



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT0280/ADJ/2020

In the matter between:

**SCHNEIDER ELECTRIC SOUTH AFRICA (PTY) LTD
(REGISTRATION NUMBER: 1971 / 002841 / 07**

Applicant

and

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION
SOUTH AFRICAN STORED ENERGY (PTY) LTD**

First Respondent

Second Respondent

Issue(s) for determination: This is an application for the Companies and Intellectual Property Commission to waive a single requirement of the Practice Note 7 of 2012, in respect of the information that a third party requestor must furnish when applying for deregistration of a company from the Register of Companies.

Coram: Lindelani Daniel Sikhitha

Date of Hearing: 07 July 2020

Decision handed down on: 27 August 2020

DECISION (Reasons and Order)

A. INTRODUCTION

- [1] The Applicant is Schneider-Electric South Africa (Proprietary) Limited which is a private company duly registered and incorporated with limited liability in accordance with the applicable company laws of the Republic of South Africa with registration number 1971 / 002841 / 07. The principal place of business of the Applicant is situated at Number 9 Old Pretoria Main Road, Midrand, Gauteng Province.
- [2] The First Respondent is the Companies and Intellectual Property Commission which is a regulatory agency established in terms of section 185 of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”). The First Respondent has its office situated at The DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria.
- [3] The Second Respondent is South African Stored Energy (Proprietary) Limited with registration number 2014 / 013362 / 07, which is a private company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa. The Second Respondent has its principal place of business situated at 92 Edge Road, Bimbaza Industrial Zone, Buffalo City, Eastern Cape.

B. RELIEF SOUGHT BY THE APPLICANT

[4] The Applicant is seeking that the Companies Tribunal should grant the following relief against the First Respondent:

- 4.1 that the First Respondent be directed to waive its discretionary requirement of furnishing a tax clearance certificate when a third party applies to deregister a company under section 82(3)(b)(ii) of the Act;
- 4.2 directing the First Respondent to reconsider the Applicant's request for deregistration of the Second Respondent which was filed with the First Respondent on or about the 20th day of December 2018;
- 4.3 Granting the Applicant further and/or alternative relief; and
- 4.4 Costs.

C. BACKGROUND FACTS LEADING TO THE APPLICATION

[5] This is an Application brought against the First Respondent in terms of section 156(b) of the Act read with regulation 142 of the Companies Regulations, 2011 ("the Regulations").

[6] In this Application, the Applicant is challenging the discretion of the First Respondent with regard to furnishing a tax clearance certificate in the event that a third party applies to deregister a company under section 82(3)(b)(ii) of the Act. The First Respondent has been insisting that the Applicant is required to furnish a SARS tax clearance certificate of the Second Respondent in terms of Practice Note 7 of 2012: Application for Deregistration of Companies and

Close Corporations in terms of the Companies Act, 2008 (Act No. 71 of 2008) (“the Practice Note 7”).

- [7] The facts giving rise to this Application are fully outlined in the Founding Affidavit deposed to by one, Jared Miller (“Miller”) who is the legal counsel of the Applicant. Miller is duly authorised by the board of directors of the Applicant in terms of resolution dated 04 December 2019. A copy of the aforesaid resolution is annexed to Miller’s affidavit marked Annexure “OM1” and it appears at pages 14 to 16 of the indexed and paginated papers. I will only summarise those facts that I consider to be relevant for purposes of making my determination of this Application.
- [8] On or about 04 July 2017, the Second Respondent instituted a breach of contract related litigation matter in the Gauteng Division of the High Court under case number 45665/17 against the Applicant. The Applicant has and continues to defend the aforesaid action.
- [9] On 07 September 2018, the Applicant successfully obtained a costs order in an interlocutory application against the Second Respondent in the sum of R69 235.26.
- [10] On 02 October 2018, the Applicant’s attorneys demanded payment of the aforesaid amount in terms of letter of demand attached to Miller’s affidavit marked Annexure “OM3” and it appears at pages 20 to 21 of the indexed and paginated papers. It appears that the Second Respondent did not make the demanded payment or offer any response to the letter of demand from the Applicant’s attorneys.
- [11] Due to the failure of the Second Respondent to pay the amount of the cost order, on 18 October 2018, the Applicant caused a warrant of execution to be

issued against the Second Respondent. A copy of the aforesaid warrant is annexed to Miller's affidavit marked Annexure "OM2" and it appears at pages 17 to 19 of the indexed and paginated papers.

