



**REPUBLIC OF SOUTH AFRICA**

**CASE NO: CTR 001/05/2013**

In the matter between:

Robert Bosch GMBH

Applicant

And

Bosch Auto Investment (Pty) Ltd

Respondent

Order handed down on 3 June 2015

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**ORDER**

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**1. INTRODUCTION**

- 1.1 This is an application in terms of section 160 of the Companies Act No 71 of 2008 ("the Act") and Regulations 153 (1) and 153 (2)(b) of the Act (GNR 351 OF 265 April 2011) ("the Regulations") for a default order confirming that the Respondent's name does not satisfy the requirement of Section 11 of the Act and that the Respondent be ordered to select a new name, as provided for in Section 160(3)(ii) of the Act.
- 1.2 The Applicant also applies for a condonation of the late service of the application on the Respondent

## **2. PROCEDURAL ASPECTS**

- 2.1 The Applicant filed on 2nd May 2013 a company name objection in terms of section 160 of the Act against the company name, “Bosch Auto Investment (Pty) Ltd” for an order that the Respondent’s name does not satisfy the requirement of section 11 of the Act.
- 2.2 The Company name objection was served on the Respondent on 10 May 2013 by affixing the document on the principal door of the premises. It must be noted that this is almost 20 months after the incorporation of the Respondent.
- 2.3 It must be noted that the company name objection was served after the 5 business days stipulated in Regulation 142 (2), hence the application for condonation.
- 2.4 Subsequent to the filing of the Application, the Applicant executed a Supplementary Affidavit which the Sheriff, Wonderboom, attempted to serve on the Respondent on 22 September 2014. However the Sheriff indicated that number 115 could not be found in Zambezi Drive.
- 2.5 In addition to the two instances of service as indicated above, a copy of the company name objection including the Supplementary Affidavit was served on 12 November 2014 at 648 Besembiesie Avenue, Montana Park which is the registered address of the Director of Bosch Auto Investments Proprietary Limited. The Applicant indicates that a Mr George who has been a tenant since June 2014 informed the Sheriff that the company is unknown at that address as per the return of service.
- 2.6 In terms of Regulation 153 (1) read with regulation 143 (1) the Respondent has 20 days to respond from the date of filing of the application with the Tribunal, failing which the Applicant is entitled to apply for a default order as provided for in Regulation 153 (1).
- 2.7 No response has been received from the Respondent hence the application for a default order

## **3. SUBSTANTIVE ISSUES**

- 3.1 The Application is filed in terms of section 160 of the Act. The Applicant submits that the Respondent’s name is confusingly similar to the Applicant’s registered, well known BOSCH trade mark and therefore falls foul of the provisions of section 11(2)(a)(iii), alternatively section 11(2)(b)(iii) of the Companies Act.

- 3.2 The use of the company's name in relation to a business trading in the same or similar goods or services as those of the Applicant is likely to lead to confusion in the trade.
- 3.3 The company's name conflicts with section 11(2)(b)(iii) of the Act.
- 3.4 The Applicant is the proprietor of the well- known trade marks BOSCH, Amature device and BOSCH logo (Car Service Sign)
- 3.5 The Applicant is involved in the manufacture, distribution, sale and service of automotive components, home appliances, power tools, garden tools and accessories. The Applicant has been using the trade mark BOSCH in relation to its products and services in South Africa since the early 1950
- 3.6 The Applicant owns a number of trade marks registrations in South Africa, incorporating BOSCH in various covering a wide range of goods and services. Refer to paragraphs 4.2.1.1-4.2.1.33 of the founding affidavit.
- 3.7 The Applicant has used the trade mark extensively and also trades under the name BOSCH.
- 3.8 The existence of BOSCH AUTO INVESTMENT (PROPRIETARY) LIMITED recently came to the Applicant's attention. The Respondent's principal business is described as *private households, exterritorial organisations, representatives of foreign governments and other activities not adequately defined.*
- 3.9 The Applicant submits that the dominant and memorable portion of the Respondent company name is BOSCH, which is identical to the Applicant's BOSCH trade mark. The remaining portion of the company's name, namely AUTO INVESTMENT, is purely descriptive and therefore cannot distinguish the company's name from the Applicant's name and trade mark.
- 3.10 The Applicant further submits that the use of the BOSCH trade mark as part of the Respondent's company name, in relation to what clearly will be the automotive industry where the Applicant's rights in BOSCH are primarily vested, amounts to trade mark infringement in terms of the Trade Marks Act, no 194 of 1993. The use of the trade mark BOSCH as part of the Respondent's company name is also likely to take unfair advantage of and be detrimental to, the distinctive character and repute of the well- known BOSCH trade mark.

