

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CTR004/12/2012

In the matter between:

TELJOY GROUP (PTY) LTD

Applicant

and

TELJOY BED FURNITURES (PTY) LTD

Respondent

Coram: Delport P.A.

Decision handed down on 22 January 2014

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 Companies Act (GNR 351 of 265 April 2011) (“Companies Act regulations” / “regulations”) for a default order that the Respondent be ordered to change its name, “Teljoy Bed Furnitures (Pty) Ltd”, because it does not comply with section 11 of the Companies Act.

BACKGROUND

- [2] The Applicant is Teljoy Group (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.

- [3] The Respondent is Teljoy Bed Furnitures (Pty) Ltd, likewise incorporated with registration number 2011/111513/07. Its registered address is 108 Berea Road, Durban.

ISSUES

- [4] The Applicant is the registered proprietor of the trade mark “Teljoy” and variants thereof, all containing the word “Teljoy”, in various categories. The trade mark registration/s is in terms of the Trade Marks Act No. 194 of 1993 (“Trade Marks Act”).
- [5] The Applicant became aware that the Respondent’s company is registered with a name that contains the letters “Teljoy”.
- [6] The Applicant filed an objection to the use of the words “Teljoy” in the name of the Respondent with the Companies Tribunal on 4 December 2012 on form CTR 142 as prescribed by regulation 142 (1) (a), together with a supporting affidavit as required by regulation 142 (1) (b), by *inter alia*, Frank Alexander Noble, the group commercial director of the Applicant, who was duly authorised by the Applicant by a board resolution of 6 September 2012
- [7] The CTR 142 is dated 7 November 2012.
- [8] A copy of the application must be served on the Respondent at its registered address within 5 days of filing it with the Companies Tribunal as required by regulation 142 (2).
- [9] The copy of the application was served on the Respondent by the Sherriff of Durban on 14 November 2012, who indicates that it was served on Zama Dladla, “apparently a responsible employee and apparently not less than 16 years of age, in control of the principal place of business” of the Respondent at 108 Berea Road, Durban in terms of Rule 4 (1) (a) (v) of the High Court Rules.

- [10] The filing date of Form CTR 142 is indicated as 14 December 2012, while the date on Form CTR 142 is 7 November 2012.
- [11] A copy of Form CTR 142 and the supporting affidavits were served on the Respondent on 14 November 2012.
- [12] No response was received from the Respondent by 14 December 2013 and the Applicant applies on Form CTR 145 for a default order in terms of regulation 153.

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 sought 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.”

- [15] The relief is sought in terms of section 11 of the Companies Act. Regulation 142 (3) (a) requires that the application must "...indicate the basis of the application, stating the section of the Act..."
- [16] The indication in Form CTR 142 is for relief in terms of section 11 (2) (b) (iii) of the Act. The affidavit of one Charné Roux refers to section 11 of the Act, while the affidavit of Frank Alexander Noble, the group commercial director of the Applicant, indicates section 11 (2) of the Act. It is accepted that the relief is sought in terms of section 11 (2) (b) of the Act as the affidavit of Frank Alexander Noble addresses the issues that must be proved under that subsection, and because section 11 (2) (b) (iii) of the Act provides for an exception to a contravention of section 11 (2) (b), which can clearly not apply here. It is not apparent why the clear requirements of the regulations are not complied with.
- [17] Section 11 (2) of the Act, as far as it is relevant, provides:
- “(2) The name of a company must—
- (a) not be the same as—
- (i) the name of another company, domesticated company, registered external company, close corporation or co-operative;
- (ii) a name registered for the use of a person, other than the company itself or a person controlling the company, as a defensive name in terms of section 12 (9), as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960), unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company;
- (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

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

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

EVALUATION

[18] It is clear from the peremptory requirements of regulation 142 that form CTR 142 and accompanying documents must be submitted to the Companies Tribunal and *only then* must the Applicant serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing same.

[19] The process apparently followed was that the application was prepared on form CTR 142 on 7 November 2012.

[20] A copy of Form CTR 142 and the supporting affidavits were served on the Respondent on 14 November 2012.

[21] The filing date of Form CTR 142 with the Companies Tribunal is indicated as 14 December 2012

[22] The date stamp of the Sherriff on form CTR 142 also indicates that the documents were served to the Respondent before filing with the Companies Tribunal.

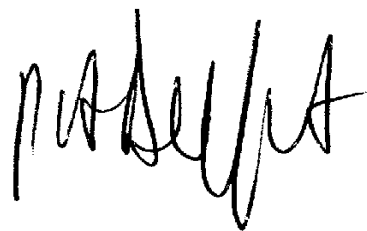
FINDINGS

[23] The process as followed by the Applicant is not in accordance with the peremptory provisions of regulation 142.

- [24] The Companies Tribunal has the power in terms of regulation 147, upon application, not *mero motu*, to condone a late filing of a document or to grant an extension or a reduction of the time for filing a document.
- [25] The deficiencies in the application do not appear to fall within the ambit of regulation 147, even if the Companies Tribunal would be able to act *mero motu*.
- [26] The deficiencies also do not fall within the ambit of substantial compliance as provided for in section 6 (9) and/or (10) of the Act.
- [27] As a result the grounds on which a default order is sought is also deficient as regulation 153 can only be applied if regulation 142 has been complied with.

ORDER

- [28] The application for a default order in terms of regulation 153 is refused.



PROF P.A. DELPORT
MEMBER OF THE COMPANIES
TRIBUNAL