



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("THE TRIBUNAL")

CASE NUMBER: CT006NOV2017

In the matter of:

EMMANUEL C MWARA

APPLICANT

iro Name Reservation "Pensions Africa"

and

COMPANIES & INTELLECTUAL

RESPONDENT

PROPERTY COMMISSION

Coram: PJ Veldhuizen

Order delivered 6 December 2017

DECISION (ORDER) & REASONS

1. THE APPLICANT

- 1.1. The Applicant is Emmanuel C Mwaba, an adult male businessman residing at 33 Roof Road, 4 Shepard Estate, Hyde Park, Johannesburg.
- 1.2. The Respondent is the Companies and Intellectual Property Commission (“CIPC”) established by section 185 of the Companies Act 71 of 2008 (“The Act”). The CIPC’s objectives include *inter alia* - “the efficient and effective registration of Companies in terms of the Act”.

2. THE APPLICATION

- 2.1. This is an application in terms of section 160 of the Act read with Regulations 142 and 153.
- 2.2. The Applicant applied to the Respondent on the 16th August 2017 for the reservation of a company name, “Pensions Africa”.
- 2.3. The Applicant was advised by the Respondent in terms of a Notice (Reference 980763922) dated the 17th August 2017 that the name applied for was declined on the basis that a “*confusingly similar name exists*”.
- 2.4. The Applicant now applies to the Tribunal for an Order setting aside the aforementioned Notice and further for an Order directing the Respondent to reserve the name as applied for.
- 2.5. For the reasons set out below, this matter now proceeds as an Application for a Default Order.

3. THE REQUIREMENTS OF THE ACT¹

- 3.1. Section 12 of the Act **enjoins** the Respondent to reserve each name as applied for in the name of the Applicant unless the Applicant is prohibited in terms of section 11(2)(a) from using the name as applied for or the name applied for is already reserved in terms of this section.

¹ The legislation is appended as an annexure

3.2. Section 11(2)(a) of the Act provides for situations where the name applied for by the Applicant already exists as a registered company name, a name registered as a defensive name, a name registered under the Business Names Act No 27 of 1960 or a mark, word or expression which is protected or the use of which restricted in terms of the Merchandise Marks Act No 17 of 1941.

4. THE FACTS

4.1. The Applicant applied for the reservation of a company name, "Pensions Africa".

4.2. The Respondent did not indicate a prohibition on the reservation of the name as contemplated in Section 11(2)(a) of the Act but appears to rely on the provisions of Sections 11(2)(b) and (c) of the Act in order to justify its refusal to reserve the name, as applied for.

4.3. The Applicant has served a copy of this application in accordance with the Act and its Regulations. The Respondent has provided an email explanation, which is disregarded, as it is not submitted in the Affidavit form required by the Regulations. The matter therefore proceeds as an Application for a Default Order as contemplated in Regulation 153.

5. ANALYSIS OF THE FACTS

5.1. The Respondent is not afforded a discretion whether to reserve the name applied for or not if the requirements of sections 11(2)(b) and (c) are not contravened.

5.2. In fact, in such circumstances the Respondent may only require an Applicant to serve a copy of the name reservation on a person with a potential interest if upon reserving the name if it has reasonable grounds for considering that the name be inconsistent with the requirements of section 11(2)(b) or (c).

5.3. Accordingly, the Respondent was not entitled to refuse the Applicant's name reservation application.

6. DECISION (ORDER)

In the circumstances, I make the following Decision (Order):

1. The Application is granted;
2. The Respondent's decision to refuse to reserve the name "Pensions Africa" is set aside and the Respondent is ordered to reserve the name as applied for;
3. The Respondent is ordered to require the Applicant to serve a copy of the name reservation on any person that the Respondent has identified who may have a potential interest in this name reservation upon the basis that the Respondent has reasonable grounds for considering that the name be inconsistent with the requirements of section 11(2)(b) or (c).

PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN

COMPANIES ACT 71 OF 2008

11. Criteria for names of companies

- (1) Subject to subsections (2) and (3), a company name-
- (a) may comprise one or more words in any language, irrespective of whether the word or words are commonly used or contrived for the purpose, together with-
 - (i) any letters, numbers or punctuation marks;
 - (ii) any of the following symbols: +, &, #, @, %, =;
[sub-para. (ii) substituted by section 6(b) of Act 3 of 2011) (Date of Commencement of sub-para (ii): 1 May 2014)
 - (iii) any other symbol permitted by the regulations made in terms of subsection (4); or
(Date of Commencement of sub-para) (iii): 1 May 2014)
 - (iv) round brackets used in pairs to isolate any other part of the name, alone or in any combination; or
 - (b) in the case of a profit company, may be the registration number of the company together with the relevant expressions required by subsection (3).
- (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 No. 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 trade mark 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; or

- (iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

(Para (a) substituted by section 6(c) of Act 3 of 2011)

- (b) not 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 a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a 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 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; 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 or in terms of the Merchandise Marks Act, 1941;

(Para. (b) inserted by section 6(d) of Act 3 of 2011)

- (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 or by 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) 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 administration or any department of such a government or administration; or

(bb) international organisation; and

(Para. (C), previously para. (b) renumbered by s.6 (d) of Act 3 of 2011)

(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) 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.

