COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT004DEC2016

In the matter between:

SKYBRIDGE CC (2004/093793/23)	First Applicant
OLEG MIKHAYLOVICH BROKORENKO	Second Applicant
and	
SKYBRIDGE INVESTMENTS (PTY) LTD (2014/286106/07)	First Respondent
CIPC (COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY REGISTRATION OFFICE)	Second Respondent

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Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	31 January 2017

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] In this application the first and second applicants (the applicants) complain that the first respondent's name does not meet or satisfy the requirements of the Companies Act 71 of 2008 (the Companies Act).

[2] It is submitted by the applicants that, the first respondent's name or the inclusion in the name of the word "SKYBRIDGE" renders it not to satisfy the requirements of section 11 of the Companies Act. This Tribunal is requested to direct the respondent to change its name to a new name compliant with provisions of the Companies Act.

[3] The nub of this application is in fact that the word "SKYBRIDGE" is registered as a trade mark in favour of the second applicant. The "SKYRIDGE" trade mark was registered between 1998 and 2005 in respect of classes 37, 38 and 41 over the following goods and services: satellite, television, video equipment service and installation, telecommunications, education; training; entertainment; sporting and cultural activities.[1]

[4] The first applicant is exclusively licensed by the second applicant for the use of the trade mark in South Africa. Therefore, I shall deal with the proprietorship of the trade mark as if it belongs to both applicants.

[1] See annexures "B1"- "B3" to the application.

Procedural shortcomings (in respect of absence of notice to first respondent and rules of natural justice)

[5] The application is before this Tribunal in terms of regulation 153 of the Companies Regulations, 2011,[2] as an application for default order. The first and second respondents did not file answers or responses to the application. However, this is not surprising in respect of the first respondent. The application was not served on the first respondent. The applicants submit that the first respondent's registered office could not be found. This in fact appears from the sheriff's return of service included in the papers.[3] The sheriff's return of service states, among others, the following:

> "That on 08 December 2016 at 15h48 the APPLICATION FOR RELIEF could not be served as no number 1257/7 could be found in CHAMFUTI CRESCENT."
>
> [underlining added for emphasis]

[2] Regulation 153 reads 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. (3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party.". The Companies Regulations were published by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 under GN R351 in Government Gazette 34239 of 26 April 2011.

[3] See annexure "OMB1" to the application for default order.

[6] The address as reflected on the sheriff's return is incorrect.[4] This appears to have been obtained from the applicants' Form CTR 142.[5] The correct address is as stated on the extracts from the second respondent[6] and the applicants' supporting affidavit:[7] 1254 7 Chamfuti Crescent (and not 1257/7 Chamfuti Crescent).

[7] Be that as it may, the applicants still expect this Tribunal to make a determination in respect of the impugned name and some sort of order regarding the non-service of the application on the first respondent.[8] A determination of the name dispute is not possible under the circumstances. The fairness of these proceedings is derailed by the absence of service on the first respondent. Notice is a cardinal ingredient of the rules of natural justice.

[8] In *Botha NO v The Governing Body of the Eljada Institute & another*,[9] the Supreme Court of Appeal said the following regarding rules of natural justice:

> "[39] As Gauntlett JA said in Lesotho in *Matebesi v Director of Immigration & others*:
>
> 'The right to be heard (henceforth "the *audi* principle") is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions…It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "stereotyped expression which is used to describe [the] fundamental principles of fairness (see *Minister of Interior v Bechler: Beier v Minister of the Interior* 1948 (3) SA 409 (A) at 451). More recently this has

[4] *Ibid.*
[5] See par 2.3.1 of the supporting affidavit.
[6] See annexure "A" to the application.
[7] See par 2.3.1 of the supporting affidavit.
[8] See par 3.1 of the affidavit for the default order.
[9] (20530/14) [2016] ZASCA 36 (24 March 2016).

> mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40, particularly in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) and more recently, *Du Preez v Truth and Reconciliation Commission supra*3 and *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 (HL) at 106d-h).'
>
> This judgment was referred to with approval by Steyn P in *Commander of the Lesotho Defence Force & others v Mokoena & others*4 and Brand JA, also in Lesotho, in *The President of the Court of Appeal v The Prime Minister & others.*"

[quoted without footnotes]

[9] As it clearly appears from the authorities quoted above, the issue of service or absence thereof on the first respondent, is fatal for this application. For completeness I should just mention that the second respondent was served. But no relief is sought against the second respondent in this application and therefore nothing turns on this.

[10] Although a solution may actually be located there, I will not deal with the issue of the wrong address on the sheriff's return of service.[10] In my respectful view the non-service of the application could have been avoided. From the second respondent's registration records,[11] the first respondent has a postal address other than its registered office address. The applicants ought to have considered service on the first respondent by way of registered post using the postal address. This is one of the recognised methods of

[10] See par 5 above.
[11] See annexure "A" to the application.

delivery of documents in terms of Table CR3 of Annexure 3 to the Companies Regulations.

Showing good cause

[11] I have had the privilege of adjudicating upon an application with similar problem to the one in this application in the matter of *Skybridge CC and Another v Skybridge Solar Solutions (Pty) Ltd and Another*.[12] That application appears to be on all fours with this matter of *Skybridge CC and Another v Skybridge Solar Solutions (Pty) Ltd and Another*. Actually, the applicants are the same in both matters. I think my comments in the other matter, including with regard to the requirements for showing of good cause,[13] may be useful in respect of this application.[14] There is no need to reinvent the proverbial wheel here.

Conclusion

[12] Therefore, the application would fail due to the shortcoming with regard to the lack of service of the application on the first respondent. In my view, obviously non-binding on my fellow members in this Tribunal, the applicants may relaunch this

[12] Decided under Companies Tribunal case/file number: CT007DEC2016 dated 31 January 2017. A copy of this decision may be obtained through access to the website: www.companiestribunal.org.za.

[13] Sections 160(1) and (2) read as follows in the material part: " (1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a 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 …registration or use of the 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."

[14] See pars 9 and 10 of *Skybridge CC and Another v Skybridge Solar Solutions (Pty) Ltd and Another*.

application, if they are so minded or so advised, once they have considered and addressed what is stated herein.

[13] Therefore, I make the following order:

a) the application is dismissed due to lack of service on the first respondent.

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Khashane La M. Manamela

Member, Companies Tribunal

31 January 2017