

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA
("THE TRIBUNAL")

CASE NUMBER: CT021MAY2015

In the matter between:

ZELDA MULDER

APPLICANT

and

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

RESPONDENT

Coram: PJ Veldhuizen

Order delivered 19 NOVEMBER 2015

ORDER

1. Introduction

- 1.1 This is an application brought in terms of section 160 of the Companies Act No 71 of 2008 ("the Act") where the Applicant applies to the Tribunal for a determination on whether the Notice, COR 9.5 – Ref 925959623, issued by the Respondent on 28 April 2015 should be set aside and the Respondent be directed to reserve the name Applicant had applied for.

- 1.2 The issues to be decided by the Tribunal are:
- 1.2.1 whether the Applicant has an interest in bringing this application;
 - 1.2.2 whether the Applicant has satisfied the Tribunals procedural requirements; and
 - 1.2.3 having considered the submissions made by the Applicant and any other interested person, whether:
 - 1.2.3.1 the name reservation satisfies the requirements of the Act; and
 - 1.2.3.2 if the reservation satisfies the requirements of the Act whether the Respondent should be directed to reserve the name.

2. Background

- 2.1 The Applicant is Zelda Mulder of No 16 Sekelbos Street, Rangeview X4, Krugersdorp.
- 2.2 The Applicant incorporated a private company in terms of the Act, K2015/117274/07, which the Applicant requires to be named Emeka Consulting Services.
- 2.3 The Respondent is the Companies and Intellectual Property Commission ("the Commission") established in terms of section 185 of the Act. The Commission is required to *inter alia* maintain a companies register¹ and perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions².
- 2.4 The Applicant applied to the Commission on 24 April 2015 for the reservation of the company name, Emeka Consulting Services. In

¹ Section 187(4)(a)(i)

² Section 187(4)(e)

addition, and presumably as a precautionary measure, the Applicant applied for alternative variations of this company name. The Applicant was advised by the Commission in terms of a COR 9.5 Notice that:

"None of the names could be approved due to the fact that it is confusingly similar to name/s already registered within the meaning of the name register in particular in terms of Sec 11 (two) (b) of the Companies Act".

- 2.5 The Commission's notice refers to several registered entities incorporating the name Emeka.
- 2.6 The Applicant argues that its name is not confusingly similar to any of the "conflicting" names referred to by the Commission due to the incorporation of the additional words "Consulting Services", when used in conjunction with each other and the name, Emeka.

3. Relief sought

The Applicant seeks the following administrative relief from the Tribunal:

- 3.1 An Order setting aside the COR 9.5 Notice; and
- 3.2 A Directive compelling the Commission to reserve the Applicant's chosen name.

4. Legislation relied upon

- 4.1 The restrictive criteria for the names that may be chosen by a company is set out in Section 11 (2) of the Act:

(2) – The name of a company must –

(a) not be the same as –

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

(ii) a name registered for the use of a person, other than the company itself or a person controlling the company, as a defensive name in terms of section 12(9), or as a business name in terms of the Business Names Act, 1960, (Act 27 of 1960), unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company;

(iii) a registered trademark belonging to a person other than the company, where mark in respect of which an application has been filed in the Republic for registration as a trademark or a well-known trademark is contemplated in section 35 of the Trade Marks Act, 1993 (Act 194 of 1993), unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or

(iv) a mark, word or expression use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act 17 of 1941), except to the extent permitted by and were in terms of that Act;

(b) not to be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless –

(i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;

(ii) in the case of the company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or person who controls the company, is the registered owner of that defensive name or business name;

(iii) in the case of a name similar to a trademark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trademark, will mark, or is authorised by the registered owner to use it; or

(iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by and in terms of the Merchandise Marks Act, 1941;

(c) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company –

(i) is part of, or associated with, any other person or entity;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) it is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any –

(aa) foreign state, head of state, head of government , government or the administration or any department of such a government ordered ministration; or

(bb) international organisation; and

(d) not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute –

(i) the propaganda for war;

(ii) incitement of imminent violence; or

(iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.

