COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT002May2015

In the matter between:

EDCON LIMITED Applicant

and

EDGAXS (PTY) LIMITED Respondent
(2013/224516/07)

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	02 September 2015

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The issue to be determined in this matter is whether the word or element EDGAXS in the respondent's registered company name[1] is confusingly similar[2] to the applicant's EDGARS trade mark or falsely implies or suggests or is such as would reasonably mislead a person to incorrectly believe that the respondent is part of or associated with the applicant.[3] The applicant submits that a positive finding by this tribunal on both is probable in this matter. The respondent is not opposing the application and therefore an order by default is sought.[4] I immediately deal with the issue of service of the application on the respondent.

[2] The application was served on 07 May 2015 upon the respondent by way of electronic mail.[5] This is an acceptable and valid method for delivery of documents in terms of Table CR-3 of Annexure 3 to the Companies Regulations, 2011.[6] It is provided therein as follows in this regard:

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[1] See annexure "CV2" (a certificate issued by the Companies and Intellectual Property Commission dated 29 January 2015) to the application on indexed p 27.
[2] As contemplated in section 11(2)(b) of the Companies Act 71 of 2008 (the Act).
[3] As contemplated in section 11(2)(c)(i) of the Act. Both sections 11(2)(b) and 11(2)(c)(i) read as follows in the material part: "(2) The name of a company must-
(a)…
(b) not be confusingly similar to a name, trade mark, mark, word or expression…
(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…"
[4] Regulation 153 of the Companies Regulations, 2011 provides for default orders and reads as follows:
"**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 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."
[5] See para 4.3 of the affidavit in support of the application for default order at indexed p 0.5; annexures "WG1" and "WG2" to the application for default order at indexed pp 0.9 - 0.11.
[6] The Companies Regulations, 2011 were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations).

"By sending the notice or a copy of the document by electronic mail, if the person has an address for receiving electronic mail"

[underlining added for emphasis]

[3] The applicant submits that the e-mail addresses[7] used for service upon the respondent belong to Ms. Sharon Nwachukwu and Mr. Charles Nwachukwu, the directors of the respondent. It is stated that, the e-mail addresses were obtained in May 2014 during "telephone discussions" between the respondent's directors and a certain Mr. Cornelius Lodewikus Potter, who was or is retained by the applicant a private investigator. I have a problem with adequacy of the service of the application using these e-mail addresses.

[4] According to the applicant, the e-mail addresses belong to the directors and not the respondent. I accept that ordinarily, the directors as functionaries of their company may be the link or contact on behalf of the company, but there should have been evidence or submissions made in this regard. It is not clear from the papers whether the e-mail addresses were provided by the respondent's directors for purposes of communication on behalf of the respondent. It is also not less significant that the e-mail addresses were provided to a private investigator of the applicant. However, I consider nothing to turn on this.

[7] The e-mail addresses are stated as: info.ysgp@gmail.com and charliemark@charliemarkcomputers.com.

[5] What is also important is the fact that a period of almost 12 months passed from when Mr. Potter acquired the information regarding the e-mail addresses to the time when delivery of the application using those addresses took place. This is a significant amount of time. There is no evidence confirming that the respondent or actually its directors were still using the e-mail addresses at the time of issuing this application. Therefore, there is no evidence that the e-mail addresses should still be considered the respondent's "address for receiving electronic mail".[8] I understand the aforesaid requirement to be current and not simply historical. However, this should not be construed to mean that the information on the address ought to have been recently acquired, but there should be indication that the address is still used by the addressee or intended recipient of the e-mail. Otherwise it would equate to a *domicilium citandi* when this is not provided by the Companies Regulations, 2011.

[6] Further, although the e-mail addresses are also reflected on the applicant's legal representatives' "cease and desist letter" dated 14 May 2014 (the letter of demand), the e-mail addresses appear to be additional to the respondent's registered office address.[9] This letter appears to have been served upon the registered office address by courier.[10] The respondent reacted to the letter of demand, albeit through its own legal representative.[11] Communication with the respondent's legal representative appears to have been by e-mail and

[8] See Table CR-3 of Annexure 3 to the Companies Regulations also reflected in para [2] above.
[9] See annexure "CV26" to the application on indexed p150.
[10] *Ibid.*
[11] See annexures "CV27" and "CV29" to the application on indexed pp 159 – 160 and 163 - 164.

telefax.[12] Also, the physical or office address of the respondent's legal representative is reflected on the communications with the applicant's legal representative.[13] Therefore, other than the e-mail addresses stated to be belonging to the respondent's directors, the applicant ought to have included or copied the respondent's legal representative through the latter's e-mail address or telefax or physical office address, when delivering the application. The applicant appears to also have been concerned about the adequacy of the service on the applicant when it only used the impugned e-mail addresses for service of the application.

