



## COMPANIES TRIBUNAL OF SOUTH AFRICA

**Case/File Number: CT002Jul2015**

In the matter between:

**COMAIR LIMITED**

**Applicant**

and

**KALULA CARRIERS (PTY) LIMITED**

**First Respondent**

(Reg NO.: 2013/202142/07)

**THE COMMISSIONER OF COMPANIES**

**Second Respondent**

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

Date of Decision : 02 November 2015

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### **DECISION (Reasons and an Order)**

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**Khashane La M. Manamela**

[1] COMAIR Limited, the applicant herein, requests this Tribunal to make a finding that the first respondent's name does not satisfy the provisions of sections 11(2)(b) and (c) of the Companies Act 2008 (the Act). It submits that the inclusion of the word or element KALULA in the first respondent's name infringes its trade marks, KULULA and KULULA.COM. The trade marks are registered in various classes covering a wide variety of goods and services.<sup>1</sup>

[2] Both the first and second respondents are not participating in these proceedings. The application was served on the first respondent by the sheriff by placing a copy thereof in the post box as the premises at the first respondent's address were found locked. The applicant submits that this is a proper method of service in terms of the rules of the High Court. However, in my view, this submission misses the point. Service of the process of this Tribunal is not in terms of the rules of the High Court, but as laid out in annexure 3 of Table CR 3 of the Companies Regulations (Companies Regulations).<sup>2</sup> The method employed by the applicant is not reflected in the Companies Regulations. Further, the sheriff's return refers to a complex and main gate 73 B as the place where the application was placed in a box. The first respondent's address as reflected on a certificate issued by the Companies and Intellectual Property Commission<sup>3</sup> papers does not include such references. Also included in the applicant's paper

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<sup>1</sup> See paragraph 4.1 of the founding affidavit on indexed pages 5 to 8; annexures "DHB2.1" to "DHB 2.16" to the application on indexed pages 20 to 48.

<sup>2</sup> The Companies Regulations were made by the Minister of Trade and Industry in terms of s 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011 (Companies Regulations).

<sup>3</sup> See annexure "DHB14" to the application on indexed pages 106 to 107.

is a document called an investigation report by an entity called Intellectual Property Investigations SA cc dated 10 June 2015.<sup>4</sup> In this report the address of the first respondent is stated as being in KwaZulu-Natal and not Gauteng Province. The applicant's attorney explained the reference to Gauteng in the first respondent's registered office address as a "typographical error".<sup>5</sup> I agree with the latter submission. However, there is no explanation in the affidavit as to the additional details (i.e. 73 B; main gate and complex) added to the respondent's registered office address. Without such an explanation or submission I am not satisfied that the application was adequately served on the first respondent. There is also no proof of the application being served on the second respondent.

[3] Further, the first respondent (hereinafter the respondent) was registered on 30 October 2013. The applicant submits that it became aware of the existence of the respondent in January 2015 and immediately sent a letter demanding that the respondent desist using the impugned name or word as part of its name.<sup>6</sup> This was almost fifteen months after the registration of the respondent. This application was only issued on 01 July 2015. There is no explanation as to how the existence of the respondent came to the knowledge of the applicant and why only in January 2015 when the respondent has long being in existence.

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<sup>4</sup> See annexure "DHB17" to the application on indexed pages 114 to 116.

<sup>5</sup> See paragraph 2.3 on indexed page 4 of the application for a default order.

<sup>6</sup> See paragraph 5.1 on indexed page 13 and paragraph 7 on indexed pages 16 to 17 of the founding affidavit.

[4] Section 160(2)(b) of the Act requires that an applicant in these circumstances must show good cause when making this type of application.

Section 160 reads as follows in the material part:

**“160. Disputes concerning reservation or registration of company names**

(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 for emphasis]

[5] I have had the benefit of previously presiding over matters where the concept of good cause was dealt with.<sup>7</sup> One of those decisions (i.e. **Comair Limited v Kuhlula Training, Projects and Development Centre (Pty) Ltd** , case/file number: CT007Sep2014, decided on 27 February 2015) involves the current applicant. Two of the aforesaid matters (i.e. the *Comair Limited v Kuhlula Training, Projects and Development Centre (Pty) Ltd* and **Nilfisk Advance A/S v**

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<sup>7</sup> See *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](http://www.companiestribunal.org.za).

**WAP Group Proprietary Limited and another** , case/file number: CT18Mar2015, decided on 10 June 2015) involve the current attorneys of record for the applicant. I rely on my reasoning in those decisions in this regard and would avoid revisiting the discussions. Consequently, I find that the applicant has failed to show good cause for bringing the application several months after the registration of the respondent. Therefore, this application will fail.

[6] I therefore make the following order:

- a) the application is refused.

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**Khashane La M. Manamela**  
**Member, Companies Tribunal**  
**02 November 2015**