4.2 The duties of the Commission are set out in Section 12 of the Act:

(2) – The Commission must reserve each name is applied for in the name of the applicant, unless –

(a) the applicant is prohibited, in terms of section 11 (2) (a), from using the name as applied for; or

(b) the name as applied for is already reserved terms of this section.

(3) - If, upon reserving a name in terms of subsection (2), there are reasonable grounds for considering that the name may be inconsistent with the requirements of –

(a) section 11 (2) (b) or (c) –

(i) the Commission, by written notice, may require the applicant to serve a copy of the application and the name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant; and

(ii) any person to whom a notice is required to be given in terms of subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160.

- 4.3 The regulation of disputes concerning the reservation or registration of company names and the jurisdiction of the Tribunal is set Section 160 of the Act:

(1) –

A person to whom a notice is delivered in terms of this Act with respect to an application for a 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 for the 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); 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) –

After considering an application made in terms of subsection (1), and any submissions by the Applicant and any other person with

an interest in the name or proposed name that is the subject of the application, the Companies Tribunal –

(a) must make a determination whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

(b) may make an administrative order directing –

(i) the Commission to –

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended the name that had been contested as the name of the company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee

for filing the Notice of Amendment contemplated in this paragraph.

(4) –

within 20 business days after receiving a notice or decision issued by the Companies Tribunal in terms of this section, an incorporator of a company, a company, a person who received a notice in terms of section 12(3) or 14(3), an applicant under subsection (1) and any other person with an interest in the name or proposed name that is the subject of the application, as the case may be, may apply to court to review the notice or decision.

5. Issues

5.1 Interest in the application

5.1.1 Section 160 of the Act provides that any person with an interest in the name of a company may make application to the Tribunal in relation to the reservation of a company name.

5.1.2 The Applicant clearly has an interest in the the name, as envisaged by the Act.

5.2 Procedure complied with

5.2.1 Section 160 read with Regulation 142 requires the Applicant to make application to the Tribunal in the prescribed manner and form.

5.2.2 The Applicant has substantially complied with this requirement.

5.3 Name to satisfy the requirements of the Act

5.3.1 Section 11 establishes the restrictive criteria for the names that may be chosen by a company.

5.3.2 The name that the Applicant requested the Commission to reserve does not offend section 11(2)(a).

5.3.3 It is arguable whether the name that the Applicant requested the Commission to reserve offends section 11(2)(b) or (c).

5.4 Commission obliged to register

5.4.1 Section 12(2) enjoins the Commission to register each name applied for unless it offends section 11(2)(a) or the name as applied for is already registered.

5.4.2 As already indicated, Applicant's requested name does not offend section 11(2)(a).

5.4.3 Should the Commission when reserving the Applicants name have a reasonable apprehension that the reserved name may offend either or both sections 11(2)(b) or (c) they may require the Applicant to take steps to draw such reservation to the attention of those who the Commission determines have an interest in the matter.

5.4.4 This apprehension does not absolve the Commission from the duty to reserve the name and it is the interested party who should approach the Companies Tribunal should they wish to allege a contravention of the Act by the Applicant.

6. Evaluation of evidence

6.1 On a conspectus of the evidence the following findings are made:

6.1.1 The Applicant enjoys an interest in this matter.

6.1.2 The Applicant is entitled to the reservation of name.

6.1.3 The Respondent is not entitled to reject the Applicants reservation of name and the Applicant is entitled to the reservation of name.

6.1.4 The Respondent is entitled, if it legitimately believes that sections 11(2)(b) and (c) are offended to notify interested

persons to consider their position with regards to the Applicant's reservation of name.

7. Decision

For the reasons above, the Tribunal is satisfied that the Applicant is entitled to the relief sought and accordingly the following Order is made:

7.1 The Respondent's COR 9.5 Notice is hereby set aside; and

7.2 The Respondent is directed to reserve the name Emeka Consulting Services for the Applicant.



PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN