HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 92630/2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 11 FEBRUARY 2022

SIGNATURE [redacted]

In the matter between:

AGILITY HOLDINGS (PTY) LTD	Applicant
and	
THE COMPANIES TRIBUNAL	First Respondent
ISHARA BODASING N. O	Second Respondent
AGILITY CO. (PTY) LTD	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMSSION	Fourth Respondent

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REASON FOR ORDER

DAVIS, J

[1] Introduction

On 26 October 2021 this application came before court on the unopposed motion court roll where an order was granted in favour of the applicant. A costs order was also granted against the Companies Tribunal who was the first respondent. The Companies Tribunal has on 23 November 2021 lodged an application for leave to appeal but has not followed the correct procedure in the lodging thereof. This has caused some delay. It has also, by way of subsequent correspondence with this Court's registrar, requested reasons for the costs order. These are those reasons.

[2] The merits of the application

2.1 The applicant is Agility Holdings (Pty) Ltd. It is a company which has been trading for approximately 20 years in the field of healthcare and risk management solutions in South Africa. It is the owner of two registered trade marks in class 35 as provided for by the Trade Marks Act 1940 of 1993 which consist of two "AGILITY" logo's. The applicant has made extensive use of these logo's and has furnished details of the millions of Rands spent on advertising (including use of these logo's) over the years. These facts are not in dispute.

2.2 The applicant further contended that the "Agility" trademarks have become assets of considerable commercial value and importance for the applicant. This is also not in dispute.

2.3 Section 11 of the Companies Act 71 of 2008, inter alia, provides as follows:

> "*11 Criteria for names of companies*
>
> *(1)* ...
>
> *(2) the name of a company must –*

> *(a)* *not be the same as* –
>
> *(i)* *the name of another company* ....
>
> *(ii)* *a name registered for the use of a person* ...
>
> *(iii)* *a registered trademark belonging to a person other than the company* ...
>
> *(b)* *not be confusingly similar to a name, trademark, word or expression contemplated in paragraph (a)* ... (my emphasis)

2.4 The third respondent was incorporated and registered under the name Agility Co. (Pty) Ltd.

2.5 Based on the clear similarity of the name of the third respondent with that of the applicant and its trade marks and the clear infringement of the provisions of abovequoted section 11 and the applicant's rights, the applicant's attorneys addressed a letter to the third respondent, requesting it to apply to the Commissioner of Companies to change its name. No response was forthcoming.

2.6 Reliant on the provision of section 160 of the Companies Act, the applicant applied to the Companies Tribunal in the prescribed manner for relief directing the third respondent to choose a name which does not consist of or incorporate the mark "AGILITY" and that the necessary name change be effected.

2.7 The third respondent failed to answer to the applicant's application, causing the applicant to apply to the Companies Tribunal for a default order.

2.8 Less than four business days later, the Companies Tribunal informed the applicant's attorneys that the default application had failed.

2.9 The Companies Tribunal's decision, handed down by Ms Bodasing (the second respondent) in her capacity as the presiding member of the Companies Tribunal reflected that the following issues were considered:

> "*This Tribunal is faced with a few main issues:*
>
> 1. *Has the applicant shown locus standi to bring this application?*
> 2. *Has the applicant shown good cause to bring this application?*
> 3. *Has the applicant shown that a default order should be granted*?"

2.10 The findings reached by Ms Bodasing were noted to be the following:

> "*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.*
>
> *5.2 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*".

2.11 The first finding was apparently based on the absence of a resolution or "evidence of who the directors of the company" were. The second finding was based on the service of the application by way of affixing to a main gate, despite it being at the registered address of the third respondent. Little regard was had to the clear infringements referred to in paragraphs 2.3, 2.4 and 2.5 above.

