



## COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT029Feb2016

In the matter between:

**BABYLONSTOREN (PTY) LIMITED**

**Applicant**

and

**BABYLON HOTEL (PTY) LIMITED**

**Respondent**

(Reg NO.: 2013/146714/07)

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Presiding Member : Khashane La M. Manamela (Mr.),

Date of Decision : 22 April 2016

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### DECISION (Reasons and an Order)

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**Khashane La M. Manamela**

[1] According to the applicant the respondent's name, as cited above, is confusingly similar to the applicant's trade mark BABYLONSTOREN<sup>1</sup> or is capable of reasonably misleading a person to incorrectly believe that there is a link or association between the applicant and the respondent.<sup>2</sup> It is therefore submitted that this Tribunal should find the respondent's name to be unsatisfactory of the provisions of sections 11(2)(b) and 11(2)(c)(i) of the Companies Act 2008 (the Companies Act).<sup>3</sup>

[2] The respondent is not partaking in these proceedings. However, there is proof on file in the form of a sheriff's return of service<sup>4</sup> confirming that the founding papers were delivered at the respondent's registered office address.<sup>5</sup> Prior to the launch of these proceedings, the applicant's attorneys of record delivered a letter demanding that respondent cease and desist from using the impugned name.<sup>6</sup> There was a further letter and telephonic interaction with the respondent by the applicant's attorneys.<sup>7</sup> Evidently all these did not yield an amicable resolution of the dispute. I am satisfied that the respondent was adequately served<sup>8</sup> with this application and that there is default on its part from filing an answer.<sup>9</sup>

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<sup>1</sup> See section 11(2)(b) of the Companies Act 71 of 2008 (the Companies Act). This statutory provision is quoted in par 5 below.

<sup>2</sup> See section 11(2)(c)(i) of the Companies Act. This statutory provision is quoted in par 5 below.

<sup>3</sup> See par 5 below for a reading, in the material part, of section 11(2) of the Companies Act.

<sup>4</sup> See sheriff's return of service on indexed p 145. The sheriff indicates that copies of the founding papers were handed to a person at the respondent's registered office address on 01 March 2016. See the footnote 5 below, for further details in this regard.

<sup>5</sup> See annexure "EFN1" to the founding affidavit on indexed p 34, which is the respondent's registration certificate reflecting its registered office address and other details.

<sup>6</sup> See annexure "EFN18" to the founding affidavit on indexed pp 117-121.

<sup>7</sup> See annexure "EFN19" on indexed pp 122-127; pars 8.7-8.10 of the founding affidavit on indexed pp 117-121.

<sup>8</sup> See regulation 153(2)(b) of the Companies Regulations, 2011.

<sup>9</sup> See regulation 143 which reads in the material part: "(1) Within 20 business days after being served with ... an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must— (a) serve a copy of an Answer on the initiating party..."

[3] The trade mark BABYLONSTOREN was registered on 07 February 2011 over goods and services in class 43 described as “Services for providing food and drink; temporary accommodation”. The trade mark was registered as property of De Goede gedacht and only later assigned to the applicant on 18 May 2015.<sup>10</sup> I note from extract from the trade marks’ register, included in the papers, that the application for registration of this trade mark was made in July 2007.<sup>11</sup> From the same document, I also note a disclaimer or endorsement filed in respect of the trade mark.<sup>12</sup> I am curious as to what the disclaimer entails, but with no greater detail provided, I will let nothing turn on this.

[4] The applicant is said to have been initially very active in the wine industry, but as from October 2010 it also operated a hotel business. Both its businesses have attained popularity locally in South Africa and internationally. On the other hand, not much is known about the respondent as it has not reacted to the application.<sup>13</sup> However, it is known that the respondent was registered on 21 August 2013. Apart from its name, which indicative of a hotel operation [even if only nominally], there is no indication of the activities of the respondent. It is also noteworthy that the respondent shares its registered office and postal addresses with its sole director.<sup>14</sup>

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<sup>10</sup> See par 44 of the founding affidavit on indexed p 19; annexure “EFN3” on indexed p 37.

<sup>11</sup> See annexure “EFN3” on indexed p 37.

<sup>12</sup> *Ibid.* It is stated on the same document under the caption “Endorsement” that “*This trade mark is registered by agreement with the trustees of the Backsberg Trust, Backsberg Estate Wines.*” I added the italics.

<sup>13</sup> See par 2 above.