[12] The Applicant sought to attach the movable property of the Second Respondent at its registered address situated at 92 Edge Road, Dimbaza Industrial Zone, Buffalo City, Eastern Cape. The aforementioned address corresponds with the address which appears on the CIPC disclosure certificate which is annexed to Miller's affidavit marked Annexure "OM4" and it appears at pages 22 to 23 of the indexed and paginated papers.

[13] It is alleged that there are two "Edge Roads" in the Eastern Cape. One is found within the jurisdiction of the sheriff of East London and another one is found within the jurisdiction of the sheriff for King Williams Town. Therefore, the Applicant instructed both the sheriff for East London and the sheriff for King Williams Town to execute the movable property of the Second Respondent. Both sheriffs rendered returns of non-service and copies thereof are annexed to Miller's affidavit marked Annexure "OM6". Annexure "OM6" appears at pages 27 to 28 of the indexed and paginated papers.

[14] On or about 20 December 2018, the Applicant, through its attorneys KapdiTwala Inc. t/a Dentons South Africa made a request for deregistration of the Second Respondent in terms of section 82(3)(b)(ii) of the Act under the following grounds:

14.1 that the Second Respondent has ceased to carry on business in terms of section 82(3)(b)(ii)(aa) of the Act; and

14.2 that the Second Respondent has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the

company being liquidated in terms of section 82(3)(b)(ii)(bb) of the Act.

[15] The full reasons of the request referred to above are fully outlined on the letter from Applicant's attorneys which is annexed to Miller's affidavit and marked Annexure "OM8" and it appears at pages 32 to 34 of the indexed and paginated papers.

[16] On or about 12 March 2019, the Applicant's attorneys, (through Kirith Haria ("Mr. Haria")), made telephonic enquiry to the First Respondent to enquire about the status of the Applicant's request. The agent at the First Respondent responded to the aforesaid telephone enquiry by Mr. Haria and indicated that the First Respondent could not process the Applicant's request because it did not include the Second Respondent's SARS tax clearance certificate.

[17] On 13 March 2019, Mr. Haria did lodge an enquiry ticket on the First Respondent's Online Query Management System to place the reasons as to why the requirement for a SARS tax clearance certificate is not applicable to the Applicant's request for deregistration of the Second Respondent. A copy of the Online Query is annexed to Miller's affidavit marked Annexure "OM9" and it appears at pages 50 to 51 of the indexed and paginated papers.

[18] On 18 March 2019, the First Respondent did respond to the Applicant's Online Query as per Annexure "OM10" to Miller's Affidavit. In its response, the First Respondent stated the following:

"Good day

Kindly be advised that you need to send an affidavit stating that you were never registered for tax if that's the case if not we need the tax clearance as it is one of the requirements.

It is trusted that you find such in order.

Kind regards,

Pamela”

[19] It is alleged in Miller’s affidavit that the Applicant could not provide a SARS tax clearance certificate of the Second Respondent or any other written confirmation from SARS that no tax liability is outstanding due to the following reasons:

19.1 A party may apply to SARS for a tax clearance certificate and SARS will issue a tax clearance certificate only if that party is the same party to which the tax clearance certificate relates.

19.2 Simply put, SARS will issue a tax clearance certificate in favour of the Second Respondent only if the Second Respondent applies for such certificate.

[20] The Applicant lodged the current proceedings with the Companies Tribunal on 20 January 2020. In its Application, the Applicant is contending that the requirement for either a SARS tax clearance certificate or any other written confirmation from SARS that no tax liability is outstanding has the following effect:

20.1 the First Respondent’s insistence on submission of a SARS tax clearance certificate has rendered the provisions of section 82(3)(b)(ii) of the Act to be non-operational for third party applicants;

20.2 the First Respondent’s insistence on submission of a SARS tax clearance certificate means that no company will be deregistered unless there is a SARS tax clearance certificate for the affected company;

- 20.3 the First Respondent's insistence on submission of a SARS tax clearance certificate means that a party that is not the affected company will not be successful in applying for the deregistration of a company even if the requirements prescribed by the Act are met; and
- 20.4 the First Respondent's insistence on submission of a SARS tax clearance certificate makes a mockery of the provisions of section 82(3)(b)(ii) of the Act as it defeats the purpose of the section.
- 20.5 the First Respondent's requirement to provide a SARS tax clearance certificate have led to an instance where a remedy under the Act exists but the First Respondent's requirement has rendered that remedy non-operational.

