



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT003NOV2015

In the matter between:

ANGLO AMERICAN SOUTH AFRICA LIMITED

Applicant

and

**ANGLO SHARIAH CAPITAL (PTY) LTD
(2013/101205/07)**

Respondent

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

Date of Decision : 22 February 2017

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The applicant in this matter is a public company and part of the Anglo-American group of companies (the Anglo-American Group). It was previously known as Anglo American Corporation of South Africa Limited until 14 April 2005.¹

[2] The Anglo American Group is a Fortune 500 and one of the world's largest mining organisation, operating in five continents in the mining of "iron ore, manganese, metallurgical coal, thermal coal, base metals and minerals – being copper, nickel, niobium and phosphates and precious metals and minerals – being platinum and diamonds".²

[3] The applicant is the proprietor of the trade mark "ANGLO", which was first adopted in 1917 by Sir Ernest Oppenheimer in respect of gold mining operations on the East Rand, Johannesburg, South Africa.³ The trade mark is registered in respect of goods and services in classes 35⁴ and 36.⁵

¹ See par 2.1 on p 2 of the founding affidavit.

² See par 4.7 on p 7 of the founding affidavit.

³ See par 4.6 on p 7 of the founding affidavit.

⁴ Class 35 goods and services are described as follows: "Advertising and business including business consulting, direction, information, enquiries, inspection, management, planning, research, supervision and valuations; expert assessments in business matters and surveys on business returns; financial appraisals; export and import agencies; management of commercial, industrial and mining enterprises; commercial projects; publicity, issuing and hire of publicity material and issuing a prospectuses; public relations; stock exchange prices." See par 4.2.1 on p 6 of the founding affidavit.

⁵ Class 36 goods and services are described as follows: Insurance and financial including actuarial work in insurance, agents and brokers for credit, bonds and other securities and insurance; assurance, banking; investment services; financial clearing houses; credit, advice and enquiries regarding credit; factoring; customs broking; estate agents; deposit of securities and all stocks and shares; leases of farming development, farming services; financial services, guarantees, securities, transactions and financing generally; hire purchase and financing of hire purchases; investment and investment of businesses; monetary transactions; real estate management, leasing, valuation and development; savings banks, societies and companies; stock brokers and stock broking agencies". See par 4.2.2 on p 6 of the founding affidavit.

[4] From its 2013 registration date,⁶ the respondent appears to be a fairly new company. It adopted a registered office address in the KwaZulu-Natal province of South Africa and shares both its postal and physical addresses with its sole director.⁷ The latter address serves as the respondent's registered office.⁸ Not a great deal more can be said about the respondent as it is not participating in these proceedings and did not file any answer to the application.⁹

[5] The application was served on the respondent by way of affixing to the principal door at its registered office address by the sheriff on 11 November 2015.¹⁰ It appears from the sheriff's return of service that the respondent's registered office address may be a private dwelling belonging to a third party who may have nothing to do with the respondent. The following remarks appear from the return of service: "THIS IS MRS SKIPHERMAN'S HOUSE NOT COMPANY AND MRS SKIPHERMAN WAS PRESENT".¹¹ However, service by way of affixing is an acceptable method of delivery of documents relating to this Tribunal.¹² I am therefore satisfied that the application was adequately served on the respondent¹³ and will proceed to make a determination on a

⁶ The respondent was registered on 18 June 2013. See annexure "AS 3", being a certificate issued by the Companies and Intellectual Property Commission on 03 August 2015.

⁷ See annexure "AS 3".

⁸ *Ibid.*

⁹ See regulation 143 of the Companies Regulations, 2011.

¹⁰ See return of service by the sheriff of the Pietermaritzburg Magistrates Court dated 20 November 2015.

¹¹ *Ibid.*

¹² See Annexure 3 of Table CR3 of the Companies Regulations.

¹³ See regulation 153 of the Companies Regulations which reads: "(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."

default order basis, as contemplated by regulation 153 of the Companies Regulations, 2011.¹⁴

[6] The applicant complains that the respondent's name "ANGLO SHARIAH CAPITAL" or inclusion of the word "ANGLO" in the respondent's name offends the applicant's trade mark "ANGLO" and therefore does not satisfy the requirements of section 11 of the Companies Act 71 of 2008 (the Companies Act).

