COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT004Sep2015

In the matter between:

ARANDA TEXTILE MILLS (PTY) LTD Applicant

and

ARANDA SECURITY AND PROJECTS (PTY) LTD Respondent

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	01 December 2015

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant complains about the inclusion of the word or element "ARANDA" in the respondent's name. It contends that the respondent's name infringes its trade mark "ARANDA" (and other related trade marks) and therefore falls foul of the provisions of section 11 of the Companies Act 71 of 2008 (the Act).[1]

[2] The applicant is a manufacturer of blankets and related products and its trade marks are registered in classes 24 and 25 covering a variety of those products.[2] The application isn't opposed by the respondent and consequently the applicant has filed an application for default order.[3]

[3] The application appears to be saddled with a few, but very critical problems. I will deal with them next under separate paragraphs.

[4] Firstly, the application is said to have been served on the respondent by registered post[4] method of delivery. However, part of the address reflected on

[1] Although there is mention of ss 11(2)(a) and 11(2)(b) of the Companies Act 71 of 2008 (the Act) a reading of the application indicates reliance on ss 11(2)(b) and 11(2)(c) of the Act.
[2] See para 18 on page 4 of the founding affidavit; annexure"ARA7" to the application.
[3] Regulation 153 reads as follows in the material part:
(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."
[4] This method is recognised in Table CR3 of Annexure 3 of the Companies Regulations, 2011. The Companies Regulations, 2011 were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations).

the proof of delivery or registered post slip[5] says “69 Mvemve Street”, instead of “691 Mvemve Street”. The latter address appears on the certificate issued by the Companies and Intellectual Property Commission on 04 August 2015 included in the papers.[6] The address reflected on the proof of delivery is clearly incorrect. There is no explanation in this regard in any of the affidavits (further from the founding affidavit, the applicant has filed another affidavit in support of the application for default order) and therefore nothing to confirm that the item was posted to a correct address. I am not satisfied that the respondent was adequately served as contemplated in regulation 153[7] of the Companies Regulations. This finding is actually disposive of the matter, but I will move on.

[5] Secondly, I have concerns regarding the actual deposition. The applicant company gave a general power of attorney to its attorneys of record, as far back as November 2008.[8] This power of attorney appears to be in perpetuity and even survived the change in legislation with the commencement of the Act on 01 May 2011. The deponent to the founding affidavit to this application relies on the authority derived from the power of attorney to bring this application.[9] Although, I will consider nothing to turn on this, I am quite concerned with the probative value of the actual content of the affidavit. The deponent to the affidavit is Mr. Tyrone Evan Walker. He is an attorney from the applicant’s attorneys of record.

[5] See annexure “ARA3”, being a slip or proof from the Post Office dated 02 September 2015 included in the papers as proof of delivery.
[6] See annexure “ARA8”.
[7] See footnote 3 above.
[8] See annexure “ARA1” to the application.
[9] See para 2 on p 1 of the founding affidavit.

He is not mentioned by name in the general power of attorney, but is probably included in the reference to the appointment of "the professional staff of MOORE ATTORNEYS"[10] made in the document. However, of even greater concern to me, is the fact that, Mr. Walker claims to have personal knowledge of all the contents of the founding affidavit.[11] He does not disclose the source or origin of his knowledge and I do not believe that he has personal knowledge of all matters in his affidavit. The submissions made in the affidavit covers many aspects of the history and business[12] of the applicant. There is no affidavit confirming any of the abovementioned statements and consequently the affidavit is populated with hearsay evidence.[13]

[6] Thirdly, Mr. Walker [again from his personal knowledge] submits that the applicant "became aware of the Respondent on/or about June 2015".[14] There is no further evidence or submissions regarding the circumstances under which the applicant became aware of the respondent's name which was registered in August 2013. This application was only launched in September 2015.[15] The law requires that an applicant under these circumstances show good cause for bringing the application. This much can be gleaned from the provisions of sections 160(1) and (2) of the Act, which read as follows:

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[10] See annexure "ARA1" to the application.
[11] See para 3 on p 1 of the founding affidavit.
[12] See, among others, paras 13 – 31 on pp 4-6 of the founding affidavit.
[13] See Cilliers AC, Loots C and Nel HC *Herbstein and van Winsen The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* (5th Edition) (Juta Cape Town 2009) at pp 444 onwards. See further Zeffertt, DT Part III, Chapter 13 Hearsay in ***Essential Evidence*** (LexisNexis May 2010) at p 2.
[14] See para 8 on p 3 of the founding affidavit.
[15] See Form CTR 142 dated 01 September 2015.

"(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) 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."

[underlining added]

[7] I have had the benefit of writing a few decisions on the principle of "showing good cause" in other matters.[16] There is no need to reinvent the proverbial wheel, in this matter. For this and other problems stated above, the application cannot succeed. And with this finding, I am precluded from getting into the merits of this matter.

[16] See ***Comair Limited v Kalula Carriers (Pty) Ltd*** , case/file number: CT002Jul2015, decided on 02 November 2015; ***The Scott Fetzer Company v Kirby Service and Repair Centre (Pty) Ltd*** , case/file number: CT005Feb2015 decided on 10 June 2015; ***Nilfisk Advance A/S v WAP Group Proprietary Limited and another*** , case/file number: CT18Mar2015, decided on 10 June 2015 and ***Comair Limited v Kuhlula Training, Projects and Development Centre (Pty) Ltd*** , case/file number: CT007Sep2014, decided on 27 February 2015. The aforesaid decisions can be accessed on the website of the Companies Tribunal: www.companiestribunal.org.za.

[8] Therefore, I make the following order:

a) the application is refused.

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Khashane La M. Manamela

Member, Companies Tribunal

01 December 2015