IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT028Mar2015

In the matter between:

Guccio Gucci S.p.A. Applicant

and

Gucci Galz Productions (Pty) Ltd Respondent

Coram: Delport P.A.

Decision handed down on 15 February 2016

Decision

INTRODUCTION

[1] The applicant applies for a default order that the respondent be ordered to change its name because it does not comply with s 11(2)(a)(i) and/or with s 11(2)(a)(ii) and/or s 11(2)(b)(i) of the Companies Act 71 of 2008 ("Companies Act"). This was stated in the CTR 142, although the supporting affidavit, (para 6) brings the application under s 11(2)(b) and s 11(2)(c).

[2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) ("Companies Act regulations" / "regulations") regulate an application to the Companies Tribunal ("Tribunal') as well as the application for a default order under certain circumstances.

BACKGROUND

[3] The applicant is Guccio Gucci S.p.A. incorporated in terms of the laws of Italy with registered address in Firenze, Italy.

[4] The respondent is Gucci Galz Productions (Pty) Ltd, a company incorporated in South Africa under registration number 2011/145482/07.

[5] The affidavit in support of the CTR 142 in terms of reg 142 was deposed by Vanni Volpi, the intellectual property counsel of the applicant, who was apparently properly authorised thereto by a notarially executed power of attorney of 21 September 2012.

[6] In contrast to the requirements of reg 142(3)(a), that requires that the application must indicate the basis of the application, stating the section of the Act or these regulations in terms of which the application is made, there is, as indicated in para 1 above, no clarity under which section/s the relief is sought.

[7] The applicant served form CTR 142 and the supporting affidavit on the respondent, within the time indicated in reg 142(2), after filing with the Tribunal.

[8] The application was also, *ex abundanti*, sent to the respondent by registered mail.

[9] The background to the application is, and I quote from the founding affidavit:

"2.2.2 The Respondent has obtained registration under the name Gucci Galz Productions (Pty) Limited, hereinafter referred to as 'the offending name': The Respondent was incorporated on 12 December 2011…"

"4.1 As mentioned in paragraph 2.2.2 above the offending name was registered on 14 May 2012. The registration of the offending name was advertised in the Government Gazette of 11 May 2012.

4.2 On or about 6 December 2011 the Applicant became aware of the advertisement of the offending name.

4.3 The Applicant instructed its attorneys, Spoor & Fisher, to address a letter of demand to the Respondent, advising of the Applicant's rights in and to its trade marks incorporation the word GUCCI and calling on the Respondent to voluntarily amend the offending name. This letter was sent by registered post to the registered postal address of the Respondent. A copy of this letter dated 7 February 2012 is attached hereto, marked as Annexure 'B'."

4.4 No response to the letter of demand has to date been received by the Respondent.

4.5 The Applicant now has no further option to apply for relief from the Companies Tribunal."

[10] The relief applied for is the present matter and it was lodged with the Companies Tribunal on 26 March 2015, according to the date stamp on the CTR 142.

[11] The facts above are somewhat confusing and I do not understand the sequence. The respondent was incorporated on 12 December 2011 and the applicant became aware of the offending name on 6 December 2011 – therefore before registration. Then the applicant states that the offending name was "registered" on 14 May 2012 and the "registration" of the offending name was advertised in the Government Gazette of 11 May 2012.

[12] There is no logic or sense in the above sequence of events and it is not possible to ascertain when the applicant became aware of the "offending name" and it must be sometime between registration of the respondent and the publication of the "offending name" in the Government Gazette, as the "letter of demand" was sent to the respondent on 7 February 2012.

[13] I shall, for the benefit of the applicant, accept that the date that the "offending name" came to its knowledge was 7 February 2012. I add that I use "offending name" in respect of the respondent's name, as it is used in the founding affidavit, without implying anything as to its nature

APPLICABLE LAW

[14] The remedies in s 160 are available, as far as it is relevant here, to "any…person with an interest".

[15] A "person" is defined in section 1 of the Companies Act to include a 'juristic" person. A "juristic person" is then defined in said section 1 as including "a foreign company". The definition of a "foreign company" in said section 1 is *inter alia* "an entity incorporated outside the Republic". The applicant is therefore a "person" for purposes of section 160.

[16] In *Ex parte application of Gore NO* 2013 JOL 30155 (WCC) para 35 the Court said that "[T]he term 'interested person' is not defined. I do not think that any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle…". In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 389 the principle was stated as: "He failed, therefore, to show that he had what Van den Heever JA (in *Ex parte Mouton and Others* [1955 (4) SA 460 (A)] described as ''n aktuele en teenswoordige belang' [actual and existing interest] in the matter. . . " and in addition a person must also have a direct interest (*Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101). (*Henochsberg on the Companies Act 71 of 2008* at 101 and at 322(21) also in respect of "Any interested person").

[17] The applicant, as registered owner of certain trade marks, is therefore a person with an interest as required by section 160 (1).

[18] Section 160, which is the basis for applications like these, 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*) 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."

EVALUATION

[19] The Companies Act does not define what is meant by "good cause" in terms of s 160(2)(b) and it is not clear whether it refers to substantive grounds (such as e.g. s 11) or whether it refers to the period of time within which the application should be launched.

[20] Based on the context of sub-s (2) of s 160, it would seem that the sensible interpretation will be that it refers to the period within which to launch the application: See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[21] The reason for the requirement that there must be good cause shown why the application was launched at a particular date would appear to be that the person doing business under a particular name, that has been registered by the Companies and Intellectual Property Commission, is not prejudiced by a belated challenge which could affect the goodwill built up in using the name. See also *Comair Limited vs Kuhlula Training, Projects and Development Centre (Pty) Limited* CT007Sept2014 of 27 February 2015.

[22] The applicant does not attempt to address the period of more than thee years since it became "aware" of the name, to the date of the launching of the objection.

[23] I state, in parenthesis and purely *obiter*, that the Companies Act apparently has, as underlying premise, a "prescription" period of three years. S 219, as one example, and there are various others, like s 77, provides as follows "Limited time for initiating complaints.—(1) A complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased."

[24] I do not imply that s 219 is applicable in this application, but to interpret s 160 that an application such as this one is not subject to some restriction as to the time within which it should be lodged, will in my opinion, lead to "…insensible or unbusinesslike results…": *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

[25] As stated above the effluxion of time should be evaluated against possible prejudice to the respondent in determining "good cause". In light of the fact that the respondent is, according to CoR 14.3, in business, there may very well be prejudice and the lack of the applicant to address the good cause requirement is, in my opinion. critical to this application.

[26] I venture to state that the Tribunal has a discretion to allow a complaint, even under the (exceptional) circumstances (as to the length of time) as in this application. However, it must base its discretion on some facts or at least averments by the applicant, or an explanation as to the effluxion of time from the date that it became aware of the "offending" name.

[27] The applicant indeed has a heading in the founding affidavit with the title "Good Cause Shown", but all that is contained under this heading are the factual (and very confusing) time line set out above in para 9.

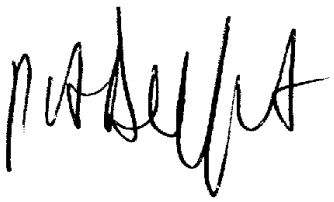
[28] If one accepts that the letter of 7 February 2012 is relevant and material in terms of the Act, and I do not, the founding affidavit still does not explain the

effluxion of time thereafter. The efficacy of the postal service during that time may also be an issue, although I do not make a finding in that regard.

ORDER

[29] The application is refused.

[30] In light of the above finding I cannot and do not make a determination as to the merits of the application.



MEMBER OF THE COMPANIES TRIBUNAL