- 3.11 The use by the Respondent of the Applicant's BOSCH trade mark as part of its company name is unauthorised by the Applicant. None of the company's services are endorsed by the Applicant.
- 3.12 The Applicant submit that the Respondent's name is confusingly similar to the Applicant's registered, well known BOSCH trade mark and therefore falls foul of the provisions of Section 11(2) (a)(iii) of the Companies Act.
- 3.13 The Applicant submit that in view of the extensive reputation that the Applicant enjoys in its BOSCH trade mark, use of the company's name in trade is likely to deceive or confuse members of the public into believing that there is some connection between the company and the Applicant, when this is not the case. In particular members of the public are likely to believe that the company is licensed to use the Applicant's trade mark or that the company was formed for the purpose of rendering services on behalf of the Applicant.

#### **4. RELIEF SOUGHT**

- 4.1 The Respondent should be ordered to change its name by virtue of the provisions of section 11(2)(c)(i) of the Companies Act on the basis that it falsely implies or suggest or is otherwise likely to mislead a person to believe, incorrectly, that the Respondent is part of, or associated with, the Applicant
- 4.2 The Companies Tribunal to direct Respondent to select a name which does not consist of, or incorporate, the Applicant's well-known BOSCH trade mark, or any other mark which is confusingly and/ or deceptively similar to the Applicant's trade mark.

#### **5. THE LAW AND APPLICATION OF LAW TO THE FACTS**

- 5.1 Before I deal with the merits of the case I need to first consider the application for condonation and whether the Applicant has shown good cause as required in terms of section 160 (2)(b).

5.2 Section 220 of the Act provides that:

*Unless otherwise provided in this Act, a notice, order or other document that, in terms of the Act must be served on a person, will have been properly served when it has been either –*

- (a) delivered to that person; or*
- (b) sent by registered mail to that person's last known address."*

Regulation 142(2) stipulates that:

*"(2) The applicant must serve a copy of the application and the affidavit on each Respondent named in the application, within 5 business days after filling it."*

*Section 160. stipulates that:*

- (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"*

5.4 The Applicant submits that the existence of BOSCH AUTO INVESTMENT (PROPRIETARY) LIMITED recently came to the Applicant's attention. The Respondent's principal business is described as *private households, extritorial organisations, representatives of foreign governments and other activities not adequately defined.*

- 5.5 The Applicant submits that the process whereby the company name objection in terms of section 160 of the Act was served and filled did not thwart the main purpose of the legislation dealing with company name objections and the parties' right to fair process.
- 5.6 The Applicant submit that there is good cause for condoning the Applicant's non-compliance with regulation 142(2) in that it served the company name objection on the Respondent after the expiration of the 5 business day service prescribed in the regulation.
- 5.7 The Applicant further submit that it is often very difficult, if not impossible, to effect service of company name objections within the short five day service period provided in the Regulation. Further that the Applicant has nevertheless made every attempt to arrange for service of the Company name on the Respondent within the prescribed service period.
- 5.8 The Applicant also submits that the application for condonation is necessary and reasonably required and should be granted on the basis that:

All parties affected by the company name objection received proper notice thereof

The merits of the company name objection are in the Applicant's favour and are of such a nature that the Applicant is entitled to have the matter properly adjudicated by way of consideration of the merits thereof.

The Applicant will be severely prejudiced if it is not afforded the opportunity to have the merits of the company name objection considered due to its unintentional non-compliance with the service

The Applicant had no intentional nor wilful disregard of the provisions of the Act nor its Regulations and the Applicant made every attempt to comply with the provisions and

The Applicant's action did not place an unnecessary administrative burden on the Tribunal.

## **6. EVALUATION**

- 6.1 It can be accepted that the Applicant did receive notice contemplated in section 160(1) of the Companies Act, 2008, and therefore the application falls within the

ambit of section 160 (2)(b). The Applicant must therefore show good cause why it only made the application almost 20 months after the registration of BOSCH AUTO INVESTMENT (PROPRIETARY) LIMITED.

- 6.2 The Companies Tribunal in COMAIR LIMITED V KUHLULA TRAININ, PROJECTS AND DEVELOPMENT CENTRE (PTY) LLIMITED case number CT007SEP2014, an unreported case stated that the issue of showing good cause in respect of an application for condonation in terms of section 160 is very critical if not decisive. It further went on to state that *“it is not implausible to imagine the adverse impact of applications challenging company names brought years after such names have been registered. This will no doubt affect the credibility of the register kept by regulatory authorities”*

*Although the Companies Act does not explain what it is meant by good cause, it was stated that it entails that an applicant has to at least adduce evidence regarding how it became aware of the reservation or registration of an impugned company name when it became aware and not earlier.”.*

- 6.3 The Companies Tribunal in the same case referring to the case of *Minister of Defence and Military Veterans v Motau and others [2014] ZACC 18 para [54]* wherein it was stated that “good cause may be defined as a substantial or “legally sufficient reason” for a choice made or action taken” came to the conclusion that showing good cause is a factual determination dependent on the circumstances of the particular matter.
- 6.4 The Applicant has not provided facts indicating how it became aware of the registration of BOSCH AUTO INVESTMENT (PROPRIETARY) LIMITED. The facts are necessary to determine good cause and that the Applicant did not wilfully default to make an application earlier than it did. Without good cause shown the main purpose of the legislation dealing with company name objections will be thwart by the adverse impact of applications challenging company names brought years after such names have been registered as it affects the credibility of the register kept by regulatory authorities.
- 6.5 The Applicant has therefore failed to show good cause required in terms of section 160(2)(b) of the Companies Act.

- 6.6 In respect to the application for condoning the Applicant's non-compliance with Regulation 142(2), I refer to the case of *Arthur Layani Khoza v ABSA BANK Limited* unreported case, case number JS 812/2012, the Labour Court held

*"Principles governing condonation This court has in several judgment stated that the principles governing the requirement of granting or refusal of condonation are well established in our law. In terms of these principles the Court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or failure to comply with the time frames, (c) prospects of success or bona fide defence in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.*

*There is also clear authority that these factors are not individually decisive but interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay."*

- 6.7 The Applicant's explanation regarding the failure to serve the Respondent timeously is that it is often very difficult, if not impossible, to effect service of company name objections within the short five day service period provided in the Regulation.
- 6.8 The Applicant did not provide facts or evidence or explain the circumstances showing the difficulty the Applicant experienced in serving the application on the Respondent by delivering the application to the Respondent or sending the application by registered mail to the Respondent's last known address as is required by section 220 of the Companies Act. Such explanation, facts or evidence is necessary to show that the Applicant did not wilfully default to serve the application within the prescribed period.
- 6.9 It has been elsewhere that *Condonation is an indulgence, not to be had merely for the asking. A litigant who does not comply with the rules is required to show 'good cause' why the rules should be relaxed. In the application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. In order to exercise its discretion whether or not to grant*



*condonation, the court must be appraised of all the facts and circumstances relating to the delay.*

- 6.10 Therefore a mere general statement that it is often very difficult, if not impossible to comply with the Regulation is not showing good cause for relaxation of the Regulation.
- 6.11 Although the Applicant indicates that the Applicant has made every attempt to arrange for service of the Company name on the Respondent within the prescribed service period, the Applicant has not explained how such attempts were made or provided evidence of such attempts. Without an indication or evidence of what attempts were made, the Applicant's explanation that it made every attempt to arrange for service on the Respondent within the prescribed time is not a satisfactory and acceptable explanation for the delay in serving the Respondent.
- 6.12 In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, "the court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. It is also important to consider what steps the applicant took as soon as it became aware that he or she was late in terms of the required time frames. The Applicant's prospects of success are in general an important though not decisive consideration. The Applicant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion."
- 6.13 The Applicant has a valid objection against the Respondent's company name in that it is confusingly similar to the Applicant's registered, well known BOSCH trade mark and therefore falls foul of the provisions of section 11(2)(b)(iii) of the Companies Act. In the light of *Melane v Santam Insurance Co Ltd* the validity of the Applicant's objection is immaterial as the Applicant has not provided reasonable and acceptable explanation for the delay in serving the Respondent. Furthermore the Applicant has not shown good cause required in terms of section 160 (2)(b).

## **7. FINDINGS**

7.1 The Applicant has failed to show good cause required in terms of section 160(2)(b) of the Companies Act.

7.2 The Applicant failed to show good cause or provide a substantial or legally sufficient reason for non-compliance with Regulation 142(2) of the Companies Act.

8. **ORDER**

8.1 The following order is hereby made:

The Application is refused

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M A Tsele-Maseloanyane

Member of the Companies Tribunal