



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT00137ADJ2019

In the matter between:

COMAIR LIMITED

Applicant

and

FUEL KALULA (PTY) LIMITED

First Respondent

COMMISSIONER OF COMPANIES AND

INTELLECTUAL PROPERTY COMMISSION

Second Respondent

Issue(s) for determination: This is an objection to the registration of the company name Fuel Kalula (Pty) Limited in terms of sections 11(2)(b), 11(2)(c) and 160 of the Companies Act, 2008 (Act No. 71 of 2008) read with regulations 13 and 142 of the Companies Regulations, 2011.

Coram: Lindelani Daniel Sikhitha

Date of handing down of decision: 03 December 2019

DECISION (Reasons and Order)

INTRODUCTION

- [1] The Applicant in this matter is Comair Limited which is a close corporation duly incorporated and registered as such in accordance with the applicable laws of the Republic of South Africa. The Applicant's registered address is situated at 1 Marignane Drive, Corner Atlas Road, Bonaero Park, Gauteng, 1619, Republic of South Africa. The Applicant is the operator of the well-known airline KULULA.
- [2] The First Respondent in this matter is Fuel Kalula (Pty) Limited with Registration Number: 2017 / 175613 / 07 which is a private company duly incorporated and registered in accordance with the applicable laws of the Republic of South Africa. The First Respondent's registered address is alleged to be situated at 27 Galway Road, 310 Cordia, Mayville, Kwa-Zulu Natal, 4091, Republic of South Africa.
- [3] The Second Respondent in this matter is the Commissioner of Companies and Intellectual Property Commission appointed in terms of section 189 of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"). The Second Respondent is cited in his official capacity as the person who is responsible for the function of the Companies and Intellectual Property Commission ("the Commission") in terms of the Act. I have noted that the Second Respondent is not cited in the Application for Relief. The Second Respondent is only cited in the Application for a Default Order. This issue is immaterial at this stage considering my decision regarding the Application for a Default Order.
- [4] This is an application in terms of section 160(1) of the Act in terms of which the Applicant is seeking an order that the First Respondent's name, being Fuel Kalula

(Pty) Limited, does not satisfy the requirements of section 11 of the Act and that the First Respondent should be directed to choose a new name, as provided for in section 160(3)(b)(ii) of the Act.

[5] The Applicant alleges that it has an interest in the name of the First Respondent within the meaning of section 160(1) of the Act by virtue of it being the proprietor of the well-known trade mark KULULA and marks incorporating KULULA, which have been registered in various classes covering a wide range of goods and services. As evidence of the trade mark registrations owned by the Applicant, the deponent to the Founding Affidavit, one Derek Henry Borer, annexed **Annexure “DHB 2.1” to “DHB 2.24”**, being copies of the pages extracted from the Register of Trade Marks.

[6] The Applicant filed the Application for Relief (Form CTR 142) on the 03rd day of September 2019. In terms of its Application for Relief, the Applicant is requesting the Companies Tribunal to grant the following relief against the First and Second Respondents:

6.1 that the First Respondent’s name does not comply with sections 11(2)(b) and 11(2)(c)(i) of the Act;

6.2 that the First Respondent is directed, in terms of section 169(3)(b)(ii), to choose a name which does not consist of, or incorporate, the mark KALULA, or any other mark which is confusingly and/or deceptively similar to the Applicant’s KULULA trade mark;

- 6.3 that the Registrar of companies be directed to change the name of the First Respondent to its registration number, in the event of the First Respondent not complying with paragraph 6.2 above within 60 days from date of the order; and
- 6.3 an order as to costs in favour of the Applicant in terms of regulation 156 of the Companies Regulations, 2011 (“the Regulations”).

FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF IN TERMS OF THE ACT AND THE REGULATIONS

[7] As I have already indicated above, this is an Application for Relief in terms of which the Applicant is objecting to the company name of the First Respondent in terms of sections 11(2)(b), 11(2)(c)(i) and 160 of the Act read with applicable Regulations. Before I deal with the merits of the Application for Relief and the Application for a Default Order, it is important that I should first deal with some preliminary issues which relates to the form and substance that the current Application for Relief should comply with in terms of the relevant Regulations.

