IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT008Aug2016

In the matter between:

Red Bull GMBH   Applicant

And

Red Bull Guard Safety and Security (Pty) Ltd   First Respondent

The Companies and intellectual Property Commission Second Respondent

Coram: Kganyago M.F

Decision handed down on the 22nd November 2016

DECISION

[1] The applicant has brought an application in terms of section 160(1) and (2) read together with section 11(2) of the Companies Act 71 of 2008 ("the Act"). The applicant is seeking an order that the first respondent be directed to change its name to a name which does not incorporate or include the applicant's Red Bull trade marks or that the second respondent be directed to remove the first respondent's name from its register.

[2] The applicant's application was served on the first respondent on the 30th August 2016 by the sheriff of the court. According to the sheriff's return of service, the applicant's application was affixed at the office door as he/she was unable to find a responsible employee or any person willing to accept service.

[3] The first respondent did not serve or file any opposing papers. The 20 days within which the first respondent is required to serve and file opposing papers if any has lapsed. The applicant is now applying for a default order in terms of the Companies Regulations, 2011 ("the Regulations").

[4]   According to the applicant, it became aware of the incorporation of the first respondent during July 2014. They immediately sent a letter of demand to the first respondent and its sole director Mr Simon Masilo Monyai by registered mail on the 08th and 09th September 2014 respectively.

[5]   The first respondent and Mr Monyai did not respond to their letters of demand. The applicant then appointed a private investigator to conduct further investigations into the first respondent as well as Mr Monyai. The outcome of the investigation was that the first respondent was not operating at the registered address and further that it was not registered with the Private Security Regulatory Authority. However, the private investigator was able to locate Mr Monyai's residential address.

[6]   On the 29th October 2014 another letter of demand was delivered at Mr Monyai's residential address. Up to date Mr Monyai did not respond to the letter of demand. No explanation was given as to what transpired between the period 29th October 2014 up to the 21st June 2016 when Jennifer A Powers signed the founding affidavit attached to form CTR 142.

[7]   Section 160(1) and (2) of the Act provides 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 defensive name, application to transfer the 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 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 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".

[8]   The applicant in this case did not receive any notice in terms of the Act. Therefore, in my view, section 160(2)(a) is not applicable in the present case, but the section that is applicable is section 160(2)(b) of the Act.

[9]   In terms of section 160(2)(b) of the Act, the application can brought at any time after the date of the reservation or registration of the name that is the subject of the application, provided good cause is shown.

[10]   Since the applicant became aware of the existence of the first respondent, it took them more two years before they initiated their application. It was not explained what action did they take after realizing that the first respondent and its sole director were not responding to their letters of demand.

[11]   The Act merely state that the application may be brought at any time after the date of the reservation or registration of the name, but does not define what "any time" entails. In my view any time will not entail a person to wait for two years before initiating the application despite been aware of the act it is complaining about.

[12]   For the two years period that the applicant has waited before initiating its application, there is no single incident which the applicant has shown which might have confused or deceived members of the public that the first respondent has a connection with the applicant. There is no single incident that the applicant has shown that might be interpreted to have injured its business as a result of the existence of the first respondent.

[13]   In my view good cause entails for the applicant to launch its application immediately it became aware of the existence of the first respondent. If it has failed to launch such an application immediately, a reasonable explanation must be given why it has failed to launch its application earlier and also show that their application is bona fide.

[14]   It cannot be ignored that since the applicant became aware of the existence of the first respondent and up to date there no single incident of confusion, deception or injury that had resulted due to the co-existence of the two names. In my view, by delaying to launch its application immediately it became aware of the existence of the first respondent, and waited for two years, imply that the two companies can co-exist peacefully in the business circle.

[15]   Under the circumstances, I am not persuaded that the applicant has shown good cause why the application they are seeking should be granted. Therefore, in my view, they are not entitled to the default order they are requesting.

16.   ORDER

In the result I make the following order:-

16.1. The applicant's application for a default order is refused.

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M.F KGANYAGO

MEMBER OF THE COMPANIES TRIBUNAL