[7] In the affidavit by Ms. Werina Griffiths in support of the application for default order, she makes the following statements:

"In previously attempting to serve documentation on the Respondent by Sheriff of the High Court as its registered address at 489 Luttig Street, Pretoria West, Gauteng, the Sheriff Pretoria South West (being the Sheriff with the requisite jurisdiction) advised us that the Respondent was not known at that address."

Ms. Griffiths continues as follows, this time regard the use of the e-mail addresses of the respondent's directors:

[12] *Ibid.* See further annexures "CV28" and "CV30" to the application on indexed pp 161 – 162 and 165.
[13] *Ibid.*

"Given that the Respondent could not be located at the premises of its registered address, and the abovementioned email addresses had previously been used to correspond with the Respondent, the circumstances of this matter necessitated service of the name objection by electronic mail to ensure that the objection was brought to the Respondent's knowledge".

[8] The above clearly is to the effect that there was something wrong with the respondent's registered office address as officially kept by the Companies and Intellectual Property Commission (the Commission).[14] The fact that the respondent may not have bothered updating its record with the Commission cannot be held against the applicant. However, the applicant's say-so without any evidence in confirmation of the alleged sheriff's communication is insufficient. This cannot sustain an application based on a default of a party in appearing to oppose the application. Besides, as already stated above, the letter of demand appears to have been delivered by courier to this address without any problems.[15] Also it is clear from Ms. Griffiths statements above that, the applicant appears to be concerned about the use of the e-mail addresses as opposed to the delivery of the application through the respondent's registered office address. There is also no evidence that the e-mail addresses were used in previous communication with the applicant before delivery of the application. I haven't

[14] See annexure "CV2", being a certificate issued by the Commission dated 29 January 2015 attached to the application on indexed p 27.
[15] See para [6] above.

seen in the papers any communication directly from the respondent or its directors, save those from the respondent's legal representative which used a different e-mail address or telefax numbers.

[9] Therefore, I do not accept that the use of the respondent's e-mail addresses stated to have been supplied by the respondent's directors during a telephone discussion with a private investigator employed by the applicant constitute adequate service. The e-mail addresses supplied almost a year ago could have changed and cannot be regarded as the respondent's e-mail for current purposes.

[10] Further, in my view, the interests of justice require that there be no doubt that a party to litigation has received notice of the proceedings. This is enshrined by our common law as rules or principles of natural justice[16] and a constitutional right, as expanded in section 34 of the Constitution of the Republic of South Africa, 1996.[17] The applicant ought to have taken reasonable or adequate steps to ensure that the respondent is given notice of the application, particularly at the default order stage, when there was no reaction to the service of the application by electronic mail. The applicant's own papers confirm that this was possible.

[16] 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 1361 and the authorities referred to there.
[17] See Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* (LexisNexis Last Updated: October 2014 - SI 17) on p 28-7.

[11] From the documents filed by the applicant the following is evinced: the respondent's registered postal address[18] and the electronic mail, telefax and office address of the respondent's legal representative who was involved in May 2014. The application could also have been served by way of affixing at the respondent's registered office address until the allegations regarding the sheriff experiencing problems with this address are established.[19] I am not satisfied that the application was adequately served as provided in regulation 153(2)(b) of the Companies Regulations, 2011. And for this reason the application ought to be refused.

[12] Therefore, I make the following order:

a) the application is refused.

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Khashane La M. Manamela

Member, Companies Tribunal

02 September 2015

[18] See annexure "CV2" to the application on indexed p 27.

[19] This method is also included in Table CR-3 of Annexure 3 to the Companies Regulations as follows: "By handing the notice or a certified copy of the document to a responsible employee of the company or body corporate at its registered office or its principal place of business within the Republic; or If there is no employee willing to accept service, by affixing the notice or a certified copy of the document to the main door of the office or place of business".