IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT005DEC2017

In the matter between:

VOLTEX (PTY) LIMITED **Applicant**

(Registration Number: 1964 / 006740 / 07)

and

WACO TRADING ENTERPRISE (PTY) LIMITED **Respondent**

(Registration Number: 2015 / 117312 / 07)

Issue(s) for determination: This is an objection to the registration of the company name Waco Trading Enterprise (Pty) Limited in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Companies Act, 2008 (Act No. 71 of 2008) read with regulations 13 and 142 of the Companies Regulations, 2011.

Coram: **Lindelani Daniel Sikhitha**

Date of handing down of decision: **28 May 2018**

DECISION (Reasons and Order)

INTRODUCTION

[1] The Applicant in this matter is Voltex (Pty) Limited, with Registration Number: 1964 / 006740 / 07 which is a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa. The Applicant's registered address is situated at Bidvest House, 18 Crescent Drive, Melrose Arch, 2196.[1]

[2] The Fist Respondent in this matter is Waco Trading Enterprise (Pty) Limited with Registration Number: 2015 / 117312 / 07 which is a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa. The Respondent's registered address is situated at 31 First Avenue, Limithill, Ladysmith, KwaZulu-Natala, 3370.[2]

[3] The Second Respondent in this matter is the Commissioner of the Companies and Intellectual Property Commission appointed in terms of section 189 of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"). The Second Respondent is cited in his official capacity as the person who is responsible for the function of the Companies and Intellectual Property Commission ("the Commission") in terms of the Act.

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[1] See paragraph 2.1 of the Affidavit in support of the Application for Default Order deposed to by Delene Mary Bertasso ("Supporting Affidavit") which appears at page 3 of the Indexed and Paginated Bundle of Documents. See also paragraph 3.1 of the Founding Affidavit in support of the Application for Objection Against Company Name deposed to by Stanley Green ("Founding Affidavit") which appears at page 12 of the Indexed and Paginated Bundle of Documents.

[2] See paragraph 2.2 of the Supporting Affidavit which appears at page 3 of the Indexed and Paginated Bundle of Documents. See also copy of Windeed Company Report for the Respondent which appears at page 6 of the Indexed and Paginated Bundle of Documents. See also paragraph 3.2 of the Founding Affidavit which appears at page 12 of the Indexed and Paginated Bundle of Documents.

[4] This is an Application for Relief in terms of which the Applicant objects to the registration of the company name of the First Respondent, being Waco Trading Enterprise (Pty) Ltd, in terms of sections 11 and 160(2)(b) of the Act, read together with regulations 13 and 142 of the Companies Regulations, 2011 ("the Regulations"). In short, the Applicant contends that the First Respondent's name is contrary to the provisions of sections 11(2)(a), 11(2)(b) and 11(2)(c) of the Act. In this regard, the Applicant contends:

4.1 that the First Respondent's company name amounts to a name that is similar to the registered WACO trade marks of the Applicant.

4.2 that the First Respondent's company name is confusingly similar to the WACO trade marks which belongs to the Applicant; and

4.3 that the First Respondent's company name falsely imply or suggest or is such as would reasonably mislead, a person to believe, incorrectly so, that the First Respondent is associated or part of the business of the Applicant.[3]

[5] In this Application for Relief, the Applicant is therefore seeking a determination by the Companies Tribunal in respect of the registration of the company name of the First Respondent by the Commission.

[6] The Applicant filed the Application for Relief (Form CTR 142) on the 06th day of December 2017. In terms of its Application for Relief, the Applicant is requesting

[3] Refer to paragraph 7.12 of the Founding Affidavit which appears at page 22 of the Indexed and Paginated Bundle of Documents.

the Companies Tribunal to grant the following relief against the First and Second Respondents:

6.1 Directing the First Respondent to change its name to one which does not incorporate the trade mark WACO, or any other trade mark / word that is confusingly and/or deceptively similar thereto;

6.2 In the event that the First Respondent fails to comply with the order set out in paragraph 6.1 above within 3 months from the date of the order, directing the Second Respondent, in terms of section 160(3)(b)(ii) read with regulation 142 of the Act, to change the name of the First Respondent to "K2015 / 117312 / 07 (Pty) Ltd", as the First Respondent's interim company name on the Companies Register; and

6.3 granting the Applicant further and/or alternative relief.

FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF IN TERMS OF THE REGULATIONS

[7] This is an Application for Relief in terms of which the Applicant is objecting to the company name of the First Respondent in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Act read with applicable Regulations. It is my view however that before I deal with the merits and/or demerits of the current Application for Relief, it is important that I should first deal with some preliminary legal issues which relates to the form and substance that the current Application for Relief should comply with.

[8] I should therefore begin such an exercise by first having a look at the provisions of regulation 13(a) which deals with the form of the applications of the nature similar to the current Application for Relief in order to determine if such application is indeed in compliance thereof. The relevant parts of regulation 13(a) read as follows:

> ***"(a) A person may apply in Form CTR 142 to the Tribunal in terms of section 160 if the person has received… a Notice of a Potentially Contested Name, in Form CoR 9.6 or a Notice of a Potentially Offensive Name, in Form CoR 9.7, or has an interest in the name of a company as contemplated in section 160(1)…." [Own emphasis added.]***

[9] As already stated, the current Application for Relief is contained in Form CTR 142 (Application for Relief). I am therefore satisfied that the current Application for Relief does comply with regulation 13(a) of the Regulations as outlined above.

[10] In terms of regulation 142(1) of the Regulations, a person may apply to the Companies Tribunal for an order in respect of any matter contemplated in the Act or the Regulations by completing and filing with the Companies Tribunal's recording officer:

10.1 an Application in Form CTR 142; and

10.2 a supporting affidavit setting out the facts on which the application is based.

[11] The current Application for Relief is made in Form CTR 142 and it is supported by a Founding Affidavit deposed to by Stanley Green who is the Managing Director of the Applicant. The deponent is duly authorised to launch the current

Application for Relief and to depose to the Founding Affidavit on behalf of the Applicant in terms of a Resolution passed by the Board of Directors of the Applicant. A copy of the Resolution is annexed to the Founding Affidavit and marked Annexure "SG1". The Application is being made in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Act read together with regulations 13 and 142 of the Regulations.[4]

[12] In terms of regulation 142(2) of the Regulations, the Applicant is required to serve a copy of the Application for Relief together with the Founding Affidavit and any attachment thereto on each respondent cited in the Application for Relief, within 5 business days calculated from the date of filing of the Application for Relief with the Companies Tribunal.

