COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT018NOV2018

In the matter between:

GLODINA LIFESTYLE PROPRIETARY LIMITED First Applicant
(in business rescue)

MAHOMED MAHIER TAYOB *N.O.* Second Applicant

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION First Respondent

GLODINA TOWELLING PROPRIETARY LIMITED Second Respondent

and

Case Number: CT008JAN2019

In the matter between:
GLODINA TOWELLING PROPRIETARY LIMITED Applicant

and

GLODINA LIFESTYLE PROPRIETARY LIMITED First Respondent
(in business rescue)

MAHOMED MAHIER TAYOB *N.O.* Second Respondent

GLODINA INDUSTRIES PROPRIETARY LIMITED Third Respondent

THE COMMISSIONER OF THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

both cases in respect of objection to company name

Presiding Member	:	Khashane La M. Manamela (Mr.)
Dates of Hearing	:	17 April and 13 June 2019
Date of Decision	:	28 June 2019

DECISION (Order and Reasons)

Khashane La M. Manamela

Introduction

[1] This is a consolidated matter comprising two applications, as appearing in the citations above. In the first application, Glodina Lifestyle Proprietary Limited (in business rescue) (Lifestyle), together with Mr Mahomed Mahier Tayob (Tayob) in his capacity as the appointed business rescue practitioner of Lifestyle, object to the company name of the second respondent, Glodina Towelling Proprietary Limited (Towelling) or the inclusion of the word "Glodina" in Towelling's name. The objection is on the basis that Towelling's name is the same as or is confusingly similar to Lifestyle's name or falsely implies or suggests or is such as would reasonably mislead a person to believe incorrectly that Towelling is part of or associated with Lifestyle (the Main Application).

[2] In the second application, which is essentially a counterapplication to Lifestyle's application or the Main Application, albeit under a different case number, Towelling objects to Lifestyle's name or the inclusion of the word "Glodina" in Lifestyle's name on the basis that the name is the same as its registered trade mark: Glodina (the Counterapplication). The objection by Towelling is also directed at an entity called Glodina Industries Proprietary Limited (Industries), the third respondent in the Counterapplication. But, I will simply refer to the applicants in the Main Application (and therefore the respondents in the Counterapplication) as Lifestyle and the applicant in the Counterapplication (and therefore the respondent in the Main Application) as Towelling. I will still mention Tayob or Industries, where necessary.

[3] Evidently, I have adopted the references Main Application, for the application brought by Lifestyle and Tayob, and Counterapplication, for the one by Towelling, simply for my ease of reference. In fact, the parties had also adopted the same referencing in their papers. Towelling says that it was directed to launch a separate application under a different case number, as opposed to simply mounting a counterapplication in the Main Application, by the office of the Registrar of this Tribunal. I must respectfully mention that the logic of this direction escapes me.

[4] Both the Main Application and Counterapplication reflect the Companies and Intellectual Property Commission or its Commissioner (the CIPC) as the first respondent and fourth respondent, respectively. I will deal with the relief sought against the CIPC under a separate heading, but towards the end of this decision.

[5] The matter came before me, on the first occasion, on 17 April 2019. Mr S J Van Rensburg SC appeared, together with Mr Naeem Essop, for Lifestyle and Mr Xolisa Hilita appeared, together with Mr Pheegane Raseemela, for Towelling. But, the hearing of the applications could not proceed on that day as Lifestyle, at the commencement of the hearing, handed up an application for a stay of the proceedings in the two applications pending some investigation (the Stay Application). I somewhat allowed submissions by the legal representatives on behalf of the parties in respect of continuation and/or postponement of the hearing, but ultimately I postponed the applications in the interests of justice to 13 June 2019. I also gave directions as to the exchange of further papers and delivery of heads of argument in all three applications, including the Stay Application.

[6] However, at the hearing of 13 June 2019, Lifestyle and its legal representatives did not appear. There was no explanation as to their non-appearance and neither did Lifestyle file any further papers, including heads of argument pursuant to the Tribunal's order of 17 April 2019. Towelling, for its part, fully complied with the order. Consequently, the matter proceeded on the basis of the papers filed by the parties, but with oral argument by Mr Hilita on behalf of Towelling. I reserved this decision at the end of the hearing on 13 June 2019.

Background

[7] There is some history to the respective objections by the parties. Therefore, the matter will benefit from some setting or background, which should not be long. I will

reflect what I consider to be common cause between the parties or not seriously contested by either of the parties.

