



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT00155ADJ2019

In the matter between:

ASTRAL OPERATIONS LIMITED

APPLICANT

and

**EARLY BIRD AGRICULTURAL PRIMARY
CO-OPERATIVE LIMITED**

FIRST RESPONDENT

**COMMISSIONER OF THE COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION**

SECOND RESPONDENT

in respect of objection to company name

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	30 September 2020

DECISION (Order and Reasons)

Summary: Objection to the first respondent's company name **EARLY BIRD AGRICULTURAL PRIMARY CO-OPERATIVE LIMITED** i.t.o. ss 11(2)(b) and 11(2)(c)(i) of the Companies Act 71 of 2008 – exemption granted in terms of section 11(2)(b) on the basis that the first respondent's name is confusingly similar to the applicant's trade mark EARLYBIRD – *obiter dicta* about misgivings regarding the delay in bringing this application and the subsequent request for default order – held, application granted, but no costs order due to peculiar circumstances of this matter - held, the applicant is to submit proof of the validity of the trade mark to the registrar

Khashane La M. Manamela

Introduction

[1] The applicant, Astral Operations Limited, is a public company listed on the Johannesburg Stock Exchange. It conducts business primarily in poultry production and chicken feed in Southern Africa. The applicant objects to the inclusion of the words “EARLY BIRD” in the first respondent’s name EARLY BIRD AGRICULTURAL PRIMARY CO-OPERATIVE. It is submitted that the first respondent’s name, inclusive of the words “EARLY BIRD”, does not satisfy the requirements of sections 11(2)(b) and 11(2)(c)(i)¹ of the Companies Act 71 of 2008 (the Companies Act) regarding the applicant’s registered trade mark “EARLYBIRD”. The application is unopposed by both first and second respondents.

[2] The application is before me in the form of a request for a default order.² Whilst the first respondent was served with the process, as far back as September 2019, there is no proof of service upon the second respondent, the Companies and Intellectual Property Commission (the CIPC). There is no explanation for this apparent omission.

[3] The relief sought in terms of this application includes that the CIPC be directed to substitute the first respondent’s registration number for its name in the event that the first respondent fails to comply with an order that it amends its name or memorandum of incorporation reflecting same. Obviously, this part of the relief is inchoate without proof of service of the application on the CIPC. I will still proceed to determine the application

¹ See par [11] below, for a reading of the material part of section 11(2) of the Companies Act.

² An application for default order is in terms of regulation 153 of the Companies Regulations, 2011. See footnote 3, below, for a reading of regulation 153.

for purposes of the rest of the relief sought by the applicant in respect of the first respondent.

[4] But before I deal with the merits of the application it is necessary to deal with some pertinent issues regarding the timing of the launch of this application and the interval between the service of the application and the filing of the request for default order.

Brief background

[5] This application was issued by this Tribunal on 16 September 2019. The deposition in the founding affidavit filed by the applicant in support of this application was on 06 August 2019. This is over a year ago.

[6] Still on 16 September 2019 this application was served on the first respondent by the sheriff of Cala and Elliot, Eastern Cape. The sheriff's return of service states that the process was served by handing a copy thereof to Mrs L Mateta. According to the applicant's attorneys of record Mrs Mateta appears to be the wife of one of the first respondent's directors, Mr Hamilton Gcinisango Mateta. The first respondent has to date not filed any papers in opposition to the relief sought by the applicant.

[7] But it was only over a year later on or around 09 September 2020 that the applicant filed an application for default order, envisaged by regulation 153³ of the

³ Regulation 153 reads in the material part: "(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,

Companies Regulations. The delay from the moment of service of the application on 16 September 2019 - and to be exact 20 business days after service of the application (during which period the first respondent was expected to file its answer in terms of regulation 143)⁴ - and 09 September 2020 when the request for default order was made, to say the least, is quite inordinate.

