



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT008Apr2015

In the matter between:

EDCON LIMITED

Applicant

and

EDGARS LANDSCAPE AND MAINTENANCE (PTY) LIMITED Respondent
(2012/224673/07)

Presiding Member	:	Khashane Manamela (Mr.)
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Date of Decision	:	28 July 2015
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DECISION (Reasons and an Order)

Khashane Manamela

[1] The EDGARS retail chain stores are well known in South Africa and southern Africa.¹ They trade in a wide range of goods and mainly sell clothing, footwear, cosmetics and mobile phone products. The first EDGARS store was opened on 06 September 1929.² These stores, together with the registered EDGARS trade mark³ belong to Edcon Limited (the applicant or Edcon), the applicant in this matter.

[2] Edcon applies that the inclusion of the word or element EDGARS in EDGARS LANDSCAPE AND MAINTENANCE (PTY) LIMITED, which is the respondent's name renders the name non-satisfactory of the requirements of sections 11(2)(b)⁴ and 11(2)(c)(i) of the Companies Act 71 of 2008 (the Companies Act).⁵ According to the applicant, the dominant or memorable part of the respondent's name is the word or element EDGARS.⁶ The applicant submits therefore that the respondent's name is confusingly similar to the applicant's trade mark EDGARS and falsely implies or suggests, or would reasonably mislead a person to believe incorrectly that, the respondent is part of, or associated with the applicant. It applies that the respondent should be directed to choose a new name in substitution of the impugned name.

¹ According to the applicant, there are over 1 300 stores in South Africa, Botswana, Namibia, Swaziland and Lesotho [see paragraphs 6 and 7 on page 7 of the indexed papers (the papers)].

² *Ibid.*

³ The papers list six registrations of the Edgars trade mark over various classes or goods including in respect of "Insurance, financial affairs; monetary affairs; real estate affairs" and "education; providing of training [sic]; entertainment; sporting and cultural activities". See in particular pages 29 and 31, and generally pages 23 to 40 of the papers.

⁴ Reference is inadvertently made to section 11(2)(a)(iii) of the Companies Act on Form CTR 142 to the application dated 13 April 2015 but correct references appear in the rest of the papers.

⁵ See paragraph 4 below for a reading of the relevant part of section 11(2) of the Companies Act.

⁶ See paragraph 17.1 on page 13 of the papers.

[3] The application is not opposed by the respondent and is therefore a request for default order as contemplated in the regulations of this Tribunal.⁷ There is proof in the form of a sheriff's return of service⁸ evincing that the respondent was adequately served with the notice or application. Further, a firm of attorneys corresponded with the applicant's attorneys of record on behalf of the respondent.⁹

[4] As stated above, this application is grounded upon the provisions of section 11(2) of the Companies Act. This section reads 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 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) ...

⁷ Regulation 153 of the Companies Regulations, 2011 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.” The Companies Regulations 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).

⁸ See page 139 of the papers. The sheriff's return state that there was service of the application on the director of the respondent, Mr ME Makhutle on 20 April 2015 at the registered office address. The address is reflected on a certificate from the Companies and Intellectual Property Commission included as annexure “CV2” on page 22 of the papers.

⁹ See paragraphs 4.5-4.7 on pages 0.5 to 0.6 of the papers, which is the affidavit in support of the application for default order.

(iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark or mark, or is authorised by the registered owner to use it; or

(iv) ...

(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...”

[underlining added for emphasis]

[5] Section 11(2), as can be gleaned above, contain a number of statutory proscriptions in respect of company names. These proscriptions range from that a company name ought not to be the same as that of another company, or a trade mark or a mark to that a company name must not be, confusingly similar to another company's name, trade mark or a mark etc.¹⁰ or be such as would “falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company...is part of, or associated with, any other person or entity”.¹¹ I have already stated above that the latter two proscriptions are where the dispute in this matter is located.¹²

[6] The applicant challenges not the whole of the respondent's name, but only the inclusion of the word “EDGARS” in the respondent's name, which the applicant submits is similar to its registered trade mark. As stated above, the

¹⁰ Section 11(2)(b).

¹¹ Section 11(2)(c)(i).

