IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 22269/2010

In the matter between

BLOOOMBERG INVESTMENT HOLDINGS (PTY) LTD Applicant

and

THE REGISTRAR OF COMPANIES First Respondent

BLOOMBERG FINANCE L.P. Second Respondent

JUDGMENT DELIVERED ON 19 MARCH 2012

DOLAMO, AJ

[1] This is an application for the review and setting aside of the First Respondent's decision of the 9th July 2010 directing the Applicant to change its name in terms of section 45(2) of the old Companies Act of 1973.

[2] The Applicant is Bloomberg Investment Holdings (Pty) Limited, registration number 2008/029292/07, a company duly incorporated with limited liability under the Company Laws of the Republic of South Africa. The Applicant is one of eight registered entities in South Africa in the Bloomberg Group of Companies and Close

Corporations, all of which feature the element "Bloomberg" as the dominant part of their corporate names.

[3] On the 17th December 2009 the Second Respondent lodged with the First Respondent an objection into the Applicant's name in terms of section 45(2) of the Companies Act. The Applicant only became aware of this fact on the 12th March 2010 when it received a letter from the First Respondent dated the 25th January 2010, advising it of the Second Respondent's objection. To this letter an incomplete copy of the objection was attached. The Applicant thereupon forwarded these documents to its attorneys who had disposed of a number of similar objection by the Second Respondent in the past.

[4] On noting that the objection was incomplete, insofar as page 3 which included paragraphs 9 – 16 of the objection had not been included, the Applicant on the 29th day of March 2010 addressed and hand a delivered letter to the First Respondent advising of this fact and that the Applicant had only received its letter dated the 25th January 2010 on the 16th March 2010. This date was more than thirty days after the date of the First Respondent's letter and within which period the Applicant had to respond to the objection. The Applicant also stated in the letter that the 30-day period therefore could only run from the date upon which the notice of objection was received by it. It also emphasised that the 30-day period can only run from the date on which a complete objection would have been received by it. There was no response from the First Respondent to the Applicant's letter.

[5] The Second Respondent was also furnished with a copy of this letter directly to afford it an opportunity to rectify the defective objection. This too did not solicit any response from the Second Respondent. A further letter of the 5th of May 2010 also failed to solicit any response from any of the Respondents.

[6] On the 11th July 2010 the applicant received a notification from the First Respondent dated the 9th July 2010 to the effect that an order to change the Applicant's name in terms of Section 45(2) of the Old Companies Act had been made as "*upon consideration on the merits regarding the abovementioned objection, concluded that the objection is sound and that your company name is undesirable*".

[7] This development led the Applicant to direct a letter to the First Respondent dated the 28th July 2010 wherein the following was stated: "that the order had clearly been made in error in light of the Applicant's letter of the 29th March 2010 (of which a further copy was attached to the document); that neither the offices of the First nor the Second Respondent had ever supplemented the defective objection and that the Applicant remained uninformed as to the grounds for the objection as set out in the missing paragraphs 9-16 on page 3 of the said letter of objection; that the 30-day period within which the Applicant could have responded to the objection could not have commenced until it had been furnished with a complete objection, and that the First Respondent was called upon to confirm, within seven days, that the order had been issued in error failing which the Applicant would be constrained to make an application to set the order aside".

[8] This was followed by a letter dated the 2nd August 2010 which was addressed to the First Respondent in which the defective nature of the objection and the First Respondent's failure to permit the applicant to respond to the objection as it had indicated it intended to upon receipt of a complete objection was reiterated. The First Respondent was requested to withdraw the order.

[9] On the 4th August 2010 the First Respondent advised the Applicant in writing that the applicant's letter of the 29th March 2010 was not included in the First Respondent's file nor was it in her possession at the time the decision was made and had only come to its attention on the 2nd August 2010.

[10] The aforesaid circumstances led the Applicant to bring the current Application for an order directing that the order of the First Respondent dated the 9th July 2010 in terms of which the Applicant was directed to change its name be set aside and that any respondent opposing the application be ordered to pay the costs on an attorney and client scale.

[11] The Applicant made the submission in its papers that it was unequivocally clear that the Applicant has been subjected to an administrative decision which is not just, right and fair according to the rules of natural justice, in that the Applicant was not afforded a hearing to which it was entitled and that the principle of *audi alteram partem* rule was not adhered to. It was further submitted that the First Respondent failed to apply her mind to the matter insofar as she did not have regard to all the relevant information she was required to consider.

