



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00560ADJ2021

In the matter between:

TRANSITAL ENGINEERING (PTY) LTD

Applicant

and

TRANSITALWORX (PTY) LTD

Respondent

(Registration Number: 1981/005525/07)

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Hearing	:	05 May 2021
Date of Decision	:	21 June 2021

DECISION (Order and Reasons)

Summary: Application to object to the respondent's name TRANSITALWORX under s 160 of the Companies Act 71 of 2008 (the Companies Act). The application is based on s 11(2)(b)(i) (i.e. that the respondent's name is confusingly similar to the applicant's name TRANSITAL ENGINEERING) and s 11(2)(c)(i) (i.e. that the respondent's name denotes an association between the applicant and the respondent) of the Companies Act. The respondent was registered in 1981 under the name TRANSITAL; the applicant in 1998 and the objection was raised after the respondent changed its name from TRANSITAL to TRANSITALWORX in 2020. Held, that the applicant did not invent the word or name TRANSITAL and thus has no right to exclude the respondent from the use of the word and that the respondent's name does not offend the provisions of the Act. Also, held - with regard to the respondent's preliminary objections that the applicant delayed in the prosecution of this application in breach of s 160(2) of the Companies Act and that the Companies and Intellectual Property Commission ought to have been joined as a party to these proceedings – that the objections are dismissed. Further, held, that the facts of the matter do not warrant an order as to costs against either party.

Khashane La M. Manamela

Introduction

[1] This is an application in terms of section 160¹ of the Companies Act 71 of 2008 (the Companies Act). It concerns an objection to the use and/or registration of the company name “TRANSITALWORX” or the inclusion of the word “TRANSITAL” in the name. Evidently, the word “TRANSITAL” is included or incorporated in the names of both parties in this application, as cited above. TRANSITAL ENGINEERING (PTY) LTD (the Applicant) was registered in 1998, whereas TRANSITALWORX (PTY) LTD (the Respondent) was registered about 17 years earlier in 1981. From 1981 when it was registered until July 2020 the Respondent was known as TRANSITAL. The Respondent changed its name from TRANSITAL to TRANSITALWORX on 10 July 2020.

[2] The Applicant objects to the registration and/or use of the name TRANSITALWORX by the Respondent. It contends that the Respondent’s name does not satisfy the requirements of sections 11(2)(b)(i) and 11(2)(c)(i)² of the Companies Act. The Applicant requests this Tribunal to make a finding to that effect and further to direct the Respondent to change its name. The application is opposed by the Respondent including on the ground that the Respondent was first to include the word TRANSITAL in its registered company name as far back as 1981.

[3] The opposed application came before me on 05 May 2021. Mr CP Wesley appeared on behalf of the Applicant whereas Mr JC Viljoen appeared on behalf of the Respondent. Both counsel had filed very useful written argument. I take advantage of the

¹ See par [20], below, for the reading of the material part of s 160 of the Companies Act.

² See par [19], below, for the reading of the material part of s 11(2) of the Companies Act.

opportunity to express my gratitude for same to both counsel, their instructing attorneys and clients. I reserved this decision after listening to oral argument by counsel.

[4] At the commencement of the hearing I had listened to argument by counsel on two points in *limine* or preliminary objections raised by the Respondent. The first point was that the Applicant delayed in the prosecution of this application in breach of section 160(2)³ of the Companies Act. The second point was that the Companies and Intellectual Property Commission (the CIPC) ought to have been joined as a party to these proceedings to give effect to the relief sought by the Applicant. I also reserved my rulings on the preliminary points. I considered the rulings or at least on the first point to require a consideration of the merits of the matter.⁴ In the circumstances of this matter it was also warranted that a wholesale approach (rather than a piecemeal one) be adopted in the determination of the facts of this matter. I will deliver my rulings on the points in *limine* or objections after the discussion of the relevant issues in the merits of this matter, below.

Applicant's case or submissions

[5] The Applicant's case is essentially derived from the affidavits filed and the oral and written argument by Mr CP Wesley, who appeared at the hearing as counsel for the Applicant. I have in some instances indicated the Respondent's responses on the issues, but the Respondent's case (discussed later) would reflect the full spectrum of the responses.

³ See par [20], below, for the reading of the material part of s 160 of the Companies Act.

