



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT016JUN2015

In the ex parte application of

CARL ZEISS AG

APPLICANT

Presiding Member of the Tribunal: Kasturi Moodaliyar

Date of Decision: 10 February 2017

DECISION (Reasons and Order)

INTRODUCTION

[1] This matter was initially brought to the Tribunal as an application in terms of section 160 of the Companies Act 71 of 2008 (“the Act”) for a determination that the company name Zeiss Trading Enterprise (Pty) Ltd does not satisfy the requirements of Section 11 of the Act.

[2] The Applicant is Carl Zeiss AG, a German company incorporated in terms of the company laws of Germany with its registered address at Carl-Zeiss Strass 22, 73447 Oberkochen, Germany.

[3] This matter was brought under the same case number (CT016Jun2015), and was dismissed on 7 December 2016 by fellow Tribunal Member, Kganyago M.F, for the following reasons:

“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 own volition, proceed to serve the other party by way of substituted service and expect the court to condone that.

The applicant has served the first respondent [Zeiss Trading Enterprise (Pty)Ltd] 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 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 by way of substituted service like it is done in the High Court.

In terms of Regulations 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.

Under the circumstances I am not satisfied with the procedure which the applicant has followed in effecting service by the way of substituted service without first obtaining an order of the Tribunal.”¹

¹ *Carl Zeiss AG v Zeiss Trading Enterprise (Pty) Ltd) and the Commissioner of Companies*, CT016Jun2016, paras 7-11.

ISSUE

[4] The Applicant has requested the following order of the Tribunal in this matter;

- a. “Condoning the Applicant’s non-compliance with Regulation 7(3) of the Companies Regulation 2011 (“the Regulations”), in that the Applicant did not approach the Tribunal for directions on substituted service before advertising its Application in terms of Section 160 of the Companies Act 71 of 2008 (“the Act”), in the local newspaper and Government Gazette;
- b. Condoning the late service of the Application by advertising the Application in the local newspaper and in the Government Gazette; and
- c. That the advertisement of the Application in the local newspaper and in the Government Gazette constituted proper and sufficient service; and
- d. That the Honourable Tribunal will, accordingly, consider the Applicant’s default application, dated 15 November 2016; or
- e. Alternatively, the Applicant seeks an order granting it leave to re-serve the Application by way of substituted service, on such directions as the Tribunal may deem fit; and
- f. In the event that the Respondent fails to file an Answer to the Application within 20 days after substituted service has been effected, that the Tribunal will consider the Applicant’s default application, dated 15 November 2016.”

EVALUATION

[5] I am not given reasons by the Applicant as to why there was late service of the application on the Ziess Trading Enterprise (ZTE).

[6] Further I am not provided any reasons by the Applicant as to why I should condone its non-compliance with regulation 7(3).

[7] In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council and Other*, the Court held that when a party seeks condonation, it is required to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one.²

[8] The Court in *General Accident Insurance Co SA Ltd v Zampelli*, stated that the “circumstances or the ‘cause’ must be such that a valid and justifiable reason exists why compliance did not occur or why compliance can be condoned”.³

[9] The application for condonation before me comes in the form of a request without reasons furnished. I therefore do not grant condonation under these circumstances.

[10] The Applicant has also asked that the advertisement in the newspaper and Government Gazette be regarded as proper service. To do so, would be contrary to Tribunal Member Kganyago M.F, who expressly dismissed the Applicant’s application for reasons stated in paragraph 3 above. The applicants are required to follow the proper procedure with regard to substituted service.

[11] For the reason above, I am also not inclined to decide on the merits of the Applicant’s case regarding the Section 160 determination. Proper process has to be followed before one can embark on that evaluation.

² *Independent Municipal Allied Trade Union (IMATU) obo Zungu v South African Local Government Bargaining Council and Others* (802/08) [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) (15 December 2009).

³ 1988 (4) SA 407(C) at 410I-J.

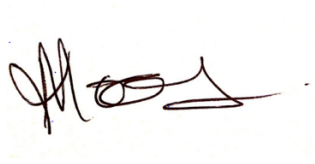
[12] I am aware that the Applicant tried on numerous occasions to serve the application on ZTE through traditional means of service, without success.

[13] I will therefore give consideration to the alternative prayer the Applicant has requested and give the Applicant the opportunity to rectify the procedural faux pas.

ORDER

[14] I grant the Applicant leave to re-serve the Applicant by way of substituted service in the form of publication in the local newspaper and in the Government Gazette.

[15] In the event that the company Zeiss Trading Enterprise (Pty) Limited fails to file an Answer to the Application within 20 days after substituted service has been effected, that the Tribunal will consider the Applicant's default application, dated 15 November 2016.



KASTURI MOODALIYAR
COMPANIES TRIBUNAL: MEMBER