(Para. (d), previously para. (C), renumbered by s. 6 (d) of Act 3 of 2011)

(3) In addition to complying with the requirements of subsections (1) and (2)-

(a) if the name of a profit company is the company's registration number, as contemplated in subsection (1)(b), that number must be immediately followed by the expression "(SouthAfrica)";

(b) if the company's Memorandum of Incorporation includes any provision contemplated in section 15(2)(b) or (c) restricting or prohibiting the amendment of any particular provision of the Memorandum, the name must be immediately followed by the expression "(RF)"; and

(Para (b) substituted by section s. 6 of Act 3 of 2011)

(c) a company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company:

(i) The word "Incorporated" or its abbreviation "Inc.", in the case of a personal liability company.

(ii) The expression "Proprietary Limited" or its abbreviation, "(Pty) Ltd.", in the case of a private company.

(iii) The word "Limited" or its abbreviation, "Ltd.", in the case of a public company.

(iv) The expression "SOC Ltd." in the case of a state-owned company.

(v) The expression "NPC", in the case of a non-profit company.

- (4) The Minister may prescribe –
- (a) additional commonly recognised symbols for use in company names as contemplated in subsection (1)(a)(iii); and
 - (b) alternative expressions, in any official language, which may be used in substitution for any expression required to follow a company's name in terms of subsection (3).

(Sub -s. (4) substituted by s. 6(f) of Act 3 of 2011)

12. Reservation of name and defensive names

- (1) A person may reserve one or more names to be used at a later time, either for a newly incorporated company, or as an amendment to the name of an existing company, by filing an application together with the prescribed fee.
- (2) The Commission must reserve each name as 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 in terms of this section.

(Sub-s. substituted by s. 7(a) of Act 3 of 2011)

- (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 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; or
- (Para. (a) amended by s. 7(b) of Act 3 of 2011)*
- (b) section 11(2)(d)-
 - (i) the Commission may refer the application and name reservation to the South African Human Rights Commission; and

(ii) the South African Human Rights Commission may apply to the Companies Tribunal for a determination and order in terms of section 160.

- (4) A name reservation continues for a period of six months from the date of the application, and may be extended by the Commission for good cause shown, on application by the person for whom the name is reserved together with the prescribed fee, for a period of 60 business days at a time.
- (5) A person for whom a name has been reserved in terms of subsection (2) may transfer that reservation to another person by filing a signed notice of the transfer together with the prescribed fee.
- (6) If the Commission reasonably believes that an applicant in terms of subsection (1), a person to whom a reserved name is to be transferred, or a person for whom a name is reserved, may be attempting to abuse the name reservation system for the purpose of selling access to names, or trading in or marketing names, the Commission may issue a notice to that person-
- (a) requiring the person to show cause why that name should be reserved or continue to be reserved, or why the reservation should be transferred;
 - (b) refusing to extend a name reservation upon its expiry;
 - (c) refusing to transfer a reserved name; or
 - (d) cancelling a name reservation.
- (7) If, as a result of a pattern of conduct by a person, or two or more persons who are related or inter-related, the Commission has reasonable grounds to believe that the person or persons have abused the name reservation system by-
- (a) selling access to names, or trading in or marketing reserved names; or
 - (b) repeatedly attempting to reserve names for the purpose of selling access to names, or trading in or marketing reserved names,

the Commission may apply to a court for an order prohibiting the person or persons from applying to reserve any names in terms of this section for a period that the court considers just and reasonable in the circumstances.

- (8) In considering whether a person has abused, or may be attempting to abuse, the name reservation system as contemplated in subsection (6) or (7), the Commission, Tribunal or a court may consider any relevant conduct by that person or any related or inter-related person, including-

(Words preceding section 12(8)(a) substituted by section 7(d) of Act 3 of 2011)

- (a) the reservation of more than one name in a single application or a series of applications;
 - (b) a pattern of repetitious applications to reserve a particular name or a number of substantially similar names, or to extend the reservation of a particular name;
 - (c) a failure to show good cause for a reservation period to be extended; or
 - (d) a pattern of unusually frequent transfers of reserved names without apparent legitimate cause having regard to the nature of the person's profession or business.
- (9) Any person may on application on the prescribed form and on payment of the prescribed fee apply to the Commission to-
- (a) register any name as a defensive name for a period of two years; or
 - (b) renew, for a period of two years, the registration of a name as a defensive name,
- in respect of which he or she has furnished proof, to the satisfaction of the Commission, that he or she has a direct and material interest.
- (10) The registration of a defensive name may be transferred to another person by notice in the prescribed manner and form and upon payment of the prescribed fee.

160. Disputes concerning reservation or registration of company names

- (1) 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
- (Sub-s. (1) substituted by s. 99(a) of Act 3 of 2011)*
- (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), if the applicant received such a notice; 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
(Para. (a) substituted by s. 99(b) of Act 3 of 2011)

- (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 name that had been contested as the name of a 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
(Sub-para (i) substituted by s. 99(c) of Act 3 of 2011)
 - (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 a 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) or 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 a court to review the notice or decision.

COMPANIES REGULATIONS

142. Applications to the Tribunal in respect of matters other than complaints

- (1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer--
 - a. an Application in Form CTR 142; and
 - b. a supporting affidavit setting out the facts on which the application is based.
- (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.
- (3) An application in terms of this regulation must--
 - a. indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and
 - b. depending on the context -
 - (i) set out the Commission's decision that is being appealed or reviewed;
 - (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;
 - (iii) set out the regulation in respect of which the applicant seeks condonation; or
 - c. indicate the order sought; and
 - d. state the name and address of each person in respect of whom an order is sought.

153. Default orders

- (1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.
- (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.
- (3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party.