



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**CASE NO: CT00971ADJ2022**

In the matter between:

**ANNA SOPHIA ROSOUW**

**Applicant**

and

**COMPANIES AND INTELLECTUAL PROPERTY COMMISSION**

**Respondent**

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***Issue for determination:*** *An application for review and setting aside of the decision of the Companies and Intellectual Property Commission – refusal to approve and reserve proposed name – name confusingly similar to a company name already existing on the name register - application for default judgment in terms of regulation 153 of the Companies Regulations, 2011 – no adequate service of the application on the Companies and Intellectual Property Commission – no adequate service of the application on all interested parties – non-joinder of an interested party – the rules of natural justice to be observed and adhered to due to non-joinder of Wild Cut (Pty) Limited – the purposes and spirit of the Companies Act requires the Companies Tribunal to be informal in certain appropriate circumstances – default judgment refused and appropriate directives issued for applicant to comply with.*

**Coram: Lindelani Daniel Sikhitha**

**Decision handed down on 22 June 2022**

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**DECISION (Reasons and Order)**

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*Per:* **Lindelani Daniel Sikhitha**

## **INTRODUCTION**

- [1] The Applicant in this matter is Anna Sophia Rosouw who is currently residing at 62 Krisant Road, Bronkhorstspuit. The Applicant is self-employed and she mainly renders company secretarial consultancy and compliance related services.
- [2] The Respondent is the Companies and Intellectual Property Commission (“the CIPC”), which is established in terms of section 185 of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”). The CIPC is one of regulatory agencies that have been established in terms of Chapter 8 of the Act. In terms of section 187 of the Act, the functions of the CIPC are, amongst other things, to register and deregister companies, directors, business names and intellectual property rights, in accordance with relevant legislation. The Respondent has its Head Office situated at **the dti Campus**, Block F, 77 Meintjies Street, Sunnyside, Pretoria.

## **BACKGROUND INFORMATION**

- [3] The Applicant alleges that she lodged an application for approval and reservation of a defensive name WILD CUT with the CIPC on the 22<sup>nd</sup> day of February 2022. The CIPC did refuse to approve and reserve the proposed name of the Applicant due to the reason that it was found to be confusingly

similar to a name that is already registered in the CIPC's companies names register.

- [4] Consequently, the Applicant is aggrieved by the decision of the CIPC and it brought the current application to review and set aside the CIPC's decision to refuse to approve and reserve the name WILD CUT. The CIPC's decision which refused to approve and reserve the name WILD CUT as proposed by the Applicant was communicated to the Applicant through form COR9.5 dated 23 February 2022.

#### **FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF IN TERMS OF THE ACT AND THE REGULATIONS**

- [5] This is an application in terms of which the Applicant is seeking for a review and setting aside of the decision of the CIPC to refuse to approve and reserve the name WILD CUT as proposed by the Applicant. Before I deal with the merits of the application, I consider it to be important that I should first deal with some preliminary issues which relate to the form and substance that applications of this nature should comply with in terms of the applicable provisions of the Act and the Companies Regulations, 2011 ("the Regulations").
- [6] In terms of section 156 of the Act, a person referred to in section 157(1) of the Act may seek to address an alleged contravention of the Act or to enforce any provision of, or right in terms of the Act by, amongst other things, applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of the Act. The Applicant made an

application to the CIPC to have the name WILD CUT reserved by the CIPC in terms of section 12(1) of the Act.

[7] The current application is contained in Form CTR 142 (Application for Relief) in line with the Regulations. In terms of regulation 142(1) of the Regulations a person may apply to the Companies Tribunal for an order in respect of any matter contemplated in the Act or the Regulations by completing and filing with the Companies Tribunal's recording officer:

7.1 an Application in Form CTR 142; and

7.2 a supporting affidavit setting out the facts on which the application is based.

[8] The current application is made in Form CTR 142 and it is supported by an affidavit ("Founding Affidavit") deposed to by the Applicant. In terms of this application, the Applicant seeks to review and set aside the decision of the CIPC to refuse to approve the name that the Applicant has proposed. I have noted that the Founding Affidavit is not commissioned and this failure constitutes a serious non-compliance with provisions of regulation 142 of the Regulations.

