



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT013Jul2019

In the matter between:

GRANDMARK INTERNATIONAL (PTY) LIMITED

Applicant

(Registration Number: 2003 / 012841 / 07)

and

XYG (PTY) LIMITED

First Respondent

(Registration Number: 2018/578027/07)

REGISTRAR OF COMPANIES

Second Respondent

Issue(s) for determination: This is an application in terms of which Grandmark International (Pty) Limited is objecting to the registration of the company name of XYG (Pty) Limited on the register of companies in terms of sections 11(2)(b) and 11(2)(c) and 160 of the Companies Act, 2008 (Act No. 71 of 2008) read with regulations 13, 142 and 153 of the Companies Regulations, 2011.

Coram: Lindelani Daniel Sikhitha

Date of handing down of decision: 01 November 2019

DECISION (Reasons and Order)

INTRODUCTION

- [1] The Applicant in this matter is Grandmark International (Pty) Limited with Registration Number: 2003 / 012841 / 07. The Applicant is a private company duly incorporated and registered as such in accordance with the company laws of the Republic of South Africa (“South Africa”). The Applicant’s registered address is at 26 Genesis Boulevard, Crown City, Crown Mines, Roodepoort, Gauteng Province, 2092, South Africa.
- [2] The First Respondent in this matter is XYG (Pty) Limited with Registration Number: 2018 / 578027 / 07. The First Respondent is a private company duly incorporated and registered as such in accordance with the company laws of South Africa. The First Respondent’s registered address is at Number E-9, Vila Alto, 22 Berg Street, Belgravia, Johannesburg, Gauteng Province, 2094, South Africa.¹
- [3] The Second Respondent is the Registrar of Companies. There are no further details of the Second Respondent that have been provided by the Applicant in the current Application for Relief.

¹ Refer to a copy of the Windeed Company Report which is marked Annexure “CN06” to the Supporting Affidavit deposited by Sara-Jane Pluke in support of the Application for Relief. See also a copy of the Windeed Company Report which is marked Annexure “DA4” to the Affidavit in Support of a Default Order deposited to by Sara-Jane Pluke in support of the Notice of Motion for Default Order.

- [4] This is an Application for Relief in terms of which the Applicant is ostensibly objecting to the registration of the company name of the First Respondent, being XYG (Pty) Ltd, in terms of sections 11(2)(a)(i), 11(2)(a)(iii), 11(2)(b)(i), 11(2)(b)(iii), 11(2)(c)(i) and 160(2)(b) of the of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”) read together with regulations 13 and 142 of the Companies Regulations, 2011 (“the Regulations”).
- [5] The Applicant is principally contending that the current name of the First Respondent does not satisfy the requirements prescribed by sections 11(2)(a)(i), 11(2)(a)(iii), 11(2)(b)(i), 11(2)(b)(iii), 11(2)(c)(i) of the Act. The orders that are being sought by the Applicant are fully set out at paragraph 36 of the Supporting Affidavit in support of the Application for Relief and paragraph 11 of the Affidavit in Support of a Default Order.
- [6] The Applicant filed the Application (Form CTR 142) with the Companies Tribunal on 23rd day of July 2019 and same was served upon the First Respondent on the 24th day of July 2019. There is no proof of service of the Application on the Second Respondent. Due to the failure by the First Respondent to file and serve its Answering Affidavit, the Applicant proceeded to file an Application for Default Order with the Companies Tribunal on the 06th day of September 2019.
- [7] I have noted that there are procedural issues that are involved in this Application for Relief which should be dealt with before I deal with the merits thereof. Should I find that there is non-compliance with any procedural requirement, then I will have no choice but to dismiss the Application for Default Order.

FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF AS PRESCRIBED IN TERMS OF THE COMPANIES REGULATIONS, 2011

- [8] This is an Application in terms of which the Applicant is objecting to the company name of the First Respondent in terms of sections 11(2)(a)(i), 11(2)(a)(iii), 11(2)(b)(i), 11(2)(b)(iii), 11(2)(c)(i) and 160 of the Act read together with the applicable regulations. It is important that I should first have a look at some preliminary issues which relates to the form and substance that an application of this nature must comply with as prescribed in terms of the applicable regulations.
- [9] My point of departure will be to look at the provisions of regulation 13(a) of the Regulations which 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.]

- [10] The Application for Relief in this matter is contained in Form CTR 142 as prescribed by the Minister of Trade and Industry in terms of section 223 of the Act. In terms of the Supporting Affidavit filed in support of the Application for Relief, the deponent alleges that she is the adult male practicing attorney in the Intellectual Property Department of Eversheds Sutherland (SA) Inc, situated at 3rd Floor, 54 Melrose Boulevard, Melrose Arch, Melrose North. The deponent further alleges that Eversheds Sutherland is the authorized address for service

of the Applicant's trade marks that form the basis of the company name objection. The deponent proceeded to allege that she is duly authorized to depose to the Affidavit in Support of the Application for Relief and the Affidavit in Support of the Application for Default Order.

[11] I now proceed to look at the provisions of regulation 142 of the Regulations which read as follows:

- (1) **A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or those Regulations, by completing and filing with the Tribunal's recording officer-**
 - (a) **an Application in Form CTR 142; and**
 - (b) **a supporting affidavit setting out the facts on which the application is based.**
- (2) **The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.**
- (3) **An application in terms of this regulation must-**
 - (a) **Indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the Application is made; and**
 - (b) **Depending on the context –**
 - (i) **Set out the Commission's decision that is being appealed or reviewed;**
 - (ii) **Set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;**
 - (iii) **Set out the regulation in respect of which the applicant seeks condonation; or**
 - (c) **Indicate the order sought; and**

(d) State the name and address of each person in respect of whom an order is sought. [Own emphasis added.]

[12] It is therefore clear that 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:

12.1 an Application in Form CTR 142; and

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

[13] I will now go through the papers filed in this Application to see if this matter is filed in compliance with regulation 142 of the Regulations. The Application is made in Form CTR 142 and it is supported by a Founding Affidavit deposed to by Sara-Jane Pluke ("Pluke") who, as it appears from the papers placed before me, is a practicing attorney in the Intellectual Property Department of Eversheds Sutherland (SA) Inc. Initially, there was no document attached which showed that Pluke is authorised to launch the current name dispute proceedings on behalf of the Applicant.

[14] In terms of section 66 of the Act, the business and affairs of a company must be managed by or under the direction of the board of directors. The board of directors has the authority to exercise all the powers and to perform any of the functions of the company, except to the extent that the Act or the company's Memorandum of Incorporation provides otherwise. It was my view therefore that the institution of the name objection proceedings must be authorised by the board

of directors of the legal entity purporting to launch such name objection proceedings.

[15] I have noted that at the time the Application for Relief was filed with the Companies Tribunal the launching of the name objection proceedings had not been authorised by the board of directors of the Applicant. At the time that it was filed, there was no resolution that has been attached which shows that the board of directors of the Applicant had indeed authorised the launching of the name objection proceedings. I was therefore not satisfied that Pluke did have the necessary authority to launch the Application for Relief before the Companies Tribunal on behalf of the Applicant.

[16] I noted that the Application for Relief has merits and if it was not for the shortcoming referred to above, I should have granted it. I was however prepared to deal with the merits of the Application for Relief once the shortcoming regarding the issue of authority to launch the name objection proceedings has been corrected by the Applicant. I did this mindful of the fact that part of the enshrining values of the Companies Tribunal are, as far as possible, to conduct its proceedings in an informal manner and as and when necessary to render assistance to the litigants.

[17] While adhering to the values outlined in paragraph [16] above, on 16 October 2019, I did make the order which appear hereunder:

“THE ORDER

I therefore make the following order:

- 1) The Application for Default Order sought against the First

Respondent in terms of regulation 153(1) of the Regulations is hereby postponed;

- 2) The Applicant is afforded an opportunity to remedy the defects of its Application by filing with the Companies Tribunal a copy of a resolution authorising its attorney, Sara-Jane Pluke to launch the name objection proceedings with the Companies Tribunal on its behalf on or before 15H00 on Friday the 25th day of October 2019; and
- 3) There is no order as to costs.”

[18] On 25 October 2019, the Applicant did file the documents listed below as directed in paragraph 2 of my order:

- 18.1 Form CTR147 for condonation of the late filing of the resolution of the board of directors and confirmatory affidavit of the director of the Applicant;
- 18.2 Confirmatory Affidavit of Allan C. Ho (“Allan”) who is the director and Chief Executive Officer of the Applicant; and
- 18.3 Resolution of the board of directors of the Applicant passed on 18 October 2019.

[19] I am now satisfied that Pluke has been duly authorised to launch the name objection proceedings on behalf of the Applicant as it clearly appears from the Resolution of the board of directors of the Applicant dated 18 October 2019. After having considered the Application for Condonation, I am persuaded to such an application. The Application for Condonation for the late filing of the Confirmatory

Affidavit and the Resolution of the board of directors of the Applicant is hereby granted.

FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF AS PRESCRIBED IN TERMS OF THE COMPANIES REGULATIONS, 2011

[20] 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)(i), 11(2)(a)(iii), 11(2)(b)(i), 11(2)(b)(iii), 11(2)(c)(i) and 160 of the Act read together with the applicable regulations. As it will appear in my evaluation of the facts and the law below, it is my view that the company name objection in this matter should be a violation in terms of sections 11(2)(a)(iii), 11(2)(b)(iii) and 11(2)(c)(i) of the Act. Be that as it may, it is important that I should first have a look at some preliminary issues which relates to the form and substance that an application of this nature must comply with as prescribed in terms of the applicable regulations.

[21] My point of departure will be to look at the provisions of regulation 13(a) of the Regulations which 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.]

[22] The Application for Relief in this matter is contained in Form CTR 142 as prescribed by the Minister of Trade and Industry in terms of section 223 of the

Act. In terms of the Supporting Affidavit filed in support of the Application for Relief, the Applicant alleges that it is the true and lawful proprietor in South Africa of certain registered XYG trade marks, which trade marks are valid, in force and extensively used within the Republic of South Africa.² The trade marks incorporating XYG are the following:

22.1 Trade mark registration number 2011/11240 in relation to XYG which is registered in class 12, in relation to the specification as it appears from an extract taken from the Trade Marks Register held at Companies and Intellectual Property Commission (“the Commission”). An extract thereof is annexed to the Supporting Affidavit and marked “CNO2”³; and

22.2 Trade mark registration number 2011/11241 in relation to XYG which is registered in class 37, in relation to the specification as it appears from an extract taken from the Trade Marks Register held at Commission. An extract thereof is annexed to the Supporting Affidavit and marked “CNO2”⁴.

