IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CTR021/07/2013

In the matter between:

WEDDINGS EXPO (PTY) LTD Applicant

and

ZEENAT KARA Respondent

Coram: Delport P.A.

Decision handed down on 29 NOVEMBER 2013

DECISION

INTRODUCTION

[1] The Applicant applies in terms of section 160 of the Companies Act 71 of 2008 ("Act" / "Companies Act") and regulations 143 and 153 of the regulations in terms of the Companies Act (GNR 351 of 265 April 2011) ("Companies Act regulations" / "regulation/s") for an order in respect of the name reserved by the respondent on the ground that it does not comply with sections 11 (2) (a) (iii) and 11 (2) (b) (i) of the Companies Act. The application is made on form CTR 142 accompanied by a supporting affidavit which is neither paginated nor indexed.

[2] In para 2 of the replying affidavit of 21 October 2013 the Applicant seeks to join Wedding Group (Pty) Ltd (2013/087946/07) as second respondent, due, *inter alia*, to the fact that the first respondent filed the answering affidavit in her capacity as "duly authorised director of Wedding Group Proprietary limited", and for an order in terms of section 160 (1), 2 (b) and 3 (b) (ii) read

with sections 11 (2) (a) and 11 (2) (b) of the Companies Act 71 of 2008 directing the second respondent (to choose a new name and) to file a notice of amendment of its Memorandum of Incorporation within a period and on any conditions that the Tribunal considers just, equitable and expedient.

[3] In a letter to the Tribunal dated 28 October 2013, the second respondent objected to the joinder as above as it did not comply with the requirements of regulation 158.

BACKGROUND

[4] The Applicant is Weddings Expo (Pty) Ltd, a company incorporated in terms of the Act by virtue of, *inter alia*, the definition of "company" in section 1 of the Act.

[5] The respondent according to form CTR 142 filed with the Tribunal on 17 July 2013 is Zeenat Kara, the holder of a company name reservation for the "Wedding Group", reserved under CoR 9.4 dated 15 April 2013.

[6] The applicant seeks, initially, an order for the "respondent to choose a new name" in terms of sections 160 (1), 160 (2) and 160 (3) (b) (ii) of the Act.

[7] Unfortunately the above are the only facts which are reasonably clear. Then the confusion starts.

[8] There is no evidence that the CTR 142 and the founding affidavit were duly served on the respondent as required by regulation 142 (2).

[9] The respondent filed an answering affidavit which is incomplete, not dated, and not certified as properly sworn. It is therefore also not possible to determine whether it was filed within the time required by regulation 143.

[10] The answering affidavit was filed for and on behalf of Weddings Expo (Pty) Ltd which was not the respondent in respect of the application filed with the Tribunal on 17 July 2013 on form CTR 142.

[11] The replying affidavit then used the answering affidavit as a justification that the respondent has now pulled Weddings Expo (Pty) Ltd "out of the hat" as a second respondent to join Weddings Expo (Pty) Ltd as a second respondent (para 2.1.4 of the answering affidavit).

[12] Jumping at this opportunity which the applicant perceived that the respondent, whether the actual (first) respondent or the purported second respondent, has afforded it, the application is metamorphosed into a different prayer, in that the purported second respondent now becomes the target of the prayer, ie that the second respondent must change its name.

APPLICABLE LAW

[13] Regulation 142 provides as follows:

"**142. Applications to the Tribunal in respect of matters other than complaints.**—(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer—

(*a*) an Application in Form CTR 142; and

(*b*) a supporting affidavit setting out the facts on which the application is based.

(2) The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.

(3) An application in terms of this regulation must—

(*a*) indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and

(*b*) depending on the context—

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(iii) set out the regulation in respect of which the applicant seeks condonation; or

(*c*) indicate the order sought; and

(*d*) state the name and address of each person in respect of whom an order is sought."

[14] The relief sough is in terms of section 160, which provides as follows:

"**160. Disputes concerning reservation or registration of company names.**— (1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive 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, or the transfer of any such reservation or registration of a 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, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

(*b*) may make an administrative order directing—

(i) the Commission to—

(*aa*) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(*bb*) register a name or amended name that had been contested as the name of a company;

(*cc*) cancel the reservation of a name, or the registration of a defensive name; or

(*dd*) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph.

(4) Within 20 business days after receiving a notice or a decision issued by the Companies Tribunal in terms of this section, an incorporator of a company, a company, a person who received a notice in terms of section 12 (3) or 14 (3), an applicant under subsection (1) or and any other person with an interest in the name or proposed name that is the subject of the application, as the case may be, may apply to a court to review the notice or decision."

