

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("The Tribunal") **CASE NO: CT006DEC2015**

Re: In an Application in terms of Section 160 of the Companies Act 71 of 2008 ("the Act") for a determination that the company name **RAJAH'S FOOD ZONE (PTY) LTD** does not satisfy the requirements of Section 11(2) of the Act.

In the matter between:

UNILEVER S.A HOLDINGS (PTY) LTD **THE APPLICANT**

AND

RAJAH'S FOOD ZONE (PTY) LTD

(2013/206541/07) **THE RESPONDENT**

Coram K. Tootla

Decision delivered on 24 May 2016

DECISION

INTRODUCTION:

[1] The Applicant is **UNILEVER S.A HOLDINGS (PTY) LTD,** a company incorporated in terms of the Companies Act and having its principal place of business at 15 Nollsworth Crescent, La Lucia Ridge Office Estate, La Lucia, 4051, Kwazulu-Natal, brings an application in terms of Sections 11 (2) and 160 of the Companies Act 2008 ("the Act") read with Regulation (Reg.) 153 for an order that the Respondent change its name (Refer to form CTR 142) as the Respondent's name is confusingly similar to the Applicant's trademark.

[2] The Respondent is **RAJAH'S FOOD ZONE (PTY) LTD** is a company incorporated in terms of the Companies Act, and having its registered address at 110 Deeside Drive, Bonela, Durban. 4091.

PROCEDURE:

[3] The application was served by the Sheriff of the Court on 17 December 2015 by "pinning on the principal door of the Respondent but the premises was locked" and "the neighbor confirmed occupancy of the Respondent". There is no evidence that the Respondent was in occupation of the premises at the date of service as the Sheriff's return is vague by the above. Proper service should be in accordance with Table CR 3 of Annexure 3 of the Regulations to the Companies Act or by substituted service depending on the circumstances.

[4] The Respondent did not serve or file any notice to oppose the Applicant's application nor served or filed any answering papers to the Applicant's claim and this may be due to the fact that the Respondent's directors did not receive the documentation pinned on the principal door.

EVALUATION:

[5] The Applicant served the document by pinning on the principal door of the Respondent's principal place of business and there is no evidence that the application did come to the notice of the Respondent. There are other forms of service mentioned in the Regulations as set above which the Applicant could have used apart from pinning on the principal door.

[6] It is clear from the affidavit and the emails attached that the Respondent was in touch with the Applicant's attorneys when it received the Letter of demand. It is also clear that there was no further contact with the Respondent at a later stage as the Respondent was not responding to any of the emails of the Applicant's attorneys.

[7] The Applicant advises that the Respondent's name registration was advertised in the Government Gazette on 9 December 2013 but came to the attention of the Applicant in August 2014. Although the Applicant's attorneys began downloading the government gazette as they state in December 2013, their client became aware of the name existence on 15 August 2014. It is indeed strange that the Applicant did not deem it fit to file its application in terms of Section 160 with the Tribunal shortly thereafter (after 15 August 2014) but decided on communicating with the Respondent via email and thereafter more than a year later approached the Tribunal on October 2015 with a formal objection. No explanation has been provided by the Applicant why an application was not made earlier than December 2015 and what was the reason for the delay save to say that it was liaising with the Respondent via registered post and email.

[8] The Applicant alleges that it has shown good cause for this application. To establish whether the Applicant has shown good cause, the Tribunal refers to Webster and Page- South African Law of Trade Marks, 4th ed, para 16.5.3 where the only requirement is that the applicant must explain the "delay" on good cause shown". The Applicant has not shown why there has been a delay of more than one year after it came to its knowledge

[9] Although the term " good cause" has not been defined in the Act or Regulations, in **Minister of Defence and Military Veterans v Motau and Others Minister of Defence and Military Veterans v Motau and Others**, it was stated that "good cause may be defined as a substantial or "**legally sufficient reason**" for a choice made or action taken". This is a factual enquiry which would differ in each case, depending on the circumstances (*De Wet and Others* v *Western Bank Ltd* 1977 (2) SA 1033 W- deals with the phrase in an application for rescission of judgment). An applicant has the duty to provide facts on which the existence of good cause can be determined.