⁴ The first point in *limine* requires that "good cause" be shown for the timing of the application brought outside of the period prescribed by s 160(2) of the Companies Act. Showing "good cause" would involve the merits of the matter, even if only at a superficial level or by just taking a peek into the merits at the preliminary stage. See par [20], below, for the reading of s 160(2) of the Companies Act.

[6] The parties are competitors in the medium to heavy engineering and have the same or similar pool of customers. They are both based in Johannesburg. The Applicant specialises in the manufacture of steel components for equipment used in underground mining. It also does machining processes, including machining of cane knife palms for a client called Thomas Foundry (Pty) Ltd (Thomas Foundry) based in Germiston, Johannesburg. The knife palms are on-sold by Thomas Foundry to sugar cane farmers. The relationship between the Applicant and Thomas Foundry has been in existence for many years.

[7] A central figure, or as Mr Wesley for the Applicant puts it, “the guiding mind” behind the formation of the two companies is a gentleman called Mr Daniele Olivi (Olivi). Olivi established the Respondent in 1981, then known as TRANSITAL. He established the Applicant in 1998. It was named TRANSITAL ENGINEERING. In 2018 Olivi sold his shares in the Applicant to a company called Oschar Investments (Pty) Ltd. The final sale agreement was concluded on 10 August 2020, after the parties had concluded what appears to have been a preliminary sale agreement in June 2018. Olivi had by then already resigned as a director of the Applicant on 10 July 2020. This date – perhaps by sheer co-incidence – is the date on which the Respondent changed its name from TRANSITAL to the current TRANSITALWORX.

[8] The Applicant says that it did not receive a notice of the change of name or the registration of the name TRANSITALWORX. Such notice is contemplated by section

160(1)⁵ of the Companies Act and would involve the CIPC. The date of receipt of the notice in terms of section 160 is relevant to the timing of the launch of an application such as this one. The timing of the launch of this application is the central issue in the determination of the first point in *limine*.⁶

[9] Also, it is contended that when purchasing Olivi's shareholding in the Applicant, the purchasers were not aware of the existence of the Respondent or the use of the name TRANSITAL by another entity related to Olivi. According to the Applicant it only became aware of the existence of the name TRANSITALWORX on 06 November 2020. Notably, this was almost four months after the Respondent had started using the name on 10 July 2020. Also, six months earlier in May 2020, the Applicant had been requested by its longstanding customer Thomas Foundry to furnish a quotation for the machining of cane knife palms. The Applicant says it did not know why no order was placed by Thomas Foundry until on 06 November 2020. One of its functionaries was informed by an employee of Thomas Foundry that the latter ended up placing the order with TRANSITALWORX. It is said that Olivi was instrumental in this turn of events and had actually told Thomas Foundry that the Respondent had taken over the Applicant's assets, plant and equipment leaving the Applicant with no capacity for the machining of cane knife palms. The latter statements or allegations are disputed by the Applicant.

[10] It is submitted that the Thomas Foundry quotation-incident made the Applicant realise that it had a competitor called TRANSITALWORX. The Applicant considers the

⁵ See par [20], below, for the reading of the material part of s 160 of the Companies Act.

⁶ See pars [22]-[27] below regarding the first point in *limine*.

choice of the name TRANSITALWORX by the Respondent to be intended to take advantage of the Applicant's good name and business reputation. After becoming aware of TRANSITALWORX on 06 November 2020, the Applicant says it had to engage its attorneys of record, conduct investigations and engage counsel in preparation of this application. The application was filed on 28 January 2021. As already indicated, the timing or the date of filing of this application is relevant to the Respondent's first point in *limine* that the Applicant delayed in the launch of this application. I deal with this in detail later, below.

[11] The Applicant's case is essentially that the name TRANSITALWORX does not satisfy the provisions of section 11(2)(b)(i) (i.e. that the name is confusingly similar to its name), alternatively, section 11(2)(c)(i) (i.e. that the name falsely implies or suggests or is such as would reasonably mislead a person to believe incorrectly that the Respondent is part of or associated with the Applicant), both of the Companies Act.⁷ Consequently, the Applicant requests that this Tribunal should make a finding to that effect and direct the Respondent to change its name and pay the costs of this application.

Respondent's case or submissions

[12] The Respondent's case is also essentially contained in the answering affidavit filed and the oral and written argument by Mr JC Viljoen, who appeared at the hearing as counsel for the Respondent. As with the Applicant's case, I have in some instances indicated the Applicant's response on the issues, to be read against the full spectrum of the issues in the Applicant's case stated above.

