



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT213/ADJ/2019**

**In the matter between:**

**RED BULL GMBH**

**APPLICANT**

**and**

**RED BULL GUARD HOLDINGS (PTY) LTD  
COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION**

**FIRST RESPONDENT**

**SECOND RESPONDENT**

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Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 19 December 2019

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**DECISION** (Reasons and an Order)

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**1. INTRODUCTION**

1.1. Applicant is Red Bull GmbH, a private limited company incorporated under Austrian law, and having its registered address at Am Brunnen 1, 5330 Fuschi am See, Austria.

1.2. First Respondent is Red Bull Guard Holdings (Pty) Ltd., a company duly incorporated in accordance with the company laws of South Africa, with registration number 2018/570375/07, and having its registered address at 10 Barberton Street, Ravensmead, Parow, Western Cape, South Africa.

- 1.3. Second Respondent is the Companies and Intellectual Property Commission (“CIPC), a juristic person established in terms of section 185(1) of the Companies Act 71 of 2008 (“the Act”).
- 1.4. This is an application for a determination order:
  - a. That First Respondent’s name does not satisfy the requirements of section 11(2) of the Act; and
  - b. That First Respondent be directed to choose a new name as provided for in terms of section 160 of the Act.

## **2. BACKGROUND**

- 2.1. On 14 October 2019 Applicant approached this Tribunal for relief. On 18 October 2019, it seems that Applicant’s attorneys sent a copy of the founding affidavit to First Respondent’s registered address, and that receipt thereof was acknowledged.<sup>1</sup>
- 2.2. No papers were served on the Second Respondent.
- 2.3. First Respondent did not file an answering affidavit within twenty (20) business days, following which, on 12 December 2019 Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations (the Regulations).<sup>2</sup>
- 2.4. Jennifer Powers, Applicant’s Intellectual Property Counsel, duly authorised, deposed to the founding affidavit for the initial application. Carla Collett, a Senior Associate with Applicant’s attorneys Webber Wentzel, deposed to an affidavit in support of the application for default judgment.
- 2.5. Applicant filed over 400 pages to support its default application, much of which was unnecessary to simply exhibit Applicant’s ownership of the Red Bull trademark and common law rights to the brand.

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<sup>1</sup> Applicant’s indexed bundle (hereinafter referred to as “bundle”) at p439.

<sup>2</sup> GN R351 in GG 34239 of 26 April 2011.

### 3. ISSUES

3.1 This Tribunal is faced with two main issues:

- i. Has the Applicant shown that a default order should be granted?
- ii. If the first issue is answered positively, has the Applicant advanced grounds for relief?

3.2 I am compelled at the outset to deal with the fact that First Respondent has not participated in these proceedings, and appears on the face of it to not even be aware thereof.

3.3 It is apparent that on 28 June 2019, Applicant's attorneys executed more than effective service in respect of a letter of demand to First Respondent.<sup>3</sup>

3.4 Applicant's attorney claims to have duly served the application on First Respondent; and refers to "proof of service"<sup>4</sup> as a letter addressed to First Respondent's registered address with an acknowledgement of receipt signed by someone whose name is written illegibly. However, upon a perusal of the contents of this letter, it seems that only an affidavit was attached, and not the required notice of application.<sup>5</sup>

3.5 Unfortunately for the Applicant, there is no service affidavit attached to the papers that could have indicated more details to confirm compliance with the Act, the Regulations and/or the Uniform Rules.

### 4. APPLICABLE LAW

4.1 Regulation 142 of Companies Regulation 2011<sup>6</sup> provides for **Applications to the Tribunal in respect of matters other than complaints:**

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<sup>3</sup> Bundle at p 430

<sup>4</sup> *Supra* n.1

<sup>5</sup> *Idem*

<sup>6</sup> GN R351 in GG 34239 of 26 April 2011.

- (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. *[My emphasis added]*

4.2 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**. *[My emphasis added]*

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

... See s. 6 (10) and (11)<sup>7</sup>

- (1) A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner—
- (a) contemplated in section 6 (10) or (11); or
  - (b) set out in Table CR 3.<sup>8</sup>

## 5. EVALUATION

<sup>7</sup> Not relevant for purposes of this decision

<sup>8</sup> **Table CR 3— Methods and Times for Delivery of Documents**

*(In terms of Regulation 7)*

A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner set out in this Table.

Nature of Person to whom the document is to be delivered	Method of Delivery
A COMPANY OR SIMILAR BODY CORPORATE	By handing the notice or a certified copy of the document to a responsible employee of the company or body corporate at its registered office or its principal place of business within the Republic; or If there is no employee willing to accept service, by affixing the notice or a certified copy of the document to the main door of the office or place of business.

- 5.1 The merits of Applicant's initial application for relief are over-shadowed by the fact that the Respondents are apparently unaware of these proceedings. Therefore I focus this decision on the importance of service.
- 5.2 In the case of **Masetlha v President of the Republic of South Africa and Another**<sup>9</sup>, **Ngcobo J stated:**
- “The procedural aspect of the rule of law is generally expressed in the maxim *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.”
- 5.3 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**,<sup>10</sup> 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 Respondent's non-participation in the proceedings should not be ascribed to ignorance thereof, due to non-service on it by the Applicant. In the case of **Skybridge CC and Another v Skybridge Investments (Pty) Ltd and Another**<sup>11</sup> 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.
- 5.4 In a situation such as the one *in casu*, this defect is easily rectified by the Applicant either serving through the Sheriff of Belville South or by the Applicant's attorney deposing to a service affidavit to show the required compliance.

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<sup>9</sup> 2008 (1) SA 566 (CC) at para 187

<sup>10</sup> Case no: CT020JUN2015 at 6

<sup>11</sup> Case no: CT004DEC2016 at 7

5.5 Applicant's attorney has confirmed that they were contacted by someone claiming to be First Respondent's legal representative; and that follow up calls were made to this person to ascertain First Respondent's position as regards Applicant's letter of demand.<sup>12</sup> It is unfortunate that there are no further details as regards the name of First Respondent's legal representative, what numbers were called, and on which dates specifically.

## **6 FINDINGS**

6.1 As mentioned earlier, the merit of Applicant's case is moot in the face of non-service thereof on the Respondent.

6.2 In light of the fact that it is not clear on Applicant's papers whether or not the Director of Red Bull Guard Holdings (Pty) Ltd is aware of this application, so that any gaps of unfairness in the procedure are plugged, the Tribunal is not satisfied that Applicant has exhausted all avenues to notify the Respondents.

6.3 There has not been satisfactory compliance with the provisions of Companies Regulation 153(2)(b). The Applicant's application for default judgment is therefore refused.

## **7 ORDER**

The application is refused.

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**ADV. ISHARA BODASING**

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<sup>12</sup> Bundle at p 431