy to Fluffy East Rand CC and to be determined by the principles of contract law (or maybe delict). I make no finding in this respect as it is not before the Tribunal, and even if it was, it is not within the jurisdiction of the Tribunal.

[15] In any case, the applicant was notified by the then attorneys of the applicant by a letter dated 12 September 2018 that the “licence” to use the “Scruffy to Fluffy” trade mark, will cease on 21 September 2018 (see Annexure K1 of the founding affidavit). This disposes of the matter whether use was authorised, at least post 21 September 2018.

[16] The applicant applied to the Companies Tribunal for relief on 21 April 2021 as indicated on the CTR 142.

[17] The basis of the relief, that must be stated in the CTR 142 as per regulation 142(3)(a), was set out as follows in para 20 the founding affidavit:

“20.1 in terms of Section 11(2)(a)(iii) of the Companies Act, 2008 the name of a company must not be the same as a registered trade mark belonging to a person other than the company, unless the registered owner of that mark has consented in writing to use of the mark as the name of the company; and

20.2. in terms of Section 11(2)(b) (*sic*) the name of a company must falsely mislead a person to incorrectly believe that it "is part of, or associated with, any other person or entity;".

[18] The relief applied for, according to the supporting affidavit lodged with the CTR 142, was:

“21.1 Accordingly, in terms of Section 160 of the Companies Act, 2008, the Applicant hereby prays that the Companies Tribunal will consider this application and make an administrative order:

21.1.1 in terms of Section 160(3)(b)(i)(cc) to cancel the reservation of the name SCRUFFY TO FLUFFY EASTRAND CC; alternatively

21.1.2 in terms of Section 160(3)(i)(dd) to transfer the reservation of the name SCRUFFY TO FLUFFY EAST RAND CC to the Applicant.

21.2 Further, the Applicant prays that, in terms of Section 160(3)(b)(ii) the Respondent will be ordered to choose a new name which does not incorporate the SCRUFFY TO FLUFFY trade mark.”

[19] A copy of the CTR 142 and the supporting affidavit were served on the respondent by email on 5 May 2021, which was not within the period of five business days from filing with the Tribunal as prescribed in regulation 142(2).

[20] There was no reaction by the respondent as on 2 June 2021 in respect of the application to the Tribunal as detailed above.

[21] In the application for a default order on CTR 145 dated 28 June 2021 the basis of the relief sought in para 14 inexplicably changed to:

“As the Applicant has not consented to the use of the trade marks by the Respondent, the Respondent's use of the name SCRUFFY TO FLUFFY EAST RAND CC is in contravention of Section 11 (2)(a)(iii) and Section 11 (2)(b)(i) of the Companies Act, 2008.”

[22] The relief that is then sought as per para 21 of the supporting affidavit of the CTR 145 affidavit is:

“The Applicant seeks relief, more specifically, in accordance with Section 160(3)(b)(ii) to the effect that the Respondent be directed 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.”

[23] The relief sought in the default application differs vastly from that in the original application. Maybe this is wise, because for obvious reasons the relief as in the original application is, for the most part, totally inapplicable. An explanation why there is a difference in the relief sought originally and in the default application would have been expected.

[24] Similarly the basis of the relief differs substantially between the default application and that in the original application. Similarly also, no explanation, even only as a courtesy to the Tribunal, was offered.

[25] The adjudication will therefore be on the basis of what should have been stated by the applicant in respect of the basis of the relief and therefore also the relief sought.

ISSUES and APPLICABLE LAW

[26] Section 160 determines the jurisdiction of the Companies Tribunal and provides, as far as it is relevant for the present matter, 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.

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

- (a) ...
 - (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
 - (b) may make an administrative order directing—
 - (c) ...
- (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.”

[27] The proposed/possible relevant provisions of section 11, due to the confusion and many errors in the papers as highlighted above, provide:

- “(2) The name of a company must—
- (a) not be the same as—
 - ...
 - (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

...

