

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT001Mar2016

In the matter between:

Safcor Freight (Pty) Ltd

Applicant

and

BPL General Trading (Pty) Ltd

First respondent

Companies and Intellectual Property Commission

Second respondent

Coram: Delport P.A.

Decision handed down on 6 June 2016

Decision

INTRODUCTION

- [1] The applicant applies for a default order that the first respondent be ordered to change its name because it does not comply with s 11 of the Companies Act 71 of 2008 ("Companies Act" / "Act").
- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) ("Companies Act regulations" / "regulations") 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 s 160(1) of the Companies Act.

BACKGROUND

- [4] The applicant is Safcor Freight (Pty) Ltd a company incorporated with registration number 1969/008086/07.
- [5] The first respondent is BPL General Trading (Pty) Ltd, a company incorporated in 2013 with registration number 2013/184851/07.
- [6] The second respondent is indicated as “Commission of the Companies and Intellectual Property Commission” (sic).
- [7] The affidavit in support of the CTR 142 in terms of reg 142 was deposed by Alison Louise Wixley, the legal executive of the applicant, who was properly authorised thereto by a round robin board resolution of the board of the company dated 29 January 2016.
- [8] The applicant served form CTR 142 and the supporting affidavit on the first respondent at its registered address, within the time indicated in reg 142(2), after filing with the Tribunal.
- [9] There is no indication whether the application was served on the second respondent.
- [10] No answering affidavit was apparently filed, and the applicant applies for a default order.
- [11] The order applied for is that the applicant’s name does not comply with the requirements of s 11 of the Companies Act and that the respondent should be directed to change its name as provided for in s 160(3)(b)(ii) of the Companies Act.
- [12] The basis of the application is that the applicant is the owner of the “BPL” trade marks under various classes in terms of the Trade Marks Act 193 of 1994 (“Trade Marks Act”). The applicant trades as “Bidvest Panalpina Logistics”, which is obviously the source of the “BPL” acronym.

APPLICABLE LAW

[13] Section 160, which is the basis for applications like these, provides, as far as it is relevant for the present matter, as follows:

“160. Disputes concerning reservation or registration of company names.—(1) ... 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 this Act.

(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

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended name that had been contested as the name of a company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; 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.”

[14] Regulation 142(3)(a) requires that the application must indicate the basis of the application, stating the section of the Act or the regulations in terms of which the application is made.

[15] The applicable provision of the Act is apparently s 11(2)(b), as it is indicated in the highlighted portion of founding affidavit by said Alison Louise Wixley.

[16] Section 11(2)(b) of the Act provides:

“(2) The name of a company must

...

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

[17] However, as discussed below, said affidavit also refers to s 11(2)(c). This section provides:

“(2) The name of a company must

...

(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

- [18] The founding affidavit and forms CTR 142 and 145 are confusing and incorrect in respect of various aspects, such as the basis of the application. In the founding affidavit of said Alison Louise Wixley, the provisions of s 160(1) are quoted in para 8.1, while the relief sought as per para 8.11 is in terms of s 160(3).
- [19] Again, the basis of the relief sought is, as stated in para 9 above, apparently s 11(2)(b), but in the final paragraph of the founding affidavit of Alison Louise Wixley the reference is to s 11(2)(c).
- [20] It requires no motivation to say that this does not comply with regulation 142(3)(a). It cannot be required from the Tribunal to *mero motu* decide what relief and under which provision the relief must be given.
- [21] Section 160(3) is, in any case, wholly inapplicable in respect of the facts.
- [22] The requirements of ss 11(2)(b) and 11(2)(c) are different, and one would at least expect that if these provisions are used in the alternative, that the elements of each would be averred. This is not the case in respect of s 11(2)(c).
- [23] An application in terms of s 160(1), under which this application should have been brought, and for the benefit of the application I accept that it was brought under said section, is qualified by sub-s (2) and 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.”

- [24] The Act does not define what is meant by “good cause” in terms of s 160(2)(b) and it is not clear whether it refers to substantive grounds (such as eg in s 11) or whether it refers to the period of time within which the application should be launched.
- [25] Based on the context of s 160(2), it would seem that the *sensible* interpretation, as discussed hereunder, will be that it refers to the period within which to launch the application.
- [26] The reason for the requirement that there must be good cause shown why the application was launched at a particular date would appear to be that the person doing business under a particular name, that has been registered by the Companies and Intellectual Property Commission, is not prejudiced by a belated challenge which could affect the goodwill built up in using the name. See also *Comair Limited vs Kuhlula Training, Projects and Development Centre (Pty) Limited* CT007Sept2014 of 27 February 2015.
- [27] The first respondent was incorporated in 2013 and applicant did commence a process to indicate that it deems the name of the respondent to be in contravention of, generically, s 11 of the Act.
- [28] This process was effected with, more or less, one-year intervals (para 5 of the founding affidavit), until the application was launched.
- [29] I state, in parenthesis and purely *obiter*, that the Companies Act apparently has, as underlying premise, a “prescription” period of three years. S 219, as one example, and there are various others, like s 77, provides as follows “Limited time for initiating complaints.—(1) A complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after—
- (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”

