COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT007DEC2016

In the matter between:

SKYBRIDGE CC (2004/093793/23)	First Applicant
OLEG MIKHAYLOVICH BROKORENKO	Second Applicant
and	
SKYBRIDGE SOLAR SOLUTIONS (PTY)LTD (2013/225755/07)	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] The first applicant is the exclusive licensee in South Africa of the second applicant for the use of the registered trade mark "SKYBRIDGE" belonging to the second applicant. The second applicant is the sole member of the first applicant. Is his affidavit in support of this application, the second applicant states that his business is in "telecommunication, primarily with satellite, antennae, television and video equipment as well as the services, installations and training thereof".[1]

[2] The first respondent is a private company with registered address in Somerset West, Western Cape Province.[2] According to extracts from records kept by the second respondent on the first respondent, the first respondent was registered on 03 December 2013.[3] The same records indicate the enterprise status of the first respondent as being in "Deregistration Process".[4] Therefore, there is an overwhelming likelihood that the first respondent may have been deregistered by now and all these may be an exercise in futility. But I will still deal further with the matter.

[3] The second respondent, although incorrectly cited,[5] is the Companies and Intellectual Property Commission or its Commissioner ostensibly as defined in section 1[6]

[1] See par 2.1.3 of the supporting affidavit.
[2] See par 2.3.1 of the support affidavit; annexure "A" of the supporting affidavit.
[3] See par 2.3.2 of the supporting affidavit; annexure "A" of the supporting affidavit.
[4] See annexure "A" of the supporting affidavit.
[5] The is no entity called the Commissioner of Companies and Intellectual Property Registration Office, as cited in this application and the acronym "CIPC" stands for Companies and Intellectual Property Commission.
[6] The Commission and Commissioner as respectively defined as: "**"Commission"** means the Companies and Intellectual Property Commission established by section 185; **"Commissioner"** means the person appointed to or acting in the office of that name, as contemplated in section 189".

of the Companies Act, read with sections 185[7] and 189,[8] also of the Companies Act. No relief is sought against the second respondent.

Relief sought and absence of service on the first respondent

[4] The first and second applicants (the applicants) complain in terms of this application that the second respondent's name does not satisfy the requirements of the Companies Act 71 of 2008 (the Companies Act). It is submitted in this regard that the second respondent's name does not meet the criteria set out in section 11 of the Companies Act with regard to the applicants' trade marks. This Tribunal is consequently requested to issue an administrative order directing the first respondent to choose a new name compliant with provisions of the Companies Act in substitution of its current name.

[5] The application is unopposed. The second respondent appear to have been served with the application by hand on 07 December 2016, which is the very same date the application appear to have been issued with this Tribunal.[9] The applicants submit in terms of the application for default order for relief, as prayed in the application, and also appear to be praying for some sort of order regarding the non-service of the application on the first respondent.[10]

[7] Section 185(1) reads: "(1) The Commission is hereby established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service."
[8] Section 189(1) reads: "(1) The Minister must appoint a suitably qualified and experienced person to be-
(a) the Commissioner of the Commission, who-
(i) holds office for an agreed term not exceeding five years; and
(ii) is responsible for all matters pertaining to the functions of the Commission".
[9] There is an imprint of the date stamp of this Tribunal on the first page of the supporting affidavit to the application. See annexure "OMB3" to the application for default order.
[10] See part 3.1 of the affidavit in support of the application for default order.

[6] But, absent service of the application on the first respondent, the application for default order is, with respect, stillborn. Regulation 153[11] of the Companies Regulations, 2011[12] clearly states that an application for default order may only be made when the respondent has not filed a response and this Tribunal is satisfied that the application was adequately served on the respondent. I cannot be satisfied with the adequacy of service when there is clearly a lack of service of the application on the first respondent. For one of the cardinal rules of natural justice is to hear both sides of the argument or dispute.[13]

[7] In *Botha NO v The Governing Body of the Eljada Institute & another*,[14] the Supreme Court of Appeal recently had this to say regarding rules of natural justice:

> "[39] As Gauntlett JA said in Lesotho in *Matebesi v Director of Immigration & others*:
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> '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 mutated to an acceptance of a more supple and encompassing duty to act fairly

[11] Regulation 153 reads as follows: "**153. Default orders (**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.".

[12] 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.

[13] See *Botha NO v The Governing Body of the Eljada Institute & another* (20530/14) [2016] ZASCA 36 (24 March 2016).

[14] (20530/14) [2016] ZASCA 36 (24 March 2016).

(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]

[8] Therefore the application will fail. But, I think this was always avoidable. The second respondent's records on the first respondent referred to above, reflect a postal address of the first respondent. Service by registered post to a person's last known address is a recognised method of delivery of documents in terms of Table CR3 of Annexure 3 to the Companies Regulations. The applicant ought to have attempted this method of service or if so minded or advised attempted to trace the current whereabouts of the first respondent. I am also aware that the second respondent's records often include addresses of directors of the registered entities. Therefore, the applicant should have also attempted to utilise those addresses, to the extent that, they are not the same as the registered office address of the first respondent. I say this whilst mindful of the fact that service upon directors' address is not necessarily a recognised method of delivery in terms of the Companies Act or the Companies Regulations. However, this may be where

sections 6(8) to 6(10)[15] of the Companies may come to the aid of a litigant like the current applicants. I am obviously making the latter comments *en passant* and do not pretend that same is binding on my fellow members who, in the future, may be seized with this matter, should a new application materialise.

Good cause in terms of section 160(2)(b) of the Companies Act

[9] I must also add, while I have the opportunity, that I am also not convinced that the applicants have shown good cause as to the timing of this application. The applicants submit that they became aware of the existence of the first respondent's name as far back as February 2016, but yet they only brought this application in December 2016.

[10] In my view, any further attempts for relief on the part of the applicants ought to fully explain the circumstances under which the applicants became aware and address the intromission between the aforesaid dates to satisfy the requirement for showing good

[15] Sections 6(8); 6(9) and 6(10) read as follows in the material part: "(8) If a form of … notice is prescribed in terms of this Act for any purpose- (a) it is sufficient if the person required to prepare or complete such a … notice does so in a form that satisfies all of the substantive requirements of the prescribed form; and (b) any deviation from the design or content of the prescribed form does not invalidate the action taken by the person preparing or completing that … notice, unless the deviation- (i) negatively and materially affects the substance of the … notice; or (ii) is such that it would reasonably mislead a person reading the … notice.
(9) If a manner of delivery of a document, record, statement or notice is prescribed in terms of this Act for any purpose (a) it is sufficient if the person required to deliver such a document, record, statement or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and (b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document, record, statement or notice, unless the deviation- (i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or (ii) is such as would reasonably mislead a person to whom the document, record, statement or notice is, or is to be, delivered.
(10) If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost."

cause as contemplated in section 160(2)(b)[16] of the Companies Act. I previously had the opportunity to offer my interpretation of this provision in other matters of this Tribunal.[17]

Conclusion

[11] As already indicated above, this application will fail due to want of notice of the application to the first respondent. The service upon the second respondent is of no consequence, as no relief is sought against the second respondent.

[12] Therefore, I make the following order:

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

Khashane La M. Manamela

Member, Companies Tribunal

31 January 2017

[16] 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."

[17] See the Companies Tribunal decision of *Comair Limited v Kuhlula Training Projects and Developments Centre (Pty) Ltd*, case/file number: CT007SEP2014 decided on 27 February 2015. A copy of this decision and other decisions of this Tribunal may be obtained from the website: www.companiestribunal.org,za.