

COMPANIES TRIBUNAL.

REPUBLIC OF SOUTH AFRICA.

CASE NUMBER: CTO28OCT2018

In the matter between:

GROWTHPOINT Properties Limited

Applicant

(Registration No. M1987/004988/06)

and

COMMISSIONER OF THE COMPANIES

First Respondent

AND INTELLECTUAL PROPERTY COMMISSION

GROWTH POINT ENGINEERING

Second Respondent

CORPORATION (PTY) LTD

(Registration No. 2004/023837/07)

DECISION

Introduction

1. On the strength of Section 160(1) and 160(2)(b) of the Companies Act 71 of 2008(the Act) the applicant, GROWTHPOINT Properties Ltd is claiming a right to challenge the continued registration and/or use of the second

respondent's name, GROWTH POINT Engineering Corporation (Pty)Ltd and is seeking the following relief in accordance with Section 160(3) of the Act:

- 1.1. A determination that the second respondent's registered company name, GROWTH POINT ENGINEERING CORPORATION offends against the provisions of Section 11(2) of the Act;
 - 1.2. An order directing the second respondent to change its name to a name which is not the same or confusingly similar to that of the applicant's name or trade mark; and
 - 1.3. An order directing first respondent, Commissioner of the Companies and Intellectual Property Commission (the Commissioner) to change the second respondent's company name by replacing it with its registration number in the event that the second respondent fails to comply with the order requiring its change of name.
2. The application is unopposed and is properly before me for adjudication.

Parties

3. The applicant is GROWTHPOINT PROPERTIES LTD, a company registered in terms of the company laws of South Africa with its registered business address at The Place, 1 Sandton Drive, Sandton(GROWTHPOINT PROPERTIES). The applicant is listed on the Johannesburg Stock Exchange and it has business interests both in and outside South Africa.
4. The first respondent is the Commissioner of the Companies and Intellectual Property Commission (the Commissioner), established in terms of Section 185 of the Act. The Commissioner is responsible for all matters pertaining to

the functions of the Companies and Intellectual Property Commission(the CIPC).

5. The second respondent is GROWTH POINT ENGINEERING CORPORATION PTY(LTD), a company registered in terms of the company laws of South Africa with its registered business address at 403 Lougardia Building, Office Suit 105 – A1, Hendrick Verwoerd and Embankment Street, Centurion(GROWTH POINT ENGINEERING).
6. In this application, I refer to the Commissioner and the CIPC interchangeably as the same person.

The statutory basis for this application

7. The main statutory provisions on which the applicant has anchored this application are the provisions of Section 11, Section 12 and section 160 of the Act.
8. The cause of application is that the registration and/or use of the company name GROWTH POINT ENGINEERING does not comply with the requirements of Section 11(2)(9)(i), Section 11(2)(a)(ii), Section 11(2)(c)(i) of the Act which provide against unauthorised registration of:
 - 8.1. a name which is the same as the name of another company - Section 11(2)(a)(i);
 - 8.2. a name which is the same as a business name in terms of the Business Names Act 27 of 1960 – Section 11(2)(a)(ii);
 - 8.3. a name which is the same as a well-known mark belonging to another person, a registered trade mark belonging to another person, or a

- mark in respect of which an application has been filed in the Republic of South Africa for registration as a trade mark.– Section 11(2)(a)(iii);
- 8.4. a name which is confusingly similar to a name, trade mark, word or expression as contemplated by the Act. - Section 11(2)(b)(i); and
 - 8.5. a name which 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.- Section 11(2)(c).
9. The applicant also claims that second respondent's contested name was registered because the first respondent failed to notify the applicant about the reservation of the second respondent's name when he, ought to have issued the notice in terms of Section 12(3) of the Act
 10. The applicant basis its entitlement to launch the present application on Section 160(1) read with Section 160(2)(b) of the Act.
 - 10.1. Section 160(1) entitles any person with an interest in the name of a company to apply to the Tribunal for a determination whether the name or the reservation or use of a company satisfies the requirements of the Act;
 - 10.2. Section 160(2)(b) entitles such an interested person to, on good cause shown, at any time after the date of the registration of the contested name apply to the tribunal for recourse.
 11. The applicant basis its claim for the relief sought, on Section 160(3)(1)(a) read with Section 160(3)(1)(b)(ii) of the Act.

- 11.1. Section 160(3)(a) requires the Tribunal to, having considered an application by an interested party, make a determination whether the company name whose registration is contested, satisfies the requirements of the Act; and
- 11.2. Section 160(3)(b)(ii) thereof empowers the Tribunal to make an administrative order directing the company whose registered name is successfully challenged, to change its name and substitute the contested name with a name that complies with the Act.

