



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT004JAN2019

In the matter between:

ASCOR INDEPENDENT WEALTH MANAGERS CC

APPLICANT

AND

ABSCOR (PTY) LTD

RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 12 April 2019

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 Applicant is **ASCOR INDEPENDENT WEALTH MANAGERS CC** (Reg. Nr. 1998/64094/23), a close corporation duly incorporated in terms of the Close Corporations Act 69 of 1984, and having its registered address at Ascor House, Apex Corporate Park, Quinton Brand Avenue, Persequor Techno Park. Pretoria, Gauteng.

1.2 Respondent is **ABSCOR (PTY) LTD** (Reg. Nr. 2016/180212/07), a company duly incorporated in accordance with the company laws of South Africa, and having its registered address at Unit 2, Industrial Hive, Cnr Sompane Drive & Mojao Street, Khutsong South, Gauteng.

1.3 This is an application for a determination order:

- a. that Respondent's name does not satisfy the requirements of section 11(2) of the Companies Act 71 of 2008 ("the Act"), and
- b. that Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.

1.4 Wouter Fourie, Applicant's member, deposed to the Founding affidavit and the affidavit in support of the default application, having been duly authorised to do so.

1.5 It appears that the Form CTR142 notice was sent via registered mail to Respondent on 17 January 2019. Having received no response, on 20 February 2019, Applicant applied for a default order of the relief sought initially.

2. ISSUES

2.1 This Tribunal is faced with two main issues:

2.1.1 Has the Applicant shown that a default order should be granted?

2.1.2 If the first issue is answered positively, has the Applicant advanced grounds for relief?

2.2 I am compelled at the outset to deal with the fact that Respondent has not participated in these proceedings, and appears to not even be aware thereof.

2.3 Applicant served notice of this application on Respondent via registered post, proof of which was attached to the application for default judgment. On perusal of the registered slip, it is apparent that the handwriting on is not clearly legible,

possibly leading to some confusion as to the address.

2.4 There is no other proof that Respondent did indeed receive notice of the application. Such proof could be in the form of a “read” receipt via email, a tracking report from the post office or a sheriff’s return of service, the latter being ideal.

3. APPLICABLE LAW

3.1 Regulation 142 of Companies Regulation 2011¹ provides for **Applications to the Tribunal in respect of matters other than complaints**

...

- (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.

3.2 Companies Regulation 153 provides for **default orders**:

...

- (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.

3.3 Companies Regulation 7 provides for **Delivery of documents**:

...

- (3) If, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or these regulations—
 - (a) if any person other than the Tribunal is required to deliver the document, the person may apply to either the Tribunal or the High Court for an order of substituted service;

¹ GN R351 in GG 34239 of 26 April 2011.

4. EVALUATION

4.1 The merit of Applicant's initial application for relief is over-shadowed by the fact that Respondent is apparently unaware of these proceedings. Therefore I focus this decision on the importance of service.

4.2 In the case of **Masetlha v President of the Republic of South Africa and Another**², Ngcobo J stated:

"The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* principle ('the audi principle'). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness...this principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual."

4.3 This Tribunal has previously been seized with the issue of proper service. In the case of **Growthpoint Properties Ltd v Growth Point Mining (Pty) Ltd**³, it was decided that a matter could not be considered until it has been established that proper service was effected. It was also noted as important that Respondent's non- participation in the proceedings should not be ascribed to ignorance thereof, due to non-service on it by the Applicant. In the case of **Skybridge CC and Another v Skybridge Investments (Pty) Ltd and Another**⁴ it was emphasised that service of notice is crucial to the rules of natural justice. Both these applications were not successful as the Tribunal found that there had not been proper service of the notice on the Respondent.

² 2008 (1) SA 566 (CC) at para 187

³ Case no: CT020JUN2015 at 6

⁴ Case no: CT004DEC2016 at 7

4.4 In a situation such as the one *in casu*, it is easily rectified by the Applicant either typing out Respondent's addresses, or writing more clearly and legibly.

4.5 Furthermore, there are other options that can be explored. If service of an application proves difficult to be effected in terms of the provisions as stipulated legislatively or in terms of the Uniform Rules, the Applicant may apply to this Tribunal for an order of substituted service in terms of Regulation 7(3)(a). The Applicant has to show that all information, which can assist in locating the Respondent, has been explored, and must enunciate the actual steps taken to ascertain the location of the Respondent. The Tribunal may then make an order for substituted service as it deems fit, such as publication in a newspaper, Government Gazette or even social media.

4.6 Finally, this Tribunal in **Tyris Construction (Pty) Ltd v Tyris Construction Projects (Pty) Ltd**⁵ granted an order for substituted service by way of publication of the Applicant's intended name dispute application in two local English newspapers circulating in the area in which the Respondent resides or trades, as well as publication in the Government Gazette.

5. FINDINGS

5.1 As mentioned earlier, the merit of Applicant's case is moot in the face of non-service on the Respondent.

5.2 In light of the fact that it is not clear on Applicant's papers whether or not the Director of Abscor (Pty) Ltd is aware of this application, so that any gaps of unfairness in the procedure are plugged, the Tribunal is not satisfied that Applicant has exhausted all avenues to notify Respondent.

5.3 There has not been satisfactory compliance with the provisions of Companies Regulation 153(2)(b). The Applicant's application for default judgment is therefore refused.

⁵ Case number: CT006JUL2017 at 16

6. ORDER

The application is refused.

ADV. ISHARA BODASING