

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case/File Number: CTR008/03/2013

In the matter between:

TRIUMPH INTERNATIONAL AKTIENGESELLSCHAFT **Applicant**

and

TRIMPH HOLDINGS PROPRIETARY LIMITED **Respondent**

(Registration Number: 2011/117791/07)

Presiding Member : Khashane Manamela

DECISION (Reasons and an Order)

[1] Triumph International Aktiengesellschaft is a company incorporated in Germany. It is the proprietor of the trade marks TRIUMPH and TRIUMPH INTERNATIONAL registered in South Africa in different classes of goods and services. Together with its subsidiaries, it manufactures and distributes women's

lingerie and other clothing items globally. Its products are also sold in South Africa through stores like Truworths, Stuttafords, Foschini and Edgars. As the applicant herein, it seeks a default order against the respondent in terms of regulation 153 of the Companies Regulations, 2011 (the Regulations). The application for default order is based on a claim that that the respondent's name does not satisfy the requirements of the Companies Act NO. 71 of 2008 (the Act), as it is confusingly similar to its trade marks.

[2] TRIMPH HOLDINGS PROPRIETARY LIMITED is the respondent in this application. However, it has not filed within the prescribed time period of 20 days [or at all] a response or answer to the applicant's initiating document or application, despite being served through the sheriff on the 04th February 2013.¹ This Tribunal is satisfied that, the application was adequately served and the request for default order is therefore properly made [**regulation 153(2)(b) of the Regulations**].

[3] Due to the silence from the respondent, there isn't much by way of details before this Tribunal about the respondent. Only what is stated in the applicant's papers regarding the respondent. From what is available there, I note that, the respondent was registered on the 19th September 2011. The description of its principal business is something of a colossal and ambitious: "PRIVATE HOUSEHOLDS, EXTERRITORIAL [sic] ORGANISATIONS,

¹ A copy of the sheriff's return of service is included in the papers.

REPRESENTATIVES OF FOREIGN GOVERNMENTS AND OTHER
ACTIVITIES NOT ADEQUATELY DEFINED”.²

[4] The applicant submits that, the existence of the respondent’s name came to its attention in October 2012, but there is no explanation as to how this happened. However, it is clear that with the applicant only having been aware of the respondent’s name in October 2012 it failed to launch this application within the three month time-period contemplated in section 160(2)(a) of the Act, unless the applicant is purporting to be relying on section 160(2)(b) of the Act. The latter provision provides for an application to be made on good cause shown at any time after the date of reservation or registration of the impugned company name.

[5] The prescribed Form CTR 142 is accompanied by a document labeled “*founding affidavit*”³ and it reflects one Claudia Meindel (Meindel) as a signatory or deponent. Meindel introduces herself as a director of the applicant, although no proof of this is included in the papers. In support of her authority to depose to the affidavit and bring the application, Meindel refers to a *letter of authority* signed by herself and another director of the applicant, Rainer Hildebrandt (Hildebrandt)⁴.

² See a certificate issued by the Companies and Intellectual Property Commission on the 11th October 2012.

³ I will continue to refer to this document as an affidavit although as it appears later herein, it falls short from being a sworn statement or affidavit.

⁴ Annexure “CM1” to the founding affidavit.

[6] Accompanying the *letter of authority* is a document by Prof.Dr Dieter Mayer, a notary public in Munich (Prof Mayer). Prof Mayer appears to certify by this document that, both Meindel and Hildebrandt are authorised to jointly represent the applicant.

[7] Therefore, with the involvement of Prof Mayer equating to certification only, the affidavit of Meindel appears not to have been attested under oath or affirmation. It is signed though at the end thereof, over a line with Meindel's name appearing below, next to words in manuscript which words seem to read: "*authorized proxy*".

[8] Further, but still on Meindel's affidavit, the following words are cancelled out by lines drawn over them: "*THUS SWORN and SIGNED to [sic] at München on this 10th day of January 2013, the Deponent having acknowledged that she knows and understands the contents hereof, has no objection to making [sic] the oath and she considers it binding on her conscience*".⁵ These words are often used as part of the deposition of the affidavit and below them, after a blank space and beneath a short line (presumably for a signature) appears the word "*Notary*". No other signatures [including the Notary's] appear on this page or on any of the other pages of the document.

[9] Also accompanying this document by Meindel is another by Prof Mayer, which essentially reads as follows:

⁵ Page 10 of the founding affidavit.

“This is to officially certify the foregoing signature, subscribed in my presence, of
Mrs. Claudia Meindel,
Born 21.08.1964,
with business address in 80335 München, Marsstraße 40,
c/o Triumph International AG.
personally known to me.
.... ”

[10] Although I am speculating, there appears to have been a seal on the document by Prof Mayer accompanying the affidavit of Meindel. I cannot do any better, as most of the documents filed with this Tribunal are copies and not original documents.

[11] Be that as it may, I am not satisfied that, the document filed by Meindel meets the requirements of an affidavit or sworn statement. The involvement of Prof Mayer seems to have been only of a notarial nature than a commissioner of oaths. I am not discarding the fact that, notaries may be authorised to act as commissioners of oaths in Germany, but if the words attributed to Prof Mayer above are all there is [and I do not have any grounds to hold a contrary view], he did not administer an oath or affirmation to Meindel, but certified the appending of Meindel's signature to the document. Actually, it does not necessarily follow that, Prof Mayer was certifying or notarizing Meindel's signature as appearing on the founding affidavit, as Prof Mayer's signature appears nowhere on the Meindel's

affidavit, but on a separate document, whose existence and relationship with Meindel's affidavit is not explained. The remarks made by the Honourable Fannin J in *Caldwell v Chelcourt Ltd* 1965 (1) SA 304 (N) at 307E are apposite:

"In the result it seems to me that I cannot hold that the second document referred to is an affidavit sworn in the manner required. If it is not a sworn document, it does not itself constitute any evidence..."

[underlining added]

[12] I therefore find that the founding affidavit of Meindel is not a valid affidavit or sworn statement as it lacks affirmation or an oath prescribed in compliance with the Regulations Governing the Administering of an Oath or Affirmation⁶ or anything similar in Germany. Regulation 142(1)(b) of the Regulations requires that Form CTR 142 be accompanied by a supporting affidavit to constitute an application as contemplated in the Act. So without a valid affidavit, there is no application before me and this is decisive of this matter.

[13] In the result:

- a) the application is dismissed.

⁶ Regulations promulgated under section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 initially published in terms of Government Notice No R1258 of 21 July 1972 and amended in 1977, 1980 and 1982.

Khashane Manamela

Member, Companies Tribunal

20th March 2014