[13] As it appears from the papers placed before me, the current Application for Relief was properly served upon the First Respondent on the 07th day of December 2017 at 15h10 at 31 First Avenue, Limithill, Ladysmith ("the service address") by affixing a copy thereof to the principal door at the given address. In addition, an electronic copy thereof was transmitted through email communication dated 12 December 2017 to the email address **wakho99@gmail.com**.[5]

[14] I am satisfied that the service address of the Application for Relief is the same as the registered address of the First Respondent as per the First Respondent's Windeed Company Report. I am further satisfied that the email address

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[4] Refer to paragraphs 1 to 2 of the Founding Affidavit which appears at pages 11 to 12 of the Indexed and Paginated Bundle of Documents. See also Annexure "SG1" – An Extract from the Minutes of the Board of Voltex (Pty) Ltd which appears at page 25 of the Indexed and Paginated Bundle of Documents.

[5] Refer to Annexure "DB4" which appears at page 85 and Annexure "DB5" which appears at page 86 of the Indexed and Paginated Bundle of Documents.

wakho99@gmail.com is the same email address that was used by the Applicant's attorneys, Edward Nathan Sonnenbergs Incorporated ("ENS"), to transmit the letter of demand to the First Respondent on or about the 14th day of October 2016. A certain Thoba Mchunu who is the director of the First Respondent did respond to the aforementioned email communication on or about the 16th day of November 2016.

[15] It is therefore clear that service of the Application for Relief upon the First Respondent was effected within a period of 5 days calculated from the date of filing of the Application for Relief as stipulated in regulation 142(2) of the Regulations. In addition, the Application for Relief was electronically transmitted to the First Respondent through email communication on 12 December 2016. I am therefore satisfied that the current Application for Relief was properly served upon the First Respondent on 07 December 2016 in the manner that had been fully outlined in the Sheriffs' Returns of Service (Annexure "DB4"). The current Application for Relief was also served upon the First Respondent through email communication on 12 December 2016.

[16] I however was not able to find any proof of service of the current Application for Relief upon the Second Respondent. Be that as it may, this shortcoming will only become relevant in the event that the Applicant is seeking any relief against the Second Respondent. In that event, I will not be able to make any order against the Second Respondent until such time that the Applicant provides proof of service of the Application for Relief on the Second Respondent.

[17] Save for the aforementioned shortcoming, I am satisfied that the current Application for Relief is in substantial compliance with regulation 142 of the Regulations and it was therefore properly brought before the Companies Tribunal.

[18] In terms of regulation 143(1) of the Regulations, any respondent who wishes to oppose the Application for Relief must serve a copy of its answer on the initiating party and file the answer with proof of service thereof with the Companies Tribunal within twenty (20) business days after being served with an application that has been filed with the Companies Tribunal.[6]

[19] It follows therefore that the First Respondent was required to serve a copy of its answer on the Applicant and file its answer together with proof of service on the Applicant with the Companies Tribunal within twenty (20) business days in terms of regulation 143(1) of the Regulations.

[20] Upon proper calculation of the time frames in terms of regulation 143(1) of the Regulations the First Respondent was required and had failed to serve on the Applicant and to file with the Companies Tribunal a copy of its answer to the current Application for Relief together with proof of service on the Applicant on or before the 09th day of January 2018. As at the date of filing of the Application for the Default Order in this matter, the First Respondent has still not served on the Applicant and filed with the Companies Tribunal a copy of its answer together

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[6] Regulation 143(1) of the Regulations reads as follows:
"Within 20 business days after being served with a Complaint Referral, or an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must––
(a) serve a copy of an Answer on the initiating party; and
(b) file the Answer with proof of service."

with proof of service on the Applicant as prescribed by regulation 143(1) of the Regulations.

[21] As a result of the First Respondents failure to serve on the Applicant and file with the Companies Tribunal a copy of its answer together with proof of service on the Applicant with the Companies Tribunal, the Applicant is therefore entitled to file the Application for Default Order with the Companies Tribunal in terms of regulation 153(1) of the Regulations.

[22] Once such Application for Default Order is filed with it, the Companies Tribunal is therefore enjoined to consider such an application in terms of sections 11(2) and 160 of the Act read with the provisions of regulation 153(2) of the Regulations. It is therefore important that I should make reference to the provisions of regulation 153(1) and (2) of the Regulations which read as follows:

> *"(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.*
>
> *(2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order–*
>
> *(a) after it has heard any required evidence concerning the motion; and*
>
> *(b) if it is satisfied that the notice or application was adequately served."*

[23] The Applicant did indeed proceed to file its Application for Default Order (Form CTR 145) in terms of regulation 153 of the Regulations on the 22nd day of March 2018.

[24] In terms of the Supporting Affidavit in support of the Application for Default Order deposed to by Delene Mary Bertasso dated 20 March 2018, the Applicant makes

the following allegations which are considered to be relevant for purposes of the current Application:

24.1 On 06 December 2017, the Applicant filed an Application for Relief (Form CTR 142) requesting the Companies Tribunal to grant an order that the First Respondent change its company name on the basis that it is contrary to provisions of section 11(2) of the Act.

24.2 On 07 December 2017, the Sheriff served a copy of the Application for Relief by affixing it to the principal door of the registered address of the First Respondent.

24.3 In addition, a copy of the Application for Relief was sent electronically to the First Respondent using an email address that ENS previously used to correspond with the First Respondent.

24.4 As at the date of filing the Application for Default Order, the First Respondent has not filed an answering affidavit in response to the Applicant's Application for Relief. This is so despite the fact that the First Respondent had been made aware of the Application for Relief.

24.5 On 12 September 2017, ENS addressed a letter of demand to the First Respondent, calling on it to change its company name to one not incorporating or confusingly similar to the Applicant's WACO trade marks.[7]

24.6 On 16 November 2017, the First Respondent responded to the letter of demand from ENS, via email, using the same email address that ENS

[7] Refer to Annexure "SG9" which appears at pages 82 to 83 of the Indexed and Paginated Bundle of Documents.

used to electronically send the Application for Relief, advising that it is not willing to change its company name.

24.7 Accordingly, the Applicant had no alternative but to proceed with the Application for Relief and the Application for Default Order.

24.8 In terms of regulation 153 of the Regulations, the Applicant is therefore requesting that an order be granted against the First Respondent as prayed for in the Founding Affidavit accompanying Form CTR 142.

THE PROVISIONS OF THE ACT AND THE REGULATIONS RELEVANT TO THE DETERMINATION OF THE CURRENT APPLICATION FOR RELIEF

[25] The Companies Tribunal is a creature of the Act and therefore its jurisdiction to deal with the current Application for Relief is to be found through conducting a thorough examination of the papers placed before me in this matter. Such an exercise also requires me to examine the relevant provisions of the Act to determine the scope and extent of the powers assigned to the Companies Tribunal to adjudicate or determine applications of similar nature to the current Application for Relief.