⁷ See par [19] below for the reading of section 11(2).

[13] According to the Respondent, both the Applicant and the Respondent belonged to “the same group of companies from 1998 up until about 2018” as they shared a common director and shareholder: Olivi. But the Applicant denies that the commonality of directors and shareholders made the Applicant and the Respondent “a group of companies”, as defined in section 1⁸ of the Companies Act. I instantaneously agree with the latter submission on behalf of the Applicant.

[14] The Respondent was registered in 1981. But the Applicant denies the relevance of the fact that the Respondent was registered in 1981 under the name TRANSITAL for the defence of this application by the Respondent. The Respondent states that it changed its name in July 2020 from TRANSITAL to TRANSITALWORX for the purpose of avoiding any confusion that it was in any way associated with the Applicant. The latter statement or the choice of words in the statement caught a high amount of attention from the Applicant. The Applicant considers the statement to be fatal to the Respondent’s opposition of this application, as it constitutes an admission that the Respondent realised that the name TRANSITAL would cause confusion or denotes an association with the Applicant. The Respondent “consciously and deliberately decided” to change its name to avoid confusion. The Respondent could instead of changing its name have demanded that the Applicant - as the new company - change its name, the Applicant concludes. The Applicant views this as a waiver of rights which the Respondent may have had to the name TRANSITAL.

⁸ Section 1 of the Companies Act defines a “group of companies” as “a holding company and all of its subsidiaries”.

[15] The Respondent admits receipt in May 2020 of the order from Thomas Foundry for the machining of the cane knife palms. Thomas Foundry approached the Respondent to quote for the work on a referral by Olivi. Apparently, Thomas Foundry had not been satisfied by a quotation provided by the Applicant. Olivi had informed Thomas Foundry that the Applicant no longer possess the required machinery for the work to be performed, and the Respondent could be considered as an alternative. It is submitted that although both parties are involved in engineering, the Respondent conducts business in what is called CNC machining whilst the Applicant does not. But the Applicant denies these averments as false and misleading.

[16] Regarding the timing of the application by the Applicant, the Respondent disputes that the Applicant became aware of the existence of the Respondent or its name only in November 2020. It argues that the Applicant was well aware or ought to have been aware of the Respondent around the date of the Thomas Foundry quotation-incident in May 2020. But ultimately the Respondent - almost dejectedly - states that only the Applicant would know when it became aware of the existence of the Respondent.

[17] Essentially, the Respondent denies that its name is confusingly similar to that of the Applicant and that it is attempting to take advantage of the Applicant's good name and business reputation. It also denies that Thomas Foundry was under any wrongful impression that the Respondent was the Applicant. The parties are clearly distinguishable from each other due to their logos, colour schemes and letterheads, it is submitted on behalf of the Respondent. But the Applicant considers the logos or colour schemes of the

two companies to be irrelevant to this application about company names. I respectfully agree with the Applicant in this regard.⁹ To the extent that colour schemes and logos have been considered relevant to the determination of name disputes in decisions of this Tribunal including *Thusanang Gast (Pty) Ltd & others v Gast Consulting (Pty) Ltd and another*¹⁰ I respectfully disagree.

Applicable legal principles and the submissions (discussed)

General

[18] The origin of the Applicant's case or objection to the registration or use of company name TRANSITALWORX by the Respondent is located within the provisions of section 11(2) of the Companies Act.

[19] The Applicant invoked sections 11(2)(b)(i) and 11(2)(c)(i) for its objection against the Respondent's name. Section 11(2) reads in the material part:

“The name of a company must-

(a) not be the same as –

(i) the name of another company ...;

...

(b) not be confusingly similar to a name ...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...

...

⁹ Delport, P. 2020. *Henochsberg on the Companies Act 71 of 2008*. LexisNexis (online version, last updated: October 2020 - SI 24) (hereafter *Henochsberg on the Companies Act*) at p 57.

¹⁰ *Thusanang Gast (Pty) Ltd & others v Gast Consulting (Pty) Ltd and another*, Companies Tribunal, Case Number: CT00404ADJ2020, 05 January 2021, decided by Mr LD Sikhitha.

(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]

[20] As already indicated this application is made in terms of section 160 of the Companies Act. This section 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.

