

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO:

CTR001/03/2013

In the matter between:

Candy Tops (Pty) Ltd

Applicant

(2001/023883/07)

and

Champion Candy (Pty) Ltd

Respondent

(2011/104375/07)

Coram: Delport P.A.

Decision handed down on 31 July 2014

Decision

INTRODUCTION

- [1] The applicant applies in terms of section 160 of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulations 143 and 153 of the Companies Act (GNR 351 of 265 April 2011) (“Companies Act regulations” / “regulations”) for a default order that the respondent be ordered to change its name, “Champion Candy (Pty) Ltd”, because it does not comply with section 11 of the Companies Act.

BACKGROUND

- [2] The applicant is Candy Tops (Pty) Ltd, a company incorporated in terms of the Companies Act with registration number 2001/023883/07.

- [3] The respondent is Champion Candy (Pty) Ltd, a company incorporated in terms of the Companies Act with registration number 2011/104375/07.
- [4] The applicant is the registered proprietor of the “Champion” and “Champion of Champion” names in South Africa in terms of the Trade Marks Act No. 194 of 1993.
- [5] The applicant filed an objection to the name “Champion Candy (Pty) Ltd” of the respondent on 4 March 2013 on form CTR 142 as prescribed by regulation 142 (1) (a), together with a supporting affidavit as required by regulation 142 (1) (b), by a certain Gary Cadle, the CEO of the applicant, who is authorised to institute this action by an undated resolution of directors. The date of filing was 4 March 2013, but the date on the CTR 142 is, for some reason, indicated as 13 September 2012.
- [6] A copy of the application was apparently served on the respondent on 1 October 2012, some 5 months before filing it with the Companies Tribunal.
- [7] A further copy was again served on the respondent on 15 February 2013, some 6 weeks before filing it with the Companies Tribunal.
- [8] The service was, apparently, in terms of the Magistrates’ Court rules as the return of service indicates.
- [9] The return by the Sherriff indicates that the second service of the documents was to a certain Mr Van Niekerk, a responsible employee, and that this service was in accordance with Rule 9 (3) (e) of the Magistrates’ Court Rules.
- [10] In terms of regulation 153 (1) read with regulation 143 (1), the respondent has 20 days to respond from the date of filing of the application with the Tribunal, failing which the applicant is entitled to apply for a default order as provided for in regulation 153 (1).
- [11] No response was filed within the period stated above and the applicant therefore applied on 26 May 2014 to the Companies Tribunal on CTR 145 in terms of regulation 153 (2) that the Tribunal make a default order in terms of regulation 153 (1).

[12] The applicant also applies, on form CTR 147 for a condonation of the “incorrect filing of a document in this matter”.

ISSUES

[13] It is contended that the name “Champion Candy (Pty) Ltd” offends against section 11(2)(b)(iii) of the Companies Act due to, inter alia, the rights of the applicant in terms of the Trade Marks Act No. 194 of 1993 to the words “Champion” and “Champion of Champions”.

[14] It is further contended, in respect of the condonation application, inter alia that the defective process “did not thwart the main purpose of the legislation dealing with the company name objections and the parties’ right to fair process.” and in para 5.3 of the supporting affidavit reasons for this are given.

APPLICABLE LAW

[15] Section 11 of the Companies Act provides as follows:

“11. Criteria for names of companies.—

...

(2) The name of a company must—

(a) not be the same as—

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

(ii) a name registered for the use of a person, other than the company itself or a person controlling the company, as a defensive name in terms of section 12 (9), as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960), unless the registered user of that defensive

name or business name has executed the necessary documents to transfer the registration in favour of the company;

(iii) a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or...

(b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless—

(i) in the case of names referred to in paragraph (a) (i), each company bearing any such similar name is a member of the same group of companies;

(ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a) (ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;

(iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a) (iii), the company is the registered owner of the business name, trade mark, or mark, or is authorised by the registered owner to use it; or

(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a) (iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;

(c) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company—

(i) is part of, or associated with, any other person or entity;

...

- [16] The regulations in terms of the Companies Act (GNR 351 of 265 April 2011) (“Companies Regulations”) provide, as far as it is relevant for the present finding, as follows:

“13. Disputes concerning company names.—*See s. 160 and Regulation 147*—A person may apply in Form CTR 142 to the Tribunal in terms of section 160 if the person has received—

(a) a Notice of a Potentially Contested Name, in Form CoR 9.6 or a Notice of a Potentially Offensive Name, in Form CoR 9.7, or has an interest in the name of a company as contemplated in section 160 (1);

(b) a Notice Refusing to Reserve or Register a Name, in Form CoR 9.5;

(c) a Notice Refusing a Name Transfer, in Form CoR 11.2 in terms of regulation 10, 11 or 12; or

(d) any notice in Form CoR 12.1, delivered in terms of regulation 12.”