2.12 The application of the applicant lodged at the Companies Tribunal was supported by a founding affidavit by a Mr Barendrecht. In it, he stated "*I am the Chairman of Agility Holdings (Pty) Ltd and I have held this position since 2005 ... . I am authorised to depose to this affidavit on behalf on the applicant and in this regard I annex a copy of an appropriate letter of authority, marked Annexure NB1*". Annexure NB1 was a written letter of authority, issued by the applicant, signed by Mr Barendrecht in his capacity as a director, confirming that: "*1. The Company is to lodge an objection to the South African company name Agility Co. (Pty) Ltd (no2016/541422/07), 2. That Neels Barendrecht be authorised to represent the company in the above proceedings and to sign all necessary documents, including affidavits to give effect to the above decision of the company. 3. That Adams & Adams be appointed to act as the Company's attorneys of record in the above proceedings*". I interpose to note that the same firm of attorneys not only acted for the applicant in the application before the Companies Tribunal, but also in the application before this court, authorised by yet another resolution.

2.13 The founding affidavit of Mr Barendrecht was accompanied by copies of the trade mark registration documents, a 91 page brochure setting out the applicant's identity and business, an investigator's report concerning the business of Agility Co (Pty) Ltd (the third respondent) and particulars of its directors, a letter of demand directed to the third respondent and copied by e-mail to one of its directors together with a follow-up letter, also copied by email and confirmatory affidavit by the applicant's attorney, incorporating legal argument and confirmation of the sending of the correspondence.

2.14 In insisting on a Board Resolution or "official documents" for purposes of proving *locus standi*, Ms Bodasing clearly ignored the uncontested

statements under oath and trite law such as the decisions in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352 A – B, *Griffiths & Ingliss (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) and *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A). However, having regard to the actual finding, Ms Bodasing did not find that the applicant has not authorised the application nor that the attorneys have no authority to act on behalf of the applicant. Insofar as these aspects were left intact, and insofar as Ms Bodasing only made findings in respect of Mr Barendrecht's authority to depose to an affidavit, then she ignored the Supreme Court of Appeal determination in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)at paragraph [19] in having required that a deponent to a founding affidavit had to have been authorised to depose to such an affidavit. Insofar as the issue of service of the application was a concern for Ms Bodasing, she appears to have ignored the provisions of section 23(3) of the Companies Act, providing for the choice of a registered address. Service on such an address, even by way of affixing to an outer door (or gate) is provided for in Annexure 3 of Table CR 3 of the Companies Regulations and is even accepted as sufficient by this Court in legal proceedings as provided for in Rule 4(1)(a)(v). As decisionmaker, Ms Bodasing has clearly misdirected herself and ignored relevant considerations, not least of all the existence of the trademarks referred to and the infringement thereon which would constitute "good cause", to such an extent that a review and setting aside of the refusal of the default application was justified.

2.15 In considering the matter, it is necessary to remind oneself that, in addition to the above, the main application was for a review in the "wide sense", i.e a complete re-hearing of the matter. See *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F – 591A.

2.16 Taking all the above into consideration, this court ordered as follows on 26 October 2021 on a default basis:

> "*1. The decision of the Second Respondent to refuse the Applicant's application to the First Respondent to make a determination in terms of section 160(3)(a) of the Companies Act, 71 of 2008 ("the Companies Act"), is reviewed and set aside;*
>
> *2. It is ordered that the Third Respondent's name does not comply with section 11(2)(b) and 11(2)(c)(i) of the Companies Act;*
>
> *3. The Third Respondent is directed, in terms of section 160(3)(b)(ii) of the Companies Act, to change its name to one which does not consist of, or incorporate, the mark AGILITY, or any other mark which is confusingly and /or deceptively similar to the applicant's AGILITY trade mark;*
>
> *4. The Fourth Respondent is authorised and directed to change the name of the Third Respondent to its registration number, 2016/541422/02, in the event of the third Respondent not complying with paragraph 3 above within 60 days from the date of this order*".

2.17 In addition, the Companies Tribunal, as first respondent, was ordered to pay the applicant's costs. It is this part of the order that the Companies Tribunal seeks to take on appeal. It is also for that purpose that it requires reasons for the order granted, despite already having delivered its application for leave to appeal.

[3] The costs order

3.1 Before proceeding with the issue of the costs order itself, it must firstly be pointed out that neither the Companies Tribunal nor Ms Bodasing (an advocate of this court) proceeded with their initial intention to oppose the main application. In fact, they have filed a notice to abide. As an aside, it is questionable whether a party, once having abided a court's decision, can thereafter, once an order has been granted, appeal that order at all. That question will, however, have to stand over for adjudication, should the application for lave to appeal be proceeded with.