(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, ... satisfies the requirements of this Act; and

(b) may make an administrative order directing-

(i) the Commission to ...

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation ...”

[underlining added for emphasis]

[21] Apart from its relevance to the merits of this application, section 160(3) of the Companies Act is relevant to both preliminary objections or points in *limine*. I deal with these objections, next.

Preliminary objections or points in limine

Delay in launching this application (the first point in *limine*)

[22] This preliminary objection or point in *limine* is premised on the provisions of section 160(2), read together with section 160(1).

[23] Section 160(2) requires that an application for an objection to a name be made within three months “after the date of a notice contemplated in [section 160(1)], if the applicant received such a notice”.¹¹ It is common cause between the parties that no such notice was delivered upon the Applicant.

[24] Section 160(2)(b) provides for a period (to object to a name) of longer than three months “on good cause shown”. But it is common cause that the Applicant did not invoke section 160(2)(b). The Applicant’s case remains that it brought this application within the period of three months contemplated in section 160(2)(a). The Applicant says it became aware of the existence of the Respondent on 06 November 2020. It filed this application on 28 January 2021. This would have been within time period in section 160(2)(a).

¹¹ Section 160(2)(a).

[25] But the Respondent considers the date of 06 November 2020 as “arbitrary”. It says the date cannot be confirmed or disputed by the Respondent. The Applicant ought to have furnished a letter or some other document to confirm the date or the necessary evidence of the circumstances or facts under which the Applicant became aware of the existence of the Respondent’s name. The Respondent labels this an evasive action by the Applicant. It is submitted that the Applicant in all probabilities became aware of the Respondent’s name in July 2020 during the Thomas Foundry quotation incident. The Respondent again relies on the decision in *Thusanang Gast (Pty) Ltd & others v Gast Consulting (Pty) Ltd and another* for its submissions in this regard.¹²

[26] The Applicant submits that it had disclosed how and under what circumstances it became aware of the Respondent’s name. It denies that it gained such knowledge earlier than 06 November 2020. It relies on the previous decision of this Tribunal in *Fibreglass Grating CC v Fibreglass gratings SA (Pty) Ltd*,¹³ in which the effluxion of a period of one year between the date of the registration of the impugned name and the date on which the objector became aware of the impugned name was held not unreasonable in the circumstances of that matter.¹⁴

[27] I could not find in the papers anything to establish the Respondent’s contention that the Applicant became aware of the impugned name earlier than 06 November 2020. The Applicant explained how it became aware of the Respondent or its name. I find the

¹² *Thusanang Gast v Gast Consulting* at par [48].

¹³ *Fibreglass Grating CC v Fibreglassgratings SA (Pty) Ltd*, Companies Tribunal, Case Number: CT001Apr2018, 02 October 2018, decided by Prof PA Delport.

¹⁴ *Fibreglass Grating v Fibreglassgratings SA* at par 22.

explanation not to contradict the essence of the findings by my fellow Tribunal Member in *Thusanang Gast v Gast Consulting*. In that matter this Tribunal dealt with an impugned name registered by the CIPC on the 20 February 2018, but the application having been brought after 11 May 2020, when a letter of demand was sent to the respondent. But the applicants failed in that matter to provide a date when they became aware of the registration of the impugned name.¹⁵ Clearly, the application in *Thusanang Gast v Gast Consulting* fell within the ambit of section 160(2)(b) of the Companies Act and consequently the applicants needed to show good cause for bringing the application beyond the period of three months stipulated in section 160(2)(a). This application is brought in terms of section 160(2)(a), despite the Applicant having not received a notice in terms of the Companies Act. I am satisfied that the Applicant has made out its case in this regard. There is nothing, other than sheer conjecture, to contradict the evidence tendered on behalf of the Applicant. Therefore, the first objection or point in *limine* would fail. I would reflect this in the terms of the order to appear at the end of this decision.

Non-joinder of CIPC (the second point in *limine*)

[28] Under this point in *limine* the Respondent argues that part of the relief claimed by the Applicant is directed at obtaining “an administrative order”, which involves the CIPC. The name change or the “administration” of the name change process involves the CIPC, the Respondent contends. The non-joinder of the CIPC would be critical to the implementation of the “administrative order” made by this Tribunal, the Respondent further contends.

¹⁵ *Thusanang Gast v Gast Consulting* at pars [54]-[55].

