



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01192ADJ2022

In the matter between:

SIYANDA GIFT MPANZA

APPLICANT

and

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

RESPONDENT

Presiding Member:

Brian Jennings

Date of handing down of decision:

20 September 2023

DECISION

Introduction

- 1 This is an application for the rescission and/or variation of the order handed down by the Companies Tribunal ("**Tribunal**") on 5 May 2023 with the above case number.
- 2 I do not find it necessary to delve into whether the Tribunal has the power to rescind a decision, as its power to do so has (in my view) been settled in previous decisions, considering the wording in Regulation 142(3)(b)(ii) of the regulations to the Companies Act.
- 3 In light of Regulation 168(2) of the regulations to the Companies Act, it is required that an applicant must first obtain a "distinguishing number... from the recording officer of the Tribunal" (in other words, a case number) in respect of its application, before that application may be served on any respondent. Therefore, as an applicant must first obtain such number before service, the calculation of the time period for the purposes of Regulation 143(1) must start from the date of receipt of such distinguishing number.
- 4 It therefore follows that Applicant did serve its Form CTR 142 with case number CT01192ADJ2022 on the Respondent within the required period of time, and that its request for a default order as previously brought under its Form CTR 145, be reconsidered in light of the Applicant's proper service.

Default order

- 5 The Applicant applied for a default judgment against the Respondent in terms of Regulation 153(1) to the Companies Act. The requirements for a default order are as follows –

- 5.1 the Applicant must have served the Respondent with an initiating document;
- 5.2 the Respondent must not have filed a response within the prescribed period;
and
- 5.3 the Applicant must have applied to have the order, as applied for, issued against the First Respondent by the Tribunal.

6 I deal with each in turn:

- 6.1 The Applicant has furnished proof that, on 21 October 2022, it served its stamped Form CTR 142, affidavit and supporting documents on the Respondent.
- 6.2 From the papers before me, no response was filed by the Respondent with the tribunal as at the date of the Applicant's application for a default order. The prescribed period of 20 business days from the date of service (as calculated above) has elapsed, as contemplated in Regulation 143(1).
- 6.3 On 2 December 2022, the Applicant applied to the Tribunal by way of Form CTR 145 for a default order.

7 Therefore, I am satisfied that the above requirements for a default order have been satisfied.

Does the application comply with section 160 of the Companies Act?

8 I am called upon to express a view in terms of section 160 of the Companies Act as to whether the Applicant is entitled to apply to the Tribunal as to whether the name it seeks to reserve satisfies the requirements of the Companies Act.

- 9 The Applicant applied to the Respondent to reserve a number of names which *inter alia* included the name "VITTLE". The Applicant received a notice from the Respondent in the form of COR9.5 rejecting its reservation of the name "VITTLE" on the basis that such name is confusingly similar to name/s already registered and therefore the name was non-compliant with section 11(2)(b) of the Companies Act. Therefore, the Applicant is entitled to make the application it so makes.
- 10 The next hurdle is one of time – an application must be brought either (i) within 3 months after the date of a notice contemplated in section 160(1); or (ii) on good cause shown at any time after the date of registration of the name that is the subject of this application.
- 11 The Applicant received the Form COR9.5 notice on 6 September 2022. The Applicant then served its initiating documents on the Respondent on 21 October 2022. This is well within the 3 month period required by section 160(2) of the Companies Act, and therefore this requirement is satisfied.
- 12 As the Applicant has satisfied both the requirements for a default order and the requirements of section 160(1) and (2) of the Companies Act, the Applicant is entitled to have the Tribunal consider whether its reservation of the name "VITTLE" complies with the Companies Act. I shall consider whether the Applicant's reservation is so compliant.

Section 11 of the Companies Act

- 13 The Respondent, in its Form COR9.5, stated that the Applicant's reservation of the name "VITTLE" was non-compliant with section 11(2)(b) of the Companies Act. As no other ground for non-compliance was given by the

Respondent, I do not find it necessary to consider any other ground other than section 11(2)(b).

