

THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT001Nov2015

In the matter between:

Virgin Enterprises Limited

Applicant

(A company registered in the United Kingdom)

and

Virgin Restaurant Primary Co-operative Limited

Respondent

(Registration number: 2012/006604/24)

Coram: S. Gounden

Decision handed down on 5 April 2016

DECISION

INTRODUCTION

- [1] The Applicant applies in terms of section 160 of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulations 143 and 153 of the Companies Regulations (GN R351 in GG 34239 of 26 April 2011) (“Companies Regulations” / “regulations”) for a default order that the respondent be ordered to change its name and file an amendment accordingly;

BACKGROUND

- [2] The Applicant is the proprietor of the trademark “VIRGIN” and has been conducting business under that name.

- [3] The Applicant filed an objection to the name “Virgin Restaurant Primary Co-operative” as stated above as prescribed by regulation 142 (1) (a), together with a supporting affidavit as required by regulation 142 (1) (b).
- [4] The application was served by the Sheriff to the Respondent on 9 November 2015. In terms of regulation 142 (2) it should be done within 5 days of filing it with the Companies Tribunal.
- [5] Rory James Richardson has signed the affidavit and has stated that he was duly authorised to act for and on behalf of the Applicant.
- [6] In terms of regulation 153 (1) read with regulation 143 (1), the first respondent has 20 days to respond, failing which the Applicant is entitled to apply for a default order as provided for in regulation 153 (1).
- [7] No response was received from the Respondent and the Applicant therefore applies to the Companies Tribunal in terms of regulation 153 (2) that said Companies Tribunal makes a default order in terms of regulation 153 (1).

ISSUES

- [8] A resolution of the Board of the Applicant authorising Rory James Richardson to act for and on behalf of the Applicant was **not** included in the application.
- [9] However, based on the findings of the Companies Tribunal on the substantive law, it is not necessary to make a finding as to defects, in [8] above, and the possible application of section 6 (9) and (10) of the Companies Act in respect of substantial compliance.
- [10] The Applicant requests that the Companies Tribunal grants the relief in the form that the Respondent be ordered to change its name and file an amendment accordingly; on the grounds that the use of the name “VIRGIN” by the Respondent is in contravention of sections 11 (2) (b) and (c) (i) of the Companies Act.

APPLICABLE LAW

[11] The jurisdiction of the Companies Tribunal is stated in section 160 of the Act and is 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.

(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.

(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—

(a) must make a determination whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended name that had been contested as the name of a company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

- (dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or
- (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.”

[12] Section 11 (2) of the Companies Act, as far as it is relevant for the present application, provides as follows:

“(2) The name of a company must—

(a) not be the same as—

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

...

(b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless,—

(i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;...;

(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;

...”

EVALUATION

[13] The question that needs to be answered is whether the Companies Tribunal has jurisdiction to grant an order on a Co-operative in terms of Section 11 of the Companies Act.

FINDINGS

[14] It is clear that the Companies Tribunal do not have jurisdiction to order an entity that is not a company to change its name in terms of Section 11 of the Companies Act.

ORDER

[15] The application that the Respondent must change its name, **cannot** be granted, as the Companies Tribunal does not have jurisdiction on this matter.

S. Gounden
MEMBER OF THE COMPANIES
TRIBUNAL
Pretoria
5 April 2016