



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: ct00142/adj/2019

In the matter between:

AGILITY HOLDINGS (PTY) LTD

APPLICANT

and

AGILITY CO. (PTY) LTD

RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 13 November 2019

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 Applicant is **Agility Holdings (RF) (Pty) Ltd** (Reg. Nr. 2005/033449/07), a company duly incorporated in accordance with the company laws of South Africa, and having its registered address at Building A, Lakefield Office Park, 272 West Avenue, Centurion, 0157, Gauteng.

1.2 Respondent is **Agility CO. (Pty) Ltd** (Reg. Nr. 2016/541422/07), a company duly incorporated in accordance with the company laws of South Africa, and having its registered address at 36 Baundary (sic) Road, Isle of Houghton, Houghton, 2198, Gauteng.

1.3 This is an application for a determination order:

- a. That Respondent's name does not satisfy the requirements of section 11(2) of the Companies Act 71 of 2008 ("the Act"), and
- b. That Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.

1.4 Neels Barendrecht, Applicant's Chairman, deposed to the Founding affidavit and signed the letter appointing Adams & Adams as the attorneys.

1.5 Gerard Muller du Plessis, an attorney with Adams & Adams Attorneys, deposed to an affidavit in support of the application for default judgment.

1.6 It appears that the Sheriff of North Gauteng served the application notice and supporting documents on Respondent's registered address on 10 September 2019. Having received no response, on 08 November 2019, Applicant applied for a default order of the relief sought initially.

2. ISSUES

2.1 This Tribunal is faced with a few main issues:

2.1.1 Has the Applicant shown *locus standi* to bring this application?

2.1.2 Has the Applicant shown good cause to bring this application?

2.1.3 Has the Applicant shown that a default order should be granted?

2.2 I am compelled at the outset to deal with the fact that Applicant has not filed any official documents, e.g. a certificate issued by the Companies and Intellectual

Properties Commission (CIPC) that reflects its registration details, current status and active directors.

2.3 Applicant instructed its attorneys during July 2018 to object to the Respondent's company name. On 3 September 2019, some fourteen months later, an application was lodged with this Tribunal. Applicant mentions its attempts to communicate with Respondent via letters. Applicant's attorneys also invoked the services of a tracing agent, whose report on the results of an investigation into Respondent reveals much information on the Respondent, including many contact details. The latter report is dated 08 October 2018, almost a year before this application was lodged.

2.4 It is also noteworthy that Respondent has not participated in these proceedings, and appears to not even be aware thereof. On perusal of the Sheriff's return of service, it is clearly indicated in capital letters that the application was attached to the "ENTRANCE GATE OF 9 BUILDINGS."

3. APPLICABLE LAW

3.1 **Section 160** of the Act deals with **disputes concerning reservation or registration of company names** and enunciates the jurisdiction of the Companies Tribunal as follows:

*(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** [my emphasis] 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.*

(2) An application in terms of subsection (1) may be made— (a) within three months after the date of a notice contemplated in subsection (1), if the

applicant received such a notice; or (b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.

3.2 Regulation 142 of Companies Regulation 2011¹ provides for **Applications to the Tribunal in respect of matters other than complaints**

...

- (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.

3.3 Companies Regulation 153 provides for **default orders**:

...

- (2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order—
 - (a) after it has heard any required evidence concerning the motion; and
 - (b) if it is satisfied that the notice or application was adequately served.

3.4 Companies Regulation 7 provides for **Delivery of documents**:

...

- (3) If, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or these regulations—
 - (a) if any person other than the Tribunal is required to deliver the document, the person may apply to either the Tribunal or the High Court for an order of substituted service.

4. EVALUATION

4.1 At the outset, I deal with the question of Applicant's authority to bring this application. The founding affidavit must set out the *locus standi* of the applicant, which the party instituting the proceedings must allege and prove.² In this

¹ GN R351 in GG 34239 of 26 April 2011.

² See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 287B-F.

instance, there is no evidence of who are the other Directors of Applicant, or if there was a Board Resolution that the deponent to the Founding Affidavit was duly authorised to depose thereto, or to instruct the attorneys.

4.2 I turn to whether the default application in terms of Regulation 153 is justified. In this regard, I refer to the dictum of Twala, J. in the Highly Nutritious Food Company case:³

Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application but to show good cause as to why the application must be entertained. The section requires the Applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application but refer to the merit of the application as well. It is section 160(1) that prescribes, for a particular category of persons, to launch an application within a period of three (3) months after they became aware of the registration of the name.

Section 160 of the Act is also there to protect the interests of companies so registered and their creditors. Applicant has made no attempt to address this Tribunal on why it took over a year to lodge this application. I am not satisfied that there will be no prejudice to the Respondent or its creditors. This is not a case of Respondent being fully aware of the proceedings and choosing not to participate.

4.3 I also take this opportunity to emphasise the importance of service.

4.4 In the case of **Masetlha v President of the Republic of South Africa and Another**⁴, Ngcobo J stated:

“The procedural aspect of the rule of law is generally expressed in the maxim

³ Highly Nutritious Food Company (Pty) Ltd. v Companies Tribunal and Others, High Court, Gauteng Local Division, Case nr. 91718/2016

⁴ 2008 (1) SA 566 (CC) at para 187

audi alteram partem principle ('the audi principle'). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness...this principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.”

4.5 This Tribunal has previously been seized with the issue of proper service. In the case of **Growthpoint Properties Ltd v Growth Point Mining (Pty) Ltd**⁵, it was decided that a matter could not be considered until it has been established that proper service was effected. It was also noted as important that the Applicant should not ascribe Respondent’s non-participation in the proceedings to ignorance thereof, due to non-service on it. In the case of **Skybridge CC and Another v Skybridge Investments (Pty) Ltd and Another**⁶ it was emphasised that service of notice is crucial to the rules of natural justice. Both these applications were not successful as the Tribunal found that there had not been proper service of the notice on the Respondent.

4.6 In a situation such as the one *in casu*, Applicant’s attorneys were furnished with the contact details of Respondent’s Directors. There is no indication that any attempt was made to call them, to email them or to write to and serve on the address from which their business was allegedly being conducted. Even worse, this Tribunal is being asked to condone service on the main gate of a cluster of units.

5. FINDINGS

5.1 I find that the deponent to the Founding Affidavit has not shown that he is duly authorised to depose thereto on behalf of the Applicant.

⁵ Case no: CT020JUN2015 at 6

⁶ Case no: CT004DEC2016 at 7

5.2 Although it is moot in light of the above finding, I note that the Applicant failed to show good cause to bring this application on a default basis.

6. ORDER

The application is refused.

ADV. ISHARA BODASING