[8] But it is not the only delay on the part of the applicant relevant to these proceedings. The following further material in the background of this matter would reveal that this application could have been launched much earlier than September 2019:

[8.1] the applicant became aware of the first respondent's name in July 2017 whilst conducting searches of the CIPC's records on unrelated matter. The applicant though waited almost two months before instructing its attorneys of record to take action.

[8.2] the applicant's attorneys sent a letter of demand to the first respondent by registered post. The letter was also served on the first respondent by the sheriff on 20 September 2017. Notably this was a year before this application was issued and couple of years before the request for default order was filed with this Tribunal.

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) ...; 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."

⁴ Regulation 143 reads in the material part: "(1) Within 20 business days after being served with ... an application, that has been filed with the Tribunal, a respondent who wishes to oppose the ... application must – (a) serve a copy of an Answer on the initiating party; and (b) file the Answer with proof of service."

[8.3] during September and October 2017 the applicant, through its attorneys, communicated with the first respondent's director in an attempt to amicably resolve the matter. This appeared to yield some results as on 18 October 2017 the first respondent's director undertook to deregister the first respondent, as opposed to just changing its name.

[8.4] between October 2017 and March 2018 there were no recorded activities on either the applicant's or the first respondent's part. This is a period of over 4 months.

[8.5] from March 2018 to 09 July 2018 the applicant's attorneys sent further correspondences to the first respondent enquiring about progress in the first respondent's deregistration process, to no avail.

[8.6] in October 2018 the first respondent's director responded to one of the applicant's letters. He cited the death of his brother as the cause of the delay or impediment in the registration process. He requested a further two weeks to finalise the process. And when there was no progress after three weeks, the applicant's attorneys followed up with another letter sent to the first respondent.

[8.7] on 28 September 2018 there was correspondence from the first respondent's director. This time he mentioned that the delay was caused by the lack of copies of IDs or identity documents from his fellow members of the first

respondent. These documents were apparently required to deregister the first respondent. But nothing materialised from all these until on 04 February 2019 and 20 February 2019 when the applicant's attorneys sent other letters to the first respondent. In the letter of 20 February 2019 the first respondent was advised to expect formal legal or "court" process. Despite the lack of tangible response to these letters, the applicant's attorneys still sent two more letters in March 2018 to the first respondent.

[8.8] after the letters in March 2018 the applicant again waited for more than 5 months before launching this application in September 2019. As stated above, the first respondent was served with this application also in September 2019.

[8.9] but, as stated above, there was to be a delay of almost a year before the applicant filed the request for default order earlier this month.

[9] The above material in the background is critical for this application as in terms of section 160(2)(b) of the Companies Act applicant has to show good cause why an application was made on the date it was made, as opposed to within a period of three months from a date stipulated under section 160(2)(a) of the Companies Act.⁵ I am aware that good cause would not have to be shown for the delay after the launch of the

⁵ Section 160 reads 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 reservation, registration or use of the 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."

application. Unfortunately, there is no provision to manage this in the Companies Regulations. I will deal with the delay before the launch of the application together with the merits of the applicant's case.

Applicant's case

[10] The applicant's case is that the first respondent's name offends the provisions of section 11(2) of the Companies Act, due to inclusion of the words EARLY BIRD.

[11] Section 11(2) of the Companies Act reads in the material part:

“(2) The name of a company must-

(a) not be the same as -

(i) ...

...

(iii) a registered trade mark ...

(b) not be confusingly similar to a ... trade mark ... 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;

...

(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...”

[12] The applicant's contention is that the first respondent's name, as currently constituted and incorporating the applicant's trade mark “EARLYBIRD”, does not satisfy the provisions of section 11(2) of the Companies Act. This is so because according to the

applicant the first respondent's name is confusingly similar to the applicant's trade mark and 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 the applicant. These contentions are based on sections 11(2)(b) and 11(2)(c)(i) of the Companies Act, respectively.

