COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT003DEC2016

In the matter between:

SKYBRIDGE CC (2004/093793/23)	First Applicant
OLEG MIKHAYLOVICH BROKORENKO	Second Applicant
and	
SKYBRIDGE CONSULTING AND ENGINEERING (PTY)LTD (2015/394103/07)	First Respondent
CIPC (COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY REGISTRATION OFFICE)	Second Respondent

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Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	31 January 2017

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The first applicant is a close corporation whose sole member is the second applicant. It was granted exclusive licence in South Africa by the second applicant for the use of the second applicant's registered trade mark "SYKBRIDGE". The second applicant is a businessman in the field of telecommunications, concentrating on satellite television, related equipment and services relating to the aforesaid business areas.[1]

[2] The first and second applicants (the applicants) seek an administrative order against the first respondent to change its registered name as it is alleged to be infringing upon the applicants' trade mark. They submit that the first respondent's name does not meet or satisfy the requirements of section 11 of the Companies Act 71 of 2008 (the Companies Act).[2] Consequently, the applicants request this Tribunal to order the first respondent to choose a new name compliant with provisions of the Companies Act in substitution of its current name.

[3] The application is unopposed, as both the first and second respondents have not filed any answer. Therefore, a determination of this application will be in the form of an application for default order, as contemplated in the provisions of regulation 153 of the Companies Regulations, 2011.[3] But, the application was served by the sheriff by way of

[1] See pars 1.4 to 2.1.3 of the supporting affidavit to the application.
[2] See par 8 below for a reading of the material parts of section 11 of the Companies Act.
[3] Regulation 153 reads as follows: "(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

affixing a copy thereof to the principal gate at the first respondent's registered office address. Service upon the second respondent appear to have been effected by hand on the same date as the issuing of this application.[4] This method of delivery is recognised in terms of the Companies Regulations.[5] Therefore, I am satisfied that the application was adequately served on both respondents.[6]

Procedural issues

[4] The first respondent's name was registered on 9 November 2015. The applicants submit that they became aware of the existence of the first respondent's name as far back as February 2016.[7] The application, as stated above, was only served and filed in December 2016. There is no explanation from the applicants as to the timing of this application or what transpired between February and December 2016.

[5] In terms of section 160(2)(b) of the Companies Act a person who is not served with a notice in terms of section 160(1) of the Companies Act can bring an application in respect of name dispute at any time upon showing good cause.[8] The lack of an

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described in subsection (1) and on every other party.". The Companies Regulations were published by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 under GN R351 in Government Gazette 34239 of 26 April 2011.

[4] The first page of the supporting affidavit to be application bears what appears to be the second respondent's (legal division's) ink stamp impression of the 07 December 2016. This Tribunal's ink stamp impression for the same date appears on Form CTR 142 to the application.

[5] See Table CR3 of Annexure 3 of the Companies Regulations.

[6] This is a requirement in terms of regulation 153(2)(b). See footnote 3 above for a reading of regulation 153(2)(b).

[7] See pars 4.1 and 4.2 of the supporting affidavit.

[8] Sections 160(1) and (2) read as follows in the material part: " (1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a 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 …registration or use of the name …satisfies the requirements of this Act.

(2) An application in terms of subsection (1) may be made-

explanation as to why the application was not brought earlier is often fatal to the outcome of applications of this nature.[9] However, in this application I consider it to be in the interests of justice based on the circumstances of this matter to proceed to deal with the merits of this matter, despite the shortcoming which may even qualify as a condonable technical irregularity.[10]

[6] I am fortified in this approach by the fact that the second respondent did not take issues with this aspect, after it was adequately served with this application. Even more so, this application is primarily for the protection of a trade mark which was in existence at the time the first respondent was registered.[11] In my view any disposal of this application on this procedural issue alone, without consideration of the merits, may be delaying the inevitable and therefore a futile exercise. The applicants would be entitled to relaunch the application, once they have addressed the shortcoming as to the delay in bringing the application and proffering an explanation for the intermission between February and December 2016. Also in my view the delay inordinate. Besides, the regulation is not cast in stone and therefore with a strong case on the merits, it is conceivable that this Tribunal would invariably proceed to a determination based on the merits of the application. Depending on circumstances, matters of form would always yield to those of substance. And there is no relief sought against the second respondent.