[26] In terms of paragraph 4.1 of the Founding Affidavit, the Applicant alleges that it is the proprietor in South Africa of several trade marks incorporating or comprising WACO. The details of the relevant WACO trade mark applications and registrations are as follows:

26.1 Trade mark no.: 1958/01831/1

Trade Mark: WACO Logo

	Status:	Registered
	Class:	9
	Goods:	Electrical fittings, electrical fusable contacts, switches, contacts and terminals, all made wholly or mainly of metal;
26.2	Trade mark no:	1958/01831/2
	Trade Mark:	WACO Logo
	Status:	Registered
	Class:	11
	Goods:	Electric lamps;
26.3	Trade mark no:	1983/02832
	Trade Mark:	WACO
	Status:	Registered
	Class:	9
	Goods:	Electrical apparatus and instruments, electric conductors, sockets, connectors and conduits, electric safety devices and apparatus, electric clamps including safety clamps, distribution boards and boxes, line connections, switches and switchboards, terminals, contacts and insulators, insulated cables, wire and clamps, plug and plug sockets of all kinds, cable and appliance couplers earthing devices and

apparatus, parts of and accessories for the aforegoing, but excluding electrical components and controls for use in brakes and braking systems for railway trucks and road vehicles;

26.4	Trade mark no:	1983/02833
	Trade Mark:	WACO
	Status:	Registered
	Class:	11
	Goods:	Electric lamps, installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes, lighting fittings, lighting units and accessories, light fitting systems, floodlights, handlamps, desklamps, tubes, lampholders, lamp shades, lighting frames, lighting apparatus and appliances, reflectors, light dimmers, light diffusers, lighting regulators, limelight lamps;
26.5	Trade mark no:	1983/02834
	Trade Mark:	WACO Logo
	Status:	Registered
	Class:	9
	Goods:	Scientific, nautical, surveying and electrical apparatus and instruments, household and

		industrial electrical wire, flexes and cables, plugs, sockets and other contacts, industrial sockets and plugs, wiring connectors, electric ore cutting and welding apparatus, electric installations for the remote control of industrial apparatus, electric light bulbs, electric loss indictors, electrical conductors, cables, electromagnetic coils, electroplating apparatus, electric soldering apparatus, power units, industrial power units, welding plugs, store fuses, bottle fuses, electric elements, socket outlets, plug tops, sockets and adaptors, connectors, shaver sockets, switches of all types, sirens, electric bells, industrial and bell material, hooters, tong testers, volt ammeters, volt-ohm ammeters, insulation testers, voltage indicators;
26.6	Trade mark no:	1983/02835
	Trade Mark:	WACO Logo
	Status:	Registered
	Class:	11
	Goods:	Electric lamps, installations for lighting, heating, steam generating, cooking, refrigerating, drying,

ventilating, water supply and sanitary purposes, lighting fittings, lighting units and accessories, light fitting systems, floodlights, handlamps, desklamps, lamps, tubes lampholders, lamp shades, lighting frames, lighting apparatus and appliances, reflectors, light dimmers, light diffusers, lighting regulations, limelight lamps;

26.7	Trade mark no:	1984/09028
	Trade Mark:	WACO CEE
	Status:	Registered
	Class:	9
	Goods:	Electrical apparatus and instruments, electric conductors, sockets, connectors and conduits, electric safety devices and apparatus, electric clamps including safety clamps, electric coils, distribution boards and boxes, line connections, measuring apparatus and instruments, relays, resitences, switches and switch boards, terminals, contacts and insulators, insulated cables, wire and clamps, plugs and plug sockets of all kinds, cable and appliance couplers, earthing devices and apparatus, parts of and accessories for the aforegoing;

26.8	Trade mark no:	2013/04676
	Trade Mark:	WACO
	Status:	Pending
	Class:	6
	Goods:	Common metals and goods made of common metals, not included in other classes, non-electric cables and wires of common metal, iromongery and small items of metal hardware, pipes and tubes of metal, safes; and
26.9	Trade mark no:	2013/04677
	Trade Mark:	WACO
	Status:	Pending
	Class:	8
	Goods:	Hand tools and implements.[8]

[27] The Applicant further alleges that it is the largest electrical wholesaler in Southern Africa and a leading stockiest and reseller of a comprehensive range of electrical and lighting products, including national and international suppliers and theirs brands. The Applicant forms part of Bidvest Electrical, which is a division of Bidvest Group Limited, a listed company on the South African stock exchange. It has 14 supplier divisions, two of which being Waco Industries and Waco-R.[9]

[8] Refer to paragraph 4.1 which appears at pages 13 to 16 of the Indexed and Paginated Bundle of Documents. See also Annexure "SG3.1" to Annexure "SG3.9" which appear at pages 28 to 41 of the Indexed and Paginated Bundle of Documents

[9] Refer to paragraphs 5.1 and 5.2 which appear at page 17 of the Indexed and Paginated Bundle of Documents.

[28] It is my understanding of the papers placed before me in this matter that the Applicant is making a company name objection application against the registration of the Respondent's company name by the Commission. The company name objection application ("Application for Relief") is being made in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Act read with regulations 13 and 142 of the Regulations.

[29] As part of my analysis of the facts that are relevant to this matter, it is imperative that I should deal with each of the provisions of the Act and Regulations that are referred to by the Applicant. However, where necessary I will make reference to the provisions of the Act and the Regulations which I consider to be relevant for purposes of my reasons and decision on the Application for Relief in this matter.

[30] My point of departure in this exercise will be to look at the provisions of section 11(2) of the Act which forms the basis of company name objection disputes. The relevant parts of section 11(2)(a), (b) and (c) of the Act reads as follows:

"(2)(a) The name of a company must 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), or 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 trademark 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 -***

(i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;

(ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;

(iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark or mark, or is authorised by the registered owner to use it; or

(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;

(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….*"*

[Own emphasis added.]

[31] I am also required to look at the provisions of section 160(1) of the Act which deals with disputes concerning reservation or registration of company names. Section 160(1) of the Act grants a right to any party who is interested in the name of the company to bring, amongst others, an application similar to the one brought by the Applicant for determination by the Companies Tribunal. The relevant parts of section 160(1) of the Act read as follows:

"(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." [Own emphasis added.]

[32] It is also important that I should, in this exercise, also make reference to the provisions of section 160(2) of the Act. These provisions are relevant for purposes of my determination and they read as follows:

"(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) <u>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."</u> [Own emphasis added.]

[33] It is common cause that the company name of the First Respondent was registered by the Commission on the 20th day of April 2015 and further that its business activities are not restricted.[10]

[34] As I have already pointed out above, the Application for Relief was only filed with the Companies Tribunal on the 06th day of December 2017. The Application for Relief was served by Sheriff on the First Respondent on the 07th day of December 2017. It is common cause that the same Application for Relief was electronically delivered to the First Respondent through email communication on the 12th day of December 2017.