[23] The Applicant therefore has an interest in the name of the First Respondent, and I am therefore satisfied that the Application for Relief does comply with the prescribed form in terms of regulation 13(a) of the Regulations. I now proceed to look at the provisions of regulation 142 of the Regulations which read as follows:

² Refer to paragraph 4 of the Supporting Affidavit.

³ Trade mark registration 2011/11240 (Annexure “CNO1” is in relation to vehicle, apparatus for locomotion by land, air or water; automotive glass; windscreens, rear and side windows; parts, fittings, components and accessories for all the aforementioned goods.

⁴ Trade mark registration 2011/11241 (Annexure “CNO2” is in relation to repair, maintenance, fitment and installation services in the fields of windscreens and automotive glass, as well as parts, fittings and accessories for these goods.

- (1) **A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or those Regulations, by completing and filing with the Tribunal's recording officer-**
 - (a) **an Application in Form CTR 142; and**
 - (b) **a supporting affidavit setting out the facts on which the application is based.**
- (2) **The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.**
- (3) **An application in terms of this regulation must-**
 - (e) **Indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the Application is made; and**
 - (f) **Depending on the context –**
 - (iv) **Set out the Commission's decision that is being appealed or reviewed;**
 - (v) **Set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;**
 - (vi) **Set out the regulation in respect of which the applicant seeks condonation; or**
 - (g) **Indicate the order sought; and**
 - (h) **State the name and address of each person in respect of whom an order is sought.** [Own emphasis added.]

[24] It is clear that 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:

24.1 an Application in Form CTR 142; and

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

[25] It is imperative that I should go through the papers filed in this Application for Relief to see if it complies with the provisions of regulation 142 of the Regulations as outlined above. The Application for Relief is made in Form CTR 142 and it is supported by a Supporting Affidavit deposed to by Pluke who, as it appears from the papers placed before me, is the attorney duly authorised and acting on behalf of the Applicant in this matter.

[26] Pluke is therefore authorised to sign all the affidavits and other documents necessary to institute and prosecute the current name dispute proceedings on behalf of the Applicant. The authority of Pluke is recorded in terms of a Resolution of the Board of Directors of the Applicant dated 18 October 2019 referred to in paragraph 18.3 above read together with the Confirmatory Affidavit of Allan referred to in paragraph 18.2 above. I am therefore satisfied that Pluke does have the necessary authority to bring the current application.

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

[28] The Application for Relief was served upon the First Respondent at its business address on the 24th day of July 2019 by Zakhele Sithebe (“Sithebe”) who is the driver in the employ of Eversheds Sutherland (SA) Inc. Service of the Application for Relief was effected at Number E9 – Villa Alto, 22 Berg Street, Belgravia, Johannesburg, Gauteng Province, 2094, South Africa. Service of the Application for Relief was done by handing a copy therefore to Tombi Mbatha (“Ms. Mbatha”) who confirmed that the First Respondent conducts its business from the premises and she acknowledged receipt of the Application for Relief on behalf of the First Respondent. Apparently the First Respondent’s director, being Mr. Xolani Mthanti (“Mr. Mthanti”) also arrived at the premises and confirmed that Ms. Mbatha is his wife and further that she is authorised to acknowledge receipt of the Application for Relief on behalf of the First Respondent.⁵

[29] I am therefore satisfied that service of the Application for Relief on the First Respondent was effected by Sithebe on the 24th day of October 2019. It is therefore common cause that the Application for Relief was served upon the First Respondent a day after it was filed with the Companies Tribunal. I am therefore satisfied that the Application was served upon the First Respondent in the manner that complies with the provisions of section 7 of the Act read together with Annexure 3 – Table CR 3 of the Regulations.

[30] I however have a concern regarding the Applicant’s failure to serve the Application for Relief upon the Second Respondent and the lack of explanation for such failure. Be that as it may, this shortcoming will become relevant only in

⁵ Refer to paragraphs 3 to 6 of Annexure “DA2” attached to Affidavit in Support of Default Order deposited by Pluke.

as far the relief that the Applicant is seeking against the Second Respondent is concerned. In that event, I will not be able to make any order against the Second Respondent until such time that the Applicant provides me with proof of adequate service of the Application for Relief upon the Second Respondent.

[31] Be that as it may, the Application for Relief is supported by a Supporting Affidavit which details all the requirements prescribed in terms of regulation 142(3) of the Regulations. Save for the shortcoming referred to in paragraph [30] above, I am therefore satisfied that the Application for Relief is, both in form and substance, in compliance with regulation 142 of the Regulations. It follows therefore that the Application for Relief has been properly brought before the Companies Tribunal and should be proceeded with on such basis.

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

[33] It follows therefore that the First Respondent, being the only respondent who was served with the Application for Relief in this matter, was required to serve a copy of its answer on the Applicant and to file its answer together with proof of service

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.”

thereof with the Companies Tribunal within a period of twenty (20) business days after being served with the Application for Relief. The twenty (20) business days period is as prescribed in terms of regulation 143(1) of the Regulations.

[34] The Application was served upon the First Respondent on the 24th day of July 2019. Based on my calculation of the time frames in terms of regulation 143(1) of the Regulations the 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 Application together with proof of service thereof on or before the 22nd day of August 2019. As at the date of filing of the Application for the Default Judgment by the Applicant, the Respondent has still not served on the Applicant and filed with the Companies Tribunal a copy of its answer together with proof of service thereof as prescribed by regulation 143(1) of the Regulations. The Application for Default Judgment was filed with the Companies Tribunal on the 06th day of September 2019.⁷

THE APPLICATION FOR DEFAULT ORDER

[35] As a result of the First Respondent's failure to serve and file its answer to the Application for Relief, the Applicant was therefore entitled to file the Application for Default Judgment with the Companies Tribunal in terms of regulation 153(1) of the Regulations. Once an Application for Default Judgement is filed with it, the Companies Tribunal is therefore enjoined to consider such an application in terms

⁷ Refer to Notice of Motion (Application for Default Order) dated 03 September 2019.

of section 160 of the Act read together with the provisions of regulation 153(2) of the Regulations.