[8] The history of the Glodina brand is said to date as far back as 1953, but the contending parties in the current applications are not that old. Towelling was registered as a private company on 31 August 2017. It is stated that its incorporation was initially as what is colloquially referred to as a "shelf company", then known as Ready Right Now. It was incorporated for the purpose of concluding a sale agreement with an entity called KAP Homeware Proprietary Limited (KAP) in respect of KAP's business division called "Glodina". Towelling changed its shelf-company name on 17 March 2018.

[9] On the other hand, Lifestyle was registered as a company on 03 August 2017, notably only 28 days before the incorporation of Towelling, but over 8 months before Towelling changed its shelf-company name. All these dates will become relevant to the discussion of the issues in this matter, below.

[10] The sale agreement between Towelling and KAP was concluded in February 2018. It included the sale and purchase of "Glodina" trade marks in favour of Towelling.

[11] Lifestyle, on the other hand, also concluded a sale agreement with KAP for the sale and purchase of KAP's Glodina business on 29 August 2017. Evidently, this sale agreement preceded the one between Towelling and KAP, which was almost 6 months later, in February 2018. However, the Lifestyle sale agreement fell through due to non-

fulfilment of come conditions precedent. It is to be noted that Lifestyle is disgruntled by what led to the collapse in the sale agreement with KAP.

[12] Lifestyle was placed under business rescue in November 2017. Following that Ms Lebogang Mpakati (Mpakati) was appointed business rescue practitioner. Eventually Mpakati was replaced by Tayob, as business rescue practitioner in October 2018, albeit in respect of what is termed reinstated business rescue process.

[13] Mpakati at some stage terminated business rescue proceedings and launched an application for the liquidation of Lifestyle on 19 February 2018, but prior to the sale agreement between Towelling and KAP. It is stated that the basis for the liquidation of Lifestyle was the lapsing of the sale agreement between Lifestyle and KAP.

[14] Other events ensued subsequent to those mentioned above, including the termination of loan facilities to Lifestyle by the IDC; liquidation of Lifestyle in March 2018; appointment of provisional liquidators in April 2018; and the reinstatement of the business rescue proceedings in October 2018, and the approval of the sale agreement between KAP and Towelling by the Competition Tribunal of South Africa on 14 August 2018.

[15] Ultimately, on 27 or 28 November 2018 the Main Application was issued and on 22 January 2019 the Counterapplication was also issued, culminating into the first hearing on 17 April 2019, which precipitated the Stay Application.

Stay Application

[16] Lifestyle handed up to me, at the hearing of 17 April 2019, the Stay Application seeking the indefinite stay or postponement of the proceedings in the Main Application and Counterapplication pending an investigation to be conducted into the affairs of Lifestyle.

[17] The Stay Application was effectively a request for postponement of the hearing of the consolidated applications. In fact, a request was forwarded by Lifestyle to the Registrar of this Tribunal a few days before the hearing on 17 April 2019, unsuccessfully seeking postponement of the hearing.

[18] The following paragraph in the founding affidavit to the Stay Application captures the essence thereof:

> "Due to incidents, and activities of amongst others the employees of IDC, the former directors, shareholders and possibly the liquidators and previous business rescue practitioners of Glodina it is necessary that the affairs of the Glodina must be investigated in a manner that will ensure that documents utilized in the elaborated scheme will be produced to evaluate to what level certain decisions was [sic] taken to the contrary of public interest and particularly contrary to interest of justice."[1]

[19] In support of the above quoted assertions Lifestyle referred to a supplementary affidavit by its director filed in the business rescue application. That affidavit contains allegations of malfeasance against the IDC or its employees and the former liquidators

[1] See par 2.1 of the founding affidavit to the Stay Application on indexed p 3.

and business rescue practitioner of Lifestyle. Basically, Lifestyle charges that some or all of these persons sabotaged its sale agreement with KAP in order to unduly benefit the IDC. This has to be investigated according to Lifestyle. I must add that the IDC is 100% shareholder in Lifestyle.

[20] In fact Tayob, as the business rescue practitioner of Lifestyle, had already obtained an order in the Pretoria High Court on 01 April 2019 on an *ex parte* basis for a secret inquiry in terms of the provisions of section 141 of the Companies Act 71 of 2008 (the Companies Act), read with the provisions of sections 417 and 418 of the Companies Act 61 of 1973.[2]

[21] It was submitted during the hearing on 17 April 2019 that officials of the IDC and other persons will be summoned to appear before the above-mentioned inquiry in order to unravel what really happened to derail the transaction between KAP and Lifestyle. Tayob also said he was to commence with the investigation into the affairs or matters relating to the transaction "within the next three weeks" from the date of hearing in April 2019.[3]