[13] Let me start with section 11(2)(b). It is submitted that the first respondent's name wholly incorporates the applicant's trade mark. It is further submitted that the words AGRICULTURAL PRIMARY CO-OPERATIVE are non-distinctive and therefore they are not sufficient to distinguish the first respondent's name from the applicant's registered trade mark. I agree with these submissions. The first respondent's name is confusingly similar to the applicant's trade mark even though the latter is constituted with no space between the words "early" and "bird", whilst the former is.

[14] But even with the abovementioned favourable outcome to the applicant, the matter does not end there. The impugned trade mark in favour of the applicant was registered long time ago in 1981. The other applicant's trade marks were registered in 1984 and 1986. I doubt that the trade mark EARLYBIRD would still offer exclusivity to the applicant, so many years later.

[15] But the applicant and its attorneys would probably have something definite to say about this. So, I would grant an order, subject to the applicant producing an official extract certified by the CIPC or the applicable statutory authority of the validity and

exclusivity of the trade mark EARLYBIRD in favour of the applicant as at the date of this decision. In the event of non-compliance on the part of the applicant within a stipulated timeframe, this order would become a nullity. This is not to doubt anyone's *bona fides*, but to ensure that this Tribunal's jurisdiction or facilities are employed towards valid, legitimate and just causes of South African natural and corporate citizens.

[16] As stated above, the applicant also sought that in the event that the relief sought is granted and the first respondent fails to change its name within the stipulated timeframe, the CIPC ought to be directed to replace the first respondent's name with the first respondent's registration number.

[17] I have already lamented that there is no proof of service of the application on the CIPC. Naturally, the relief sought against the CIPC is stillborn without prior notice of these proceedings to the CIPC. But that does not really matter, as in my opinion, this Tribunal does not have jurisdiction to grant such an order. I have held this view previously in other matters and I am still unpersuaded by views to the contrary expressed by my fellow members of this Tribunal. There is simply no room for such an order, no matter how much everyone may be concerned about the first respondent's lethargy or contempt in implementing an order granted by this Tribunal.

Conclusion (and costs)

[18] As already stated, the applicant is successful in the relief it sought. The applicant also sought a costs order against the first respondent. I think in the circumstances of this matter, costs ought not to follow the outcome.

[19] The first respondent or, actually, its functionaries, does/do not appear to have been calculated or influenced by *mala fides* in including the words EARLY BIRD in the first respondent's name. Also, I do not think the circumstances of this matter warrant a costs order, apart from the order for a change of name. Therefore, I would not exercise to the applicant's benefit the discretion afforded by regulation 156 of the Companies Regulations.⁶ Overall, the first respondent and its functionaries do not appear to have been motivated by profit-making motives, but socio-economic circumstances objectives.

Order

[20] Therefore, an order is made in the following terms:

- a) that, the first respondent's registered company name "**EARLY BIRD AGRICULTURAL PRIMARY CO-OPERATIVE LIMITED**" does not satisfy the requirements of section 11(2)(b) of the Companies Act 71 of 2008;

⁶ See regulation 156(1) of the Companies Regulations, which reads: "Upon making an order, the Tribunal may make an order for costs."

- b) that, the first respondent is directed to choose a new name and file a notice of amendment to its Memorandum of Incorporation;
- c) that, the first respondent is directed to complete the activities ordered in b) hereof within three (03) months of service of this order upon the first respondent in terms of regulation 153(3) of the Companies Regulations, 2011;
- d) that, the applicant is to produce and submit to the registrar or recording officer of this Tribunal an official or certified extract from the CIPC or the applicable statutory authority confirming that the trade mark EARLYBIRD is still validly and exclusively registered for the benefit of the applicant as at the date of this decision;
- e) that, orders a) to c) above would become operative only upon confirmation by the registrar or recording officer of this Tribunal that order d) above has been complied with by the applicant, and
- f) that, the registrar or recording officer of the Companies Tribunal is requested to bring this decision to the attention of the Commissioner of the Companies and Intellectual Property Commission for noting.



Khashane La M. Manamela

Member, Companies Tribunal

30 September 2020