[36] It is important that I should have a close look at the provisions of regulation 153 of the Regulations. The relevant provisions of regulation 153 of the Regulations 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.”**

[37] The Applicant did indeed proceed to file its Application for Default Judgment (Form CTR 145) in terms of regulation 153 of the Regulations on the 06th day of September 2019. It is common cause that the Application for Default Judgment was filed after the expiry of the 20 (twenty) business days period that the First Respondent is afforded to serve and file its answer in terms of regulation 143(1) of the Regulations.

[38] In terms of the Affidavit in Support of the Application for Default Judgment deposed to by Pluke dated the 05th day of September 2019, the Applicant makes the following allegations which are considered to be relevant for purposes of

dealing with the Application for Default Judgment and the Application for Relief in this matter:⁸

38.1 The Applicant is making an application to the Companies Tribunal for a default order against the First Respondent under the following circumstances:

38.1.1 The company name objection application was filed with the Companies Tribunal on the 23rd day of July 2019;

38.1.2 The company name objection application was served upon the First Respondent at its business address on the 24th day of July 2019;

38.1.3 The First Respondent's answering affidavit was due on the 20th day of August 2019;

38.1.4 The period within which the First Respondent had to file its answering affidavit has expired, and the First Respondent has failed, neglected and/or refused to file its answering affidavit within the prescribed time period; and

38.1.5 As at the date of filing of the Application for Default Order, there was no answering affidavit which was filed by the First Respondent.

38.2 On 25 July 2019 at approximately 09h04, the First Respondent's director, Mr. Mthanti, called the Applicant's attorneys offices using his cellular

⁸ Refer to paragraph 4 of the Supporting Affidavit which appears at pages 5 to 6 of the Indexed and Paginated Bundle of Documents.

phone number 082 614 2354 and spoke to a candidate attorney of Pluke by the name of Samkelisiwe Sibanda (“Sibindana”).

- 38.3 During the aforementioned telephone call, Mr. Mthanti informed Sibindana that he wanted no further correspondence between the First Respondent and the Applicant.
- 38.4 Mr. Mthanti further indicated that the First Respondent would voluntarily apply to the Commission for a company name change.⁹
- 38.5 The Applicant’s attorneys did afford the First Respondent additional time post the expiration date for the filing of its answering affidavit to enable the First Respondent to lodge its application for voluntary company name change with the Commission.
- 38.6 On 03 September 2019, an updated Windeed search was conducted and it was discovered that the First Respondent has not made any effort to voluntarily change its name. The First Respondent has also not made any further attempts to contact the Applicant or its attorneys.
- 38.7 As a result of the First Respondent’s failure alluded to above, the Applicant was left with no alternative but to bring its Application for a Default Order against the First Respondent.
- 38.8 Despite the Application for Relief having been served on it, the First Respondent had failed to serve its answer on the Applicant and to file its answer and proof of service thereof with the Companies Tribunal.

⁹ Refer to Sibandana’s Confirmatory Affidavit which is annexed to Pluke’s Affidavit in Support of Default Order marked Annexure “DA3”.

38.9 Accordingly, the Applicant is applying for Default Judgment in terms of regulation 153(1) read together with section 160(3) of the Act.

[39] In terms of regulation 153(2)(b), the Companies Tribunal may make an appropriate order in relation to the Application for Default Judgment if it is satisfied that the Application was adequately served on the Respondent(s) against whom a default order is being sought.

[40] Based on what I have already stated above, I am satisfied that the Application for Relief was adequately served upon the First Respondent. I am however not satisfied that the Application for Relief was adequately served upon the Second Respondent. Consequently, I will proceed to deal with the merits of the Application for Relief and the Application for Default Judgment only in as far as it relates to the default orders that are being sought against the First Respondent. I proceed on such basis because I will not be able to grant any default orders against the Second Respondent without proof that the Application for Relief was indeed served upon the Second Respondent. Accordingly and for the sake of completeness, all default orders that are being sought by the Applicant against the Second Respondent should and are hereby refused on the basis that there is no adequate service of the Application for Relief upon the Second Respondent.

FACTS AND THE PROVISIONS OF THE LAW THAT ARE RELEVANT TO THE CURRENT APPLICATION FOR RELIEF

[41] The Companies Tribunal is a creature of statute, being the Act and its jurisdiction to deal with any application is founded on the relevant provisions of the Act and the Regulations. I am therefore required to examine the provisions of the Act and

the Regulations in order to determine the scope and extent of the powers assigned to the Companies Tribunal in the process of adjudicating on and making a determination with regard to any application that is lodged with the Companies Tribunal in terms of the Act read together with the Regulations.

