

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

Case no: CT016Jun2015

In the matter between:

Carl Zeiss AG

Applicant

And

Zeiss Trading Enterprise (Pty) Ltd

First Respondent

The Commissioner of Companies

Second Respondent

Coram: Kganyago M.F

Decision handed down on the 07th December 2016

DECISION

- [1] The applicant has brought an application in terms of section 160 read together with section 11(2)(b) of the Companies Act 71 of 2008 (“the Act”). The applicant is seeking an order that the first respondent be directed to choose a new name which does not consist of, or incorporate the mark “ZEISS” or any other mark which is confusingly and/or deceptively similar to the applicant’s ZEISS trade mark. The applicant is also seeking a costs order against the first respondent.
- [2] The applicant’s application was filed with the Tribunal on the 15th June 2015. The applicant has been aware of the existence of the first respondent since May 2014.
- [3] After its application was filed with the Tribunal, the applicant struggled to serve the application on the first respondent. The first attempt to serve the first respondent was made by the sheriff on the 18th June 2015 and the sheriff rendered a return of non service. The second attempt to serve the first

respondent by the sheriff was made on the 15th March 2016, and again it was a return of non service.

- [4] Seeing that it was unable to serve the first respondent with its application, the applicant out of its own volition and without first obtaining an order of the Tribunal, served the first respondent by way of substituted service. The applicant published its application once in the Mahikeng Mail of the 3rd June 2016 and also published it once in the Government Gazette of the 10th June 2016.
- [5] Based on the publication that appeared in the Mahikeng Mail and Government Gazette, the applicant is now applying for a default order.
- [6] What I must first decide is whether it is permissible for a party to create its own procedures which it will follow without the sanction of the Tribunal. In this case, the applicant has out of its own volition decided to serve the first respondent by way of substituted service without first approaching the Tribunal.
- [7] In terms of Regulation 154 of the Companies Regulations 2011 (“the Regulations”), the Tribunal is empowered to give directions of how to proceed with the matter, and if a question arises as to the practice or procedure to be followed in cases where it is not provided in the regulations, the member may have regard to High Court Rules. It is common cause that the Regulations does not have provision for substituted service.
- [8] In terms of the High Court Rules, a party who wishes to serve another party by way of substituted service, must first obtain an order of the court to do so. The party cannot out of its volition, proceed to serve the other party by way of substituted service and expect the court to condone that.
- [9] The applicant has served the first respondent by way of substituted service without first obtaining an order of the Tribunal, and it did not even apply for condonation for failure to first obtain permission from the Tribunal. Therefore, in my view, a party is not permitted to create its own procedures of how the other party should be served. If the applicant was experiencing problems of how to

serve its application, it should have first approached the Tribunal for permission to serve by way of substituted service like it is done in the High Court.

[10] In terms of Regulation 142(2), the applicant must serve a copy of its application and affidavit on each respondent named in the application, within 5 business days after filing it with the Tribunal. The applicant's application was served outside the stipulated 5 days. Even though the applicant is explaining the problems it experienced, it is not specifically applying for condonation for serving of its application out of time.

[11] Under the circumstances I am not satisfied with the procedure which the applicant has followed in effecting service by way of substituted service without first obtaining an order of the Tribunal.

[12] ORDER

In the result I make the following order:-

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

M.F KGANYAGO

MEMBER OF THE COMPANIES TRIBUNAL