[9] In terms of regulation 142(2) of the Regulations, the Applicant is required to serve a copy of the application together with the Founding Affidavit and any attachment thereto on each respondent cited in the application, within five (5) business days, calculated from the date of filing of the application with the Companies Tribunal.

[10] It is evident from the papers placed before me that the current application was filed with the Companies Tribunal on the 10<sup>th</sup> day of March 2022. The

application for a default order was filed on the 05<sup>th</sup> day of May 2022. Upon receipt and perusal of the papers, I immediately noticed that the Founding Affidavit was lacking in certain aspects which I consider to be material for purposes of its evaluation. I also noticed that there was no proof attached to show that this application was served on the CIPC.

[11] In terms of section 180 of the Act, the Companies Tribunal must conduct its adjudication proceedings contemplated in the Act expeditiously and in accordance with the principles of natural justice. The doctrine of '*audi alteram partem*' is the basic notion of the principles of natural justice and it had been in operation for centuries. The doctrine says that no one should be condemned without having been afforded an opportunity to be heard prior to such condemnation. In the field of administrative decisions, this principle has been applied to ensure fair play and administration of justice to the affected persons before any administrative decision is taken. This doctrine ensures that every affected person is given and guaranteed a right to a fair hearing prior to taking any decision that affects his or her rights and legitimate expectations.

[12] The right to a fair hearing requires that individuals are not penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the cases against them, a fair opportunity to answer them, and the opportunity to present their own cases. It is my view therefore that the Applicant should, in line with the principles of natural justice, also cite and have the application served on the company that is registered and using the name WILD CUT (PTY) LIMITED with registration number: 2007/022902/07). This company has direct interest in the name that is the subject matter of the current

review application. Similarly, this application should also be served on the CIPC.

- [13] It is advisable that the Applicant must join WILD CUT (PTY) LIMITED as second respondent in this application in line with the provisions of regulation 158 of the Regulations. This will ensure that WILD CUT (PTY) LIMITED is given notice of these proceedings and it is also afforded an opportunity to be heard by the Companies Tribunal before any adverse finding is made against them.

#### **THE FORM AND SUBSTANCE OF THE APPLICATION FOR DEFAULT ORDER**

- [14] Despite the fact that there was no proper service of the current application on the CIPC, the Applicant proceeded to file the application for default order with the Companies Tribunal in terms of regulation 153(1) of the Regulations. The application for default order was filed with the Companies Tribunal on the 05<sup>th</sup> day of May 2022. The application for default order was clearly filed after the expiry of twenty (20) business days that the CIPC is afforded to file its answer in terms of the Regulation 143(1) of the Regulations.

- [15] Once an application for default order is filed, the Companies Tribunal is enjoined to consider such an application in line with the applicable provisions of the Act and Regulations. The Companies Tribunal is therefore enjoined to consider the current application in terms of the provisions of regulation 153(1) and (2) of the Regulations. It is important that I should refer to the provisions of regulation 153(1) and (2) of the Regulations which read as follows:

“(1) **If a person served with an initiating document has not filed a response within the prescribed period, the initiating party**

**may apply to have the order, as applied for, issued against that person by the Tribunal.**

(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.**” [Own emphasis added.]

[16] In terms of regulation 153(2)(b) of the Regulations, I can only consider the current application for default order and to make an appropriate order in relation thereto, if I am satisfied that the application was adequately served on all the respondents who are cited therein. I am therefore not satisfied that there was adequate service of the application on the CIPC.

[17] The Applicant is, in terms of regulation 142(2) of the Regulations, required to serve a copy of the application and supporting documents on each respondent who is named on the application within five (5) business days after filing with the Companies Tribunal. It follows therefore that the application was not adequately served on the CIPC and that the application for default order should therefore be refused on that basis alone.