[10] Since such facts are absent as pointed out above, it can be concluded that good cause has not been shown, moreover there is more than one year delay without proper explanation. There was no reason why the Applicant delayed its application to the Tribunal, but instead decided to issue a letter of demand and further letters which delayed its application to the Tribunal.

[11] To elaborate, an applicant in terms of Section 160 (2) (b) has to show good cause why an application is made at the time it was made. The date which is material in this regard is not when the application was made, but when the applicant became aware of the disputed name and that was 15 August 2014.

[12] The delay from that date to 13 December 2015 is an unreasonable delay and issuance of letters to the Respondent is not in accordance with Section 160 (2) a sufficient reason to show good cause. The delay by the Applicant also added to the fact that the Respondent had most probably moved his business (that is why the premises was vacant and locked) also exacerbates the Applicant's position.

[13] Not only is the failure to show good cause a fatal one, it is also the duty of the Act to protect the registration or reservation of company name, unless found to be contrary to the provisions of the Companies Act. In view of the fact that this is in line with Section 7 of the Act which clearly states that it must "provide a predictable and effective environment for the efficient regulation of companies"; it can be concluded that the Applicant has not explained the delay in lodging its Application in December 2015, more than one year after it became aware of the Respondent's name and has been allowing the Respondent's company name to co-exist with the trade mark of the Applicant.

[14] Section 160 (2) does not require a letter of demand but rather an application to the Tribunal. It is the duty of the Applicant to make an application without delay to the Tribunal. The delay in making an application might imply that the Applicant and Respondent companies can co-exist in the business environment without confusion. Imagine the untold adverse effect that late applications of this nature can have, years after such a name is registered. A letter of demand does not amount to good cause as the Act does not make any provision for this prior to an application being brought to the Tribunal.

Thus the Applicant has not fulfilled the requirement of "good cause" in terms of Section 160 (2) (b). In the circumstances, and for these reasons, the Tribunal cannot deal with the merits of the matter.

[15] Furthermore, the Tribunal is not satisfied with the service made on the Respondent by pinning on the principal door on a locked premises which was by the Applicant's own admission for a company which was not in operation.

[16] Thus the Tribunal is not convinced that the documents did come to the knowledge of the Respondent. It is indeed necessary in Law to enquire whether or not a proper service was effected. Rule 4(1) (v) of the Uniform Rules of Court provides that a Sheriff's service on a company should take place by delivering a copy of the Application to a responsible employee at the registered office or principal place of business of the company, or **if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or any manner provided by law"(my emphasis).**

However, in this instance it is clear that the premises were locked and the company was not operational. It would have served the Applicant better to have made some enquiries via a tracing agent as to the whereabouts of the directors, alternatively make an application for substituted service.

[17] Rule 4(1) (v) is the same as the rule which is contained in Annexure 3, Table CR 3 for service on a company or body corporate in the Companies Act. The Courts have been extremely cautious in observing whether proper service has been effected, before examining the merits of a case, and have emphasized the importance of proper service of court processes (See Ritchie vs Andres 1882(2) EDC 25C), it was held that judgment will only be given against those served. If the Court finds that service does not comply with the requirements, the Court should not grant any relief prayed for in default, before a proper return has been obtained. There are other Supreme Court of Appeal Cases to this effect which the Tribunal is obliged to follow.

[18] In the circumstances, the Tribunal is of the view that the application has not been properly served and hence the application fails on this ground. service.

ORDER:

The application is dismissed.

k.y. tootla (electronically signed)

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KHATIJA TOOTLA

Member of the Companies Tribunal

24 May 2016