

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT014Nov2016

In the matter between:

Growthpoint Properties Ltd

Applicant

and

Growth Point Development (Pty) Ltd

Respondent

Coram: Delport P.A.

Decision handed down on 12 April 2017

Decision

INTRODUCTION

- [1] The applicant applied for a default order that the first respondent be ordered to change its name because it does not comply with, *inter alia*, s 11(2)(a)(iii), s 11(2)(b)(iii) and s 11(2)(c)(i) of the Companies Act 71 of 2008 (“Companies Act” / “Act”).
- [2] The Companies Tribunal (“Tribunal”) ruled on 7 March 2017 that the applicant is required to submit supplemental affidavit/s to address the formal deficiencies as stated in said ruling within 15 business days of the date of that ruling (“original ruling”).
- [3] The supplemental affidavit by Likonelo Magagula was filed and addressed the authority of the company (applicant) as well as the issue of “good cause” in terms of s 160(2)(b) of the Companies Act.
- [4] This ruling will be in addition to that of 7 March 2017, and the facts therein will

not be repeated here.

- [5] It is accepted that the director and the financial manager of the applicant has, by way of board resolution as indicated by SA4 of the supplementary affidavit, authority to bring the application.
- [6] What is relevant is that “the institution of the proceedings and the prosecution thereof that must be authorised” (*Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624) and not whether the deponent to an affidavit filed in support of an application on behalf of a company is authorised to depose to the affidavit. The Tribunal queried the former, not the latter.
- [7] In respect of “good cause” the relevant section (160) was quoted in full in the initial ruling, and it is not intended to repeat it here. The arguments in the supplementary affidavit (para 10) as to the application the first part of s 160 (1), and therefore also as to the compliance with “good cause”, are irrelevant as the context, as well as *Comair Limited vs Kuhlula Training, Projects and Development Centre (Pty) Limited* CT007Sept2014 of 27 February 2015 would indicate.
- [8] This is clearly not a case contemplated in s 160(1) about “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,...*”, in respect of which the CIPC is obliged to send a notice.
- [9] The founding affidavit is confusing and not correct in respect of, *inter alia*, the relief sought. Paragraph 25 of said affidavit states that the name of the respondent “offends against section 11(2)(a)(iii), (b)(iii) and (c)(i)...”/
- [10] Section 11(2)(a) cannot be applicable as the name of the respondent is clearly not the same as that of the applicant.
- [11] However, to further prolong the process by pointing out glaring deficiencies

and mistakes will only prejudice the applicant and increase costs.

- [12] The applicant filed an application CTR142, together with a supporting affidavit by one Roland Krabbenhoft with the Tribunal on 10 November 2016. The filing date at the Tribunal is indicated as 16 November 2016. On 23 November 2016 a copy of this application was served on the respondent's registered address at 328 Victoria Road, Pietermaritzburg, Kwa-Zulu Natal, 3201, which service took place within five business days after 16 November 2016 and in terms of the Uniform Rules.
- [13] I will accept that the complaint is, as far as s 11 of the Companies Act is concerned, that:
- "(2) The name of a company must:
- ...
- (b) (iii) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless 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) (i) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company is part of, or associated with, any other person or entity;"
- [14] No response was received by the respondent within 20 business days as required by regulation 143 and the applicant applies for a default order in terms of regulation 153, as per CTR 145.
- [15] The applicant has extensive rights in respect of the word "Growthpoint" in respect of the Trade Marks Act 1993, as is evidenced by the various trade marks registered under the different classes.
- [16] The respondent's name is not exactly the same as that of the applicant's

“Growthpoint” and it also includes the word Development.

[17] “[C]onfusingly similar” as in s 11(2)(b) requires not only that “the marks be compared side by side but consideration must be given to whether the average customer in the market place would probably be deceived or confused by their similarity”: *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others supra* para 6, following *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[18] The question is therefore whether the names are alike in a manner that will confuse the reasonable person, being the “ordinary reasonable careful man, ie not the very careful man nor the very careless man” (*Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E); *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA); *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C); *Adidas AG & another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013)) or “an assessment of the impact which the defendant’s mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution.”: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[19] “The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question.”: *Century City Apartments Property Services CC and Another v Century City Property Owners Association* [2010] 2 All SA 1 (SCA) para 13. This decision whether there is a reasonable likelihood of deception or confusion amounts to a value judgment: *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA) para 10.

[20] The words “Growthpoint” and “Growth point” are ordinary words and it would therefore be more likely to be confusing if compared to words that are unique

or a combination of letters that are not a recognized word. The addition of “Development” or “Developement”, which may be purely descriptive and again an ordinary word will not, in my opinion, lessen the likelihood of confusion.

[21] It is therefore found that the name “Growth point Developement” is confusingly similar with the use of “Growthpoint” in various combinations in trade mark registrations and therefore does not comply with s 11(2)(b) of the Companies Act.

[22] On the basis of the *dictum* in *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA), I need not separately decide on the possible contravention of s 11(2)(c) of the Companies Act.

FINDING and ORDER

[23] The respondent’s name does not comply with s 11(2)(b) of the Companies Act.

23.1 The respondent is directed in terms of s 160(3)(b)(ii), to choose a name which does not consist of, or incorporate, “Growth point”;

23.2 The respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name as per 23.1 above.

Prof P.A. Delpont

MEMBER OF THE COMPANIES TRIBUNAL