[7] The application was filed with this Tribunal in November 2015, but the applicant appears to have been hesitant in pursuing the matter to finality and had to be urged by the office of the registrar of this Tribunal to take steps towards finalisation of the matter. However, to the applicant's credit, there were informal attempts towards amicable resolution of the matter with the respondent, but in vain.

[8] Still on informal attempts at amicable resolution of the name dispute, the applicant also sent correspondences between June and August 2014 demanding that the respondent cease and desist the use of the impugned name. The respondent, through what appears to be its accountants or incorporators, responded and undertook to stop using the name, but failed to honour the undertaking. Therefore, the only option left for the applicant was to bring this application in terms of section 160 of the Companies Act for relief based on the provisions of sections 11(2)(b) and 11(2)(c), also of the Companies Act.

¹⁴ *Ibid.*

[9] Sections 11(2)(b) and 11(2)(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...”

[10] As indicated above, the applicant submits that the respondent’s name or inclusion of the word “ANGLO” in the respondent’s name is in conflict with the provisions of the Companies Act in that the name is confusingly similar to its trade mark “ANGLO” (as envisaged in section 11(2)(b)) or is falsely implies or suggests or is such as would

reasonably mislead a person to incorrectly believe that the respondent is part of or associated with the applicant (as envisaged in section 11(2)(c)). It is further submitted that the inclusion of the other words in the respondent's name like "SHARIAH" and "CAPITAL", which are labeled descriptive words,¹⁵ does not distinguish the respondent's name from the applicant's trade mark.

Conclusion

[11] I do not consider it warranted to produce a thesis on this very straightforward dispute. I agree with the views of the applicant and accept the submissions made in this regard. Therefore, I find that the respondent's name does not satisfy the requirements of the Companies Act and will consequently order that the respondent change its name.

[12] Although I do not find this necessarily decisive on the issue or even influential to the determination made herein, I nevertheless feel compelled to add this, particularly with the order that is to be made with regard to costs. The respondent conceded that the name offends the applicant's trade mark as far back as June 2014 through correspondence by the respondent's accountants or incorporators. The material part of the concession says:

"It [the company] is a newly registered company, and there was no intention to infringe on the name "ANGLO".

In order not to infringe on the name ANGLO, we hereby undertake to change the name of the company or alternatively, de-register the company."¹⁶

¹⁵ See par 4.5 on p 7 of the founding affidavit

¹⁶ See annexure "AS5" to the founding affidavit, being an electronic mail dated 19 June 2014 from Ismail Khan to Herman Blignaut.

Costs

[13] As part of the abovementioned relief, the applicant also requests this Tribunal to grant a costs order against the respondent. Regulation 156(1) of the Companies Regulations provides that “Upon making an order, the Tribunal may make an order for costs”. [I added the underlining for emphasis] In my view, the aforesaid is crafted in a way that it denotes the exercise of discretion by this Tribunal comparable to that of the High Court, albeit with obvious statutory limitations entrapping this Tribunal.

[14] It is trite that the award of costs is in the discretion of the adjudicating body or person.¹⁷ Invariably costs are awarded to the successful litigant, but conduct of the unsuccessful party may influence this part of the determination. Although, the respondent did not live up to its informal undertakings to voluntarily cease and desist the use of the impugned name, there is no evidence suggesting that it continued trading or operations under the name. Everything points to an inadvertent choice of company name by a start-up company. I also did not detect any malicious attempt by the respondent to infringe upon the applicant’s trade mark or take advantage of the applicant’s goodwill. These are, but some of the issues weighing against mulcting the respondent with any costs. Therefore, no order as to costs will be made.

[15] Therefore, I make the following order:

¹⁷ See *Greater Johannesburg Metropolitan Council (Johannesburg Administration)* 1999 (1) SA 104 (SCA) at 109A-B; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F-G; *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23F-28F.

- a) the respondent's registered company name "**ANGLO SHARIAH CAPITAL**" does not satisfy the requirements of the Companies Act 71 of 2008;
- b) the respondent is directed to choose a new name and file a notice of amendment to its Memorandum of Incorporation;
- c) the 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, and
- d) there is no order as to costs.

Khashane La M. Manamela
Member, Companies Tribunal
22 February 2017