[35] It is further common cause that the Applicant did not receive the notice contemplated in section 160(1) of the Act from the Commission. Therefore section 160(2)(a) of the Act is not applicable to the current Application for Relief. The Applicant therefore falls in the category of any person with an interest in the name of a company as envisaged in section 160(1) of the Act. In terms of section 160(2)(b) of the Act, the Applicant is permitted to file its application to challenge registration of a name at any time. In order to have the current Application for Relief entertained by the Companies Tribunal, the Applicant is however required

[10] Refer to a copy of Respondent's Windeed Company Report marked Annexure "DB1" and which is dated 15 March 2018 which appears at pages 6 to 8 of the Indexed and Paginated Bundle of Documents.

to show good cause as to why its application should be entertained as prescribed by section 160(2)(b) of the Act.

[36] It is important for me to begin the exercise of determining the question as to whether or not the Applicant had succeeded in showing good cause to explain the delay in filing its Application for Relief by unpacking the essential requirements for establishing good cause which the Applicant is required to show in terms of the provision of section 160(2)(b) of the Act. In order for me to properly do such exercise I must analyze the Applicant's papers as well as looking at relevant case law in order to see if the Applicant had presented the necessary and/or relevant facts to substantiate good cause for its Application for Relief to be entertained by the Companies Tribunal as required by section 160(2)(b) of the Act.

SHOWING OF GOOD CAUSE BY THE APPLICANT IN TERMS OF SECTION 160(2)(b) OF THE ACT

[37] Our courts have had countless opportunity to determine the important factors which should be considered when dealing with the issue of showing good cause in terms of their rules of processes and procedures. I therefore find such case law to be relevant for purposes of the exercise that I am called upon to perform as part of my determination in this matter.

[38] In *Colyn v Tiger Food Industries*, Jones AJA had the following to say regarding the essential requirements to show *"good cause"* in relation to an application for rescission of default judgment, which requirements are, in my view and with

necessary changes, also relevant to the Application for Relief that is currently placed before me for my determination:

> *[11] …The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait:*
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> > *'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'*
>
> ***With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success*** *(Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal.)."*[11] [Own emphasis added.]

[11] See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003).

[39] The principles governing the requirements for granting or refusing of condonation applications by courts or tribunals (including the Companies Tribunal) are well established in our law. In terms of these principles the courts or tribunals have a discretion which is to be exercised judicially after taking into account all the relevant facts which have been brought before them by applicants for such condonation. These facts will differ from one case to the other and what would be reasonable facts in one case might be unreasonable in another case.

[40] Be that as it may, the factors which are important and which the Companies Tribunal is enjoined to take into consideration in the determination of whether or not condone the lateness to file the company name objection and to entertain an Application for Relief brought before it by an applicant in terms of section 160(2)(b) of the Act are the following:

40.1 the degree of lateness or non-compliance with the prescribed time frame;

40.2 the explanation for the lateness or the failure to comply with time frames;

40.3 prospects of success or *bona fide* defense in the main case;

40.4 the importance of the case;

40.5 the respondent's interest in the finality of the matter or case brought before the court or tribunal;

40.6 the convenience of the court or tribunal; and

40.7 avoidance of unnecessary delay in the administration of justice.[12]

[12] See *Kritzinger v Commission for Conciliation, Mediation and Arbitration and Others* (JR 2254/05) [2007] ZALC 85 (9 November 2007) at para [10]. See also *Khosa v ABSA Bank Limited* (JS 812/2012) [2013] ZALCJHB 98 (12 March 2013) and *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

[41] As Molahlehi J stated in *Kritzinger v CCMA & Others*,[13] the aforementioned factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the aforementioned factors for instance, the court or tribunal may find that a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly it may find that strong prospects of success may compensate the inadequate explanation and the long delay to file an application.

[42] In an application for condonation in terms of section 160(2)(b) of the Act, an applicant will succeed in showing good cause for a delay by means of giving an explanation that shows how and why the delay in the filing of its application with the Companies Tribunal occurred. In other words, the Applicant is required to be generous with the truth with regard to the cause of the delay and it must make full disclosure of all information that is relevant to the lateness in filing its Application for Relief.

[43] I also found other authorities which support the fact that the Companies Tribunal could decline the granting of the application for condonation if it appears to it that the late filing of the application was wilful or was due to gross negligence on the part of an applicant for condonation. In fact the Companies Tribunal could on this ground alone decline to grant an indulgence to an applicant for condonation. Prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined by the Companies Tribunal is the likelihood or chance of

[13] Ibid at para [11].

success when the main case is adjudicated by the Companies Tribunal.[14]

[44] It is my view therefore that without a reasonable and acceptable explanation for the delay, the prospects of success will be rendered immaterial, and therefore an application for condonation should be refused. Similarly without prospects of success, no matter how good the explanation for the delay could be, an application for condonation should be refused. It has also been held by the courts and tribunals that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of the filing of its case with the court or tribunal.[15]

[45] In my view and coming back to the Application for Relief that is before me, a proper explanation for the delay entails an explanation by the Applicant for each period of the delay and the disclosure of all the details relevant to the delay. The Applicant is therefore required to make full disclosure with regard to all the facts that are relevant to the delay in filing its Application for Relief. In other words, the Applicant is required to be generous with the truth about the real cause of the delay thereby taking the Companies Tribunal into its total confidence.

[46] In explaining the causes of the delay in terms of section 160(2)(b) of the Act, the Applicant need to include the date on which it first became aware of the registration of the First Respondent's company name by the Commission and the stage at which the Applicant became aware of the lateness in the filing of its Application for Relief with the Companies Tribunal.

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[14] See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

[15] See *Melane v Santam Insurance Co Ltd,* 1962 (4) SA 531 (A) at 532C-F.

[47] In the event that the Applicant did not make the Application for Relief immediately or soon after becoming aware of the registration of the First Respondent's company name, the Applicant need to provide an explanation for such delay. Similarly, if the Applicant did not file an Application for Relief together with an application for condonation immediately after became aware of the lateness of the referral of its Application for Relief, the Applicant need to provide an explanation for such lateness as well. Risking the danger of repeating myself, it is of crucial importance that the Applicant must take the Companies Tribunal into its confidence with regard to all facts which are relevant to the determination of its Application for Relief by the Companies Tribunal. If the Applicant was to make minimal or no disclosure of all the relevant facts, the Companies Tribunal will unfortunately not come to its assistance.

[48] It is clear therefore that in terms of section 160(2)(b) of the Act, the Applicant just like any other interested person and at any time after registration of a company name by the Commission is allowed to bring an application to the Companies Tribunal on good cause shown in the prescribed manner and form for a determination whether the company name of the First Respondent satisfies the requirements of the Act.

[49] In *Highly Nutrious Food Company (Pty) Ltd v Companies Tribunal and Others*,[16] Twala J held that section 160(2)(b) does not refer only to the delay in bringing the application but also to showing good cause as to why the application must be entertained by the Companies Tribunal. According to him, this section therefore

[16] See *Highly Nutrious Food Company (Pty) Ltd v Companies Tribunal and Others* (Case Number: 91718/2016), Gauteng Division, Pretoria (dated 22 September 2017) at para [18] (unreported).

requires the Applicant to furnish a reasonable explanation for the delay in filing its Application for Relief with the Companies Tribunal as well as a reasonable explanation as to why such Application for Relief should be entertained by the Companies Tribunal. In other words, this section does not only require an explanation as to the delay in bringing the Application for Relief but it also require an explanation with regard to the merits of such an Application for Relief as well. I am therefore inclined to agree with the interpretation given to section 160(2)(b) of the Act by Twala J as outlined above.

[50] In my view I am required, in terms of section 160(2)(b) of the Act, to make some form of assessment of the Applicant's papers placed before me and to also make findings with regard to each of the following factors:

50.1 the degree of lateness or non-compliance with the prescribed time frame by the Applicant;

50.2 the explanation for the lateness or the failure to comply with time frames as alleged by the Applicant;

50.3 prospects of success in the main case as alleged by the Applicant;

50.4 the importance of the case to the Applicant;

50.5 the respondent's interest in the finality of the matter or case brought before the Companies Tribunal by the Applicant;

50.6 the convenience of the Companies Tribunal in dealing with the application brought by the Applicant; and

50.7 avoidance of unnecessary delay in the administration of justice.

[51] It is therefore imperative that I should examine the papers placed before me in this Application for Relief in order determine as to whether the Applicant did indeed succeed in showing good cause for its Application for Relief to be entertained by the Companies Tribunal as provided for in section 160(2)(b) of the Act.

The degree of lateness or non-compliance with the prescribed time frame by the Applicant:

[52] It has already been established that the First Respondent was registered on the 20th day of April 2015. The Applicant filed its current Application for Relief with the Companies Tribunal on the 06th day of December 2017.

[53] There is, however, no disclosure in the Founding Affidavit regarding the date when the Applicant became aware of the registration of the First Respondent by the Commission. The Applicant only makes the following allegations which I consider to be relevant for purposes of my assessment in this matter:

53.1 On 18 April 2016, ENS addressed a letter to the First Respondent advising that the Applicant was entitled to lodge a company name objection in respect of the registration of its company name, and requesting it to provide the exact nature of its business activities. A deadline of 2 May 2016 was stipulated for a response.

53.2 The First Respondent did not respond to this letter and ENS conducted a forensic search to obtain the latest contact details for Thoba Mchunu,

the director of the First Respondent. The forensic search, however yielded no results. ENS then conducted various Internet searches and found that the First Respondent does not have an online presence. There is, however, no disclosure made regarding the dates when these activities were conducted by ENS on behalf of the Applicant.

53.3 A commercial investigator was then appointed to assist the Applicant in ascertaining the First Respondent's business activities, as well as the nature and extent of its use, if any, of the WACO trade mark. The investigator performed various searches, such as visiting the registered address of the company, conducting searches on additional databases and social media platforms, and determined that the First Respondent's business activities relate to "sound system hire, catering, mobile toilets, trailer VIP toilets, stage hire, office and school stationery, birthday / wedding cakes, cleaning material, school desks and tables, general building, plumbing / plastering, tiling and draping".[17] There is, however, no disclosure regarding the dates when the commercial investigator was engaged and when did such commercial investigator submit its investigation report.

53.4 Given the First Respondent's diversified business activities, ENS addressed a letter of demand to the First Respondent, calling on it to change its company name to one not incorporating or confusingly similar

[17] Refer to First Respondent marketing pamphlet marked Annexure "SG8" which appears at page 80 of the Indexed and Paginated Bundle of Documents.

to the Applicant's WACO trade marks. The aforesaid letter of demand is Annexure "SG9" and it is dated 12 September 2016.[18] According to Annexure "SG10" the aforesaid letter of demand seems to have been communicated to the First Respondent through email communication on 14 October 2016.[19]

53.5 The First Respondent did respond to the letter of demand through email communication sent to ENS by its director Thoba Mchunu on 16 November 2016. In the aforesaid email communication the following was stated in response to the aforementioned letter of demand:

> **"Hi. I would like to let you know that I will not be changing my company name, as it was the name chosen when I registered my company, the CIPC company chose the name Waco trading enterprise out of 4 names I had submitted! I would also like to add that I paid a certain price for the registration…"[20]**

[54] Be that as it may, I took note of the fact that the Applicant did not take the Companies Tribunal into its total confidence thereby disclosing the exact date that and manner in which it became aware of the registration of the First Respondent's company name by the Commission. I will however assume that the Applicant did indeed became aware of the registration of the First Respondent's company name just before 18 April 2016. I do so because of the

[18] Refer to page 82 of the Indexed and Paginated Bundle of Documents.
[19] Refer to page 84 of the Indexed and Paginated Bundle of Documents.
[20] Refer to Annexure "SG10" which appears at page 84 of the Indexed and Paginated Bundle of Documents.

fact that this is the date that ENS addressed a letter to the First Respondent for the first time regarding registration of the First Respondent's company name by the Commission.[21]

[55] Although one cannot put the exact date that the Applicant acquired knowledge of registration of the company name of the First Respondent by the Commission, it is clear that the Applicant acquired knowledge of the registration of the First Respondent's company name after a lapse of a period of eleven months or so from the date of registration of the company name of the First Respondent by the Commission.

[56] The Applicant only filed the Application for Relief on the 06th day of December 2017. According to my calculations, the application was filed after a period of more than one (1) year and seven months had lapsed from the date that the Applicant acquired knowledge of the registration of the company name of the First Respondent by the Commission.

[57] I find the delay to be excessive and the Applicant must definitely provide a good explanation for the delay. Should the Applicant fail to provide a good explanation for such excessive delay to file its Application for Relief with the Companies Tribunal immediately after acquiring knowledge of the registration of the company name of the First Respondent, I will be inclined to refuse condonation for such late filing.

[21] Refer to Annexure "SG7" which appears at page 78 to 79 of the Indexed and Paginated Bundle of Documents.

The explanation for the lateness or the failure to comply with time frames offered by the Applicant:

[58] I have already concluded that the Applicant acquired knowledge of registration of the First Respondent's company name by the Commission just before 18 April 2016. I will therefore assume that immediately after acquiring such knowledge, the Applicant instructed ENS.

[59] On 18 April 2016, ENS did indeed address a letter to the First Respondent advising that the Applicant was entitled to lodge a company name objection in respect of the registration of its company name, and requesting it to provide the exact nature of its business activities. A deadline of 2 May 2016 was stipulated for a response. A copy of the letter written to the First Respondent by ENS is annexed to the Founding Affidavit and marked Annexure "SG7" which appears at pages 78 to 79 of the Indexed and Paginated Bundle of Documents.