[22] In sum, it is submitted on behalf of Lifestyle that "*[t]he purchase of the business by Glodina Towelling and directly by the IDC was unlawful and falls to be set aside, the complete defense raised by Glodina Towelling is their so-called purchase of the Trade marks. Considering what is stated herein it is in the interests of justice that these*

[2] The order was granted by Baqwa J of the Gauteng Division (Pretoria) of the High Court under case number: 21726/2019.
[3] See par 3.37 of the founding affidavit to the Stay Application on indexed p 11.

proceedings be stayed until the completion of my investigation into the affairs of Glodina Lifestyle and IDC".[4] [italics added to the quotation]

[23] As indicated above, I adjourned the hearing of all applications, including the Stay Application on 17 April 2019 primarily to afford Towelling and its legal representatives an opportunity to file papers in opposition of the relief sought in terms of the Stay Application. They had indicated at the hearing that they intend doing so after it became clear to them that I was disinclined to proceed with the hearing without considering the submissions by Lifestyle in terms of the Stay Application.

[24] An answering affidavit was indeed filed on behalf of Towelling in opposition to the relief sought in the Stay Application. Towelling's opposition of the Stay Application is mainly predicated upon the following. The application is improper for want of compliance with the Companies Regulations, 2011, particularly Regulations 142 and 148. Lifestyle failed to show good cause why it brought the application in the last-minute at the hearing in April 2019. Further that the application is premised upon assertions relevant to the IDC and irrelevant to Towelling, despite the fact that the IDC is not a party in these proceedings. The affidavit is riddled with hearsay evidence unaccompanied by confirmatory affidavits by the relevant persons. And that this Tribunal lacks jurisdiction to grant the relief sought in terms of the application. There was no replying affidavit delivered on behalf of Lifestyle.

[4] See par 3.38 of the founding affidavit to the Stay Application on indexed pp 11-12.

[25] Although I listened to the oral submissions by only Mr Hilita on behalf of Towelling at the hearing of 13 June 2019, due to non-appearance of Lifestyle and its legal representatives, I made it clear to Mr Hilita that I will consider all material in the papers filed in the matter and not only be limited to written or oral argument. I, consequently, dismissed the Stay Application with costs, but listened to submissions with regard to the applicable scale of the costs at the end of the hearing. I will revert to this issue, when I deal with the issue of costs in the other applications.

[26] It is noteworthy that Lifestyle also participated in the hearing at the Competition Tribunal before the transaction between Towelling and KAP was approved. Lifestyle appear to have also raised the issues against the IDC, which the Competition Tribunal found to be beyond its jurisdiction and mandate, and, consequently, incapable of prohibiting the merger.

Lifestyle's case against Towelling

[27] Lifestyle's case against Towelling is simply that the latter's company name or inclusion of the word "Glodina" in the company name is confusingly similar to Lifestyle's name and therefore in contravention of section 11 of the Companies Act. Thus, Towelling ought to be directed to change its company name, failing which the CIPC is to substitute Towelling's registration number for its company name. I will deal with the latter part of the prayer at the end of this decision.

[28] According to Lifestyle or in fact Tayob, subsequent to his appointment as business rescue practitioner and the first meeting of creditors on 13 November 2018, he "unearthed that the Second Respondent was utilising the name Glodina Towelling which is confusingly similar to that of the First Applicant".[5] It is submitted in this regard that Towelling was registered on 31 August 2017, whereas Lifestyle was registered on 03 August 2017, which is 28 days apart. Accordingly, it is submitted that Towelling's name is contrary to the provisions of sections 11(2)(a), 11(2)(b) and 11(2)(c) of the Companies Act.

[29] I must state, without much ado, that I find no merit in Lifestyle's assertion based on section 11(2)(a) of the Companies Act that Towelling's name is the same as its name. Towelling's name (i.e. Glodina Towelling) is clearly not the same as Lifestyle's: Glodina Lifestyle. The words "Towelling" and "Lifestyle" are material in this regard. Therefore, I find that no case is made against Towelling in terms of section 11(2)(a). This then leaves for determination Lifestyle's case based on sections 11(2)(b) and 11(2)(c).

[30] Lifestyle's case against Towelling's name under sections 11(2)(b) and 11(2)(c) is that the latter's name was registered after its own company name. But, with respect, this submission misses the point. Towelling's case is based on its Glodina trade mark and not its company name.

[31] It is beyond argument that in terms of section 11(2) of the Companies Act trade marks trump, so to respectfully speak, company names irrespective of the date of

[5] See par 6.3 of the founding affidavit to the Main Application.

registration of the trade mark. To put it differently, irrespective of the fact that a trade mark may have been acquired or registered long after the registration of the company name the trade mark shall be protected to the detriment of the company name.[6] This appears to put paid to Lifestyle's case against Towelling, but I have to consider the submissions made on behalf of Towelling, particularly with regard to condonation.