[29] Mr Viljoen, appearing for the Respondent, argued that this objection is actually triggered by the way in which the Applicant decided to “formulate its relief”. The current relief is formulated in such a way that it would be impossible to give effect to it without the joinder of the CIPC. The CIPC needed to be party to this application to give effect to any possible order for a name change by the Respondent.

[30] Mr Wesley on behalf of the Applicant argued that the fact that the CIPC changes or gives effect to name changes has no bearing on compliance with section 11(2) of the Companies Act. The CIPC has no interest in this matter. The CIPC would not be prejudicially affected by the outcome of this application. Also, pleading or raising the non-joinder of a party is a plea in abatement¹⁶ and ought not to be used in an attempt to have a matter dismissed.

[31] I respectfully directed Mr Viljoen’s attention to section 160(3)(b)(i). This provision specifically refers to an administrative order which this Tribunal can make against “the Commission” or the CIPC. I enquired from him whether this does not affect the theme of his submissions, as it appears that the lawmaker deliberately indicated when the relief sought would require a direct order against the CIPC. The relief in section 160(3)(b)(i) does not include name change. Name change is possible as relief under section 160(3)(b)(ii) which does not require that a direct order be made against the CIPC, but only that of the affected company. Mr Viljoen - to his credit - labeled my query “a very good point” but remained steadfast in his view that the CIPC would require to be

¹⁶ See generally Daniels, H. 2002. *Beck's Theory and Principles of Pleadings in Civil Actions*. 6th ed. LexisNexis: online version at 10.1.

joined, as there is no distinction between sections 160(3)(b)(i) and 160(3)(b)(ii). He reiterated that the formulation of the relief - as in this matter - would be influential, if not decisive, on the decision whether or not to join the CIPC.

[32] But I remain convinced that the two provisions (i.e. sections 160(3)(b)(i) and 160(3)(b)(ii)) are distinct from each other. Only when the relief or the administrative orders stipulated in section 160(3)(b)(i) is/are sought would it be necessary to cite the CIPC. The relief sought in this application is clearly predicated upon the provisions of section 160(3)(b)(ii): name change. This Tribunal is not requested to direct the CIPC to effect the name change, but to direct the Respondent to do so in the event of a successful application. Where the order is only directed at the cited respondent - as in this application - the joinder of the CIPC is unwarranted. It does not make any difference that the implementation of the order would involve the CIPC. Such involvement would be due to the statutory role assigned by the lawmaker to the CIPC and not due to the craftsmanship of the Applicant or its lawyers in the formulation of the relief sought. Otherwise the CIPC would have to be routinely cited in all applications concerning name changes. Therefore, this objection will also fail. I now turn my attention to the issues in the merits of this application.

The Respondent was known as TRANSITAL since 1981

[33] At face value this matter appears to be only a name dispute, but there is more than that. The issues in the parties' respective cases, summarised above, confirm this.

[34] It is common cause that the Respondent before the name change used the name TRANSITAL. The Applicant says it wasn't aware of the existence of the Respondent (then known simply as TRANSITAL) until after it had changed its name to TRANSITALWORX. I asked both counsel appearing for the parties at the hearing whether the historical aspect of the matter is relevant for a determination to be made in this matter. By the historical aspect I am referring to the fact that the Respondent previously, at least since 1981, had used the name TRANSITAL. It is beyond argument that this was before the Applicant was incorporated in 1998.

[35] Mr Wesley for the Applicant submitted that this history is irrelevant. It is his view that the provisions of the Companies Act do not create what he calls "a temporal hierarchy of rights". Mr Viljoen's view was that the history is relevant.

[36] I do not agree that the history of a company name is irrelevant. The date when a party is registered as a company or the date when a party had effected a name change is critical for the determination of a name objection brought in terms of section 160. This is explained better by consideration of the provisions of section 12 of the Companies Act, dealing with the reservation of names.

[37] Section 12 of the Companies Act reads in the material part:

“(1) A person may reserve one or more names to be used at a later time, either for a newly incorporated company, or as an amendment to the name of an existing company, by filing an application together with the prescribed fee.

(2) The Commission must reserve each name as applied for in the name of the applicant, unless –

- (a) the applicant is prohibited, in terms of section 11(2)(a), from using the name as applied for; or
- (b) the name as applied for is already reserved in terms of this section.
- (3) If, upon reserving a name in terms of subsection (2), there are reasonable grounds for considering that the name may be inconsistent with the requirements of-
 - (a) section 11(2)(b) or (c)-
 - (i) the Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant; and
 - (ii) any person to whom a notice is required to be given in terms of subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160 ...”