[42] The Applicant makes the following allegations in Pluke's Supporting Affidavit which I consider to be relevant in the adjudication of this Application and the ultimate determination that I should make in terms thereof:

42.1 The Applicant is the true and lawful proprietor in South Africa of the following registered trade marks, which trade marks are valid, in force and extensively used within the Republic of South Africa:

42.1.1 Trade mark registration number 2011/11240 in relation to XYG which is registered in class 12, in relation to the specification as it appears from an extract taken from the Trade Marks Register held by the Commission. An extract from Trade Marks Register is annexed to the Supporting Affidavit and marked "CNO1"; and

42.1.2 Trade mark registration number 2011/11241 in relation to XYG which is registered in class 37, in relation to the specification as it appears from an extract taken from the Trade Marks Register held by the Commission. An extract from the Trade Marks Register is annexed to the Supporting Affidavit and marked "CNO2".

42.2 The Applicant is a well-established auto spares supplier to spare shops, workshops and the like across Southern Africa. The Applicant's

complement of services includes, amongst other, the supply of autobody parts, automotive glass and windscreens, engines as well as other automotive mechanical spare parts and accessories.

- 42.3 On or about the 21st day of May 2019, the Applicant became aware of the existence of the First Respondent when the Applicant's firm of attorneys duly informed it of the existence of the First Respondent after conducting a cursory search of the Commission's records of trade marks and company names.
- 42.4 On becoming aware and on the 23rd day of May 2019, the Applicant instructed its attorneys to send a letter of demand to the First Respondent. The letter was sent by registered mail to the First Respondent on the 04th day of June 2019. A copy of the aforesaid letter is annexed to Pluxe's Supporting Affidavit marked "CNO3" and it is dated 03 June 2019.
- 42.5 The Applicant's firm of attorneys made several attempts to contact the First Respondent through alternative means such as telephone calls and e-mails, but their attempts were in vain as they were unable to contact the First Respondent.
- 42.6 The Applicant instructed its firm of attorneys to prepare and apply for the lodgment of the name objection proceedings against the First Respondent with the Companies Tribunal.
- 42.7 The Applicant's attorneys proceeded to file the Application for Relief and to serve same upon the First Respondent. As at the date of filing of the

Application for Default Judgment, there has been no response forthcoming from the First Respondent.

- 42.8 The Applicant was founded in 1994 in South Africa and it is trading as a quality after-market spares supplier and the sole African-based Temot shareholder.
- 42.9 In order to differentiate itself in the highly competitive environment, the Applicant has registered and protected a number of trade marks for various auto spare parts. This has ensured that its clients and the market at large, are able to identify the Applicant as the supplier of the quality goods amongst several competitors.
- 42.10 The Applicant is the proprietor of the unique and highly distinctive “XYG” trade marks, which it uses for its automotive windscreens and automotive glass range. The Applicant’s use of the “XYG” trade marks predates its registration on the Trade Marks’ Register in 2011. Accordingly, the Applicant’s “XYG” trade marks have acquired a significant reputation in its industry over the years.
- 42.11 Applicant’s distinctive “XYG” brand and trade marks have been extensively advertised, promoted and used across Southern Africa in the automotive sector. As a result, a substantial number of persons interested in the goods and services concerned have been exposed to Applicant’s “XYG” trade marks and have come to associate “XYG” with the Applicant in this industry.

- 42.12 The First Respondent was incorporated on the 07th day of November 2018. The registration of the First Respondent by the CIPC came to the attention of the Applicant on or about the 21st day of May 2019.
- 42.13 After having conducted internal investigations with regard to the registration of the First Respondent, the Applicant instructed its attorneys to establish if the First Respondent has no association and/or relationship whatsoever with the Applicant's enterprise or any of its subsidiaries or authorised licensees and further that the First Respondent has not been authorised to use the "XYG" name or trade marks.
- 42.14 It is submitted that the Applicant has shown "good cause" within the meaning of section 160(2)(b) of the Act for the offending name to be removed.
- 42.15 It is not clear to the Applicant in which industry the First Respondent operates because its business activities appear to be unrestricted from the Windeed company report. The First Respondent has also failed to respond to the Applicant's attorneys' letter of demand to provide clarification with regard to the industry that they operate in.
- 42.16 The Applicant is of the view that the continued use of the "XYG" trade marks by the First Respondent is tantamount to passing-off and/or unlawfully competing with Applicant by taking unfair advantage of the goodwill and reputation that the Applicant has built up in and to its "XYG" trade marks over the years.

- 42.17 The visual, phonetic and conceptual similarities between XYG (Pty) Ltd and the Applicant's long-standing registered "XYG" trade marks, leads the Applicant to believe that members of the public will be misled or confused into believing that there is some authorised connection or association in the course of trade between the services offered by the First Respondent with those of the Applicant when this is definitely not the case.
- 42.18 The Applicant's industry is highly charged, competitive and it is characterised by agreements and/or arrangements between various stakeholders which include but not limited to, the proverbial "man on the street", fitment centres, panel beaters and insurance companies. These agreements and/or arrangements require the Applicant to adhere to the highest quality standards by using approved spare parts as well as providing adequate warranty provisions for same.
- 42.19 The critical safety components for motor vehicles, the financial investment made by consumers when they purchase their motor vehicles and the intricate knowledge one needs to have in order to discern the validity and/or quality of used auto spares; further entrenches the Applicant's belief that it cannot be or cannot be seen to be associated with the entities who may not possess the requisite degree of skill and expertise in offering these types of goods or services in such an environment.