[12] The application was opposed by the Second Respondent only. The First Respondent confirmed that it will abide the court's decision.

[13] Initially the Second Respondent, in its opposing papers, stated that it opposed the application on the basis that the application was bad in law as it seeks to review the decision of the First Respondent in terms of the common law when in fact the correct procedure to review and/or appeal a decision of this nature was in terms of Section 48 of the Old Companies Act. Secondly, that the Applicant sought to set aside the decision of the First Respondent on the grounds of the *audi alteram partem* rule when in fact the First Respondent's decision was made as a consequence of the Applicant's own conduct and tardiness in a way it has dealt with this matter. And, lastly, that there were no reasonable prospects of success on the merits. The Section 48 of the Companies Act argument was not pursued in argument before this court. The Second Respondent however persisted with the argument that the Applicant's own conduct deprived it of being heard and therefore that the *audi alteram partem* rule was subjugated by the Applicant itself, and that there were no merits in the application.

[14] The Second Respondent submitted that the Applicant had for a period of about five months after it came to its knowledge that the First Respondent had made an order declaring its name objectionable and undesirable did nothing to correct the situation. Also, it was argued, that the Applicant could have responded to the objection and reserved its right to supplement its response on receipt of the missing page. In particular it was argued that Applicant failed to request an extension of the period of time within which to respond to the Second Respondent's objection despite the fact that the First Respondent readily grants such extensions of the time within which to respond

to a company name objection. Respondent emphasized that this was a fact which the Applicant could not dispute as it is familiar with the day to day practice of the First Respondent.

[15] The Second Respondent also argued that in this space of five months the Applicant merely wrote two letters, and relying on the court's decision in *Darsaf v Harnett Aluminium (Pty) Ltd,* sat back and did nothing despite the fact that there was an objection pending against its company name. In essence the Second Respondent argued that reliance on this judgment was misplaced.

[16] Furthermore, the Second Respondent argued that it was sufficient that what had been communicated to the Applicant under cover of First Respondent's letter dated the 25th January 2010 was not a decision or order, but merely a notice of an objection. Second Respondent's objection, according to this argument, therefore came to the knowledge of the Applicant and the fact that one page from the objection was missing cannot negate the fact that knowledge had been acquired. The Second Respondent argued that the Applicant elected not to respond to the objection and cannot now come to court and rely on equity, fairness and the *audi alteram partem* rule to justify the setting aside of a decision in which it actively elected not to participate. It submitted that the Applicant could have taken adequate and timely steps to respond to the objection and exercise its rights under the *audi alteram partem* rule instead of choosing not to do anything. On the merits the Second Respondent's argument was that the Applicant had not put forward any exceptional circumstances that warrant the setting aside of the First Respondent's decision.

[17] In the alternative Second Respondent also argued that should the court find that the Applicant is entitled to a review of the First Respondent's decision in terms of the common law then, at most, the Applicant would be entitled to an order setting aside the First Respondent's decision coupled with an order that the matter be remitted back to the First Respondent for consideration.

[18] The concession that if the court grants the Applicant an order setting aside the First Respondent's decision that this should be coupled with an order remitting the matter back to the First Respondent for adjudication was made as early as in its opposing papers. To this the Applicant replied. "*I deny that it will be appropriate to refer the matter back to the registrar for reconsideration in so far as this officer will remain ceased of an incomplete objection and an incomplete file upon which to reconsider.*"

[19] The Applicant's stance however has altered and at the hearing it accepted that should the order of the First Respondent be set aside, the proper approach will be to remit the matter back to the First Respondent for her reconsideration.

