COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT012Jan2015

In the matter between:

LEGAL EXPENSES INSURANCE SOUTHERN AFRICA LTD Applicant

and

WISE-UP TRADING AND PROJECTS CC (2011/067571/23) Respondent

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	01 April 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] In this application, dated 26 November 2014 and issued on 28 January 2015,[1] the applicant seeks an administrative order directing the respondent to change its current name to a name which complies with the provisions of the Companies Act 71 of 2008 (the Companies Act). The applicant contends that the respondent's current name offends its trade marks and takes advantage of its goodwill. The applicant has filed an application for default order on 16 February 2016, as the respondent has to date not filed any papers in opposition of the relief sought. A quick look at the abovementioned dates will clearly confirm that, there has been delay between the issuing and prosecution of this application.

[2] The applicant offers no credible explanation for the delay, although I have noted the contents of electronic mail exchanges between the office of the registrar of this Tribunal and the applicant's attorneys of record in December 2015.[2] There are also submissions made in the application for default order [referred to above] lodged by the applicant in terms of regulation 153[3] of the Companies Regulations, 2011.[4] The application for default order was made despite the fact that, the applicant says it

[1] See Form CTR 142 dated 26 November 2014 bearing this Tribunal's rubber stamp of 28 January 2015. The papers are not paginated or indexed and therefore, I will try and use a practical mode of reference.
[2] See electronic mail exchanges between the office of the registrar and the applicant's attorneys of record of 02; 08 and 09 December 2015.
[3] The application for default order is dated 16 February 2016. Regulation 153 of the Companies Regulations, 2011 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."
[4] 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).

encountered problems with the service of the papers on the respondent.[5] I will return to this issue in a moment.

[3] The applicant is described in the founding or supporting affidavit as, a "leading South African company in the legal expense insurance sector".[6] It provides and develops – on a continuous basis – legal service and insurance products. It is generally known by the name Legalwise and is the proprietor of the trade marks WISE-UP; LEGALWISE and LEGALWISE PLATINUM.[7] The trade marks are registered in classes 16; 36; 42 and 45 over a variety of services and goods, mainly of insurance, legal and financial nature. The oldest of the WISE-UP trade mark registrations was effected on 04 March 2002;[8] the LEGALWISE[9] trade mark on 10 January 1992 and the LEGALWISE PLATINUM trademark, only recently on 10 August 2012.[10]

[4] I have already indicated above that, the respondent is not taking part in these proceedings. Also stated above is that the applicant indicated encountering problems with service of the application on the respondent's registered office address. According to the applicant, the sheriff was unable to locate the respondent's registered office address.[11] I hasten to point out that, this submission, with respect, is incorrect. In terms of the applicant's own papers, the respondent's registered office address is at 658 Mpola, 1st

[5] See footnote (fn) 2 above.
[6] See par 2.12 of the founding affidavit on p 2.
[7] See pars 3.2 and 5 of the founding affidavit on pp 3-7; annexures "C1" – "C8".
[8] See annexure "C1" to the founding affidavit.
[9] See annexure "C3" to the founding affidavit.
[10] See annexure "C6" to the founding affidavit.
[11] See par 3.3 on p 2 of the supporting affidavit in the application for default order. See also fn 3 above.

Street, Pine Town, 3621.[12] The sheriff's return refers [not once, but twice] to 65 Mpola Street. Both the number (i.e. 65 instead of 658) and street name (i.e. Mpola Street instead of 1st Street) are incorrect. The same mistake is made on the registered mail slip dated 30 January 2015.[13] In the application for default order there is another variation of the respondent's registered office address, made by the applicant.[14] Therefore, on the available evidence, ironically courtesy of the applicant itself, there has not been any attempt to serve or deliver the application on the correct registered office address of the respondent, as appearing on annexure "A" to the papers.[15] But the correct address was used for the letter of demand. The applicant hasn't submitted that there were problems experienced with delivery of the letter of demand. In fact, the applicant or perhaps its attorneys were expecting a response thereto, but in vain.[16] Therefore, available evidence, points to there being nothing wrong with the respondent's registered office address. Only the applicant has acted erroneously in terms of its own records or facts. In my view, this error or shortcoming will be significant in respect of the outcome of this application. I will nevertheless momentarily move on to other issues.

[12] See par 2.2 on p 2 of the founding affidavit; annexure "A" to the founding affidavit titled "Close Corporation Search".
[13] See registered mail slip is attached to application for default order as annexure "AJD3". Thereon the address is stated as "65 Mpola Street Pinetown 3610".
[14] See par 2.2 on p 2 of the affidavit in support of application for default order. Therein the following is said to be the respondent's registered office address: C1 – C8, 65 Mpola Street, Pinetown, Kwazulu Natal, 3621".
[15] See fn 12 above.
[16] See pars 4.3-4.4 on pp3-4 of the founding affidavit; pars 4.3-4.4 on p3 of the supporting affidavit to the default order application. See further par [5] and fn 19 below.

[5] According to the applicant, the respondent was registered or incorporated on 05 May 2011.[17] The applicant submits that it became aware of the existence of the respondent's name on 17 February 2012, after the name was advertised in the government gazette of 04 February 2012.[18] It thereafter instructed its attorneys of record to send a letter of demand on 30 August 2012 for the respondent to cease and desist from using the impugned name, but in vain. The letter also indicated to the respondent that a response was expected by not later than 13 September 2012, "failing which a formal objection will be lodged without further warning".[19] I assume reference to "formal objection" was to these proceedings. There was no response, hence these proceedings, which, as stated above,[20] were only initiated in January 2015.