3.2 The affidavit which Ms Bodasing had filed in the main application, deposed thereto in both her capacity as second respondent and on behalf of the Companies Tribunal, was labelled by her to be an "EXPLANATORY AFFIDAVIT". In it, prior to the later delivery of the notice to abide, she sought to expressly oppose "in particular" the costs order being sought against the Companies tribunal.

3.3 The portion of Ms Bodasing's affidavit dealing with the issue of costs, relied heavily on quoted extracts from the decisions in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) and *Black Sash Trust v Minister of Social Development* 2017 (9) BCLR 1089 (CC) (which followed on the judgment between the same parties granted earlier that year and reported at 2017 (3) SA 335 (CC). In both those cases, a primary feature was whether costs orders should be granted against the Public Protector and the then Minster of Social Development in their personal capacities. That issue did not arise in the present matter and the selective paragraphs quoted from these judgments by Ms Bodasing in her affidavit, dealing with issues of bad faith and "gross negligence in connection with litigation" do not find application. The exposition of the law regarding punitive costs in the minority judgment in the *Public Protector*-case, is also

not applicable to this case. What it does do though is to confirm that, although the then Chief justice (with Goliath J concurring) would not have granted costs on an attorney and client scale, costs would still have been awarded against the Public Protector as an unsuccessful litigant, even though she had performed a public function (as a chapter 9 institution).

3.4 To sum up the evaluation of this part of the argument proffered by the Companies Tribunal and Ms Bodasing the position of the following:

- The issue of personal costs did not feature in this matter and the reliance on case law dealing with that issue, is misplaced.

- The issue of punitive costs did not feature in this matter and arguments put forward dealing with principles that relate to such costs orders are equally misplaced.

- There is no general principle that costs orders should or could not be awarded against decision-making bodies carrying out their statutory functions or performing their duties.

3.5 The general rule regarding costs is that, save in exceptional circumstances where the successful party may be deprived of its costs, costs should follow the event. This is because "*the purpose of an award for costs is to indemnify a successful party who has incurred expenses*" in instituting legal proceedings. See: Van Loggerenberg, *Erasmus Superior Court Practice*, second edition at D5 -1 and the cases listed in footnote 2 on that page.

3.6 The award of costs furthermore amounts to an exercise of the court's discretion. The learned author referred to above, sums up the relevant case law in this regard as follows (at D5-6): "*In leaving the court a discretion,*

the law contemplates that it should take into consideration the circumstances of each case, carefully weighing up the issues in each case, the conduct of the parties and any other circumstances which may have a bearing on the issues of costs and then make such an order as to costs as would be fair and just between the parties".

3.7 In the present matter, the applicant felt aggrieved by the "failure" of its application to the Companies Tribunal and in particular the basis upon which Ms Bodasing had determined why that application should fail. As pointed out above, the applicant was justified in being aggrieved and the decision was clearly unsustainable. Moreover, as also pointed out, the applicant was entitled to protect itself against infringement of its registered trademarks. This was a statutory protection, specifically catered for in the Companies Act (apart from other intellectual property law remedies) and therefore it was entitled to have recourse to the Companies Tribunal. Once that recourse failed, it was entitled to approach the court. Having done so and having had its application initially opposed then no longer opposed but still left with an attempted "bite at the cherry", the applicant was justified in briefing specialist counsel and in delivering heads of argument which might not have been necessary in unopposed motion court.

3.8 The applicant has therefore incurred costs in the furtherance of justified litigation. The incurrence of these costs have been occasioned by the reviewable decision(s) of the first two respondents. In these circumstances I exercised the court's discretion in granting a costs order in accordance with the general rule in favour of the successful applicant. Such orders are common occurrences in review applications and should not in any way hamper or preclude the workings of the Companies Tribunal.

[4] These then, are the reasons for the order(s) granted, including that of costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 26 October 2021

Reasons delivered: 11 February 2022

APPEARANCES:

For the Applicant:	Adv L G Kilmartin
Attorney for the Applicant:	Adams & Adams Attorney, Pretoria