[21] The Applicant further submits that section 82 of the Act does not impose any statutory requirement on third party requestors to furnish tax information about the company whose deregistration is being sought. Neither does the impugned requirement appear expressly in the Regulations subordinate to the Act. It follows therefore that such a requirement is without any legal basis and should therefore be waived.

[22] In its Affidavit deposed by Christa Klokow on behalf of the First Respondent, the following is stated in paragraph 6.1 to 6.2:

- 22.1 On 21 December 2018, the First Respondent received an application for the deregistration of the Second Respondent from Vanessa Jacklin-Levin acting on behalf of Dentons South Africa who are the attorneys representing the Applicant.
- 22.2 According to the First Respondent's central workflow system, although the application was received via the

deregistration@cipc.co.za mailbox, the deregistration application was never processed. In other words, it was neither approved nor rejected.

[23] I will therefore proceed on the basis that the request of the Applicant to have the Second Respondent deregistered has not been processed and it is therefore still pending before the First Respondent. I will therefore ensure that the order that I shall make will be crafted in a manner that takes into account this important fact and can be enforced as well.

D. APPLICABLE LEGISLATION

[24] This is an application brought against the First Respondent in terms of section 156(b) of the Act read with regulation 142 of the Regulations. The relevant provisions of section 156(b) read as follows:

“A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company’s Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company’s Memorandum of Incorporation or rules, by-

(a) ...

(b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act. . . .”

[25] It is my view that this Application is one of such applications that are permitted in terms of the Act. The provisions of regulation 142 of the Regulations read as follows:

- “(1) Any person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these Regulations, by completing and filling 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.”

[26] In my view, the current Application is brought by a person contemplated in section 157(1)(a) of the Act. The deponent of the Miller is authorised to bring this Application on behalf of the Applicant as per signed on 04 December 2019. The relevant provisions of section 157(1)(a) read as follows:

“(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-

(a) directly contemplated in the particular provision of this Act. . . .”

[27] The Applicant is making the current Application to the Companies Tribunal to challenge the discretion of the First Respondent in respect of furnishing a SARS tax clearance certificate in the event that a third party files a request to the First Respondent for deregistration of a company under section 82(3)(b)(ii) of the Act. The relevant provisions of section 82(3)(b)(ii) read as follows:

“(3) In addition to the duty to deregister a company contemplated in subsection (2)(b), the Commission may otherwise remove a company from the companies register only if-

(a) . . .

(b) the Commission-

(i) . . .

- (ii) has received a request in the prescribed manner and form and has determined that the company-**
 - (aa) has ceased to carry on business; and**
 - (bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.”**

[28] Regulation 168 of the Regulations deals with the issue of filing of documents at any regulatory agency. In terms of regulation 2(f) of the Regulations, the term “regulatory agency” is defined to mean the First Respondent, the Takeover Regulation Panel, or the Companies Tribunal. The relevant provisions of regulation 168 read as follows:

- “(1) A regulatory agency—**
 - (a) must assign a distinctive number to each document filed for the first time with the recording officer of that body;**
 - (b) must ensure that every document subsequently filed in respect of a matter is marked with the same distinguishing number;**
 - (c) may refuse to accept a document subsequently filed in respect of the same matter that is not properly marked with the assigned distinguishing number;**
- (2) Before serving a copy of an initiating document on any person, the initiating party must—**

- (a) obtain a distinguishing number for that document from the recording officer of the Tribunal; and
 - (b) note the distinguishing number on every copy of that document.
- (3) A person who files any document with a regulatory agency in terms of the Act or these regulations must provide to that regulatory agency the person's—
 - (a) legal name;
 - (b) address for delivery of documents;
 - (c) telephone number;
 - (d) if available, email address and fax number; and
 - (e) if the person is not an individual, the name of the individual authorised to deal with the regulatory agency on behalf of the person filing the document.
- (4) The recording officer of a regulatory agency—
 - (a) must take reasonable steps to—
 - (i) confirm the identity of any person filing a document with that regulatory agency;
 - (ii) verify that the person filing a document on behalf of, or in relation to a juristic person, has the right to file that document in their own name, or is authorised to file the document on behalf of another person who has the right to file the document;

pleases with the documents filed with it. Whatever the regulatory agency does with such documents, it must ensure that it is done within the scope and ambit of regulation 168.