[60] It is alleged by the Applicant in its papers that:

60.1 the First Respondent did not respond to the letter dated 18 April 2016;

60.2 ENS conducted a forensic search to obtain the latest contact details for Thoba Mchunu, the director of the First Respondent;

60.3 the forensic search conducted by ENS, however yielded no results;

60.4 ENS then conducted various Internet searches and found that the First Respondent does not have any online presence;

60.5 a commercial investigator was then appointed to assist the Applicant in ascertaining the First Respondent's business activities, as well as the nature and extent of its use, if any, of the WACO trade mark;

60.6 the investigator performed various searches, such as visiting the registered address of the company, conducting searches on additional databases and social media platforms, and determined that the First Respondent's business activities relate to "sound system hire, catering, mobile toilets, trailer VIP toilets, stage hire, office and school stationery, birthday / wedding cakes, cleaning material, school desks and tables, general building, plumbing / plastering, tiling and draping";

60.7 given the First Respondent's diversified business activities, ENS addressed a letter of demand to the First Respondent, calling on it to change its company name to one not incorporating or confusingly similar to the Applicant's WACO trade marks. The aforesaid letter of demand is dated 12 September 2016 and it is annexed to the Founding Affidavit and marked Annexure "SG9".[22]

[61] The First Respondent did respond to Annexure "SG9" and stated the following in relation thereto:

> **"Hi. I would like to let you know that I will not be changing my company name, as it was the name chosen when I registered my company, the CIPC company chose the name Waco trading**

[22] A copy of Annexure "SG9" appears at pages 82 to 83 of the Indexed and Paginated Bundle of Documents.

enterprise out of 4 names I had submitted! I would also like to add that I paid a certain price for the registration…"[23]

[62] Even though there is no disclosure regarding what the Applicant did between the period 16 November 2016 and 06 December 2017, I however gathered the following to be the chain of events from the Applicant's papers that have been placed before me in this matter:

62.1 That the Board of Directors of the Applicant held a Board Meeting on 22 June 2017 wherein it was resolved that Stanley Green is authorised and empowered to institute, prosecute and finalise proceedings on behalf of the Applicant, before the Companies Tribunal and before the Commission, against WACO TRADING ENTERPRISE (PTY) LTD (2015/117312/07) and to execute all documents and affidavits and to do all such things as may be necessary to give effect thereto.

62.2 The Founding Affidavit deposed to by Stanley Green was only signed and commissioned on the 27th day of October 2017.

62.3 The Application for Relief is dated 06 December 2017 and it was also filed with the Companies Tribunal on the same day.

[63] I have noted that the Applicant did not make any attempt in its papers placed before me to explain the periods of delay outlined in paragraphs 62.1 to 62.3 above. The Applicant has therefore failed to make full disclosure regarding the

[23] Refer to Annexure "SG10" which appears at page 84 of the Indexed and Paginated Bundle of Documents.

delay which occurred between 16 November 2016 and the date of filing of its Application for Relief.

[64] The Applicant only filed its Application for Relief on the 06th day of December 2017. In terms of section 160(2)(b) of the Act, the Applicant is required to provide an explanation for the periods of delay which occurred between the following dates:

64.1 The delay which occurred between 20 April 2015 and 18 April 2016;

64.2 The delay which occurred between the date that it acquired knowledge of registration of the company name of the First Respondent by the Commission and 18 April 2016;

64.3 The delay which occurred between the 02nd day of May 2016 and the 12th day of September 2016, being the date when a letter of demand was addressed to the First Respondent by ENS on its behalf;

64.4 The delay which occurred between the 12th day of September 2016 and the 16th day of November 2016, being the date when ENS received a response from the First Respondent categorically stating that the First Respondent will not change its name;

64.5 The delay which occurred between the 16th day of November 2016 and the 22nd day of June 2017, being the date when the Applicant secured a Resolution by its Board of Directors;

64.6 The delay which occurred between the 22nd June 2017 and 27th day of October 2017, being the date when the Founding Affidavit in support of the Application for Relief was deposed to by Stanley Green was signed and commissioned; and

64.7 The delay which occurred between the 27th day of October 2017 and the 06th day of December 2017, being the dated when the current Application for Relief - Form CTR 142 was signed and filed with the Companies Tribunal.

[65] According to my calculations, the current Application for Relief was filed after a period of more than one (1) year and seven months had lapsed from the date that the Applicant acquired knowledge of the registration of the company name of the First Respondent by the Commission. I find the delay to be excessive and the Applicant is definitely required to provide a good explanation for the delay in filing its Application for Relief.

[66] I examined the Applicant's papers as placed before me in this matter and could not find any explanation for the delay in filing its company name objection Application. I therefore find that the Applicant had not provided any explanation for the delay which occurred between the period 02 May 2016 and 12 September 2016 in its papers. Similarly, I find that the Applicant did not provide any explanation for the delay which occurred between the period 16 November 2016 and 06 December 2017. I therefore find the delay in this matter to be excessive, unreasonable and unjustifiable.

The importance of the case to the Applicant:

[67] Judging from the manner in which the Applicant dealt with its objection to the registration of the company name of the First Respondent since 16 November 2016 until 06 December 2017, it is my view that the Applicant did not consider this case to be so important to it. If indeed the Applicant considered this case to be so important, it could have ensured that a challenge to the registration of the company name of the Respondent is done immediately after 16 November 2016. I say so because on the 16th day of November 2016 ENS did receive a response from the director of the First Respondent clearly indicating that the First Respondent will not be changing its name. It is my firm view therefore that the Applicant should, with effect from 16 November 2016, actively pursued its objection against the registration of the company name of the First Respondent and it should have done so while displayed some form of robustness in its conduct.

[68] Despite having known on 16 November 2016 that the First Respondent is refusing to accede to the Applicant's demand to change its company name, the Applicant waited for a period of more than one year to make a first attempt to file a company name objection application with the Companies Tribunal. I therefore find that the Applicant did not consider this case to be so important to it. After having considered the conduct of the Applicant since 02 May 2016 as well as the unexplained delays which occurred before the Applicant could file the Application for Relief on 06 December 2017 with the Companies Tribunal, I find that the Applicant did not consider its name objection against the company name of the

First Respondent to be important.

[69] I therefore find that this factor should therefore count against the Applicant in my determination of the question whether or not the Applicant succeeded in showing good cause for the delay in filing its Application for Relief.

The First Respondent's interest in the finality of the matter or case brought before the Companies Tribunal by the Applicant:

[70] The First Respondent only responded to the letter of demand dated 12 September 2016 on 16 November 2016. In its response, the First Respondent indicated that it will not be changing its company name.

[71] The First Respondent did not file any answer to the Application for Relief, despite having been served with such the Application for Relief on 07 December 2017. The same Application for Relief was electronically transmitted to the First Respondent through email communication on 12 December 2017.

[72] Considering the fact that the First Respondent did not file its answer to the Application for Relief after having been served with same, I therefore find that the First Respondent does not seem to be interested in the finality of the company name objection application brought against it.