[underlining added for emphasis]

[38] Section 12, in my view, clearly confirms that when reserving names the CIPC ought to consider the interests of those who may have already reserved¹⁷ or registered a particular name.¹⁸ The provisions even allow the CIPC to cause notice to be sent to a bearer of interest in a name that the CIPC may “upon reserving ... [be of the view that] there are reasonable grounds for considering that the name may be inconsistent with the requirements of section 11(2)(b) or (c)”.¹⁹ The latter provisions are those predicated on the Applicant’s case.

¹⁷ Section 12(2)(b).

¹⁸ Section 12(3).

¹⁹ *Ibid.*

[39] The historical aspect embedded in section 12 is from the moment of the reservation of a company name. This is obviously different from the one involved in this matter, but it illustrates the point that history is not irrelevant. Also that a person who was first to reserve or register a company name has the interest worthy of regard in future reservation or amendment of names by others. In fact, the interest of the forerunner involved here is equivalent to a legal standing to object against any subsequent name reserved or registered after the forerunner's own name. This is what is contemplated by section 160 of the Companies Act. There is clearly a temporal hierarchy of rights or interests detectable here. Obviously this is not the same as saying that the determination to be made on the name dispute would routinely be in favour of the objecting forerunner.

The Respondent changed its name from TRANSITAL to TRANSITALWORX in 2020

[40] It is also material that the Respondent in July 2020 changed its original name registered in 1981. The Applicant did not object to the name TRANSITAL until it was changed to TRANSITALWORX. The Applicant says that it was not even aware that there is another company using the name TRANSITAL. It was the name change to TRANSITALWORX which brought the Respondent to the attention of the Applicant.

[41] The Applicant now objects to the changed name. The question that occupied everyone at the hearing is whether when determining the objection against the changed name TRANSITALWORX one ought to consider the fact that the name TRANSITALWORX is used by a company that was first to include the word or name

TRANSITAL in its name? It is still a relevant question to ask and for it to be answered at this stage of the proceedings.

[42] Let's backtrack to the essentials of this application. The objection – in part - is on the basis that the name TRANSITALWORX is confusingly similar to the name TRANSITAL ENGINEERING. This is based on section 11(2)(b)(i). No doubt the alleged similarity is due to the existence of the word TRANSITAL in both names.

[43] The word TRANSITAL appears to be a made-up word. Mr Wesley for the Applicant actually referred to it as follows: “made-up word, it is unique” not explained in the dictionary.²⁰ He added that this renders the name “distinctive” and its use by the Respondent would add to the confusing similarity between the two parties or an incorrect or improper suggestion of an association. The latter is the other part of the Applicant's case based on section 11(2)(c)(i).²¹ I enquired from Mr Wesley whether the fact that the word or name TRANSITAL is made-up obliges us to make enquiries as to who came up with the word or name. His answer was familiar: that the Companies Act does not provide for the temporal hierarchy of rights with regard to company names.

[44] But once it is accepted that the word or name TRANSITAL is a made up or invented word, there is no escaping that one would have to consider who invented the word or to cast a blind eye to that question or consideration. I also do not consider it in the interests of justice that this Tribunal could simply accept without more that the

²⁰ Transcript at p 30 lines 8-16.

²¹ *Ibid.*

Applicant has rights to the use of the name or word TRANSITAL to the exclusion of the Respondent. Also, this does not appear to accord with one or more of the purposes of the Companies Act as set out in its section 7.²²

[45] Further, when considered against the peculiar facts of this matter the word or name TRANSITAL appears to have lost its novelty or uniqueness, at least between the Applicant and the Respondent. This may well be due to owing their incorporation to a common figure or guiding mind in the person of Olivi. The involvement of Olivi in the incorporation of both companies may explain why upon incorporation of the Applicant in 1998 and the name-change of the Respondent in 2020 the authorities did not consider anything the matter with the parallel existence of both names. I am not suggesting that the co-existence should have been disallowed. Mr Viljoen for the Respondent actually submitted that the fact that the two companies co-existed for many years is “massive impediment” to the relief claimed by the Applicant and therefore the change in the Respondent’s name cannot be a concession that there is confusion but a distinguishing feature.²³ I respectfully agree with Mr Viljoen. It does not matter that the Respondent changed its name from TRANSITAL to TRANSITALWORX in 2020.

