

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT015June2016

In the matter between:-

Edcon Limited

Applicant

And

New Wave Wholesalers(Pty) Ltd

Respondent

Coram: Kganyago M.F

Decision handed down on the 17th November 2016

DECISION

- [1] The applicant has brought an application seeking an order condoning their late service of their application at the respondent's registered office and also deeming that service to be sufficient service on the respondent, alternatively that they be granted leave to effect service of their application by way of substituted service in one local and one national newspaper.
- [2] According to the applicant, its form CTR142 was filed with the Tribunal on the 30th June 2016. On the 4th July 2016, the sheriff attended the director's residential address in order to effect personal service of the application on the director. However, the director was unknown at the given address and the sheriff rendered a return of non-service.
- [3] On receipt of the sheriff's return of non-service, the applicant's attorneys instructed the sheriff to serve the application at the respondent's registered address. That was effected on the 19th July 2016 by affixing a copy of the application to the principal door of the premises. The sheriff on his return of service made a note that the respondent has vacated the premises.

[4] Regulation 142(2) provides as follows:

“The applicant must serve a copy of the application and affidavit on each respondent named in the application within 5 business days after filing it.”

[5] What the regulation entails is that within 5 business days of filing the application with the Tribunal, the applicant must serve its application on each respondent named in its application. In this case, if I were to accept that the service that was effected on the 19th July 2016 was sufficient, that was still effected outside the 5 days stipulated in regulation 142(2). If I were to grant an application for substituted service, publication will also be done outside the stipulated 5 days time period.

[6] The applicant has correctly stated that in terms of section 220 of the Companies Act, read with Regulation 7 of the Regulations to the Companies Act and Table CR 3 to the Regulations, service on a company or similar body corporate by affixing the application to the main door of the place of business is sufficient. However, in this case, the sheriff on his return of service has noted that the respondent has vacated the premises. It is clear that the respondent is no longer operating at that premises. Therefore, in my view, even if that type of service is permitted, it will not serve any purpose since the application will not come to the attention of the respondent.

[7] In *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012(5) SA 142 (CC) at para 74 the court stated:

“ The considerations drive me to conclude that the meaning of “deliver” in section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach-by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that section 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high

significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer.”

- [8] The applicant in its affidavit did not make an averment that its application has reached the respondent. Based on the note on the sheriff's return that the respondent has vacated the premises, the applicant will not make such an averment. In my view, it is clear that the applicant's application did not reach the respondent, and therefore, the service by the sheriff by affixing on the principal place of the respondent, despite been aware that the respondent has vacated the premises is not sufficient. There will therefore be no need for me to determine whether condonation for such service should be condoned or not.
- [9] What I must now determine is whether the applicant should be granted an order to serve its application by way of substituted service. It is clear that if the order is granted, publication will be made outside the five days time limit as that has long expired.
- [10] It is trite that in an application for condonation, the factors to be considered are the degree of lateness, explanation for the delay, prospects of success and prejudice which the applicant might suffer.
- [11] The applicant's application is extremely late. However, I am satisfied that the applicant has adequately dealt with the explanation for the delay. The applicant in its main founding affidavit, had advanced facts which shows that they are having a fairly good chance of prospects of success. If condonation is not granted, the applicant will be prejudiced by the alleged use by the respondent of the name which the applicant alleges that it is confusingly similar to its registered well known trade mark.
- [12] It is clear that the applicant is unable to serve the process on the respondent. In my view, it is be proper if the applicant effect service on the respondent by way of publication once in a local and national newspaper.

[13] Under the circumstances, I am satisfied that the applicant has shown good cause why condonation for publication its application outside the required 5 days period should be granted. I am also satisfied that the applicant has also made a case why service by way of substituted service should be granted.

14. ORDER

In the result I make the following order:-

- 14.1. Condonation for late service on the applicant by way of substituted service is granted.
- 14.2. The applicant is hereby directed to effect service on the respondent by means of publication once in a local and national newspaper.

M.F KGANYAGO

MEMBER OF THE COMPANIES TRIBUNAL