<sup>14</sup> See annexure “EFN1” to the founding affidavit on indexed p 34.

[5] As stated above, this application is premised on the applicant's claim that the respondent's name does not satisfy sections 11(2)(b) and 11(2)(c)(i) of the Companies Act. These provisions read in the material part:

“(2) The name of a company must-

(a) not be the same as...

(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) ...

...

(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...”

[6] The nub of the applicant's contentions is located in the following statements from the applicant's founding affidavit:

“5.1 Historically, BABYLONSTOREN was the name given by early Cape-Dutch settlers to a hillock or geographical feature situated along the Berg River in what is today the Western Cape Province of South Africa.

5.2 As early as the 1700s, the land surrounding this feature was owned and developed as farmland by early Cape settlers. ...

5.3 At first, the surrounding farmlands were referred to simply as the Drakenstein Valley, but with the formal acquisition of ownership over the land in 1692, a part of the farmland became privately owned and was recorded under the Dutch name “De Babilonische Tooren”. Over time, and with further changes in ownership,

the farm became known and was referred to as BABYLONSTOREN. There is, unfortunately, no official record of the date of first use of the name BABYLONSTOREN, but it seems that the name was first used as early as 1744. The name BABYLONSTOREN was subsequently recorded in grants of ownership over the farmland and appeared on maps of the Cape region.”<sup>15</sup>

and further that:

“7.2 BABYLONSTOREN means the Tower of Babel, which is referred to in a biblical story, and is a direct reference to the geographical landmark on the farm. The Tower of Babylon is historically associated with Babylonia which is today known as the city of Babylon. Conceptually, therefore, there are similarities between the Respondent’s name and the BABYLONSTOREN trade mark.”<sup>16</sup>

[I added underlining for emphasis]

[7] From the above, I gather that, the applicant’s name was initially a geographical nickname to a hillock or geographical feature along the Berg River. The nickname was derived from the Tower of Babel as in the Christian bible. It is not explained whether the conceivers of the nickname saw or imagined any resemblance between the two. What is explained is that the Tower of Babel or BABYLONSTOREN was reportedly a feature in the biblical Babylonia or city of Babylon. Although the area had another name (i.e. Drakenstein Valley), the name BABYLONSTOREN stuck, so to speak, by both informal and formal use.

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<sup>15</sup> See pars 5.1-5.3 of the founding affidavit on indexed pp 19-20.

<sup>16</sup> See par 7.2 of the founding affidavit on indexed p 28.

[8] It is significant that from the beginning the two words “Tower” and “Babylon” or the other way round have been used together. The area of the applicant’s present day farm was never referred to as Babylon or Babylonia, but always BABYLONSTOREN (i.e. the Tower of Babylon or Babel). Equally, the applicant or its assigner registered the trade mark for BABYLONSTOREN and not just BABYLON. There is no explanation for this. But to me this appears deliberate, as it is rational. It is the specific feature, being the tower (Tower of Babylon) from the City of Babylon and not just the city; the conceivers of the name were referring to. They saw resemblance or whatever connotation between the geographical feature or the hillock along the Berg River at the Tower of Babylon. Nothing else from Babylon appears to have been imported and incorporated into the geographical nomenclature of the area. I find it reasonable to imagine that the authorities may have had some apprehensions regarding granting BABYLON as a trade mark.<sup>17</sup> But, nothing will turn on this imagination. Simply put, the protection afforded the applicant’s trade mark is for the combined two words “BABYLONSTOREN”.

[9] The present application, in my view, appears to assert rights over the word Babylon which is only but a part of the applicant’s name. There is no justification for this assertion as it simply amounts, in my view, to an extension of the applicant’s existing proprietary rights. Nothing in law and fact supports this extension. The applicant or its predecessor-in-title was not granted monopoly or exclusivity over the word Babylon.

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<sup>17</sup> See Ribbens *What’s in a name? An analysis of the Registrar’s directive on names of companies, close corporations and defensive names* 1995 (November) *De Rebus* 709-713 710.

[10] Further, in my view, the applicant's trade mark (i.e. BABYLONSTOREN) is clearly distinguishable from the respondent's name (BABYLON HOTEL). There is no confusing similarity. I also do not consider it possible that any reasonable person would be misled into incorrectly believing that there is any association between the respondent and the applicant. With that, this application fails.

[11] I therefore make the following order:

- a) the application is dismissed.

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**Khashane La M. Manamela**

**Member, Companies Tribunal**

22 April 2016