¹² See paragraph 2 above.

respondent did not file papers or proffer through his attorneys an explanation as to its choice and proprietorship of the impugned name. However, amongst the papers filed on behalf of the applicant in support of the relief sought, there is a certificate issued by the Companies and Intellectual Property Commission (the CIPC) dated 11 September 2014.¹³ I note from this document that the respondent has a sole director named MOSHEMANEGAPE EDGAR MAKHUTLE.¹⁴ [my underlining] I therefore deem it conceivable that the respondent's name is derived from one of the names of its incorporator and director, which is EDGAR. I also deem it conceivable that the letter "S" was added to the name EDGAR to indicate possession or that the company belongs to EDGAR. Perhaps, an apostrophe should have been used, but there is nothing in the papers to preclude an inference that the respondent's name originates from its incorporator's name. I do not consider drawing such an inference inimical to the provisions of the Companies Act and its Companies Regulations. To the contrary, I actually find solace from them.¹⁵

[7] I have the benefit of a determination made in another matter of this Tribunal. In **Comair Limited** and **Kalule Fashion's Proprietary Limited**¹⁶ I had this to say:

"[23] Although, the fact that the word KALULE is the surname of the sole director and maybe shareholder of the respondent has influenced the findings I have already made

¹³ See page 22 of the papers. See further footnote 8 above.

¹⁴ *Ibid.*

¹⁵ See generally sections 180(1)(a) and (b) and regulation 154(3) of the Companies Regulations.

¹⁶ Decided on 28 August 2013 under case number: Ctr017/10/2012. This decision is available on the Companies Tribunal website: www.companiestribunal.org.za or from the registrar.

above, I deem it necessary to briefly traverse separately this issue before I conclude this matter. I think I may begin here by quoting the following from *Brian Boswell Circus (Pty) Ltd & Another v Boswell Wilkie Circus (Pty) Ltd*. (82/85) [1985] ZASCA 64; [1985] 2 All SA 512 (A) (22 August 1985):

“In the present case the name adopted by appellants for their circus business is second appellant's own name, Brian Boswell. Assuming for the moment that the adoption of this name is likely to cause deception and/or confusion, the question which arises is whether the second appellant and his alter ego, first appellant, are not entitled willy-nilly to trade under that name. Generally, the courts in this and other countries have shown a reluctance to prevent a man trading under his own name. In England this reluctance is evident in many of the decisions referred to by the Court a quo ... In the United States of America the right of a man to do business under his own name has been described as "one of the sacred rights known to the law" and as "part of the natural and inalienable rights guaranteed by the very first clause of our Constitution" ... And in *Policansky's case*, supra, WESSELS CJ stated it as a cardinal principle that...-

‘A person has a property right or a quasi property right to the use and enjoyment of his own family name as well in carrying on a business and selling his goods as he has to any other species of property consequently every person has a prima facie right honestly to use his own name in his own business and to sell his goods under his own name, and any injury resulting therefrom is a *damnum absque injuria* ...’ [Paragraph 13 of the judgment as reflected on <http://www.saflii.org.za>.]

[24] The aforesaid right has some limitations. For example, the right may be limited where a party has contracted not to use his own name or if “*the business is started for the fraudulent purpose of imitating another's goods and so filching his trade...*” [Paragraph 13 of the judgment as reflected on <http://www.saflii.org.za>.] Yes, there are limitations to every right and this is a view shared by T. Schoeman (Schoeman), the Registrar of Patents, Designs, Trade Marks and Companies in 1968 [*Company Names*, 1968 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 346] when he stated that

“a surname simpliciter, i.e. a surname not qualified either by the first names or initials, or by other descriptive wording, would be refused, as it is not the practice to allow a monopoly in a surname.” So, Schoeman - although he worked under a different statutory environment [The Companies Act 46 of 1926 and perhaps later the Companies Act 61 of 1973] - would have registered the respondent’s name as it is *“qualified ... by other descriptive wording”*, being FASHION or FASHION’S. Here, the CIPC registered the respondent’s name and I would like to imagine that, there was consideration of all relevant elements of the name when doing so, including the fact that the name should not be prohibited in terms of section 11(2) of the Act. [This is required in terms of section 12 of the Act]”

[quoted with altered font and footnotes reference appearing in square brackets in the text]

[8] From the above, it is clear that the respondent is entitled to use his name or surname *“qualified ... by other descriptive wording”*.¹⁷ The respondent’s name is clearly qualified and appears to be descriptive of the respondent’s business. Although, it appears as if, it is no longer a requirement that companies describe their business in the records held with the CIPC¹⁸, the respondent’s name, in my view, is indicative of its business of landscaping and maintenance. If ever there was a doubt, this clearly makes it distinguishable to the applicant’s business, so as to avoid any confusion. I do not accept that the impugned name should be dissected for a memorable or dominant part. The whole name should be considered. This is my understanding of the requirements derived from the

¹⁷ Schoeman 1968 *THRHR* at 346.

¹⁸ For a broad overview on the background and policy considerations regarding the “new” Companies Act see Mongalo T (ed) *Modern Company Law* (Juta 2010).