[20] The Applicant is entitled to a just administrative action. There is no doubt, and so much was conceded by the Second Respondent, that the Applicant was entitled to the relief sought. The difference between the parties, however, was what happens after the First Respondent's decision is set aside. There appears to be a realisation now by the Applicant, as distinct from its original stance, that the matter has to be remitted back to the First Respondent for re-adjudication. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004(4) SA 490 (CC) at par 25 to which Mr Sholto-

Douglas who appeared for the Applicant referred in his heads of argument the Constitutional Court confirmed that the courts' power to review administrative action now ordinarily arises from PAJA, not from the common law as in the past. It is clear therefore that PAJA cannot be circumvented where it is applicable. It follows furthermore that Section 8 of PAJA which now fashions the remedies to which an applicant for review may be entitled is also applicable. This section provides in sub-section 8(1)(c)(ii) that remitting the matter for reconsideration by the administrator follows on the setting aside of the decision. Having regard to the scheme of this section an order of setting aside an administrative decision is coupled with one of remittance for reconsideration. Only in exceptional circumstances would the court substitute its order for that of the administrator. In my view the Second Respondent was correct in pointing out that the relief sought by the Applicant, in the circumstances, should incorporate an additional order of remittance for reconsideration.

[21] Although it was conceded by the Second Respondent that the order of the First Respondent had to be set aside I mention all the arguments raised by it because, in my view, are relevant to the question of costs.

[22] As regards costs, Ms Joubert, who appeared for the Second Respondent, argued that even if the Applicant were to succeed in having the decision of the First Respondent set aside, the matter would have to be remitted back to her to be adjudicated properly. For this reason, if I understood his argument correctly, it was necessary for the Second Respondent to oppose the matter so as go point this out. Consequently the Applicant should not be entitled to a cost order because it rejected the suggestion that the mater be remitted back to the First Respondent when it was

made early in this matter. In other words, the Second Respondent's opposition of the matter was justified in that it pointed out the correct procedure to be followed once the First Respondent's order is set aside. Mr Sholto-Douglas, on behalf of the Applicant, on the other hand, argued that the Second Respondent's opposition of the matter in the face of a clear case that the First Respondent's decision was to be set aside was unnecessary and that it should be ordered to pay the costs including the costs of two counsel. The costs of two counsel, according to Mr Sholto-Douglas, were necessary because of the importance of the matter to the Applicant. He also argued that the Second Respondent mentioned the remittance of the matter to the First Respondent in the alternative, the main argument being that the Applicant was not entitled to bring a review of the First Respondent's decision under the common law but in terms of Section 48 of the Companies Act. In the circumstances the Second Respondent should be ordered to pay the costs, he argued.

[23] Was the Second Respondent justified in going beyond just pointing out that on setting aside Second Respondent's order the matter has to be remitted to the administrator for consideration?

[24] I am of the view that there is merit in Ms Joubert's argument. The concession that in the event of the order of the First Respondent being set aside the matter should be remitted back to her (First Respondent) was made in the opposing affidavit and not for the first time in argument. I am satisfied that even if it was in the alternative it was incumbent upon the Applicant to consider it rather than to brush it aside in the terms in which it did as set out supra [para 6 supra]. The argument that this was not the Second Respondent's main reason for opposing the application does not detract from the fact

that the concession was made and should have been properly considered by the Applicant. The Second Respondent however should not have raised all the other grounds of opposing the application. Both parties in my view had acted in haste in responding to the other party's case.

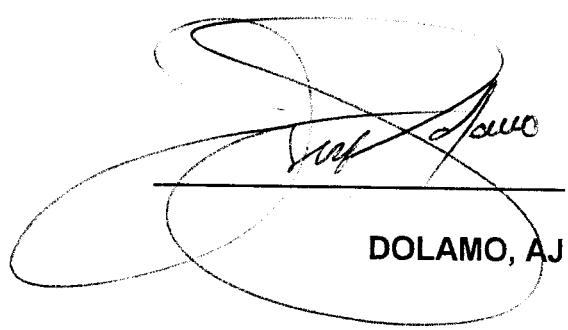
[25] I am satisfied that this is a case where the general rule that the costs follow the event should not be strictly applied. A fair order of costs would be that each party should pay its own costs in lien with the alternative submission of Ms Joubert.

[26] The order I make therefore is the following:

1. The order of the First Respondent dated 9 July 2010 directing the Applicant to change its name in terms of Section 45(2) of the Companies Act 1973 is set aside;

2. The matter is remitted to the First Respondent for reconsideration with the following further direction:
   2.1 That the Applicant respond to the Second Respondent's letter of objection to the First Respondent dated 17 December 2009, read together with missing page 3 thereof (paragraphs 9-16 inclusive) within 30 days of date of this order;

3. That each party is to pay its own costs of this application.



DOLAMO, AJ