IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("The Tribunal") **CASE NO: CT003OCT2015**

Re: In an Application in terms of Section 160 of the Companies Act 71 of 2008 ("the Act") for a determination that the company name LIBERTY CONTRACTORS (PTY) Ltd does not satisfy the requirements of Section 11(2) of the Act.

In the matter between:

LIBERTY GROUP LTD **THE APPLICANT**

(1957/002788/06)

AND

LIBERTY CONTRACTORS (PTY) LTD

(2013/206541/07) **THE RESPONDENT**

Coram K. Tootla

Decision delivered on 17 April 2016

DECISION

INTRODUCTION:

[1] The Applicant having its principal place of business 1 Ameshoff Street, Braamfontein, Johannesburg, brings an application in terms of Sections 11 (2) (a)(iii) alternatively, 11 (2)(b)(iii) and (c)(i) and 160 of the Companies Act 2008 ("the Act") read with Regulation (Reg.) 153 for an order that the Respondent change its name (Refer to form CTR 142) as the Respondent's name is confusingly similar to the Applicant's trademark; and that the use of this name is likely to lead to confusion in the trade; in addition that it amounts to trade mark infringement in terms of Section 34 (1)(b) and (c).

[2] The Respondent is a company incorporated in terms of the Companies Act, and having its registered address at 915 Moholo Street, Thabong, Welkom, Free State.

PROCEDURE:

[3] The application was served by the Sheriff on 15 October 2015 (incorrectly stated as 13 October 2015 by the Applicant's attorney) by "fixing on the principal door of the Respondent and also served the application via registered mail on 8 October 2015. Proper service should be in accordance with Table CR 3 of Annexure 3 of the Regulations to the Companies Act or by substituted service depending on the circumstances.

[4] The Respondent did not serve or file any notice to oppose the Applicant's application nor served or filed any answering papers to the Applicant's claim.

EVALUATION:

[5] The Applicant served the document by pinning on the principal door of the Respondent's registered address and there is no evidence that the application did come to the service of the Respondent. There are other forms of service mentioned in the Regulations as set above which the Applicant has used and that is via registered post.

[6] The Applicant advises that the Respondent's name registration was advertised in the Government Gazette on 9 December 2013 but came to the attention of the Applicant on 17 April 2015.

[7] Although the Applicant became aware of the name existence on 17 April 2015, it did not deem it fit to file its application in terms of Section 160 with the Tribunal but embarked on an investigation and thereafter, 6 months later on 8 October 2015 approached the Tribunal with a formal objection. No evidence has been led as to the exact date when the Applicant's attorney had knowledge of the notice in the Government Gazette, rather the Tribunal is only appraised of the fact that the Applicant's client was advised of this on 17 April 2015.

[8] The Applicant alleges that it has an interest in the name of the Respondent within the meaning of Section 160 of the Act and that there is good cause for this application both on the merits and background. However, the question is firstly, has the Applicant shown good cause. According to Webster and Page- South African Law of Trade Marks, 4th ed, para 16.5.3 the only requirement is that the applicant must explain the "delay" on good cause shown". The Applicant has not shown why there has been a delay of 6 months after it came to its knowledge

[9] Although the term " good cause" has not been defined in the Act or Regulations, in **Minister of Defence and Military Veterans v Motau and Others Minister of Defence and Military Veterans v Motau and Others**, it was stated that "good cause may be defined as a substantial or "legally sufficient reason" for a choice made or action taken". This is a factual enquiry which would differ in each case, depending on the circumstances (*De Wet and Others* v *Western Bank Ltd* 1977 (2) SA 1033 (W- deals with the phrase in an application for rescission of judgment). An applicant has the duty to provide facts on which the existence of good cause can be determined.

Since such facts are absent as pointed out above, it can be concluded that good cause has not been shown, moreover there is a clear 6 month delay without any explanation.

[10] To elaborate, an applicant in terms of Section 160 (2) (b) has to show good cause why an application is made at the time it was made. The date which is material in this regard is not when the application was made, but when the applicant became aware of the disputed name.

[11] Not only is the failure to show good cause a fatal one, it is the duty of the Act to protect the registration or reservation of company name, unless found to be contrary to the provisions of the Companies Act. In view of the fact that this is line with Section 7 of the Act which clearly states that the Act must "provide a predictable and effective environment for the efficient regulation of companies", it can be concluded that the Applicant has not explained the delay in lodging its Application in December 2015, more than 6 months after it became aware of the Respondent's name. Thus the Applicant has not fulfilled the requirement of "good cause" in terms of Section 160 (2) (b). In the circumstances, and for these reasons, the Tribunal cannot deal with the merits of the matter.

[12] Furthermore, the Applicant has also stated that there is a trade mark infringement in terms of Section 34 of the Trademarks Act, which the Tribunal has no jurisdiction to adjudicate upon a matter which falls squarely within the purview of the High Court. However, the Tribunal has jurisdiction to deal with a contravention of Section 11 of the Act when there a well- known trademark which has been contravened.

ORDER:

The Applicant's application is dismissed.

k.y. tootla (electronically signed)

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KHATIJA TOOTLA

Member of the Companies Tribunal

17 April 2016