E. EVALUATION OF THE CURRENT APPLICATION

[30] It is contended by the Applicant that the First Respondent's requirement for either a SARS tax clearance certificate or any other written confirmation from SARS that no tax liability is outstanding has the following effect:

- 30.1 the First Respondent's demand has rendered the provisions of section 82(3)(b)(ii) of the Act to be non-operational for third party applicant who applies for deregistration of affected company;
- 30.2 no company will ever be deregistered unless there is a SARS tax clearance certificate that is submitted for the affected company;
- 30.3 a party that is not the affected company will not be successful in applying for the deregistration of an affected company even if the requirements prescribed by the Act are met; and
- 30.4 the First Respondent's demand makes a mockery of the provision as it defeats the purpose of section 82(3)(b)(ii) of the Act.
- 30.5 the First Respondent's requirement to provide a tax clearance certificate have led to an instance where a remedy under the Act exists but the Commission's requirement has rendered that remedy non-operational.

[31] This Application by its very nature requires me to also deal with the mandate of the First Respondent in terms of both the Act and the Regulations. The First Respondent is a creature of statute which has been specifically

established in terms of section 185(1) of the Act. The First Respondent has jurisdiction in terms of specific matters provided for in the Act and the Regulations throughout the Republic of South Africa.

[32] In terms of section 185(2) of the Act, the First Respondent is independent and subject only to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (“the Constitution”) and the law and any policy statement, directive or request issued to it by the Minister in terms of the Act.

[33] In terms of section 185(2)(d) of the Act the First Respondent must exercise the functions assigned to it in terms of the Act or any other law, or by the Minister, in the most cost-efficient and effective manner and in accordance with the values and principles mentioned in section 195 of the Constitution¹.

[34] In terms of section 187(4)(d) of the Act, the First Respondent must register and deregister companies, directors, business names and intellectual property rights, in accordance with relevant legislation. It does so upon receipt of requests to such effect from members of the public.

[35] The First Respondent, as a regulatory agency envisaged in the Act and the Regulations accepts requests (including filing of documents) by members of the public and it should proceed to process such requests in terms of regulation 168 of the Regulations. This is one of such mandate that is assigned to the First Respondent in terms of the Regulations.

[36] Any document that has been filed with the regulatory agency in terms of regulation 168 must be dealt with in terms of the procedure outlined in this regulation. In my view, what is of importance for purpose of this determination is regulation 168(4) of the Regulations which makes the following provisions:

¹ Section 195 of the Constitution reads as follows

- “(4) The recording officer of a regulatory agency—**
- (a) must take reasonable steps to—**
 - (i) confirm the identity of any person filing a document with that regulatory agency;**
 - (ii) verify that the person filing a document on behalf of, or in relation to a juristic person, has the right to file that document in their own name, or is authorised to file the document on behalf of another person who has the right to file the document;**
 - (iii) verify the authenticity of every document being filed;**
 - (b) may demand that the person seeking to file a document supply reasonable evidence for the purposes contemplated in paragraph (a); and**
 - (c) may reject any document on the grounds that the requirements of paragraph (a), or a demand issued in terms of paragraph (b), have not been satisfied.”**

[37] It is therefore clear that a regulatory agency may only demand that the person seeking to file a document supply reasonable evidence for the purpose contemplated in paragraph 168(4)(a). In addition, a regulatory agency may reject any document on the grounds that the requirements of regulation 168(4)(a), or the demand issued in terms of regulation 168(4)(b), have not been satisfied. I now turn to deal with the pending request by the Applicant to

deregister the Second Respondent and the reasons provided by the First Respondent for its refusal to process and finalize such request.

