IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CTR004/12/2012

In the matter between:

Teljoy Group (Pty) Ltd — Applicant

and

Teljoy Bed Furnitures (Pty) Ltd — Respondent

Coram: Delport P.A.

Decision handed down on 2 June 2014

DECISION

INTRODUCTION

[2] 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 regulations in terms of the Companies Act (GNR 351 of 265 April 2011) ("Companies Act regulations" / "regulation/s") for a default order that the respondent be ordered to change its name, to wit "Teljoy Bed Furnitures (Pty) Ltd", because it does not comply with section 11 (2) (b) (iii) of the Companies Act ("substantive application").

[2] Application is made on form CTR 144 and on form CTR 145 with supporting affidavits. The applications are however not indexed or paginated.

[3] In Teljoy Group (Pty) Ltd and Teljoy Bed Furnitures (Pty) Ltd (Case No: CTR004/12/2012) the Companies Tribunal ruled as follows on 22 January 2014 ("initial ruling"):

> "[18] It is clear from the peremptory requirements of regulation 142 that form CTR 142 and accompanying documents must be submitted to the Companies Tribunal and *only then* must the Applicant serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing same.
>
> [19] The process apparently followed was that the application was prepared on form CTR 142 on 7 November 2012.
>
> [20] A copy of Form CTR 142 and the supporting affidavits were served on the Respondent on 14 November 2012.
>
> [21] The filing date of Form CTR 142 with the Companies Tribunal is indicated as 14 December 2012
>
> [22] The date stamp of the Sherriff on form CTR 142 also indicates that the documents were served to the Respondent before filing with the Companies Tribunal.

FINDINGS

[23] The process as followed by the Applicant is not in accordance with the peremptory provisions of regulation 142.

[24] The Companies Tribunal has the power in terms of regulation 147, upon application, not *mero motu*, to condone a late filing of a document or to grant an extension or a reduction of the time for filing a document.

[25] The deficiencies in the application do not appear to fall within the ambit of regulation 147, even if the Companies Tribunal would be able to act *mero motu*.

[26] The deficiencies also do not fall within the ambit of substantial compliance as provided for in section 6 (9) and/or (10) of the Act.

[27] As a result the grounds on which a default order is sought is also deficient as regulation 153 can only be applied if regulation 142 has been complied with."

[4] The applicant now also applies for condonation of the deficient process on Form CTR 147 with a supporting affidavit ("condonation application").

BACKGROUND

[5] The facts on respect of the substantive application are:

[5.1] The applicant is Teljoy Group (Pty) Ltd, a company incorporated in terms of the Act by virtue of, *inter alia*, the definition of "company" in section 1 of the Act.

[5.2] The respondent is Teljoy Bed Furnitures (Pty) Ltd, likewise incorporated with registration number 2011/111513/07. Its registered address is 108 Berea Road, Durban.

[5.3] The applicant is the registered proprietor of the trade mark "Teljoy" and variants thereof, all containing the word "Teljoy", in various categories. The trade mark registration/s is in terms of the Trade Marks Act 194 of 1993 ("Trade Marks Act").

[5.4] The applicant became aware that the respondent's company is registered with a name that contains the word "Teljoy".

[5.5] The applicant filed an objection to the use of the word "Teljoy" in the name of the respondent with the Companies Tribunal on 4 December 2012 on

form CTR 142 as prescribed by regulation 142 (1) (a), together with a supporting affidavit as required by regulation 142 (1) (b), by *inter alia*, Frank Alexander Noble, the group commercial director of the applicant, who was duly authorised by the applicant by a board resolution of 6 September 2012.

ISSUES

[6] In terms of the substantive application the applicant requests that the Companies Tribunal grant the relief in the form that the respondent be directed to choose a new name as provided for in section 160 (3) (b) (ii) of the Companies Act on the grounds, as stated in Form CTR 142, that "[t]he company's name conflicts with section 11 (2) (b) (iii) of the Companies Act, 2008".

[7] The condonation application on Form CTR 147 asks for the condonation of the erroneous process of serving the application as set out above.

APPLICABLE LAW

Condonation application

[8] Regulation 142 provides as follows:

"**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." (The emphasis is mine)

[9] 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."

[10] In the initial ruling it was indicated in para 24 that regulation 147 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 and there is therefore no basis on which the reasoning in the initial ruling can be changed.

[11] 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."

[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 *Henochsberg 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 *Henochsberg 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. Although the period between service and filing with the Companies Tribunal was 13 business days, while 20 business days should be afforded from date of filing, there has to date not been any reaction or response from the respondent. If the date of application for relief is accepted as 7 November 2012 as indicated in the Form CTR 142, then the service on the respondent was also outside the 5 business days as required by regulation 142 (2).

[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.