²² The following purposes of the Companies Act appear to be applicable in this regard: “(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law; (b) promote the development of the South African economy by- ... (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation ... (l) provide a predictable and effective environment for the efficient regulation of companies.”

²³ Transcript at p 35 lines 13-20.

Is the Respondent's name confusingly similar to that of the Applicant?

[46] I think it is important that there be an unequivocal answer to the question whether the Respondent's name is confusingly similar to that of the Applicant. I mention this due to the views I already expressed above.

[47] I answer the question in consideration of what is stated above, including that the Applicant has no exclusive rights to the use of the word or name TRANSITAL. I can also add that I do not consider the Respondent to have rights exercisable to the exclusion of the Applicant in respect of the word or name TRANSITAL. Against the backdrop of these considerations, I agree with the submissions by Mr Viljoen on behalf of the Respondent that the inclusion or addition of the word "WORX" to "TRANSITAL" to make it "TRANSITALWORX" and the word "ENGINEERING" to make it "TRANSITAL ENGINEERING" distinguish the two company names from each other.

[48] It is also not irrelevant to bear in mind that the Respondent existed even under the new regime of the Companies Act using the name TRANSITAL until July 2020. This to me suggests that there is no reasonable possibility of confusion by members of the public. Therefore, I will dismiss the applicant's case based on section 11(2)(b) of the Companies Act.

Did the Respondent intend taking advantage of the Applicant's good name or reputation?

[49] This question is meant to provide a direct answer to the Applicant's case based on section 11(2)(c).

[50] In my view it is vital to consider that when the Respondent applied to amend its name in July 2020 it was already known as TRANSITAL. It had used that name since 1981. It amended its name to TRANSITALWORX. This, it is explained, was to avoid confusion with the Applicant's name TRANSITAL ENGINEERING. I do not agree with the Applicant that this explanation on the part of the Respondent amounts to a concession regarding the existence of confusion or a waiver of rights. At most the explanation – with respect – sounds absurd.

[51] Once it is accepted that the Respondent was already using a name which incorporated the word TRANSITAL before it amended it to the now challenged TRANSITALWORX this puts paid to the Applicant's case based on section 11(2)(c)(i). The requirement of fault as intent to mislead or the alternative effect of misleading is impossible where the party so accused was already using the impugned name or the impugned word as part of its name.²⁴

[52] Put differently, in the circumstances of this matter it is improbable that the use of the name TRANSITALWORX by the Respondent could be dissatisfactory of the provisions of section 11(2)(c)(i) of the Companies Act.

Conclusion

[53] As already stated, this application will be dismissed for the reasons stated above. This brings me to the issue of costs. The Applicant is unsuccessful in its application. The norm is that costs should follow the outcome. But regulation 156(1) of the Companies

²⁴ *Henochsberg on the Companies Act* at p 58(1).

Regulations, 2011 imbues this Tribunal with discretionary jurisdiction to decide whether to make or not make an order as to costs. I consider it necessary to interfere with the conventional norm applicable to the direction of the award of costs. I don't think that the circumstances of this matter would justify that the unsuccessful party be mulcted with costs of this application.

[54] The Applicant was entitled to bring this application relying upon the protection ordinarily offered by the Companies Act. Although I have found the application to be without merit, I do not find that a costs order against the Applicant will be proper and justified. I reach the same conclusion with regard to the unsuccessful preliminary objections raised by the Respondent. Therefore, no order as to costs will be made overall and thus each party will be responsible for its own costs.

Order

[55] For the reasons appearing above, an order is made in the following terms:

- a) that, the Respondent's first and second preliminary objections or points in *limine* are dismissed;
- b) that, the application is dismissed; and
- c) that, no order as to costs is made in respect of both a) and b) hereof.

Khashane La M. Manamela (Mr)
Member, Companies Tribunal
21 June 2021

Appearances:

For the Applicant	:	Mr CP Wesley
Instructed by	:	Hills Incorporated Attorneys Brooklyn, Pretoria
For the Respondent	:	Mr JC Viljoen
Instructed by	:	McKenzie Van der Merwe Willemse Attorneys Kempton Park, Johannesburg