

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT 006JUL2017

In the matter between:

TYRIS CONSTRUCTION (PTY) LTD

Applicant

(Registration Number: 1995/007033/07)

AND

TYRIS CONSTRUCTION PROJECTS (PTY) LTD

Respondent

(Registration Number: 2016/322678/07)

DECISION

INTRODUCTION:

- [1]** The applicant is Tyris Construction (Pty) Ltd, a company registered with the Companies Intellectual Property Commission, with its principal place of business at Suite A102, De Goedehoop Office Park, 11 Sovereign Office Park, Irene, Pretoria. The applicant was incorporated on 14 July 1995 under registration number 1995/007033/07.

- [2] The respondent is Tyris Construction (Pty) Ltd, a company registered with the Companies and Intellectual Property Commission, with its registered business at 6 Felicity Court, 23 Cavendish Road, Yeoville, Johannesburg, 2198. The company was incorporated on 25 July 2016 under registration number 2016/322678/07.
- [3] The applicant was granted an order for substituted service, in terms of Regulation 7 (3) of the Companies Act Regulations, by the Companies Tribunal on 02 October 2017. This was due to the initial return of non-service on the respondent at the registered address. The order authorised the service by way of advertisements in two local English papers circulating in the area of respondent's registered address; one circulating in the area and the other being a community newspaper circulating in the area in which the director for respondent, Mr Matthew Tshingwana resides or trades, as well as publication in the Government Gazette. The said order further stated that the notices of the application were to remain in the newspapers for a period of 20 business days from the date of advertisement, before the applicant's application in respect of the name dispute was heard by the Tribunal. The Tribunal is therefore satisfied that the requirements of S.142 (2) of the Regulations to the Companies Act 71 of 2008 ("The Act") have been duly complied with.

[4] The Tribunal is further satisfied that the advertisements were in compliance with the order.

[5] The applicant has filed this application in terms of S.11 (2)(a), 11(2)(b) and or 11(2)(c)(i) of the Companies Act, and requests that the Tribunal directs the respondent, in terms of S.160(3)(b)(ii) of the Act, to choose a new statutorily compliant name as provided for in terms of regulation 156 of the Companies Regulations, 2011. The applicant therefore requests that the tribunal grant the relief sought, ordering the respondent to choose a new name.

Submissions by Applicant

[6] Applicant deposed to an affidavit as required by Regulation 142(2), and submitted that the name Tyris was derived from a combination of the names of its founders **Tyrone** Adams and **Chris** Erasmus. Since its incorporation in 1995, the company has grown from a small to a medium sized enterprise to one of the biggest construction companies in Gauteng. Its projects range from commercial, civil, residential and specialised projects segments of the market. The applicant's activities diversified over the years and the name TYRIS is now represented in all sectors of the building countrywide, from prime residential and commercial developments to civil contracts for Eskom.

As the applicant's business activities in the building industry diversified, various other entities bearing the name and mark TYRIS were incorporated. The entities are:

1. TYRIS PROPERTY DEVELOPMENT (PTY) LTD
1997/005294/07
2. TYRIS REALTY (PTY) LTD 2001/004033/07
3. TYRIS INDUSTRIAL (PTY) LTD 2004/0354481/07
4. TYRIS PLANT HIRE CC 2005/169971/23
5. TYRIS (PTY) LTD 2013/227767/07

[7] The applicant further submits that the company has invested a substantial amount of time, money and effort through its 22 years of existence to build the TYRIS name, brand and business. Through its commitment and substantial efforts, the applicant has become known for its pledge to building relationships based on solid principles of trust, integrity and respect. The applicant and its associated companies have built up an extensive reputation and goodwill in the name and mark TYRIS, and its turnover has grown from R10 555 037.39 in 1997 to R406 827 524.30 in 2016.

[8] The applicant has filed an application for trade mark registration of the name TYRIS in respect of construction services. The trade

mark application was provisionally accepted by the registry on 19 April 2017.

- [9]** The applicant submits further that the respondent's company name and the recorded profession of the sole director, being builder, carpenter and joiner, that there is a direct overlap of services of interest to the parties. Applicant states that the public will undoubtedly be deceived or confused into believing that the respondent's company name, Tyris Construction Projects (Pty) Ltd is that of the applicant, alternatively is associated with or endorsed by the applicant, which is not the case. With the exception of the incorporation of the descriptive word "Projects" into its name, the applicant argues that the respondent's company name, Tyris Construction Projects (Pty) Ltd, is for all practical purposes identical to the applicant's name Tyris Construction (Pty) Ltd.