The applicable law

14 CIPC's Form CoR9.5 rejects the proposed reserved names in terms of "in particular" section 11(2)(b) of the Companies Act. The conduct of the CIPC in this regard falls squarely with a previous order given under *Nkabinde v CIPC* (CT01234ADJ2022). For the same reasons as espoused in the *Nkabinde* decision, section 12(2) provides no discretion to the CIPC to fail to reserve names which might fall under sections 11(2)(b) or 11(2)(c) of the Companies Act.

15 The correct course for the CIPC is to adhere to the prescripts of section 12(3)(a) which deals with the process upon receipt of a name reservation: It provides as follows:

"If, upon reserving a name in terms of subsection (2), there are reasonable grounds for considering that the name may be inconsistent with the requirements of –

(a) section 11(2)(b) or (c) –

- (i) the Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant; and*
- (ii) any person to whom a notice is required to be given in terms of subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160; or"*

16 CIPC's Form CoR9.5 does not comply with the requirements of section 12(3)(a)(i) of the Companies Act.

17 As I held in the *Nkabinde* decision:

"The purpose behind section 12(3)(a)(ii) is clear – it is the prerogative of the Tribunal to adjudicate disputes as to name reservation – hearing from the applicant and the other interested persons. Although not before me, one presumes that the time periods in section 160(2) are pertinent, and that a person applying to reserve a name would need to wait out a 3 month period in case any such application is contested....

While I am sympathetic to the approach adopted by the CIPC and for the reasons it has submitted, its conduct must however fall squarely within the four corners of the Companies Act. The CIPC refers me to Regulation 9(3)(c) and the decision of Prof PA Delpont in *Agri-Boost (Pty) Ltd v AGRI BOOST SA (Pty) Ltd*. My responses are as follows:

- 17.1 Reliance on Regulation 9(3)(c) cannot be to the wholesale abandonment of the clear wording of section 12 of the Companies Act. Regulations are subservient to the Act, and must be read in a holistic manner so as to ensure, as far as possible, that they are not inconsistent. Refer section 158(b)(ii) which compels both the Tribunal and the CIPC, when determining a matter brought before it, where if any provision of the Companies Act or a document in terms of the Companies Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of the Companies Act and will best improve the realisation and enjoyment of rights.
- 17.2 It would therefore be inconsistent to regard the reference to section 11 in Regulation 9(3)(c) as applying to the entirety of section 11 of the Companies

Act. It clearly is meant to apply to section 11(2)(a) as contemplated by section 12.

17.3 This view is even more so when one takes into account Regulation 9(4) which provides as follows:

"If the Commission has accepted the reservation of a name that the Commission considers may be contestable on any ground contemplated in section 12(3), the Commission, when issuing Form 9.4 in response to the application, must also issue –

(a) A Notice of a Potentially Contested Name, in Form CoR9.6, to the applicant if the name is contestable in terms of section 12(3)(a), read with section 11(2)(b) or (c); or

(b) ,,,."

17.4 Prof Delport, in his foresaid decision, focused on the similarity of the two names. The comment quoted by the CIPC in its papers was clearly marked "as an aside" and, in my view, does not form part of his order and construing it as such is incorrect. The issues in the current case were not before Prof Delport in the foresaid decision.

17.5 I do not agree that the Tribunal, or the CIPC, has the power to override what is clearly the procedure established to deal with contestable names in terms of section 11(2)(b) or (c). The apparent unbusinesslike consequence is a matter for Parliament to address."

18 The above reasoning applies equally to the facts under consideration, and on which I rely again.

Order

In the circumstances, I make the following order:

- 19 The Applicant's recission application is successful.
- 20 The Applicant's application for a default order is granted.
- 21 The decision of the CIPC in terms of Form CoR9.5 dated 06 September 2022 under reference 9372857348 is hereby reviewed, and set aside.
- 22 The CIPC is directed to reconsider the application taking into account section 12(3)(a) read with Regulation 9(4) and to issue a Form CoR9.6 to the Applicant.
- 23 The Respondent is directed to reserve the name "VITTLE" as a contestable name, pending resolution of any contest in respect of such name.

BRIAN JENNINGS
MEMBER OF THE COMPANIES TRIBUNAL