(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."

[9] See the Companies Tribunal decision of *Comair Limited v Kuhlula Training Projects and Developments Centre (Pty) Ltd*, case/file number: CT007SEP2014 decided on 27 February 2015. A copy of this decision and other decisions of this Tribunal may be obtained from the website: www.companiestribunal.org,za.

[10] See regulation 154(3).

[11] The trade mark was registered on 08 October 1998; 10 May 2005 and 30 May 2005 in terms of extracts from the trade marks register included as annexures "B1"- "B3" to the application.

Merits

[7] As indicated above, the applicants complain that the first respondent's name does not satisfy the requirements of the Companies Act. Firstly, they challenge the name as they consider it to be in breach of the provisions of section 11(2)(b) and secondly of section 11(2)(c), both of the Companies Act.

[8] Sections 11(2)(b) and (c) of the Companies Act read as follows in the material part:

> "**11. Criteria for names of companies**
> (1) …
> (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) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;
> (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) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;
> (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…"

[9] The first applicant is the registered proprietor of the trade mark "SKYBRIDGE" in respect of classes 37, 38 and 41 over the following goods and services: satellite, television, video equipment service and installation, telecommunications, education; training; entertainment; sporting and cultural activities.[12] The trade mark was registered between 1998 and 2005 and therefore remains valid and, as indicated above, was in existence at the time of the incorporation of the first respondent.[13] The applicants submit that the first respondent's name is in conflict with provisions of the Companies Act in respect of its trade mark.

Section 11(2)(b) of the Companies Act

[10] The first part of the challenge is in terms of section 11(2)(b) of the Companies Act. It is submitted in this regard that the first respondent's name is confusingly similar to the applicants' trade mark "SKYBRIDGE". It is contended that the dominant part of the first respondent's name is the word "SKYBRIDGE" and that the other part of the first respondent's name does not distinguish it from the applicants' trade mark. Consequently, it is submitted that there is confusing similarity between the two.

[11] Due to the confusing similarity, it is likely that members of the public would be confused, especially if the first respondent's area of business overlaps with the business area of the applicants, it is further submitted. I agree. The facts are, in my view, much clear as the first respondent's name is dominated by the word "SKYBRIDGE". The other parts of the first respondent's name (i.e. "CONSULTING AND ENGINEERING") are

[12] See annexures "B1"- "B3" to the application.
[13] See annexure "A" to the application.

almost generic. Confusion of the first respondent's name and the applicant's trade mark as being similar is established.

Section 11(2)(c) of the Companies Act

[12] The second part of the challenge is based on section 11(2)(c) of the Companies Act. It is submitted that the first respondent's name falsely implies or suggests or is such as would reasonably mislead a person to believe incorrectly that the first respondent is "part of, or associated with, any other person or entity"[14] with the applicants and consequently the applicants' business. By and large the same argument is raised here, as in confusing similarity above. I also agree that there is the likelihood that the first respondent or its business may be incorrectly associated as forming part of the applicants. Without authority or consent as to use from the applicants, the first respondent cannot include the word "SKYBRIDGE" as part of its name, lest the name is found not to satisfy the requirements of the Companies Act, as herein.

Conclusion

[13] Therefore, the applicants are successful and the first respondent will be ordered to change its name to one which satisfies the provisions of the Companies Act.

[14] Therefore, I make the following order:

a) the first respondent's registered company name "**SKYBRIDGE CONSULTING AND ENGINEERING**" does not satisfy the requirements of the Companies Act 71 of 2008;

[14] See par 8 above for a reading of section 11(2)(c) of the Companies Act.

b) the first respondent is directed to choose a new name and file a notice of amendment to its Memorandum of Incorporation;

c) the first respondent is directed to complete the activities ordered in b) hereof within three (03) months of service of this order upon the respondent in terms of regulation 153(3) of the Companies Regulations, 2011.

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Khashane La M. Manamela
Member, Companies Tribunal
31 January 2017