The convenience of the Companies Tribunal in dealing with the application brought by the Applicant:

[73] Even if I were to find that there were reasons to accept the explanation proffered for the delay by the Applicant in this matter, central to the current Application for

Relief is whether or not the Applicant does have any reasonable prospects of success on the merits of its objection to the registration of the company name of the First Respondent by the Commission.

[74] It is commonly accepted that even if a reasonable or acceptable explanation had been offered for the delay by an applicant for relief, no purpose would be served in granting an application for condonation if such an applicant has no prospects of success on the merits of the application against registration of the company name of a respondent by the Commission.

[75] The rationale behind the approach adopted by the courts or tribunals is that to simply go through the motions of having to litigate a claim which has no merit cannot be in the interest of justice or the convenience of the courts or tribunals. Furthermore, to grant condonation under those circumstances would clearly be prejudicial to the respondent party, which will be compelled to defend a case which has no merit.

[76] The Applicant has made the following allegations which are considered to be relevant for purposes of assessment of the issue(s) that have been referred to the Companies Tribunal for consideration:

76.1 The Applicant is the proprietor in South Africa of nine (9) trade marks incorporating or comprising WACO.

76.2 The registration of the aforesaid nine (9) trade marks predates the registration of the company name of the First Respondent by the Commission.

76.3 The Applicant is one of the largest electrical wholesaler in Southern Africa and a leading stockiest and reseller of a comprehensive range of electrical and lighting products, including national and international suppliers and theirs brands.

76.3 The Applicant forms part of Bidvest Electrical, which is a division of Bidvest Group Limited, a listed company on the South African stock exchange.

76.4 The Applicant has 14 supplier divisions, two of which being Waco Industries and Waco-R.

76.5 The Applicant is making an objection against the registration of the First Respondent's company name by the Commission. This objection is being made in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Act read with regulations 13 and 142 of the Regulations.

76.6 The First Respondent's company name contains the word WACO which is similar to the registered trade marks of the Applicant.

76.7 The dominant, distinctive and memorable feature of the First Respondent's company name is the word WACO. WACO is therefore the word that persons who encounter the First Respondent's company name are likely to remember, bearing in mind the consumer's tendency to imperfectly recall names and trade marks and to only recall the first element of a trade mark or name.

76.8 The Applicant's WACO trade mark is wholly incorporated in the First Respondent's company name. The phrase "Trading Enterprise" is wholly

descriptive, and does not assist to distinguish the First Respondent's company name from the WACO trade marks, and therefore reduce the likelihood of deception or confusion.

76.9 The WACO trade mark registrations cover a variety of goods, including goods that will be used on a construction site, which are similar to the First Respondent's "general building and plumbing / plastering services".

76.10 The First Respondent has such a diverse range of business activities to such an extent that it is conceivable that it may enter into the Applicant's direct field of interest in the future.

76.11 The First Respondent's company name is confusingly and/or deceptively similar to the Applicant's registered and distinctive WACO trade marks.

76.12 The First Respondent's company name will reasonably mislead a person to believe, incorrectly so, that the First Respondent is part of, or associated with, the Applicant's business.

76.13 The Applicant therefore contends that the First Respondent's company name does not comply with sections 11(2)(a), 11(2)(b) and 11(2)(c) of the Act.

[77] I agree that the dominant, distinctive and memorable feature of the company name of the First Respondent is similar to the WACO trade marks owned by the Applicant.

[78] I further agree that the company name of the First Respondent is such that it falsely imply or suggest or is such as would reasonably mislead a person to

believe incorrectly that the First Respondent is part of or associated with the Applicant.

[79] Based on what I have stated above regarding the degree of lateness and the absence of reasonable explanation for the lateness, the interests of justice as well as convenience of the Companies Tribunal are not in favour of the granting of condonation to the Applicant and thereby paving way to have the company name objection Application against the registration of the company name of the First Respondent to be entertained by the Companies Tribunal. In my view, the determination of the issue of whether or not to grant condonation in this matter must be arrived at after I have done an exercise of balancing all the seven factors that are relevant when determining the issue of showing of good cause in terms of section 160(2)(b) of the Act.

Avoidance of unnecessary delay in the administration of justice:

[80] It is trite law that condonation may be granted in instance where the interests of justice permit. In the determination of the question as to whether condonation should be granted or not by the court or tribunal a lot depend on the facts and circumstances of each case that is being considered. The factors to be considered when determining whether it is in the interests of administration of justice to grant condonation include, but are not limited to the following:

80.1 the extent of the delay;

80.2 the explanation for the delay;

80.3 the effect of the delay on the administration of justice and the other

litigants;

80.4 the importance of the issues to be raised in the case;

80.5 the prospects of success; and

80.6 the nature of the relief sought.[24]

[81] In my determination of the interests of justice, I am therefore required to do so with reference to all the factors listed in paragraph 80 above. I have already found that the delay in this matter is excessive, unreasonable and unjustifiable.

[82] I now find that the cause of the delay in this matter false squarely at the door of the Applicant who wilfully or gross negligently decided to do nothing or very little for more than one (1) year and seven (7) months after acquiring knowledge of the registration of the company name of the First Respondent by the Commission during April 2016.

[83] Similarly, the Applicant decided to do nothing or very little for the period between 16 November 2016 and 06 December 2017 after it was informed of the First Respondent's refusal to change its name. Worse for the Applicant is the fact that it failed to provide any explanation for its failure to bring its name objection application immediately after acquiring knowledge of the registration of the company name of the First Respondent by the Commission.

[84] It is my view that the delay undoubtedly has enormous and serious effect to the administration of justice more so if one is to consider it from the position of the First Respondent and the Companies Tribunal. As it will be exposed when I deal with the prospects of success, the Application for Relief brought by the Applicant

[24] Refer to *Liesching and Others v The State and Another* [2016] ZACC 41 at para 14.

has merits and therefore the Applicant does have prospect of success in its objection against the company name of the First Respondent. However the fact that the Applicant has unreasonably and unjustifiably delayed the referral of its company name objection application resulted in unnecessary delay in the administration of justice. In my view, the delay would be prejudicial to the First Respondent. The First Respondent would have undoubtedly proceeded to do business under the impression that the Applicant is no longer interested in pursuing its company name objection dispute after receiving a response from the First Respondent on 16 November 2016. My view in this regard is supported by the fact that the Applicant went into total silence between the period 16 November 2016 and 06 December 2017.

[85] I therefore find that the administration of justice will not be best served by granting condonation to the Applicant for the late filing of its company name objection application. Granting condonation to the Applicant will only serve to delay the administration of justice and to condone the unreasonable and unjustifiable delay caused by the Applicant itself. The administration of justice will on the other hand be best served in this matter by refusing to grant condonation to the Applicant for the late filing of its company name objection application.

Prospects of success in the main case offered by the Applicant:

[86] It is now common cause that the Applicant is the proprietor in South Africa of nine (9) trade marks incorporating or comprising the word WACO. The registration of the aforesaid nine (9) trade marks predates the registration of the company name

of the First Respondent by the Commission. The company name of the First Respondent was registered by the Commission on the 20th day of April 2015.