- [17] The reference to regulation 147 is clearly wrong and it should be a reference to regulation 142 which reads:

“142. Applications to the Tribunal in respect of matters other than complaints.—(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal’s recording officer—

(a) an Application in Form CTR 142; and

(b) a supporting affidavit setting out the facts on which the application is based.

(2) 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.

(3) An application in terms of this regulation must—

- (a) indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and
- (b) depending on the context—
 - (i) set out the Commission’s decision that is being appealed or reviewed;
 - (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;
 - (iii) set out the regulation in respect of which the applicant seeks condonation; or
- (c) indicate the order sought; and
- (d) state the name and address of each person in respect of whom an order is sought.”

EVALUATION

[18] The service of the documents on the respondent was fundamentally and totally flawed and wrong.

[19] It is not required of this Tribunal to educate the applicant but just a few of the deficiencies in the service can be mentioned:

19.1 The use of the Magistrates Courts Rules is wrong, as the Companies Act clearly indicates in s 220 of the Act and in Table CR3 of Annexure 3 of the regulations what process should be used;

19.2 If there is, for any reason, a question about the practice or procedure, then the High Court process must be followed as prescribed by regulation 154 and also in Annexure 3;

19.3 The apart from the process, the manner of service was also wrong as there were two of these, starting some 5 months before filing with the Tribunal. No reference was also made in the affidavits of the first service of 1 October 2012.

[20] Regulation 142 (3) (a) also requires that the application must "...indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made."

[21] I will deal with the condonation application first.

[22] The powers of the Companies Tribunal in respect of condonation are contained in regulation 147, that provides as follows:

"147. Late filing, extension and reduction of time

(1) A party to any matter may apply to the Tribunal to condone late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in form CTR 147.

(2) Upon receiving a request in terms of sub-regulation (1), the recording officer, after consulting the parties to the matter, must set the matter down for hearing at the earliest convenient date."

[23] Regulation 147 clearly does not apply to an incorrect process in respect of the serving of the application on the respondent as the particular regulation clearly only refers to late filing, extension and a reduction of time. The supporting affidavit in respect of Form CTR 147 does not address this issue.

[24] The supporting affidavit in respect of Form CTR 147 states in para 5.2 that "[i]t is respectfully submitted that the process whereby the company name objection in terms of Section 160 of the Act was served and filed substantially complied with both the Act and its accompanying Regulations, as contemplated by Section 6(9)(a) of the Act. The manner in which the service and filing took place did not thwart the main purpose of the legislation dealing with the company name objections and parties' right to fair process." This is, incidentally, the same reason proffered for equally defective service of documents in *Teljoy Group (Pty) Ltd and Teljoy Bed Furnitures (Pty) Ltd* CTR004/12/2012 delivered on 2 June 2014 and I will therefore also repeat what was stated then:

[12] This is, however, a bland statement without any authority. Section 6 (9) deals with the *manner* of delivery, not the prescribed process. This much is clear in the requirement in para (b) of the subsection where the tests are whether the intended recipient *received* the document etc or whether the deviation from the requirements in respect of the *content* of that document etc, would reasonably deceive that person. Section 6 (9) will therefore only apply, in the context of the facts under discussion, if the required *manner*, eg written to the registered address, is not complied with (see *Henochoberg on the Companies Act 71 of 2008* at 43).

[13] In this respect it may be necessary to note, and I do not make a decision in this respect, that the service of notices to respondents, especially in respect of name objections, are consistently done by way of the rules of the Supreme Court (rule 4) or that of the Magistrates Court (rule 9). The *ratio* for this practice is not clear as the Companies Tribunal is neither of those Courts. The Companies Act clearly prescribes in s 220 and in Table Cr3 of Annexure 3 what the manner, methods and times for delivery of documents should be. See also in this respect section 5 of the Companies Act.

[14] However, in my opinion a legalistic approach in respect of the notice process should be avoided. The following comments in *Henochoberg on the Companies Act 71 of 2008* at 43 in respect of section 6 of the Companies Act should be applied:

“The provisions in respect of substantial compliance (sub-ss (9)–(11)) are, it is respectfully submitted, application of the purposive approach of the Act (see **General Note** on s 7 and authorities there cited; *MB Barter and Trading (Pty) Ltd v Ashbury* 7058/2007 25 October 2012 (WCC) at para 17 and s 82 sv **Subsection (3)**). It is submitted that the principles in sub-ss (9)–(11) and the discussion hereunder should be applied in light of the judgments in eg *Sebola v Standard Bank* 2012 (5) SA 230 (SCA) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) in respect of “delivery” in terms of the National Credit Act No. 34 of 2005. In the *Kubyana* case *supra* the Constitutional Court said that: “[39] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice.” and “[80] . . . delivered means taking a notice to the consumer. As long as steps taken show on a balance of probabilities that the notice is likely to have reached the consumer, the court before which the

proceedings are brought may be satisfied that the notice was delivered.” See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (2) SA 604 (CC) para 30; *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* [2014] 1 All SA 294 (SCA) para 16, s 346 sv **Subsection (4A)** under Chapter XIV of the 1973 Act *post* and **General Note** on s 220.”