[38] In essence, the First Respondent's basis for refusing to process and finalize the request of the Applicant to have the Second Respondent deregistered in terms of section 82(3)(b)(ii) is recorded in the papers placed before me as follows:

“Kindly be advised that you need to send an affidavit stating that you were never registered for tax if that's the case if not we need the tax clearance as it is one of the requirements.”

[39] The Applicant contends that section 82 of the Act does not impose any requirement on third party requestors to furnish a SARS tax clearance certificate or tax information about the company whose deregistration is being sought. Neither does the impugned requirement to furnish SARS tax clearance certificate appear expressly in the Regulations that are subordinate to the Act.

[40] I do agree with the Applicant that such a requirement is without any legal basis and should therefore be waived by the First Respondent. In addition, the First Respondent, as a creature of statute, always derives its powers from the enabling Act and the Regulations that are subordinate to the Act. It follows therefore that the First Respondent does not have powers to impose any requirement that is not authorized in terms of either the Act or Regulations.

F. FINDINGS

[41] Evidence placed before me does confirm that the Applicant did comply with all the prescribed statutory provisions and the requirements regarding the

lodgement of the request for deregistration of the Second Respondent. There is no statutory requirement concerning the submission of SARS tax clearance certificate relating to the tax affairs of the affected company when a third party files a request for deregistration of a company. I therefore find that the insistence by the First Respondent that the Applicant must furnish it with a SARS tax clearance certificate relating to the tax affairs of the Second Respondent to be unlawful.

[42] I further find that the failure by the First Respondent to process and finalize the request made by the Applicant to have the Second Respondent deregistered to have been made deliberately. Such a requirement is irrational and not authorized by the Act and the Regulations. Therefore the First Respondent did not have any legal basis to ignore the request made by the Applicant to have the Second Respondent deregistered.

[43] The conduct of the First Respondent to impose a requirement for submission of a SARS tax clearance certificate of the Second Respondent by the Applicant is therefore unlawful and it is hereby reviewed and set aside. Similarly, the decision of the First Respondent to refuse to process and finalize the request of the Applicant to have the Second Respondent deregistered is hereby reviewed and set aside.

[44] It follows therefore that the First Respondent should be ordered to process and finalize the request filed by the Applicant on 20 December 2018 within a period of 10 days from date of delivery of the order that I will make below.

G. COSTS

[45] The Applicant requested that it should be awarded costs if it were to succeed in its Application. There is no doubt that the Applicant was forced to bring the current Application due to the conduct of the First Respondent. The First Respondent choose to ignore the request of the Applicant to have the Second Respondent deregistered. This conduct clearly shows that the First Respondent did not understand its powers and functions in terms of the Act and the Regulations. And as a regulatory agency, a high level of service standard is expected from the First Respondent. It is highly unacceptable and improper that a regulatory agency can ignore to process a request from a member of the public that it is created to serve in the first place.

[46] I am however mindful of the fact that the First Respondent did file an affidavit in terms of which certain important facts were placed before me. These facts assisted me in making the determination that I made in this matter. I am therefore not convinced that this is a case in which I should show my displeasure towards the conduct of the First Respondent by making a cost order against it.

[47] The Second Respondent opposed the application and its arguments for opposing such application did not have merits at all. The issues that are raised in the Second Respondent's affidavit are better off reserved for a response to the request of the Applicant to have it deregistered. The filing of an opposition and an answer to the current Application by the Second Respondent imposed a burden on the Applicant to prepare and file a reply. It follows therefore that considering the outcome of the current Application the

Second Respondent should pay the costs of the Applicant on a party and party High Court scale.

THE ORDER

[48] I therefore make the following order:

48.1 The First Respondent is hereby directed to process and finalize the request for deregistration of the Second Respondent that was made and filed by the Applicant on 20 December 2018 within a period of 10 (ten) days from date of delivery of this order to the First Respondent.

48.2 The Registrar of the Companies Tribunal is directed to ensure that this order is delivered to the First and Second Respondents within a period of 5 (five) days from date of issuing.

48.2 The Second Respondent is hereby ordered to pay the costs of the Applicant which costs shall include the costs of counsel on a party and party High Court scale.

Lindelani Sikhitha

Tribunal Member

27 August 2020