Application of the Law

- [10]** This is an application in terms of S.160 read with S.11 (2) of the Companies Act. The applicant seeks relief in terms of S. 160 (1) of the Act, which provides for specific remedies available in instances where the tribunal has determined that an application complies with the requirements of S.11. It states:

“ A person to whom a notice is delivered in terms of this Act with respect to an application for 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 a 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 (s11).”

[11] Section 160 (2)(b) which is relevant to this case, provides that an application in terms of subsection 1 above, may be made on good cause shown at any time after the date of reservation or registration of the name that is the subject of the application, in any other case.

[12] Section 160(3) provides for the powers of the tribunal where subsections (1) and (2) have been satisfied. It provides as follows:

“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 (s.11); and**

(b) May make an administrative order directing-

(i) The Commission to-

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

**(ii) a company to choose a new name, and
file a notice of 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.”**

[13] The tribunal is therefore tasked with considering this application and satisfying itself that it complies with the requirements of s. 11 (2) which provides:

“The name of a company must-

(a)Not be the same as-

(iii) A registered trademark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act no. 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.”

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

(iii) In the case of a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark, or mark, or is

**authorised by the registered owner
to use it.”**

**(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.”**

Evaluation

[14] The tribunal dealt adequately with the issue of ‘good cause shown’ when considering the application for substituted service.

[15] Section 11 lists the criteria applicable for company names. On assessment of applicant’s name and that of respondent, one can easily identify the similarity in the names. Both applicant name Tyris Construction (Pty) Ltd and Tyris Construction Projects (Pty) Ltd WALKER are the similar, except for the further descriptive word “Projects” in respondent’s name. Both companies also provide similar services and compete in the construction industry. It is apparent that the dominant and striking feature in both names is TYRIS CONSTRUCTION which describes the businesses of both applicant and respondent.

- [16]** It is not difficult to see that the name Tyris Construction Projects is confusingly similar to the name Tyris Construction, and that a potential client might be led to think that the company is the same or affiliated with the applicant's company.
- [17]** As required by the Act, the name must also not be the same or confusingly similar to a registered trade mark registered in terms of the Trade Marks Act, unless the owner has consented in writing that the mark can be used as a company name.
- [18]** Applicant has established that Tyris Construction is a well-established brand in Gauteng and South Africa as a whole, with a turnover close to half a billion rand. There is a serious risk of confusion of the public, which causes the undesirability of the name Tyris Construction Projects. In *Azisa Pty) Ltd v Azisa Media CC* [2002] 2 All SA 488 (C) at 500, the court held that a company name may be deemed undesirable in circumstances where it is likely to mislead or deceive the public, or is the same or similar to that of another and as a result is likely to lead to confusion amongst members of the public. In *New Media Publishing (Pty) Ltd v Eating out Web Services CC* 2005 (5) SA 388 (C) at 394, relating to the Trade Marks Act on name similarities, the court held:

“there is, it seems to me, an interdependence between two legs of the inquiry: the less the similarity between the respective goods or services of the parties, the greater will be the degree

of resemblance required between the respective marks before it can be said that there is a likelihood of deception or confusion in the use of the allegedly offending mark”

- [19]** There is an overwhelming resemblance between the names Tyris Construction and Tyris Construction Projects. Tyris Construction is the dominant feature in both names and is the main idea or impression left in the mind of the customer.

FINDINGS

- [20]** The name Tyris Construction Projects is confusingly similar to Tyris Construction and there is a reasonable likelihood of confusion amongst members of the public.
- [21]** The name Tyris Construction Projects would reasonably mislead a person to believe incorrectly, that the company is part of, or associated with the Tyris Construction brand.
- [22]** Respondent's name consequently does not satisfy the requirements of the Companies Act.

ORDER:

It is therefore ordered that:

- The Respondent is directed to choose a new name that is not confusingly similar to the applicant;
- The respondent file a notice of amendment of its Memorandum of Incorporation,
- In light of the non-service of application documents on the respondent and for reasons of expedience as provided for in S. 160 (3)(b)(ii), due to unlocated address, the CIPC is ordered to cancel or alternatively, change the name of the respondent.

B. Zulu
26 February 2018