[15] The non-compliance with the requirements of service on the respondent did not, in my opinion, cause any prejudice or potential prejudice to the respondent. It had sufficient time to respond....

[16] Although the process followed was, as indicated above, woefully flawed, there was apparently no prejudice or potential prejudice based on the purposive approach of the Act as indicated above. I am therefore prepared to condone the flawed and incorrect procedure in respect of service.”

[25] The patience of the Tribunal is been stretched with applications of this quality, but at this stage it is still important that the applicant and client not be saddled with more costs and inconvenience and uncertainty and condonation is granted, albeit possibly *ultra vires* the powers of the Tribunal as in the regulations.

[26] Regulation 142 (3) provides, actually requires, that an application must indicate the basis of the application, stating the section of the Act in terms of which the Application is made.

[27] Form CTR 142 of 13 September 2012 states that the basis for the application is because the name “conflicts with section 11 (2) (b) (iii)...” This cannot be true as para (iii) is qualified with “unless”. Therefore, that particular provision creates an exception to the provisions of subsection (b), thereby excluding a contravention.

[28] I am (again) inclined not to entertain the application based on the incorrect and deficient documentation, but it would (again) further prejudice the applicant and it would therefore serve no purpose.

- [29] I will base my evaluation on the fact that the respondent's name is in conflict with section 11 (2) (b) in that it is confusingly similar to a name, trade mark, mark, word or expression contemplated in subsection (2) (a).
- [30] Applied to the matter under consideration the question as to what is "confusingly similar". It must be as alike in a manner that will confuse the reasonable person, ie the "ordinary reasonable careful man, ie not the very careful man nor the very careless man" (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E) at 280). This reasonable man (person) should further be qualified as in *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315F-G: "A rule of long standing requires that the class of persons who are likely to be the purchasers of the goods in question must be taken into account in determining whether there is a likelihood of confusion or deception."
- [31] In the 1973 Companies Act (61 of 1973) the test was as to when the name was "undesirable", and those principles which should also apply to "confusion" and "confusingly similar" (*Henochsberg on the Companies Act 71 of 2008* at 56).
- [32] In *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA) the following was said:
- "... [8] Concerning the 'undesirable' inquiry Lazarus AJ, after an analysis of the case law, pointed out that by the introduction of the word 'undesirable' the Legislature must have intended to create a new and more liberal test than the test of calculated to cause damage to the earlier company name in the recognition that proof of damage is often difficult for the objector to establish (at 198E) and concluded that: 'In my view it is inappropriate to attempt to circumscribe the circumstances under which the registration of a company name might be found to be "undesirable". To do so would negate the very flexibility intended by the Legislature by the introduction of the undesirability test in the section and the wide discretion conferred upon the Court to "make such order as it deems fit". For the purposes of the present matter it suffices

to say that, where the names of companies are the same or substantially similar and where there is a likelihood that members of the public will be confused in their dealings with the competing parties, these are important factors which the Court will take into account when considering whether or not a name is "undesirable". It does not follow that the mere existence of the same or similar names on the register (without more) is "undesirable". (At 198J - 199C.)”

[33] In *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C) the Court found that the use of the name “Azisa Media CC” is not undesirable, but that the word “Azisa” only would in all likelihood lead to inconvenience and confusion amongst the customers.”

[34] The business spheres of the applicant and the respondent are important, but not in a company law sense. This is important in respect of the Trade Marks Act No. 194 of 1993. In *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) at 394 the Court said:

“There is, it seems to me, an interdependence between the two legs of the inquiry: the less the similarity between the respective goods or services of the parties, the greater will be the degree of resemblance required between the respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark and *vice versa*.”

[35] This dictum, which was referred to with approval by the Supreme Court of Appeal in *Metterheimer and Another v Zonquasdrif Vineyards CC and Others* 2014 (2) SA 204 (SCA) at 209 illustrates an important distinction between the provisions of the Trade Marks Act and that of the Companies Act. In the former the particular goods and/or services can be a determining factor in respect of the test for confusion. The Companies Act on the other hand is not concerned with the goods/and or services, and the name *per se* must be evaluated to determine eg confusion.

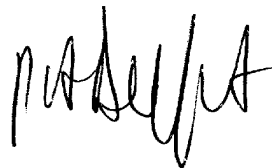
FINDING

[36] On the basis of the *Azisa (Pty) Ltd v Azisa Media CC and Another* case *supra* it cannot be stated that “Champion Candy (Pty) Ltd” will reasonably mislead the reasonable person to believe incorrectly that there is an association with the trade marks “Champion” and/or “Champion of Champions”.

[37] The word “Champion” is used in many products and services (from spark plugs to sports programs) and the applicant cannot in company law claim exclusive use of the word “champion”.

ORDER

[38] The application for an order in terms of section 160 of the Companies Act is refused.



MEMBER OF THE COMPANIES TRIBUNAL