- 42.20 The Applicant did not consent and does not consent to the use of its “XYG” trade marks within the First Respondent’s company name, in the market-place or in any manner at all. This unauthorized use of the Applicant’s trade marks by the First Respondent amounts to trade mark infringement, as well as passing-off at common law.
- 42.21 The Applicant’s common law and statutory rights under the Trade Marks Act, 1993 (Act No. 194 of 1993) (“the Trade Marks Act”), acquired in and to its unique and highly distinctive “XYG” trade marks, entitles it to prevent the use of a name or a mark by any other person in the course of trade, which is confusingly or deceptively similar to its “XYG” trade marks, in relation to the goods and/or services for which they are applied to be registered, or similar goods or services, wherein such use there exists the likelihood of deception and/or confusion.
- 42.22 The Applicant objects to the company name XYG (Pty) Ltd , Registration Number: 2018 / 578027 / 07 in terms of sections 11(2)(a)(i), 11(2)(a)(ii), 11(2)(b)(i), and 11(2)(b)(iii) of the Act which stipulate that a name of a company must not be the same as, or confusingly similar to, the name of another company or a registered trade mark belonging to another entity.
- 42.23 The company name XYG (Pty) Ltd offends against section 11(2)(c)(i) of the Act, which states that a name of a company must not falsely imply association with another entity or reasonably mislead a person to incorrectly believe that it is part of, or associated with another entity.

- 42.24 The Applicant has expended considerable time, money and effort in advertising and promoting its goods and services that are offered under its “XYG” trade marks. The Applicant has accordingly acquired a substantial reputation and goodwill in and to its “XYG” trade marks as a result of its extensive advertising and promotion and they can, without doubt, be well recognised to persons interested in the goods and services with which the Applicant’s trade marks are associated. Accordingly, the Applicant enjoys strong common law rights in and to its “XYG” trade marks.
- 42.25 Over and above the statutory infringement mentioned above, such unauthorised and unlawful use of the Applicant’s “XYG” trade marks or a trade mark confusingly and/or deceptively similar thereto by a third party would also be considered to be passing-off and unlawful competition. Due to Applicant being one of the largest after-market auto spares supplier across Southern Africa, and more specifically, operating with a prominent presence within South Africa, the Applicant has created a brand which has acquired protectable reputation and goodwill. The misrepresentation of business origin by the infringing entity XYG (Pty) Ltd will potentially cause damage to the Applicant’s reputation as a result of the confusion and deception in the market-place.
- 42.26 If the deception and/or confusion as outlined above does indeed occur, then XYG (Pty) Ltd is very likely to take unfair advantage of, or be

detrimental to distinctive character or repute of the Applicant's trade marks.

42.27 Accordingly, the Applicant is of the opinion that the XYG (Pty) Ltd name conflicts with the Applicant's rights, hence, the XYG (Pty) Ltd name is both undesirable and will most like cause damage in terms of the provisions of sections 11(2)(a)(i), 11(2)(a)(iii), 11(2)(b)(iii) and 11(2)(c)(i) of the Act.

[43] It is common cause that the XYG trade marks are all valid and in full force and effect. The Applicant filed its XYG trade marks applications in South Africa on 12th day of May 2011 and those filing date of the XYG trade marks predates the date of registration of the First Respondent's company name by at least 7 (seven) years and 6 (six) months. The Applicant therefore holds statutory rights in the XYG trade marks by virtue of the provisions of the Trade Marks Act.

[44] 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. 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.

[45] 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)(iii), 11(2)(b)(iii) and (c)(i) of the Act reads as follows:

“(2) The name of a company must -

(a) not be the same as-

- (i)
- (ii)
- (iii) **a registered trade mark belonging to a person other than the company, or in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act 194 of 1993), unless the registered owner of the mark has consented in writing to the use of the mark as the name of the company;**
- (iv)
- (b) **not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless -**
 - (i) **...**
 - (ii) **...**
 - (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) **...**
- (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.]

[46] I should also 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 such as 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.]

[47] I should also, in this exercise, make reference to the provisions of section 160(2) of the Act. I consider these provisions to be relevant for purposes of my determination and the relevant parts 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) 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.” [Own emphasis

added.]

[48] There are certain facts which I consider to be important for purposes of my evaluation and determination of the issues involved in this matter. These facts can be summarised as follows:

48.1 The Applicant filed its applications for registration of the “XYG” trade marks on the 12th day of May 2011.

48.2 The company name of the First Respondent was registered by the Commission on the 07th day of November 2018.¹⁰

48.3 The Applicant became aware of the registration of the First Respondent’s company name on or about the 21st day of May 2019.

48.4 The Applicant instructed its attorneys to send a letter of demand to the First Respondent on or about the 23rd day of May 2019.

48.5 The letter of demand was sent to the First Respondent on or about the 04th day of June 2019 via registered mail and the First Respondent was afforded an opportunity until the 21st day of June 2019 within which to respond to the letter of demand.

48.6 The First Respondent failed to furnish the Applicant with a response to the letter of demand.

48.7 The Applicant’s attorneys did make several attempts to contact the First Respondent through alternative means such as telephone calls and e-

¹⁰ Refer to a copy of Respondent’s Certificate issued by the Commissioner on Thursday, December 13, 2018 marked Annexure “B” and which is appears at pages 40 of the Indexed and Paginated Bundle of Documents.

mails, but those attempts were in vain as they were unable to contact the First Respondent.

48.8 The Applicant instructed its attorneys to prepare and apply for the lodgement of the Application for Relief outside the stipulated three-month period, after the registration of the First Respondent.

