Companies Tribunal

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("The Tribunal") **CASE NO: CT011NOV2015**

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 GROWTHPOINT MINING (PTY) Ltd does not satisfy the requirements of Section 11(2) of the Act.

In the matter between:

GROWTHPOINT PROPERTIES LTD **THE APPLICANT**

(1987/004988/06)

AND

GROWTHPOINT MINING (PTY) LTD

(2014/19003/07) **THE RESPONDENT**

Coram K. Tootla

Decision delivered on 27 April 2016

DECISION

INTRODUCTION:

[1] The Applicant having its registered office at The Place, 1 Sandton Drive, Sandton, Gauteng, brings an application in terms of Sections 11 (2) (a)(iii) , 11 (2)(b)(iii) and (c)(i) and 160 of the Companies Act 2008 ("the Act") read with Regulation (Reg.) 13 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 as the Applicant has not consented to the use thereof ; and is such that it would reasonably mislead a person to incorrectly believe that it is part of, or associated with, the Applicant.

[2] The Respondent is a company incorporated in terms of the Companies Act, and having its registered office at 101 Woodburn Manor, French lane, Sandton, Gauteng.

PROCEDURE:

[3] From the papers it appears that the CTR form 142 and supporting documentation was filed with the Tribunal on 22 November 2015 but the documents were served by the Sheriff on 20 November 2015. In terms of Regulation 142 (2), the applicant must serve a copy of the application and supporting affidavit on each respondent named in the application within 5 business days after filing it with the Tribunal. The Applicant has thus served the documents 2 days prior to filing it on the Respondent and has to be wary of not following the Law in this regard.

[4] The application was served by the Sheriff on 20 November 2015, stating that it was served by "affixing to the principal door of the Respondent. 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.

[5] I am not convinced that the documents did come to the knowledge of the Applicant as the Respondent lives in a complex and there is no evidence from the Sheriff's return that the Sheriff did gain access to the door of the apartment of the Respondent. Thus it is 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).**

[6] This rule is 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.

[7] Thus it is unlikely that the Respondent did receive the application papers as set out above and below.

EVALUATION:

[8] The Applicant served the document by pinning on the principal door of the Respondent's registered address and there is no evidence that the application did come to the attention of the Respondent. There are other forms of service mentioned in the Regulations as set out above, which the Applicant has not deemed fit to use, for example, substituted service.

There is no evidence that the Sheriff enquired from the guard at the complex gates whether the Respondent's director in fact lived at that address. The return simply states after diligent search and no details of this search have been mentioned.

[9] In addition, a fatal flaw in the Application is that the Applicant has not advised the Tribunal when Respondent's name registration was advertised in the Government Gazette and when it came to the Applicant's notice. No evidence has been led in the papers with regard to the aforementioned. Thus from the papers it can be seen the Applicant has only shown why it has an interest in the matter. However, it has not shown good cause by explaining when it became aware of the name of the respondent nor has it explained how long thereafter it made the application. There has been no explanation at all in terms of Section 160 as to good cause.

[10] The Applicant indirectly claims that it has an interest in the name of the Respondent within the meaning of Section 160 of the Act, but has not shown good cause for this application both on the merits and background.

[11] Thus, the question is firstly, has the Applicant shown good cause. According to Webster and Page (South African Law of Trade Marks, 4th Ed, para 16.5.3), the only requirement is that the applicant must explain the "delay" on good cause shown". In this instance, the Applicant has not shown good cause at all.

[12] 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. Since such facts are absent as pointed out above, it can be concluded that good cause has not been shown.

[13] 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. The only information that the Tribunal can glean from the CIPC certificate is that the company was registered on 7 October 2014. When did the Applicant become aware of this name registration and how long after that was an application made; and if an application was made later what was the delay, if any, in bringing the application. Some kind of proof should be submitted as to when the name registration of the Respondent came to its attention or was brought to its attention.

[14] Not only is the failure to show good cause a fatal one, it is the duty of the Act to protect the registration or reservation of a company name, unless found to be contrary to the provisions of the Companies Act. In view of the fact that showing "good cause" is in line with Section 7 of the Act, which clearly states that the Act must "provide a predictable and effective environment for the efficient regulation of companies", it can be concluded that the Applicant has not shown good cause at all. More than a year has expired after the name registration of the Respondent's company name, but there is no explanation as to when the Applicant became aware of the said registration. There is also no explanation as to how long it took the Applicant to bring this application after having knowledge thereof and what was the cause of the delay if any. 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] It is rather disturbing that the Applicant has not advised the Tribunal that it has previously applied for similar relief in exactly the same circumstance for exactly the same Respondent under case no. CT020Jun2015 and that the application was refused by another Tribunal member. The correct procedure is for the Applicant to have made an application under the previous case number and explain what had occurred i.e. that there was no service on the Respondent in the matter previously. In fact the Applicant has no reason to apply to the Tribunal if there is no proper service of the application.

[16] Time and again this Tribunal has been receiving incorrect and poorly drafted applications of this nature, which is not appreciated by the Tribunal, as it utilizes valuable time of Tribunal members as well as amounts to wasteful resources of the government. It is important for the Applicant to apply its mind properly to the Law and to consult its legal advisors to avoid unnecessary expense to its shareholders.

[17] It is rather obvious also that CIPC has registered the exact same name for two companies but with two differing registration numbers, with exactly the same director; with the same address which seems rather odd and incorrect unless CIPC can show that it was an error.

ORDER:

1. The Applicant's application is dismissed.

2. A copy of this order is to be served on CIPC requesting reasons why it has registered two companies (company registration number 2014/19003/07 (under this case) and company registration number 2014/189968/07 under another) exactly the same company names, same registered office, same director but under two registration numbers.

   In the event that this was an error on the part of CIPC, CIPC is ordered to rectify the error and to ensure that only one registration name and number for the Respondent is maintained. CIPC is to advise the Respondent accordingly.

3. Copy of this order is to be served via registered post and ordinary mail on the Respondent.

k.y. tootla (electronically signed)

_____

KHATIJA TOOTLA

Member of the Companies Tribunal

27 April 2016