- [30] I do not imply that s 219 is applicable in this application, but to interpret s 160 in such a manner that an application such as this one is not subject to some restriction as to the time within which it should be lodged, will in my opinion, lead to "...insensible or unbusinesslike results...": *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18
- [31] As stated above the effluxion of time should be evaluated against possible prejudice to the respondent in determining "good cause".
- [32] I venture to state that the Tribunal has a discretion to allow a complaint, even under the (exceptional) circumstances (as to the length of time) as in this application.
- [33] The circumstances in respect of the delay to approach the Tribunal seems to be without "good cause" and no explanation is given for the effluxion of time and the long intervals in the attempted communication with the first respondent.
- [34] However, should I be wrong in finding that there was not "good cause" in respect of the delay, I will proceed to decide the matter on the merits, as far as it is possible given the confusion as to the ground for the application and the basis thereof, as set out above.

[35] **Section 11(2)(b)**

35.1 I venture to state the *caveat* that it should be noted that authorities in respect of the Trade Marks Act should be applied with circumspection due to, *inter alia*, the fact that in respect of s 34 of the Trade Marks Act, the protection is also in respect of a mark, not only the name. Therefore the only question in respect of the Companies Act is in respect of a name, as marks are not registered in terms of the Companies Act: see *Henochsberg on the Companies Act 71 of 2008* at 56. In addition, it is also important that in respect of the Trade Marks Act, there is a direct link between the name/mark and the particular goods and/or services. In this respect the following was stated in *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) at 394:

‘There is, it seems to me, an interdependence between the two legs of the inquiry: the less the similarity between the respective goods or services of the parties, the greater will be the degree of resemblance required between the respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark and *vice versa*.’

This link is absent in respect of the names in terms of the Companies Act. See especially *Metterheimer and Another v Zonquasdrif Vineyards CC and Others* 2014 (2) SA 204 (SCA) at 209.

35.2 However, the Supreme Court of Appeal has now stated that the test for s 11(2)(b) and s 11(2)(c) of the Act is the same as in respect of s 34(1)(a), (b) and (c) of the Trade Marks Act: *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 15. The nature of the goods and services will therefor now be relevant to determine, inter alia, confusion in terms of s 11(2)(b).

35.3 “[C]onfusingly similar” as in s 11(2)(b) requires not only that “the marks be compared side by side but consideration must be given to whether the average customer in the market place would probably be deceived or confused by their similarity”: *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others supra* para 6, following *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

35.4 The question is therefore whether the names are alike in a manner that will confuse the reasonable person, being the “ordinary reasonable careful man, ie not the very careful man nor the very careless man” (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E); *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA); *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C); *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013)) or “an assessment of the impact which the defendant’s mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution.”: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

35.5 “The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question.”: *Century City Apartments Property Services CC and Another v Century City Property Owners Association* [2010] 2 All SA 1 (SCA) para 13. This decision whether there is a reasonable likelihood of deception or confusion amounts to a value judgment: *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) para 10.

35.6 In respect of the name “BPL” (the letters), ie not the “device” (“graphics”), the question is therefore whether there would be confusion as envisaged in s 11(2)(b):

35.7 The “name” of the applicant is “BPL” while that of the first respondent is “BPL General Trading (Pty) Ltd”. There is therefore a different use and context and as such the reasonable consumer should not be confused: see also *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C).

35.8 The business of the first respondent is not stated and there is no indication in the papers as to the type of business other than that it is a “private company”. The businesses of the applicant in respect of the registered trade marks are extensive and, in general, it can be stated that, according to the classes of registration, it is advertising, and/or freight transport and handling. There does not, objectively, appear to be similarities between the different businesses.

35.9 In light of the authorities quoted above, and the facts as stated in paras 35.7 and 35.8 above, it is my opinion that the names “BPL” and “BPL General Trading (Pty) Ltd” are not confusing.

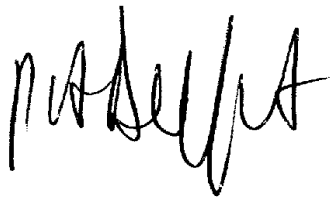
[36] **Section 11(2)(c)**

It could be argued that the elements of s 11(2)(c) and s 11(2)(b) are dissimilar and that separate requirements would apply to s 11(2)(c). However, in *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 15 the Supreme Court of Appeal said that “the same test

[for ss 11(2)(b) and s 11(2)(c)] is applicable to the use of the trade mark".
Therefore, if there is no contravention in respect of s 11(2)(b), it cannot be
said that there was a contravention of s 11(2)(c).

ORDER

[37] The application is refused.

A handwritten signature in black ink, appearing to read 'P.A. Delport', written in a cursive style.

Prof P.A. Delport

MEMBER OF THE COMPANIES TRIBUNAL