[8] I should begin such an exercise by first having a look at the provisions of regulation 13(a) which deals with the form of the applications of the nature like the current Application for Relief in order to determine if it is indeed in compliance thereof. The relevant parts of regulation 13(a) read as follows:

“(a) A person may apply in Form CTR 142 to the Tribunal in terms of section 160 if the person has received... a Notice of a Potentially Contested Name, in Form CoR 9.6 or a Notice of a Potentially

**Offensive Name, in Form CoR 9.7, or has an interest in the name
of a company as contemplated in section 160(1)....”** *[Own
emphasis added.]*

- [9] The Application for Relief in this matter is contained in Form CTR 142 (Application for Relief). As pointed out in paragraph 5 above, the Applicant is the proprietor of the KULULA trade mark and therefore it does indeed have an interest in the name of the First Respondent. I am therefore satisfied that the current Application for Relief does comply with regulation 13(a) of the Regulations as outlined above.
- [10] In terms of regulation 142(1) of the Regulations, a person may apply to the Companies Tribunal for an order in respect of any matter contemplated in the Act or the Regulations by completing and filing with the Companies Tribunal’s recording officer:
- 10.1 an Application in Form CTR 142; and
 - 10.2 a supporting affidavit setting out the facts on which the application is based.
- [11] The current Application for Relief is made in Form CTR 142 and it is supported by a Founding Affidavit (“the Affidavit”) deposed to by Derek Henry Borer (“Borer”). Borer, as it appears from the papers placed before me, is the Company Secretary of the Applicant. Borer is indeed duly authorised to launch the current Application for Relief and to depose to the Affidavit on behalf of the Applicant and his authority to do so is in terms of a Resolution passed by the Board of Directors of the Applicant dated 21 August 2019 (“the Resolution”). A copy of the Resolution is annexed to the Affidavit and marked Annexure “DHB 1”.

- [12] In terms of regulation 142(2) of the Regulations, the Applicant is required to serve a copy of the Application for Relief together with the Affidavit and any attachment thereto on each respondent cited in the Application for Relief, within five (5) business days, calculated from the date of filing of the Application for Relief with the Companies Tribunal.
- [13] The Application for Relief was purportedly served on the First Respondent by Sheriff at 310 Cordia, 27 Galway Road, Bonela, Durban, 4001. Service of the Application for Relief was effected on the 09th day of September 2019 by affixing a copy thereof to the principal door as the Sheriff found the principal door locked and thus preventing alternative service. The Sheriff also made a comment to the effect that the premises was found vacant. Be that as it may, the Application for Relief was served within 4 (four) days from the date it was filed with the Companies Tribunal.
- [14] It is alleged in paragraph 4.8 of the Founding Affidavit in support of the Application for a Default Order deposed to by Gerard Muller Du Plessis that the Application for Relief was served upon the Second Respondent. Despite this allegation having been made, I however did not find any proof of service of the Application for Relief on the Second Respondent. Be that as it may, this shortcoming will only become relevant in the event that the Applicant is seeking any relief against the Second Respondent. In that event, I will not be able to make any order against the Second Respondent until such time that the Applicant provides me with proof of adequate service of the Application for Relief on the Second Respondent.

[15] Be that as it may, in terms of regulation 143(1) of the Regulations, any respondent who wishes to oppose the Application for Relief must serve a copy of its answer on the initiating party and file the answer with proof of service thereof with the Companies Tribunal within twenty (20) business days after being served with an application that has been filed with the Companies Tribunal. The relevant provisions of regulation 143(1) of the Regulations read as follows:

“Within 20 business days after being served with a Complaint Referral, or an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must—
(a) serve a copy of an Answer on the initiating party; and
(b) file the Answer with proof of service.” [Own emphasis added.]

[16] It follows therefore that the First Respondent was required to serve a copy of its answer on the Applicant and file its answer together with proof of service on the Applicant with the Companies Tribunal within twenty (20) business days in terms of regulation 143(1) of the Regulations.

[17] Upon proper calculation of the time frames in terms of regulation 143(1) of the Regulations the First Respondent was required to serve its answer on the Applicant and to file with the Companies Tribunal a copy of its answer to the Application for Relief together with proof of service on the Applicant on or before the 07th day of October 2019. As at the date of filing of the Application for the Default Order by the Applicant, the First Respondent has still not served on the Applicant and filed with the Companies Tribunal a copy of its answer together

with proof of service on the Applicant as prescribed by regulation 143(1) of the Regulations.

[18] As a result of the First Respondent's failure to serve its answer on the Applicant and to file it together with proof of service on the Applicant with the Companies Tribunal, the Applicant proceeded to file the Application for Default Order with the Companies Tribunal in terms of regulation 153(1) of the Regulations. I now turn to deal with the Application for Default Order in order to determine if it was filed in compliance with regulation 153 of the Regulations.

THE FORM AND SUBSTANCE OF THE APPLICATION FOR DEFAULT ORDER

[19] Once an Application for Default Order is filed with the Companies Tribunal, it is therefore enjoined to consider such an application in terms of sections 11(2) and 160 of the Act read with the provisions of regulation 153(1) and (2) of the Regulations. It is therefore important that I should make reference to the provisions of regulation 153 of the Regulations. The relevant provisions of regulation 153 of the Regulations read 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.*** [Own emphasis added.]

[20] The Applicant did indeed proceed to file its Application for Default Order (Form CTR 145) in terms of regulation 153 of the Regulations on the 23rd day of October 2019. It is clear that the Application for Default Order was filed after the expiry of the twenty (20) business days that the First Respondent is afforded to file its answer in terms of the Regulation 143(1) of the Regulations.

