



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00381ADJ/2020

In the matter between:

Business Leadership South Africa

Applicant

vs

Business Leadership South Africa NPC

First respondent

Companies and Intellectual Property Commission

Second respondent

Presiding Member of the Tribunal : P.A. Delport

Date of Decision : 17 March 2021

DECISION

INTRODUCTION

- [1] The applicant applies for a default order because the name of the first respondent does not comply with section 11(2) of the Companies Act 71 of 2008 (“Companies Act” / “Act”).
- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”) *inter alia* regulate an application to the Companies Tribunal (“Tribunal”) as well as the application for a default order under certain circumstances.
- [3] The jurisdiction of the Tribunal in this matter is as determined in section 160(1) of the Companies Act.

BACKGROUND

- [4] The applicant is Business Leadership South Africa, a foundation registered as a non-profit organisation (“NPO”), apparently in terms of the Nonprofit Organisations Act 71 of 1997.
- [5] The first respondent is Business Leadership South Africa NPC (2019/191903/07), a company incorporated in terms of the Companies Act.
- [6] The second respondent is the commissioner of the Companies and Intellectual Property Commission (“CIPC”) in the capacity as the person responsible for the administration of the Companies Act.
- [7] The application is brought by Busisiwe Mavuso, the chief executive officer of the applicant, who has the authority to act for and on behalf of the applicant in terms of a board decision of 26 March 2020.

- [8] The applicant is the proprietor in South Africa of a number of trade marks in terms of the Trade Marks Act 194 of 1993 incorporating, or comprising, “Business Leadership South Africa” over a range of classes and services.
- [9] The applicant became aware of the registration of a company with the name “Business Leadership South Africa NPC” during 2019.
- [10] The applicant submitted an application for relief to the Companies Tribunal on CTR 142 dated 9 June 2020 with a supporting affidavit.
- [11] The applicant sent a copy of the CTR 142 and supporting affidavit as lodged with the Companies Tribunal on 12 June 2020 by email to the address of a director of the first respondent that was used in correspondence, that was responded to, in respect of the name of the first respondent.
- [12] The notification/service as above was within the period of 5 business days as prescribed by regulation 142(3) and in a manner allowed in terms of Table CR 3 of Schedule 3 of the regulations.
- [13] There was no reaction or “answer” by the first respondent.
- [14] The relief in respect of the name of the first respondent sought by the applicant in para 8 of the founding affidavit lodged with the CTR 142 based on section 11(2) is:
“8.1 directing the First Respondent to change its name to one which does not consist of or incorporate the trade mark BUSINESS LEADERSHIP SOUTH AFRICA, or any other trade mark/word that is confusingly or deceptively similar thereto;
8.2. in the event that the First Respondent fails to comply with the order set out in paragraph 8.1 above within 3 months from the date of the order, directing the Second Respondent, in terms of Section 160(3)(b)(ii) read with Section 142 of the Act, to change the name of the First Respondent to “K201 6/326775/08 NPC”, as the First Respondent's interim non-profit company name on the Companies Register; and
8.3. granting the Applicant further and/or alternative relief.”

ISSUES and APPLICABLE LAW

[15] Section 160, which determines the jurisdiction of the Companies Tribunal, provides, as far as it is relevant for the present matter, as follows:

“160. Disputes concerning reservation or registration of company names.—(1)

“...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, ..., satisfies the requirements of this Act.

(2) An application in terms of subsection (1) may be made—

(a) ...

(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, ..., 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.”

[16] The relevant provisions of section 11 provide:

“(2) The name of a company must—

(a) not be the same as—

...

(iii) a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or

(b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) ...

(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;

... and”

EVALUATION

[17] Section 160, as quoted above, provides:

“(2) An application in terms of subsection (1) may be made—

...

(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.”

- [18] The applicant is, due to the fact that it is the proprietor of various trade marks, an “interested person” as contemplated in section 160(1).
- [19] I am satisfied that the notice to the first respondent was adequately served (reg 153(2)(b))
- [20] The Act does not define what is meant by “good cause” in terms of section 160(2)(b). In *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) the Court said at para 18 that “[t]he section requires the applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application... [and] the Tribunal was obliged to look at the whole matter including the merits to determine whether it was in the interests of justice to entertain the application.”
- [21] The applicant has clearly complied with *The Highly Nutritious Food Company (Pty) Ltd* “good cause” test in respect of merits as well as the period within which the application was brought.
- [22] An allegation of facts set out in an initiating document that is not specifically denied or admitted in an answer must be regarded as having been admitted: regulation 143(4).
- [23] The first respondent did not answer, and even if its recalcitrance is seen as a denial, “bald” denials will, as was been pointed out in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), not be sufficient (see also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87

(SCA) and *Ragavan v Kal Tire Mining Services SA (Pty) Ltd* 2019 JDR 1739 (GP) in respect of default judgments).

FINDING

- [24] The name of the first respondent does not, as averred by the applicant, comply with sections 11(2)(a) of the Companies Act as it is the same as a trade mark/s owned by the applicant: see *Williams v Janse van Rensburg* (3) 1989 (4) SA 884 (C); *Century City Apartments Property Services CC and Another v Century City Property Owners Association* [2010] 2 All SA 1 (SCA).
- [25] The relief sought by the applicant in para 8.2 of the founding affidavit to CTR 142 is, in my opinion, not within the jurisdiction of the Companies Tribunal as determined in section 160(3)(b) of the Companies Act. As “creature of statute” the Companies Tribunal does not have any other “inherent” powers.
- [26] Any enforcement of a decision/finding of the Companies Tribunal that is not complied with, is in terms of, *inter alia*, Part D of Chapter 7 of the Companies Act.
- [27] The first respondent must file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name to a name that does not incorporate the word/s “Business Leadership South Africa”.
- [28] There is no order as to costs.

SIGNATURE

P.A. DELPORT

COMPANIES TRIBUNAL: MEMBER

DATE: 17 March 2021