



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**(“The Tribunal”)**

**CASE NO: CT012JUN2015**

**In the matter between:**

**METINDUSTRIAL (PTY) LTD**

**THE APPLICANT**

**AND**

**KWENA BATTERY CENTRE SERVICES (PTY) LTD**

**THE RESPONDENT**

**(2015/105690/07)**

**Coram K. Tootla**

**Decision delivered on 14 August 2015**

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**DECISION**

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**INTRODUCTION:**

- [1] The Applicant is **METINDUSTRIAL (PTY) LTD**, a company incorporated in terms of the Companies Act of 2008, having its registered place of business at Liverpool Road, Industrial Sites, Benoni, brings an application in terms of Sections 11 (2)(a)(ii) and (iii) and 160 of the Companies Act 2008 (“the Act”) read with Regulation (Reg.) 153 for an order that the Respondent be ordered to change its name because it does not comply with the aforementioned sub-sections.

- [2] The Respondent is KWENA BATTERY CENTRE SERVICES (PTY) LTD, a company incorporated in terms of the Companies Act having its registered place of business at Mabotja Street, Nyanyathu, Kwa- Thema, Springs, Gauteng.

#### **PROCEDURE:**

- [3] The Applicant served a copy of the CTR 142 application in accordance with the rules and filed same with the Tribunal timeously. The CTR 145 and accompanying affidavit was also served and filed by the Applicant timeously. The Respondent did not serve or file any notice to oppose the Applicant's application nor served or filed any answering papers to the Applicant's claim.
- [4] However, the Applicant has not served the papers on the Companies and Intellectual Commission (CIPC) as second Respondent nor has the Applicant requested an order in accordance with Section 160 (3) and Section 14(2) of the Act. This is required to inform CIPC of the application; to provide CIPC the opportunity to oppose the Application should it wish to do so and to ensure that the order granted by the Tribunal can be made against CIPC to change the name should the Respondent not do so.( in the event that the order is granted)
- [5] In addition, the Applicant's papers are uncoordinated in that the orders requested for in CTR 145 CTR 142 and the affidavits differ. The CTR 145 mentions only Section 11(2) (a)(ii)and (iii) and then (iii) is repeated which is illogical, whereas the supporting affidavit to the CTR 142 and the founding affidavit mention in addition Section 11(2)(b)(ii) and (iii); and Section 11(2)(c)(i).

#### **BACKGROUND:**

- [6] The Applicant claims that its trade mark BATTERY CENTRE and its logo has been in existence since 1973, and which has also been registered in subsequent years in various classes as per clause 3 of the founding affidavit attached to the CTR 142.

- [7] The Applicant also claims common law rights in the trademark “BATTERY Centre” due to its “valuable national reputation and goodwill” and due to wide spread and extensive use” thereof since 1973. It can be noted that the registration of the Respondent’s name took place recently in 2015 and the Respondent has no consent from the Applicant to use the trademark as its name.
- [8] The Applicant contends that its trademark is in respect of both the goods and services supplied by itself and its franchisees, such that that a substantial number of members of the public in S. Africa associate goods and services to “BATTERY CENTRE”.
- [9] It also contends that the Respondent’s company name is “confusingly and or deceptively similar to its trademark and that it offends against the provisions of Section 11(2) (a)(ii) and (iii) of the Act as set out in form CTR 145 and seeks an order in accordance with this.

#### **APPLICABLE LAW:**

- [10] For the purpose of brevity Section 11 of the Companies Act and Regulation (Reg) 142 (applies where relevant) will not be set out in detail herein.
- [11] The Applicant’s application has not been made in terms of the Reg 142 and in the circumstances it is unclear which particular subsection of Section 11 of the Act is applicable and why the Applicant believes it has a right in terms of the Act to do so. Note that Regulation 142 (3) clearly states that the section of the Companies Act on which the application is made, must (my emphasis) be indicated. This is clearly a peremptory provision and the Companies Tribunal cannot *mero motu* condone non-compliance. The principle of substantial compliance as set out in section 6(9) and (10) do not apply as there is a confusion about the sub- sections which are applicable (contradiction between CTR forms and founding affidavit); and more especially as there no proper justification provided for the application of those sub-sections.

## **EVALUATION:**

[12] Despite citing Section 11(2) and some of its subsections, the Applicant has not justified its case under those subsections mentioned in the CTR 142 and 145. Mere allegations that the Respondents' company name is contrary to the provisions of those subsection does not assist the Applicant's case. The Applicant is expected to explain why in terms of those subsections and the case law that the Respondent's name is in contravention of those subsections and to contextualize its claims.

[13] Furthermore, the Applicant has not provided any proof of its defensive name registration as alleged. The Tribunal is a separate and independent entity from CIPC and cannot verify those records as this information ought to have been provided by the Applicant in justification of its case as well as quote the relevant section of the Act which applies for name reservation and to explain why it believes this reservation gives it a prior claim to the name i.e it has not justified its case based on this claim either.

## **FINDINGS:**

[14] In the circumstances, the Applicant has failed to prove its case on a balance of probabilities.

## **ORDER:**

[15] The Applicant's application is dismissed.

*k.y. tootla (electronically signed)*

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**KHATIJA TOOTLA**

**Member of the Companies Tribunal**

**14 August 2015**