[18] Section 7 of the Act deals with the purposes of the Act and these are listed as follows:

18.1 to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

- 18.2 to promote the development of the South African economy by-
  - 18.2.1 encouraging entrepreneurship and enterprise efficiency;
  - 18.2.2 creating flexibility and simplicity in the formation and maintenance of companies; and
  - 18.2.3 encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- 18.3 to promote innovation and investment in the South African markets;
- 18.4 to reaffirm the concept of the company as a means of achieving economic and social benefits;
- 18.5 to continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
- 18.6 to promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- 18.7 to create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- 18.8 to provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;



18.9 to balance the rights and obligations of shareholders and directors within companies;

18.10 to encourage the efficient and responsible management of companies;

18.11 to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

18.12 to provide a predictable and effective environment for the efficient regulation of companies.

[19] The current application is effectively challenging the decision of the CIPC to refuse to approve and reserve the name that had been proposed by the Applicant. In performing function of approving or refusing to approve names proposed by members of the public, including the Applicant, the CIPC is undoubtedly performing an administrative act. Such an act will fall squarely within the scope and ambit of administrative law.

[20] Administrative law is a branch of public law which regulates the activities of bodies that exercise public powers or perform public functions. It empowers administrative officials so that they may implement policies or programs, and limits the exercise of power by requiring all administrative action to meet the minimum requirements of lawfulness, reasonableness and fairness in line with the provisions of section 33(1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution"). A review application by its nature requires the Applicant to therefore make certain allegations regarding the manner that she alleges that the decision of the CIPC is unlawful or unreasonable or procedurally unfair.

[21] I have noted, while perusing through the papers, that the Applicant lacks legal knowledge and thorough understanding of the legal processes which must be complied with when bringing and prosecuting review applications before the Companies Tribunal. In adhering to the spirit and purport of the Act, I am therefore duty bound to guide and direct the Applicant regarding what she should do to comply with the legal requirements in terms of the Act read together with the Regulations.

[22] In terms of section 183 of the Act, the Companies Tribunal may, subject to the requirements of the applicable sections of the Act, determine any matter of procedure for an adjudication hearing, with due regard to the circumstances of the case. Based on the authority which is vested on the Companies Tribunal in terms of section 183 of the Act, I am therefore making the order and issuing the directives below. The directives below are being issued in line with the spirit and purport which appear from the provisions of section 180 of the Act. This section requires the Companies Tribunal to do the following during adjudication hearings before the Companies Tribunal:

22.1 to conduct its adjudication proceedings expeditiously and in accordance with the principles of natural justice; and

22.2 when circumstances permit, to conduct its proceedings informally.

## **THE ORDER AND DIRECTIVES**

[23] Based on what I have outlined above, I therefore make my order and issue the directives which appear below:

- 23.1 The application for default Order in terms of regulation 153 of the Regulations is hereby refused on the ground that there was no adequate service of the application for relief on the CIPC and WILD CUT (PTY) LIMITED;
- 23.2 The application is hereby postponed *sine die*;
- 23.3 In line with the provisions of sections 180 and 183 of the Act, the Applicant is directed to file a Supplementary Affidavit and to ensure that the following information is included in her Supplementary Affidavit:
- 23.3.1 An allegation regarding the manner in which the decision of the CIPC is alleged to be unlawful or unreasonable or unfair; and
- 23.3.2 An explanation as to why the Applicant is entitled to have the proposed name approved and reserved in her favour. The Applicant must also list the grounds for making such contention.
- 23.4 The Applicant is directed to complete a new Form CTR 142 which include the CIPC and the WILD CUT (PTY) LIMITED as respondents;
- 23.5 The Applicant is directed to serve the application, the newly completed Form CTR 142 and the Supplementary Affidavit on the CIPC and WILD CUT (PTY) LIMITED; and
- 23.6 Service of the documents referred to in paragraph 23.5 above must be effected by office of the Sheriff that is appointed to serve legal processes in each of the areas where the offices of each of the

respondent is physically situated and/or where the registered offices of each of the respondent are situated.

23.7 There is no order regarding costs.

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**LINDELANI DANIEL SIKHITHA**

**Chairperson of the Companies Tribunal**

**22 June 2022**