Main application

[17] Section 160 of the Companies Act provides:

"160. Disputes concerning reservation or registration of company names.—(1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive 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 reservation, registration or use of the name, or the transfer of any such reservation or registration of a name, satisfies the requirements of this Act."

[18] Regulation 142 (3) provides, as far as it is relevant, as follows:

"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."

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

"Criteria for names of companies.— (1) ...

(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

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

(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;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—

(*aa*) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(*bb*) international organisation; and

EVALUATION

[20] In *Ex parte application of Gore NO* 2013 JOL 30155 (WCC) para 35 the Court said that "[T]he term 'interested person' is not defined. I do not think that any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle…". In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 389 the principle was stated as: "He failed, therefore, to show that he had what Van den Heever JA (in *Ex parte Mouton and Others* [1955 (4) SA 460 (A)] described as ''n aktuele en teenswoordige belang' [actual and existing interest] in the matter. . . " and in addition a person must also have a direct interest (*Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101). (*Henochsberg on the Companies Act 71 of 2008* at 101).

[21] The applicant is therefore a person with an interest as required by section 160 (1).

[22] 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.

[23] In this matter it is not easy to determine what section of the Act is used as basis for the application.

[24] Form CTR 142 states that the basis is because of the name conflict in terms of section 11 (2) (b) (iii). This cannot be true as that provision is qualified with "unless". Therefore, that particular provision creates an exception to the provisions of subsection (b), thereby excluding a contravention.

[25] The supporting affidavit does not clear up the confusion, it adds to it. Paragraph 7.5 states that the respondent's "name is therefore confusingly similar to the Applicant's registered …trade mark and therefore falls foul of the provisions of Section 11 (2) (a) (iii)…" This is also not true, as para (iii) contains an exclusion to the possible contravention in subsection (a). In addition, para (a) does not prohibit names that are "confusingly similar", it applies to names that are the "same". "Confusingly similar" was included in the original Companies Act, but was removed by the Companies Amendment Act 3 of 2011.

[26] The founding affidavit then proceeds in para 8.2 to claim that the respondent be ordered to change its name by virtue of the provisions of section 11 (2) (b) on the basis that it falsely implies, or suggests, or is otherwise reasonably likely to mislead a person to believe, incorrectly, that the respondent is part of, or associated with the applicant. This is not what subsection 11 (2) (b) provides. It provides that a names must not be confusingly similar to a name, trade mark, mark, word or expression contemplated in subsection (2) (a). The confusion continues but the above examples will suffice.

[27] I am inclined to refuse an order based on the incorrect and deficient documentation, but it would further prejudice the applicant and it would therefore serve no purpose.

[28] I will base my evaluation on the fact that the respondent's name is in conflict with:

[28.1] section 11 (2) (b) in that it is confusingly similar to a name, trade mark, mark, word or expression contemplated in subsection (2) (a);

and/or

[28.2] section 11 (2) (c) in that it falsely implies, or suggests, or is otherwise reasonably likely to mislead a person to believe, incorrectly, that the respondent is part of, or associated with the applicant.

[29] The word “Teljoy” is registered to the applicant as a trade mark in various categories in terms of the Trade Marks Act 194 of 1993 as evidenced by the affidavit of Frank Alexander Noble, who is the group commercial director of the applicant. These categories are mainly technological and related industries.

[30] The question as to what is “confusingly similar” (it is accepted that the exceptions under s 11 (2) (b) do not apply). 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] The test in terms of the 1973 Companies Act (61 of 1973) was to when the name was “undesirable”, and those principles which should *mutatis mutandis* 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] The word "Teljoy" is not an ordinary word used in a colloquial sense, and as such there would, in my opinion, a reasonable likelihood that the reasonable person would be confused.

[34] Teljoy Bed Furnitures (Pty) Ltd is clearly in a totally different business sphere than the applicant. The significance of this is important in respect of the Trade Marks Act 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.

FINDINGS

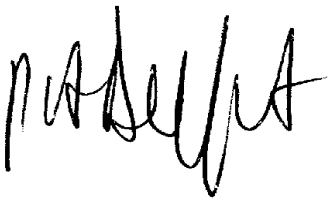
[36] Based on the above it is clear that the use of the word “Teljoy” in “Teljoy Bed Furnitures (Pty) Ltd” does not comply with section 11 (2) (b) of the Companies Act.

[37] Due to the conclusion in respect of section 11 (2) (b), I find it unnecessary to make a ruling on the application of section 11 (2) (c) of the Companies Act.

ORDER

[38] It is ordered in terms of section 160 (3) (b) (ii) of the Companies Act that the respondent change its name as it does not comply with section 11 (2) (b) of the Companies Act.

[39] The respondent is ordered to file an amended Memorandum of Incorporation reflecting the change of name within 30 business days of the date of this order.



MEMBER OF THE COMPANIES TRIBUNAL