[32] Towelling filed an answering affidavit to the Main Application. It is contended, among others, that Lifestyle contributed to the recalling of the IDC loan facilities by perpetuating fraud which led to termination of the loan agreement and inability to deliver the guarantees for the KAP sale agreement. Further, that Lifestyle has not shown good cause by explaining the delay in launching the Main Application. Towelling denies, as false, Lifestyle's submission that it only became aware of the existence of Towelling on 30 November 2018 as Towelling had sent a letter of demand on 09 November 2018.

Towelling's case against Lifestyle

[33] Towelling, like Lifestyle, made submissions for condonation in its application, as contemplated by section 160(2)(b) of the Companies Act. This provision requires that an applicant ought to show good cause for bringing an application as it did. But I hasten to point out that the phrase or words "good cause" are not defined or explained in this provision nor the Companies Act. One has to find clarity elsewhere.

[6] See *Cedeberg Cellar (Pty) Ltd & Another v Cedar Brew (Pty) Ltd* (CT013FEB2015) [2015] Companies Tribunal (17 December 2015) available on the website of the Companies Tribunal: www.companiestribunal. org.za.

[34] In the Constitutional Court decision of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC), albeit referring to different set of circumstances, the phrase good cause was said to refer to a substantial or legally sufficient reason for a choice made or action taken.[7]

[35] Almost close to home (as it involved a decision of this Tribunal) in the matter of *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others*[8] Twala J had the following to say with regard to the concept or phrase "good cause" in section 160(2)(b):

> "[18] Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application but to show good cause as to why the application must be entertained. The section requires the applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application but refer to the merit of the application as well."

[36] Towelling appreciated the fact that to succeed in the quest for condonation it has to establish both reasons for the delay and prospects of success with regard to the merits of the Counterapplication as indicated by the decision of *The Highly Nutritious Food Company*, referred to above. It submits that it wanted to change its shelf-company name to its current name, as far back as February 2018 when it concluded the sale agreement with KAP.

---

[7] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) 89 at par 54.
[8] *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017.

[37] It is submitted that Towelling became aware of the use of the Glodina name by Lifestyle around on 27 February 2018, when Towelling concluded the sale agreement with KAP. However, Towelling, and all material times, was under the impression that there was a pending liquidation application against Lifestyle until on 31 October 2018 when it received a notice of a creditors meeting in the reinstated business rescue proceedings. It had not suspected that after the sale of business agreement between itself and KAP, Lifestyle could still be using the Glodina name. Subsequent to becoming aware of the unauthorised use, it unsuccessfully attempted to amicably resolve the issue. It also became aware of the existence of Industries in December 2018, when drafting an answering affidavit to the Main Application. It is submitted that the delay in launching the Counterapplication was not willful.

[38] It is further submitted that Towelling has strong prospects of success in respect of the Counterapplication and ostensibly opposition to the Main Application. This, among others, is due to the acquisition of the GLODINA business and trade marks which are registered in South Africa and a host of other countries. It is accordingly submitted that Lifestyle's inclusion of the word "Glodina" in its name is confusingly similar to the aforementioned registered trade marks.

[39] I am satisfied that Towelling has successfully established good cause and, therefore, I will consequently grant condonation with regard to the delay in bringing the Counterapplication. I find solace in the fact that apart from the absence of inordinate delay in launching the Counterapplication, Towelling appears to have strong prospects of

success in both its opposition to the Main Application and the merits of the Counterapplication.

[40] Regarding the merits of the Counterapplication Towelling's case is simply that Lifestyle's name or the inclusion of the word "Glodina" in Lifestyle's name does not satisfy the requirements of sections 11(2)(a); 11(2)(b) and 11(2)(c) of the Companies Act.

[41] I again hasten to respectfully find that there is no merit in Towelling's assertions based on section 11(2)(a). Lifestyle's company name (i.e. Glodina Lifestyle) is not the same as Towelling's trade mark or company name. This then leaves for determination a case based on sections 11(2)(b) and 11(2)(c).

[42] It is submitted that, apart from the registration of the Glodina trade marks worldwide, the Glodina brand has become a household name in South Africa as a supplier of fine towels to the hospitality industry and South African major retailers. As a result, the name Glodina has gained considerable and favourable reputation. Therefore. the incorporation of the name or word Glodina in Lifestyle's and Industries' respective names is confusingly similar to the Glodina trade mark owned by Towelling. More so, due to the fact that the dominant, distinctive and memorable feature of the company names of Lifestyle and Industries is the word Glodina. Again, Lifestyle did not file any answering or replying affidavit in reaction to the affidavit filed by Towelling in support of its case.

