

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO:

CTR22/02/2013

In the matter between:

A&D Spitz (Pty) Ltd
(1999/025520/07)

Applicant

and

Spitz and Sons Events Management and Supplier Services
(Pty) Ltd
(2011/122816/07)

Respondent

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.
- [2] The applicant also applies for a condonation of the late service of the application on the respondent (“condonation application”).

BACKGROUND

- [3] The applicant is A&D Spitz (Pty) Ltd a company incorporated in terms of the Companies Act with registration number 1999/025520/07.
- [4] The respondent is “Spitz and Sons Events Management and Supplier Services (Pty) Ltd”, a company incorporated on 19 August 2011 in terms of the Companies Act with registration number 2011/122816/07.
- [5] The applicant is the registered proprietor of the “Spitz”, “A&D Spitz” and “Spitz Style” names in South Africa in terms of the Trade Marks Act No. 194 of 1993.
- [6] The applicant filed an objection to the name “Spitz and Sons Events Management and Supplier Services (Pty) Ltd” of the respondent on 20 February 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 Allan Leslie Kallner, the merchandise director of the applicant, who is authorised to institute this action by an undated resolution of directors of the applicant.
- [7] A copy of the application was apparently served on the respondent on 5 March 2013. It must be noted that this is some 18 months after the incorporation of the respondent.
- [8] The return by the Sherriff indicates that the service of the documents was by handing a copy thereof to a certain “Boipelo”, without indicating who this person is in respect of the respondent.
- [9] 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).
- [10] It is not clear how this process complies with s 220 of the Companies Act and/or Table CR3 of Annexure 3 of the regulations.
- [11] Although there was communication between the applicant and respondent subsequent to the service of the documents on the latter, no response was

“filed” as required by regulation 153 within the period stated above and the applicant therefore applied on 2 June 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 submitted with the application of 2 June 2014, for a condonation of the service of the documents on the respondent later than 5 days from filing with the Companies Tribunal.

ISSUES

- [13] It is contended in the affidavit of Allan Leslie Kallner that the name ““Spitz and Sons Events Management and Supplier Services (Pty) Ltd” falls foul of section 11(2)(a)(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 “Spitz”, “A&D Spitz” and “Spitz Style”. The CTR 142, on the other hand, states that section 11(2)(b)(iii) is the relevant provision.
- [14] It is further contended, in respect of the condonation application, inter alia that the late serving of the documents “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] I will deal with the condonation application first.

[19] 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.”

[20] The condonation application falls within the powers of the Tribunal, and although the documents were served on a certain “Boipelo”, with no indication of age or the relationship of that person to the respondent, the respondent clearly received the documents and the late serving would not appear to have caused any injustice, inconvenience or costs and the application for condonation is granted. I think a decision as above is in line with the *dicta* in *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.

[21] 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.

[22] Form CTR 142 of 20 February 2013 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.

[23] The supporting affidavit of Allan Leslie Kallner avers that the basis of the application is section 11(2)(a)(iii) of the Companies Act, which, even on a cursory reading of that section, also cannot be applicable. The affidavit also refers to a “close company”, which is a foreign concept, at least in respect of the present Companies Act.

- [24] I am really perplexed, and getting even more so, by the confusion caused by these simple and clear provisions of the Companies Act and why the documentation cannot be done properly and correctly.
- [25] I will, however, 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) so as not to prejudice the applicant or cause it to incur further costs or inconvenience.
- [26] 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."
- [27] 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).
- [28] 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 in respect of "Azisa (Pty) Ltd", but that the word "Azisa" only would in all likelihood lead to "inconvenience and confusion amongst the customers".
- [29] 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*.”

- [30] 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

- [31] In light of especially the *Azisa (Pty) Ltd v Azisa Media CC and Another* case *supra* it cannot be said that “Spitz and Sons Events Management and Supplier Services (Pty) Ltd”, will reasonably mislead the reasonable man (person) to believe incorrectly that there is an association with the trade marks “Spitz”, “A&D Spitz” and “Spitz Style”.
- [32] Any confusion should also be excluded by the descriptive words in “Spitz and Sons Events Management and Supplier Services”. Note that as stated above, it is irrelevant whether there is a similarity or dissimilarity in the trade or products, but the descriptive words in the name clearly distinguished it from the words such as “Spitz”, “A&D Spitz” and “Spitz Style”.

ORDER

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



MEMBER OF THE COMPANIES TRIBUNAL