48.9 The Applicant did not receive notice contemplated in sections 160(1) and 160(2)(a) of the Act.

48.10 The current Application was only filed with the Companies Tribunal on the 23rd day of July 2019.

48.11 This Application was hand delivered to the First Respondent on the 24th day of July 2019 by handing it to Ms. Mbatha, who is the wife of Mr. Mthanti, who is one of the directors of the First Respondent.

48.12 On the 25th day of July 2019, the First Respondent's director, Mr. Mthanti, called the Applicant's attorneys' offices using his cellular phone number 082 614 2354 and spoke to Sibindana.

48.13 During the aforementioned telephone call, Mr. Mthanti informed the Applicant's attorneys that he wanted no further correspondence between the First Respondent and the Applicant. He indicated that he would voluntarily apply to the Commission for a company name change.

[49] It is common cause that the Applicant did not receive notice contemplated in section 160(1) of the Act. It follows therefore that section 160(2)(a) of the Act is

not applicable to the current Application. The Application falls within the ambit of section 160(2)(b) of the Act. 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. This being the case, the Applicant is required to show good cause as to why it only made the Application almost 8 (eight) months after the date of registration of First Respondent's company name.

[50] It is not farfetched to imagine the adverse impact of applications challenging company names brought years after such names have been registered. This will undoubtedly affect the credibility of the Register of Companies that is kept by the Commission in terms of the Act. Having said all that, I now turn to deal with the issue of good cause as prescribed by section 160(2)(b) of the Act.

SHOWING OF GOOD CAUSE IN TERMS OF SECTION 160(2)(b) OF THE COMPANIES ACT, 2008

[51] In terms of section 160(2)(b) of the Act, the Applicant is permitted to file its application to challenge registration of a name of a company by the Commission at any time. However, in order to have its Application entertained by the Companies Tribunal, the Applicant is required to show good cause as prescribed by section 160(2)(b) of the Act.

[52] I have noted and remain mindful of the fact that the Act does not define or explain what is meant by the words "showing good cause". In my view showing good cause entails that, the Applicant must at least adduce evidence regarding how it became aware of the registration of the challenged company name of the First

Respondent. In other words, the Applicant must provide a reasonable explanation which show that it did not wilfully default to make the application earlier than it did.

[53] 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. The Companies Tribunal had previously dealt with the requirements of showing good cause in *Comair Limited vs Kuhlula Training, Projects and Development Centre (Pty) Limited* CT007Sept2014. The judgment in this case was handed down on 27 February 2015 by Khashane Manamela and he had the following to say regarding showing of good cause:

“[6] . . . Although, the CA 2008 doesn’t explain what is meant by showing good cause, in my view it entails that, an applicant has to at least adduce evidence regarding how it became aware of the reservation or registration of an impugned company name when it became aware and not earlier. In other words that it did not wilfully default to make the application earlier than it did. In *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18, although dealing with a slightly different connotation of the phrase, it was stated that “good cause may be defined as a substantial or “legally sufficient reason” for a choice made or action taken”. Therefore, stating only a date on which the applicant became aware of

the challenged name, does not [in my view] amount to showing good cause.” [Own emphasis added.]

[54] It therefore follows that in a name dispute application in terms of section 160(1) of the Act, an applicant will succeed in showing good cause envisaged in section 160(2)(b) of the Act by means of giving an explanation that shows how and why it took the time that it took to file its application with the Companies Tribunal. In other words, the Applicant is required to be generous with the truth regarding the time it took and the cause for the delay thereof in filing its application with the Companies Tribunal. The applicant must make full disclosure of all information that is relevant to the time that was taken by it to file its Application. This disclosure must begin from the date that it became aware of the registration of the impugned company and the steps it took thereafter.

[55] In my view and coming back to the Application 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 regarding all the facts that are relevant to the delay in filing its Application. In the process of 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 steps that the Applicant took immediately after acquiring such knowledge.

[56] I have noted that the Applicant provided detailed explanation regarding the date when it became aware of the registration of the First Respondent’s company

name and the steps that it took to bring its objection to the First Respondent's company name to the attention of the First Respondent. Despite having been given a notice of objection in respect of its company name (in the form of a letter of demand), the First Respondent failed and/or neglected and/or refused to change its company name. Despite having made an undertaking to change the First Respondent's name, Mr. Mthanti, who is the director of the First Respondent, failed and/or neglected to change the First Respondent's company name.

[57] In my view, the explanation provided by the Applicant and more specifically, the steps the Applicant took upon acquiring knowledge of registration of the First Respondent's company name is reasonable and sufficient to excuse the delay in filing the Application for Relief in this matter. The Applicant has therefore succeeded in giving a satisfactory explanation and further providing the basis for its Application to be entertained by the Companies Tribunal.

EVALUATION AND FINDINGS

[58] The Applicant is the owner of various registered trade marks which incorporate or comprise of the words XYG all of which are registered trade marks in various classes on the Trade Marks Register currently held by the Commission. The First Respondent's company name contains the words XYG which are similar to the registered trade marks of the Applicant. The dominant, distinctive and memorable feature of the Respondent's company name is therefore the words XYG. XYG is therefore the words 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(s) of a trade mark or name.

[59] The Applicant's XYG trade mark is wholly incorporated in the First Respondent's company name. The phrase "(Pty) Ltd" is wholly descriptive, and does not assist to distinguish the First Respondent's company name from the XYG trade marks, and thereby reducing the likelihood of deception or confusion.

[60] It is common cause that the XYG trade mark registrations cover a variety of goods and services. The First Respondent's business activities are not known but it is therefore conceivable that the First Respondent may enter into the Applicant's direct field of interest in the future. This would overlap with the goods and services covered by the Applicant's trade marks registrations in classes 12 and 37 of the Trade Marks Register.