[87] The Applicant alleges that it is one of the largest electrical wholesaler in Southern Africa and a leading stockiest and reseller of a comprehensive range of electrical and lighting products, including national and international suppliers and theirs brands. The Applicant forms part of Bidvest Electrical, which is a division of Bidvest Group Limited, a listed company on the South African stock exchange. The Applicant has 14 supplier divisions, two of which being Waco Industries and Waco-R.

[88] It is common cause that the Applicant is making an objection against the registration of the First Respondent's company name by the Commission. This objection is being made in terms of sections 11(2)(a), 11(2)(b), 11(2)(c) and 160 of the Act read with regulations 13 and 142 of the Regulations.

[89] The First Respondent's company name contains the word WACO which is similar to the registered trade marks of the Applicant. The dominant, distinctive and memorable feature of the First Respondent's company name is therefore the word WACO. WACO is therefore the word that persons who encounter the First Respondent's company name are likely to remember, bearing in mind the consumer's tendency to imperfectly recall names and trade marks and to only recall the first element of a trade mark or name.

[90] The Applicant's WACO trade mark is wholly incorporated in the First Respondent's company name. The phrase "Trading Enterprise" is wholly descriptive, and does not assist to distinguish the First Respondent's company

name from the WACO trade marks, and therefore reduce the likelihood of deception or confusion.

[91] The WACO trade mark registrations cover a variety of goods, including goods that will be used on a construction site, which are similar to the First Respondent's "general building and plumbing / plastering services". The First Respondent has, therefore, such a diverse range of business activities to such an extent that it is conceivable that it may enter into the Applicant's direct field of interest in the future.

[92] I do agree with the Applicant that the dominant, distinctive and memorable feature of the First Respondent's company name is similar to the Applicant's registered and distinctive WACO trade marks. I do agree further with the Applicant that the First Respondent's company name will reasonably mislead a person to believe, incorrectly so, that the First Respondent is part of, or associated with, the Applicant's business.

[93] As I have already stated all the factors which must be taken into account when dealing with condonation applications are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the Applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.

[94] While I am mindful of repeating myself, when dealing with an application for condonation, good cause is shown by the Applicant giving an explanation that shows how and why the delay occurred in the first place. There is authority that

the Companies Tribunal could decline the granting of condonation if it appears that the delay was wilful or was due to gross negligence on the part of the Applicant. In fact the Companies Tribunal could on this ground alone decline to grant an indulgence to the Applicant. The prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard by the Companies Tribunal.[25]

[95] It is important to point out that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and application for condonation should be refused. Similarly without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.[26]

[96] The standard that is required in order to show prospects of success is lower than that applied when the main case is considered by the courts or the Companies Tribunal. The applicant for condonation needs show more than just listing factors related to prospects of success. The applicant needs to persuade the court or the Companies Tribunal that there is a chance of it getting the relief that it is seeking when its case is considered by the court or Companies Tribunal. It is not sufficient for the Applicant to boldly claim that it has good prospect of success. What is

[25] See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.
[26] See *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F.

required from the Applicant is to set forth briefly and succinctly the essential information that may enable the Companies Tribunal to assess the Applicant's prospects of success in the matter**.** A bald submission unsupported by any factual averments is therefore not good enough to discern what the prospects of success are in a matter.

[97] It follows therefore that even if I were to find that there were reasons to accept the explanation offered for the delay by the Applicant in this matter, central to the current Application for Relief is whether the Applicant had any reasonable prospects of success on the merits of its objection to the registration of the company name of the First Respondent by the Commission. It is trite that even if a reasonable or acceptable explanation had been offered for the delay by the Applicant, no purpose would be served in granting the application for condonation if the Applicant has no prospects of success on the merits of the application against registration of the company name of the First Respondent by the Commission.

[98] The rationale behind the above approach as adopted by the courts or tribunals is that to simply go through the motions of having to litigate a claim which has no merit cannot be in the interest of justice or the convenience of the courts or tribunals. Similarly to simply go through the motions of having to litigate a claim while there is no reasonable and justifiable explanation for the delay cannot be in the interest of justice or the convenience of the courts and tribunals. Furthermore, to grant condonation under those circumstances would clearly be prejudicial to the respondent party, which will be compelled to defend a case which has no

merit or which does not have reasonable and justifiable explanation for the delay at all.

THE FINDINGS

[99] The Applicant failed to provide any reasonable and justifiable explanation for the delay to file its name objection application against the registration of the company name of the First Respondent by the Commission. I do find that there is no reasonable and justifiable explanation provided by the Applicant in this matter for the delay which occurred between 16 November 2016 and 06 December 2017. I therefore find that such delay is excessive, unjustifiable and unreasonable and therefore same cannot be condoned.

[100] I further find that the Applicant's conduct displays a litigant which does not consider its case to be important. If the Applicant considered its case to be so important, it would have launched and pursued its application with some degree of robustness.

[101] I further find that the interests of justice will not be best served by granting condonation to the Applicant for the late filing of its application against registration of the First Respondent's company name by the Commission. On the other hand, the interests of justice will be best served if condonation is refused.

[102] I further find that it is in the interests of the First Respondent and the convenience of the Companies Tribunal that finality of this company name objection dispute is reached expeditiously. For the reasons stated above, I find that the Applicant

failed to show good cause for its Application for Relief to be entertained by the Companies Tribunal.

[103] I do agree with the Applicant's contention that it is the proprietor of the WACO trade marks.

[104] I further do agree with the Applicant's contention that the dominant, distinctive and memorable feature of the First Respondent's name is similar to the WACO trade marks owned by the Applicant.

[105] I further do agree with the contention of the Applicant that the First Respondent's name falsely imply or suggest or is such as would reasonably mislead a person to believe, incorrectly so, that the First Respondent is part of or associated with the business of the Applicant.

[106] I therefore find that the Applicant does have prospect of success with regard to its company name objection application against the registration of the First Respondent's company name by the Commission.

[107] Based on the fact that the Applicant failed to provide and explanation for the delay and having found the delay in filing the current Application for Relief to have been excessive, unreasonable and unjustifiable, I am therefore persuaded to dismiss the current Application for Relief. I am persuaded to do so on the ground that the Applicant had ultimately failed to show good cause for the delay and for its Application for Relief to be entertained by the Companies Tribunal in terms of section 160(2)(b) of the Act.

THE ORDER

I therefore make the following order:

1) The Application for Default Order in terms is dismissed.

2) The Application for Relief against the registration of the company name of the First Respondent, being Waco Trading Enterprise (Pty) Ltd by the Second Respondent is dismissed.

3) There is no order as to costs.

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LINDELANI DANIEL SIKHITHA

Member of the Companies Tribunal

28 May 2018