[21] In order for me to consider the current Application for Default Order and to make an appropriate order in relation thereto, I must be satisfied that the Application for Relief was adequately served on the First and Second Respondents.

[22] It is my view that the First Respondent did not receive a copy of the Application for Relief in this matter. I say so because in paragraph 7 of the Affidavit, the deponent states the following which I consider to be relevant to the determination of the issue of service of the current Application on the First Respondent:

“7.1 On 3 May 2019, a letter was addressed to the Respondent by the Applicant’s attorneys, and sent by post and registered mail, requesting the Respondent to advise the Applicant of its exact field of business, in order for the Applicant to consider its options. In this regard, I annex, marked Annexure “DHB14”, a copy of the letter.

7.2 No response was received from the Respondent and, in an attempt to settle this matter amicably, without the necessity of an application, the Applicant’s addressed a further reminder sent via post and by registered mail to the Respondent, dated 13 June 2019, a copy of which is annexed, marked Annexure

“DHB 15”. Again, no response was received from the Respondent.

7.3 Two further weeks had passed and no response was received from the Respondent. The Applicant’s attorneys then conducted a consumer trace of the sole director of Fuel Kalula (Pty) Limited, to obtain further contact details of the sole director to enquire whether a response to the previous letters would be forthcoming. A copy of the consumer trace report is annexed and marked, Annexure “DHB 16”. The Applicant’s attorneys attempted to contact the sole director of the Respondent telephonically, using the contact numbers contained in the search report. Unfortunately, none of the contact numbers listed on the consumer search report was reachable. Thereafter, the Applicant’s attorneys contacted PC Training and Business College, which was listed as the employer of the sole director. However, the staff at PC Training and Business College indicated that Ms. Majola is no longer in their employ and she did not leave any forwarding contact details.

7.4 An accompanying affidavit of Whitney Lee Govender-Williams will be filed evenly herewith to confirm the telephone discussions between PC Training and Business College and the Applicant’s attorneys.

7.5 In a final attempt to settle this matter, the Applicant’s attorneys instructed the Sheriff of Durban West to serve yet another letter on the Respondent’s registered address. A copy of this letter, dated 27 June 2019 is annexed and marked, Annexure “DHB 17”. On 9 July 2019, the Deputy Sheriff of Durban West, Mr. SE Sithole, served the letter of 27 June 2019, on the Respondent’s registered address. However, the occupier indicated that the Respondent was unknown at the address. A copy of the Sheriff’s return of service is annexed and marked, Annexure “DHB 18”.

7.6 The Applicant’s attorneys conducted a search in respect of the Respondent in August 2019 and confirmed that the name remains unchanged.” [Own emphasis added.]

[23] I did peruse Annexure “DHB 18” annexed to the Affidavit and I noted the following comments made by the Deputy Sheriff which I consider to be important for my determination of the Application for Default Order in this matter. The relevant parts of Annexure “DHB 18” read as follows:

“On this 09 day of JULY 2019 at 09 : 51 I attempted to serve this LETTER on DEFENDANT at 310 CORDIA 27 GALWAY ROAD BONELA. I, however, ascertained that DEFENDANT is unknown at the given address, as informed by MR SIYABONGA, PRESENT OCCUPIER.”

[Own emphasis added.]

[24] It is clear from the comments of the Deputy Sheriff quoted above that the First

Respondent is not known at 310 Cordia, 27 Galway Road, Bonela. The then occupier who was found by the Deputy Sheriff at the premises was Mr. Siyabonga. The Applicant failed to provide an explanation as to why the Application for Relief was presented to the Sheriff for service at the aforementioned address. Such an explanation is critically crucial because at the time of presenting such documents to the Sheriff for service, the Applicant was already aware that the First Respondent is unknown at such an address.

[25] I have noted the fact that it is impossible for the Applicant to serve the Application for Relief at the address of the First Respondent. As per Deputy Sheriff's comments, the First Respondent is either unknown at the aforesaid address or the premises was found vacant. It follows therefore that the Applicant can, if it so wishes, make an application for an order of substituted service to either the Companies Tribunal or the High Court in terms of regulation 7(3)(a) of the Regulations.

[26] Despite having made allegations regarding service of the Application for Relief on the Second Respondent, I was not able to find any proof of such service. I am therefore not satisfied that there was adequate service of the Application for Relief on the First and Second Respondents. It follows therefore that, as things currently stand, the Application for Default Order should be refused.

THE ORDER

I therefore make the following order:

- 1) The Application for Default Order in terms of regulation 153 of the Regulations is

hereby refused on the ground that it was not adequately served on the First and Second Respondents.

- 2) There is no order as to costs.

LINDELANI DANIEL SIKHITHA
Member of the Companies Tribunal
03 December 2019