[61] It is common cause that the Applicant filed its "XYG" trade marks applications for registration in South Africa on 12th day of May 2011. These trade marks applications were accepted by the Commission on the 13th day of February 2015 and they were finally registered on the 24th day of July 2017. It is clear therefore that the filing of the applications for registration of the "XYG" trade marks by the Applicant predates the incorporation of the First Respondent by at least 7 (seven) years and 6 (six) months.

[62] The Applicant has thus succeeded in demonstrating that it holds statutory rights in the "XYG" trade marks by virtue of the provisions of the Trade Marks Act. If one is to compare the First Respondent's company name "XYG (Pty) Ltd" with

the Applicant's registered "XYG" trade marks, there is no doubt therefore that the First Respondent's company name is the same as the Applicant's registered "XYG" trade marks. The Applicant's registered "XYG" trade marks are wholly incorporated in the First Respondent's offending company name.

[63] The use of the name "XYG (Pty) Ltd" by the First Respondent is not authorised by the Applicant. It is conceivable that the First Respondent's company name will be used in respect of the goods and/or services covered by the Applicant's registered "XYG" trade marks. It follows therefore that such use of the name will most definitely amount to an infringement of one or more of the Applicant's registered "XYG" trade marks.

[64] It is further common cause that the Applicant did not consent to the use of its registered "XYG" trade marks by the First Respondent. It follows therefore that the First Respondent is not authorised to use the trade marks "XYG" in its company name. In relation to the merits of the current Application I therefore make the following findings:

64.1 The dominant, distinctive and memorable feature of the First Respondent's company name is similar to the Applicant's registered and distinctive "XYG" trade marks. The First Respondent has not been granted permission by the Applicant to use the aforesaid registered trade marks. The First Respondent's company name is therefore in contravention of section 11(2)(a)(iii) of the Act.

64.2 Similarly, the First Respondent's company name is confusingly similar to the registered "XYG" trade marks of the Applicant. The First Respondent

has not been granted permission by the Applicant to use the aforesaid registered trade marks. The First Respondent's company name is therefore in contravention of section 11(2)(b)(iii) of the Act.

64.3 The First Respondent's company name also 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 is associated with the Applicant. The First Respondent's company name is therefore in contravention of section 11(2)(c)(i) of the Act.

RELIEF SOUGHT

[65] I have noted that the Applicant is requesting amongst other things that the Companies Tribunal should make the following order:

“In the event that the first respondent fails to comply with this order within 30 days, the CIPC is directed to record the first respondent's registration number followed by (Pty) Ltd, as the interim company name of the first respondent, on the companies register....” [Own emphasis added.]

[66] The types of reliefs that the Companies Tribunal is competent to grant are contained in section 160(3) of the Act. The relevant provisions are contained in section 160(3)(b)(ii) which read as follows:

“(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is

the subject of the application, the Companies Tribunal-

(b) may make an administrative order directing-

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph. [Own emphasis added.]

[67] It is clear from the provisions of section 160(3)(b)(ii) that the Companies Tribunal lacks the powers to make the type of the order that the Applicant is seeking against the Commission in this Application for Relief. There are no statutory provisions which gives the Companies Tribunal the powers to direct the Commission to change the name of the First Respondent to its registration number, as the First Respondent's interim company name on the Companies Register. If the Respondent fails to comply with the order of the Companies Tribunal, then the Applicant will be at liberty to bring an appropriate application for enforcement of the order of the Companies Tribunal before the High Court in terms of section 195(8) of the Act.

[68] I have also noted that the Applicant is seeking for an order for costs in terms of

regulation 156(1) of the Regulations. The relevant provisions of regulation 156(1) of the Regulations read as follows:

“156(1) Upon making an order, the Tribunal may make an order for costs.” [Own emphasis added.]

[69] Regulation 156(1) affords the Companies Tribunal a discretion on whether or not to grant orders for costs when making its orders in respect of matters brought before it. Even though the Applicant is seeking an order for costs against the First Respondent, I am however not persuaded that this is one of those cases that I should make a cost order against the First Respondent. I therefore find no compelling reason for me to impose a cost order against the First Respondent.

THE ORDER

I therefore make the following order:

- 1) The Application for Default Order sought against the First Respondent in terms of regulation 153(1) of the Regulations is hereby granted.
- 2) The objection lodged by the Applicant against the registration of the company name of the First Respondent, being XYG (Pty) Limited, by the Second Respondent is hereby granted.
- 3) The First Respondent is hereby directed to change its company name to one which does not incorporate the Applicant’s registered trade marks, being “XYG”, or any other trade mark or word that is confusingly and/or deceptively similar to the Applicant’s registered trade marks, being “XYG”, within a period of 60 (sixty)

calendar days from date of this order;

- 4) The First Respondent is ordered to file a notice of an amendment of its Memorandum of Incorporation, within 60 (sixty) calendar days from date of this order;
- 5) The First Respondent is hereby exempted from the requirement to pay the prescribed fee for filing the notice of amendment of its Memorandum of Incorporation contemplated in section 160(3)(b)(ii) of the Act.
- 6) The Registrar of the Companies Tribunal is hereby directed to serve this judgment on the Second Respondent within a period of 5 (FIVE) business days from date of this order; and
- 7) There is no order as to costs.

LINDELANI DANIEL SIKHITHA
Member of the Companies Tribunal
01 November 2019