Companies Act or the Companies Regulations. There may well be other requirements elsewhere, like in the realm of trade marks or intellectual property as a whole, but those are beyond this Tribunal's determinations. Besides, there is no indication of how the respondent's name and the EDGARS trade mark are confusingly similar or could denote association or relationship between the respondent and Edcon or its trade mark. Therefore, I find that the respondent's name does not offend the provisions of the Companies Act as claimed by the applicant.

[9] I have another concern. It is with regard to the timing in the bringing of this application. Although I have already found no merit in the application, I consider the aspect of when, as in date, the application was brought to be significant. I equally consider this issue, on its own, to be decisive of this application. The respondent was registered on 18 December 2012.¹⁹ This application was only issued on 13 April 2015,²⁰ almost two and half years after the registration of the respondent. The application is in terms of section 160 of the Companies Act, which provides the procedural mechanism for applications relating to disputed company names. It 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

¹⁹ See annexure “CV2” on page 22 of the papers.

²⁰ This is the date of the Form CTR 142 and the registrar's stamp, appearing on page 1 of the papers.

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.

[Subs. (1) substituted by s. 99 of Act 3/2011]

(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.

(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is the subject of the application, the Companies Tribunal-

(a) must make a determination whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

[Para. (a) substituted by s. 99 of Act 3/2011]

(b) may make an administrative order directing-

(i) ...

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph."

[underlining added for emphasis]

[10] My understanding of section 160(2) is as follows. In the one instance, where a notice of the registration or reservation of a company name is delivered

to a person or interested person, the recipient of such notice may bring an application disputing registration or reservation of a company name within three months after the date of the notice. In the other instance, where no such notice was delivered, a party affected by the registration or reservation of a company name may “*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*” apply to this Tribunal for relief.²¹ [my emphasis]. There is no time limitation to the second instance, only that when an application is brought, the applicant must show good cause. The Companies Act and its attendant Companies Regulations do not define or explain what is meant by “*on good cause shown*”. In ***Minister of Defence and Military Veterans v Motau and Others***, it was stated that “good cause may be defined as a substantial or “legally sufficient reason” for a choice made or action taken”.²² This is a factual enquiry or determination which obviously would differ from matter to matter, depending on circumstances.²³ An applicant has the duty to provide facts on which the existence of good cause can be determined.²⁴ Absent such facts, good cause hasn’t been shown.

[11] In this matter the applicant appears not to have received a notice of registration of the respondent’s name in terms of section 160(1) of the Companies Act. Therefore, this application ought to be made in terms of section 160(2)(b). As stated above, an applicant in terms of the latter statutory provision

²¹ S 160(2)(b) of the Companies Act.

²² *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 para [54].

²³ *Ibid.*

²⁴ See generally *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W) which dealt with the concept or phrase in an application for rescission of judgment.

has to show good cause why an application is made at the time it was made. The date which is material in this regard is not when the application was made, but when the applicant became aware of the impugned name. For, it is the awareness or gaining knowledge of the impugned name, which will influence the disgruntled party to bring an application or not.

[12] There is no direct indication or submission in this matter of when the applicant became aware of the respondent's name. It is only submitted that *"Soon after becoming aware of the existence of the Respondent, on 16 April 2014, demands were addressed to it by the Applicant's Attorneys"*.²⁵ Therefore, one could infer from the aforesaid that the applicant became aware of the respondent's name during April 2014 or earlier. This was almost one and half years after the respondent's incorporation or perhaps even longer. The applicant did not make any further submissions in this regard. I do not consider the submissions made to amount to showing good cause as required in section 160(2)(b) of the Companies Act.

[13] This Tribunal has already found in other matters that failure to show good cause is decisive and fatal in applications of this nature.²⁶ In my view the same finding is apposite in this matter. This view is also fortified by the fact that I

²⁵ See paragraph 19.1 on page 15 of the papers.

²⁶ 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] and *Heritage Resources Limited v Biofoods South Africa Cc*, an unreported Case NO.: CTR025/02/2013 (Companies Tribunal, decided on 04 May 2015) at para [7]. Copies may be obtained from the website: www.companiestribunal.org.za.

consider myself enjoined to protect the integrity of the company name reservation and registration process. Company names reserved or registered by the CIPC must enjoy some level of certainty and credibility. Once registered, the names, ought to be protected unless found to be contrary to the provisions of the Companies Act. However, any challenges to company names have – in themselves – to comply with the provisions of the Companies Act. In my view this would contribute to meeting the purposes of the Companies Act, including the purpose to “provide a predictable and effective environment for the efficient regulation of companies.”²⁷

[14] Therefore, I confirm my findings above by making the following order:

a) the application is dismissed.

Khashane Manamela

Member, Companies Tribunal

28 July 2015

²⁷ See section 7(l) of the Companies Act.