[6] The applicant doesn't appear to be worried by the intermission of over two years between the letter of demand in September 2012 and this application in January 2015. It submits, almost brazenly, that there was no undue delay as follows:

> "…in light of the above time line of events, … there has been no undue delay between the date of the Applicant becoming aware of the offending name and the Applicant's Application for relief. Any delay between the date on which the Applicant became aware of the offending name and the filing of the Application for relief can be attributed to the Applicant's bona fide attempts to resolve this matter directly with the Respondent."[21]

[17] The applicant relied on a document (i.e. annexure "A") which appears to have been obtained from a third party source and not the Companies and Intellectual Property Commission or the CIPC regarding the registration details of the respondent.
[18] See pars 4.1 and 4.2 on p 3 of the founding affidavit.
[19] See par 9 of annexure "B" to the founding affidavit.
[20] See par [1] above.
[21] See par 4.5 on p 4 of the founding affidavit.

[7] I do not agree that there was no undue delay. There was inordinate delay before the applicant brought this application. There was a further delay between the sheriff's attempt to serve the application on 30 January 2015[22] and the application for default order on 16 February 2016. In fact, more than a year had elapsed, in the second delay. Although, the second delay is not decisive for this application,[23] it is not favourable to the administration of the roll of matters of this Tribunal and precipitates some level of uncertainty as to the names' register kept by the Companies and Intellectual Property Commission (the CIPC). The applicant, ably assisted by its attorneys, could have attended to matters herein a bit decisively and swiftly.

[8] On the other hand, section 160 of the Companies Act provides, among others, the time periods within which applications of this nature are to be brought. Sections 160(1) and (2) of the Companies Act read as follows:

> "(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-

[22] See return of service by Sheriff: Pinetown attached to application for default order as annexure "AJD4".
[23] See generally 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 ed (Juta Cape Town 2009) on pp 714-715 and the authorities quoted there.

(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 for emphasis]

[9] I accept that, the applicant did not receive notice envisaged in section 160(1). As already mentioned, it became aware of the existence of the respondent's name from reading the government gazette.[24] Therefore, it could only have brought this application beyond the three months' period contemplated in section 160(2)(a), by showing good cause in terms of section 160(2)(b).

[10] However, the Companies Act doesn't define or explain what is meant by showing good cause. In my view, good cause entails the applicant adducing evidence regarding why it brought the application on the date it did and not earlier. This would include, the date when the applicant became aware of the existence of the impugned name; how it became aware, and what it did since becoming aware, before it brought the application. In the decision of *Minister of Defence and Military Veterans v Motau and others*[25] it was stated that "good cause may be defined as a substantial or "legally sufficient reason" for a choice made or action taken. Assessing whether there is good cause for a decision is a

[24] See par [5] above.
[25] [2014] JOL 32592 (CC).

factual determination dependent upon the particular circumstances of the case at hand".[26] In other words, this is a factual enquiry. It is dependent on the facts or circumstances of the particular matter. An applicant in these circumstances has to provide a reasonable explanation regarding the aforesaid.[27]

[11] The applicant herein has not explained the reasons for its inaction after getting no response to its letter of demand. But, it couldn't have been waiting for a response from the respondent for over two years. In fact, it had placed a deadline by which the respondent was to react to its demand.[28] The further delay after expiry of the deadline imposed in the letter of demand until this application was filed is, in my view, unreasonable. Therefore, the applicant has failed to show good cause and therefore to clear the hurdle, so to speak, posed by section 160(2)(b) of the Companies Act. This, in my view, is decisively fatal for this application.

[12] In other matters of this Tribunal [I have recently had the opportunity to adjudicate upon], I also considered failure to show good cause to be fatal.[29] There is a good reason for this. The register of company names kept by the CIPC ought to enjoy some level of certainty and credibility. Challenges to company names cannot be indefinite. This is not to indirectly introduce a time-limit to section 160(2)(b). This will not be necessary.

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[26] See *Minister of Defence and Military Veterans v Motau and others* at para [54], which is quoted without references.
[27] See *Herbstein and van Winsen The Civil Practice of the High Courts and Supreme Court of Appeal of SA* on pp 715-716 and the authorities quoted there.
[28] See par 5 and fn 19 above.
[29] See *COMAIR Limited v Kuhlula Training, Projects and Development Centre (Pty) Limited*, an unreported Case NO.: CTR007SEP2014 (Companies Tribunal, decided on 27 February 2015) at paras [5] – [6]; *The Scott Fetzer Company v Kirby Service and Repair Centre (Pty) Ltd*, Case NO.: CT005FEB2015 (Companies Tribunal, decided on 10 June 2015) at paras [8] – [9]. Copies of these decisions may be obtained from the website of the Companies Tribunal at: www.companiestribunal.org.za.

Evidently, the legislature has sufficiently built-in some control measures within section 160(2) already. I see no reason for not giving effect to the clear intentions of the legislature in this regard. Therefore, for lack of service of the application and failure to show good cause, as fully explained above, this application fails and will be dismissed.

[13] Accordingly, I make the following order:

a) the application is dismissed.

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Khashane La M. Manamela

Member, Companies Tribunal

01 April 2016