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

...

(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...

[(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;

...”]

EVALUATION

[28] Section 160, as quoted above, provides:

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

...

(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.”

[29] The Act does not define what is meant by “good cause” in terms of section 160(2)(b). In *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) the Court said at para 18 that “[t]he section requires the applicant to furnish a reasonable explanation as to *why* the application should be entertained by the Tribunal. It does not require an explanation *only as to the delay in bringing the application...* [and] 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.” [emphasis is mine].

- [30] The applicant has, subject to the comments in paras 23-25 above, complied with both elements of *The Highly Nutritious Food Company (Pty) Ltd* “good cause” test/s. The applicant has substantive grounds to bring the application and there was no “undue delay” in enforcing its rights in bringing the application.
- [31] Whether the notice to the respondent was adequately served (regulation 153(2)(b)) is uncertain. Although it can be done by email as prescribed in Table CR3 of Annexure 3 to the regulations, it was out of time. Again, no explanation for this deficiency was offered and it was not explained and no application for condonation as provided for in regulation 147 was filed.
- [32] The Tribunal has the powers to condone any technical irregularities in any proceedings (regulation 154(3)). Although I am, for the reasons set out above in respect of the quality of the application, loathe to exercise this discretion and could require compliance with regulation 147, it will serve no purpose to follow a legalistic approach. The late service on the respondent could, in my opinion, not have caused any prejudice to the respondent, also because there was no response from the respondent.
- [33] An allegation of facts set out in an initiating document that is not specifically denied or admitted in an answer must be regarded as having been admitted: regulation 143(4) and see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
- [34] The respondent did not answer, and even if its recalcitrance is seen as a denial, “bald” denials will, as was pointed out in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), not be sufficient, and see also *Ragavan v Kal Tire Mining Services SA (Pty) Ltd* 2019 JDR 1739 (GP) in respect of default judgments.
- [35] The name of the respondent is not the “same” as that of the trade mark of the applicant as it must be identical rather than “similar to”: See eg *Williams v Janse van*

Rensburg (3) 1989 (4) SA 884 (C); *Century City Apartments Property Services CC and Another v Century City Property Owners Association* [2010] 2 All SA 1 (SCA), but also *Global Vitality Incorporated v Enzyme Process Africa (Pty) Limited and Others* (20884/2013) [2015] ZAWCHC 111 (21 August 2015). Section 11(2)(a)(iii) is therefore not applicable.

[36] In respect of section 11(2)(b)(i), it is noted that the tests for confusion as developed in respect of trade marks are also applied in respect of company names: *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA).

[37] To be “confusingly similar” there must be “. . . a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the goods or merchandise of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a *reasonable likelihood of confusion or deception* is a question of fact to be determined in the light of the particular circumstances of the case.” *Adidas AG and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013)

[38] “It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant's mark is used are the goods of the proprietor of the registered mark, ie the plaintiff, or that there is a material connection between the defendant's goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection”: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[39] Whether there is a reasonable likelihood of such confusion arising is a matter for the judgment of the court and it is a question of fact which will have to be determined in the light of all the circumstances of each case: *Better Homes Expo (Pty) Ltd v Consep Home Ideas (Pty) Ltd* 2019 JDR 0220 (GJ) and authorities there cited.

[40] Actually, the intention initially was that the two entities should be seen to be associated. When the association ended “formally” with the sale of Scruffy to Fluffy East Rand CC, the reasonable likelihood is that ordinary members of the public will still accept that there is an association, and that is why the permission to use the trade mark was revoked.

FINDING

[41] The name of the respondent does not comply with section 11(2)(b)(i) of the Companies Act as it is confusingly similar to the trade mark owned by the applicant.

[42] The respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order, in order to change its name to exclude the words “Scruffy to Fluffy” and is exempted from the payment of the prescribed fee for such filing.

[43] There is no order for costs.

P.A. DELPORT

COMPANIES TRIBUNAL: MEMBER