Conclusion

[43] On the basis of the submissions above, I agree that Lifestyle's and Industries' company names are confusingly similar to Towelling's trade mark Glodina. The corollary of these findings is that the Main Application is dismissed with costs and the Counterapplication is granted with costs, on the terms appearing in the order below.

[44] Consequently, I will direct that Lifestyle and Industries choose new names and accordingly file notices of amendment to their respective Memoranda of Incorporation. To avoid doubt, costs awarded in respect of both applications shall be at the scale of party and party and shall include those consequential upon the employment of counsel or advocate. These costs shall include those in respect of the hearing of 17 April 2019.

[45] I mentioned above that I reserved to deal with in this written decision the issue of whether the scale of costs awarded in respect of the Stay Application is to be that of party and party or punitive scale of attorney and client. Mr Hilita, appearing for Towelling, passionately urged me to grant costs at a punitive scale and did not for a moment share my concern that same may not be provided by Regulation 156 of the Companies Regulations. As a result, a considerable amount of time was spent debating the various parts of Regulation 156. In sum, he submitted that the Stay Application was improper; disregarded applicable rules or Regulations and amounted to a delaying tactic. Therefore, it should be met with a befitting order as to costs. I agree that the timing of the Stay Application left a lot to be desired, but I cannot find any indication of malice on the part of Lifestyle or Tayob. They clearly wanted postponement of the matter to hold the

inquiry for which they have already gotten a court order, although I have disagreed with the merits of this submission. They should be held liable for costs occasioned by the postponement of the hearing and in respect of the Stay Application, but not on a punitive scale.

Substitution of company registration numbers for an impugned company name

[46] As stated above, Towelling also requested an order that the CIPC be directed to replace the respective names of Lifestyle and Industries, in the event that, these companies do not heed the order to amend their names.

[47] I shared my respectful view with Mr Hilita that this Tribunal lacks such jurisdiction or capacity to make a determination of the sort required by his client.[9] With respect, he appeared to be slightly amused by this, in as much as, he disagreed with my view. He handed up a copy of another decision of this Tribunal which held a contrary opinion. It is obviously a concern that there is divergence in views amongst members of this Tribunal. But, I am respectfully steadfast in my view that this Tribunal lacks the competence to grant the requested order.

Order

[48] Therefore, the following orders are made:

[48.1] under case number: CT018NOV2018:

a) the application is dismissed with costs on a party and party scale, including those consequent upon the employment of counsel or advocate, and

[9] See, among others, the decision of *Agility Holdings (RF) (Pty) Ltd v Neo Computers (Pty) Ltd* (CT008FEB2018) [2018] Companies Tribunal (30 April 2018) at par 20.

b) the costs in a) hereof shall include costs of 17 April 2019.

[48.2] under case number: CT008JAN2019:

a) the application is granted with costs on a party and party scale, including those consequent upon the employment of counsel or advocate;

b) the costs in a) hereof shall include costs of 17 April 2019.

c) the registered company name of **GLODINA LIFESTYLE PROPRIETARY LIMITED** (in business rescue) does not satisfy the requirements of section 11(2)(b) of the Companies Act 71 of 2008;

d) the registered company name of **GLODINA INDUSTRIES PROPRIETARY LIMITED** does not satisfy the requirements of section 11(2)(b) of the Companies Act 71 of 2008;

e) Glodina Lifestyle Proprietary Limited (in business rescue) and Glodina Industries Proprietary Limited are each directed to choose a new name and file notices of amendment to their respective Memoranda of Incorporation in this regard, and

f) Glodina Lifestyle Proprietary Limited (in business rescue) and Glodina Industries Proprietary Limited are directed to complete the activities ordered in e) hereof within 30 (thirty) days from date of service of this order on them.

[48.3] with regard to the Stay Application, which relates to proceedings under both case numbers CT018NOV2018 and CT008JAN2019:

a) the application is dismissed with costs on a party and party scale, including those consequent upon the employment of counsel or advocate, and

b) the costs in a) hereof shall include costs of 17 April 2019.

_____

Khashane La M. Manamela

Member, Companies Tribunal

28 June 2019

Appearances:

For Glodina Lifestyle and MM Tayob	:	SJ Van Rensburg SC (no appearance on 13 June 2019)
Instructed by	:	Aphane Attorneys Erasmia, Pretoria
For the Glodina Towelling	:	X Hilita
Instructed by	:	Shandu Attorneys Inc Sandton, Johannesburg