EVALUATION

[15] A cursory reading of section 160 will indicate that the original relief applied for by the applicant as in the CTR 142 is not possible against the respondent as indicated. See also *Coastal Property Management Services (Pty) Ltd v Ravindra Lautan* (CTR002/07/2012 of 23 November 2012).

[16] There are various other patent and critical defects in the applicant's case, some of which are the absence of any proof of the proper serving of the document on the respondent as indicated in the CTR 142 and non-compliance with the proper procedure for joinder as required by regulation 158.

[17] The deficiencies in the formalities in respect of the respondent's (whether actual or purported) papers are also glaring.

[18] Fortunately I do not have to attempt to undo the Gordian knot as a result of the circumstances referred to in paras 16 and 17 above.

[19] The company is a separate (juristic) person in terms of section 19 of the Act. It is trite law that as such it can (actually it must) enforce its rights, and defend those rights in its own name.

[20] However, as juristic person it can only act through agents (or organs if the act is to the inside). It is also trite law that an agent can only act in that capacity if there is authority from the principal.

[21] Section 66 (1) of the Act provides (the italics are mine):

> "**66. Board, directors and prescribed officers.**—(1) The business and affairs of a company must be managed by or under the direction of its *board*, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

[22] Therefore:

> "The directors' powers under s 66 enable them to cause the company to participate in legal proceedings. For this purpose they must authorise the institution of the proceedings and the prosecution thereof (*Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624). They must also authorise one of their number or someone else (eg a manager or the secretary) to represent the company in such proceedings. The authorisation may be particular (ie with reference to a single case) or general (ie with reference to any case or any class of case, eg actions against debtors for payment) (see *Louw v WP Koöperasie Bpk* 1991 (3) SA 593 (A) at 602–603). There must be evidence before the Court that the person purporting to represent the company has been authorised accordingly with regard to the particular proceedings (*Mall* (*Cape*) (*Pty*) *Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351–352; *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C) and *Boerboonfontein BK v La Grange NO* 2011 (1) [Page 254] SA 58 (WCC) and numerous other cases; and *cf Pretoria City Council v Meerlust Investments* (*Pty*) *Ltd* 1962 (1) SA 321 (AD) at

325; but *cf Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705. See *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* [2002] 1 All SA 10 (C) at 15 and *Mphahlele Taxi Association v Lebowakgomo Taxi Owners' Association* [2002] 3 All SA 124 (T) at 126 for the requirements for authorisation in the case of common law legal persons). While in motion proceedings the best evidence would be an affidavit by an officer of the company annexing a copy of the relevant resolution of the board, such evidence is not "necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is [the company] which is litigating and not some unauthorised person on its behalf" (*Mall* case *supra* at 352 *per* Watermeyer J (as he then was)). For examples of cases where the Court held there was sufficient evidence of the authority, notwithstanding that less than the best evidence thereof had been adduced, see *Thelma Court Flats* (*Pty*) *Ltd v McSwigin* 1954 (3) SA 457 (C) at 459–461; *Dowson & Dobson Ltd v Evans & Kerns* (*Pty*) *Ltd* 1973 (4) SA 136 (E) at 137–138; *Poolquip Industries* (*Pty*) *Ltd v Griffin* 1978 (4) SA 353 (W) at 355–357; *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) at 418 (unaffected by the subsequent judgments in this case: 1992 (2) SA 748 (C); 1993 (1) SA 639 (AD); *Tattersall v Nedcor Bank Ltd* 1995 (3) SA 222 (AD) at 227–229).

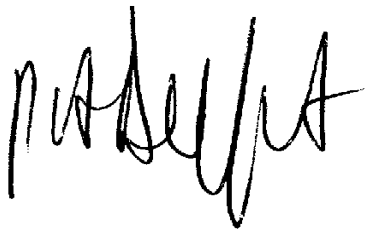
As was held by the Supreme Court of Appeal in the *Ganes* case *supra*, at 624F–J, it is irrelevant whether the deponent to an affidavit filed in support of an application on behalf of a company is authorised to depose to the affidavit. What is relevant is that 'the institution of the proceedings and the prosecution thereof that must be authorised'.": *Henochsberg on the Companies Act 71 of 2008* page 253.

[23] There is no evidence of compliance with this requirement in the founding affidavit of the applicant. In actual fact the applicant's replying affidavit was deposed by the "exhibition manager" (para 1.1), who is ostensibly not even a board member.

[24] A similar deficiency is present in the respondent's papers, if it is accepted, but I do not decide thus, that the purported second respondent was joined properly.

ORDER

[25] The application for an order in terms of section 160 of the Companies Act 71 of 2008 is refused.



PROF P.A. DELPORT

MEMBER OF THE COMPANIES TRIBUNAL