Facts

12. The facts of this case are simple, straight-forward and uncontested, as appears from what follows.
13. In support of this application, the applicant has placed the following evidence before the tribunal:
 - 13.1. Copy of a disclosure certificate showing full registered details of the applicant, according to this certificate, the applicant's name which is sought to be protected was registered on 12 October 1987. The certificate appears to have been issued by the CIPC;
 - 13.2. Copy of a disclosure certificate showing full registered details of the second respondent, according to this certificate, the second respondent's contested name was registered on 26 August 2004. The certificate appears to have been issued by the CIPC;
 - 13.3. Copies of certified extracts for the applicant's registered trade marks, according to the extracts, the applicant's trade marks were registered

in 2007. The extracts appear to have been issued by the Registrar of Trade Marks.

14. Section 221(1) of the Act provides that a statement, entry or record, or information, in or on any book or document is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered or recorded it unless it is proved that that person did not make, enter or record it. There is no evidence before me suggesting that the documents were neither issued by the CIPC nor the Registrar of Trade Marks. In the result, I am bound to accept contents of the aforesaid certificates and extracts as having been admitted.
15. Applicant's name, GROWTHPOINT Properties, was registered as a public company in October 1987 and is continuing to trade as such. Additionally, applicant is the owner of trade marks and registered trade marks that incorporate the word GROWTHPOINT, GROWTHPOINT PROPERTIES and variations thereof, such trade marks were registered in 2007 in accordance with the Intellectual Property rights laws of South Africa. Further, the applicant has pending applications in and outside South Africa for registration of further trade marks incorporating the word GROWTHPOINT, GROWTHPOINT PROPERTIES and its variations.
16. The applicant has been using its company name GROWTHPOINT PROPERTIES and its trade mark namely, GROWTHPOINT, in South Africa continuously and extensively since 1987 in relation to a variety of services which include real estate, property, finance and consultancy since registration of its company name and trade marks more than thirty years ago. Throughout

the years, GROWTHPOINT has expended considerable amounts of time and money on promoting commercialising its brand name. The applicant has no less than ten companies registered in the Republic of South Africa under the name "GROWTHPOINT". Such companies are involved in a range of services which include but are not limited to building managers, management services, security and healthcare property management.

17. The applicant's registered trade mark services include trading in advertising, insurance, assurance, and consultancy. As a result of the applicant's substantive and significant use of GROWTHPOINT trade marks and company names across the world particularly in South Africa, GROWTHPOINT has become a household brand in the real estate, property, finance, consultancy and other related industries. Based on these factors, applicant submits that GROWTHPOINT qualifies as a well-known trade mark as set out in the Trade Mark Act of 1993 and should thus be protected.

18. The second respondent's name GROWTH POINT ENGINEERING CORPORATION (Pty)(Ltd) was registered in the year 2004. The second respondent's principal business cannot be established from the CIPC registration documents attached to this application. However, it appears from the Lexis SACompany search extract attached to the application that the second respondent's principal business is Engineering Communication and Management Consulting.

19. The applicant's attorneys discovered the second respondent's registered name during a routine periodic ad hoc search in May 2018 and advised the applicant accordingly. The applicant initiated the process to object to the

registration in July 2018 when it sent a letter to the second respondent, registering its objection to continued registration and use of the name GROWTH POINT ENGINEERING and demanding that the second respondent voluntarily removes the words “GROWTH POINT” from its name.

20. Applicant states that the second respondent’s contested name was registered because the first respondent failed to notify the applicant about the reservation of the second respondent’s name when he, according to the applicant, ought to have issued the notice in terms of Section 12(3) of the Act

Issues to be considered by the Tribunal

21. Whether the applicant qualifies as an interested party as envisaged by the Act;
22. Whether the applicant has showed good cause for the merits of the application to be entertained; and
23. Whether on the merits, the applicant has made out a case for the relief sought.
24. I propose to first deal with the enquiry relating to good cause of good cause and if necessary, proceed to the remaining enquiries.

Good cause

25. It is settled that good cause involves three essential elements: the applicant must
- 25.1. (1) give a reasonable (and obviously acceptable) explanation for default to lodge the application earlier
- 25.2. (2) show that its application is made *bona fide*, and

- 25.3. (3) show that on the merits it has a *bona fide* case which, *prima facie*, carries some prospect of success.
26. It is already on record that
- 26.1. the applicant's name GROWTHPOINT PROPERTIES was registered in the year 1987;
 - 26.2. the applicant's mark GROWTHPOINT has been used by the applicant continuously from 1987 to date;
 - 26.3. the second respondent's name GROWTH POINT ENGINEERING was registered in the year 2004;
 - 26.4. the applicant's trade marks GROWTHPOINT were registered in the year 2007; and
 - 26.5. at the time of launching this application, the applicant had pending applications in and outside South Africa for registration of further trade marks incorporating the word GROWTHPOINT.
27. It is thus clear from the above information that the name of the applicant, the name of the second respondent, the unregistered marks of the applicant as well as the registered marks of the applicant were registered in terms of the Companies Act 61 of 1973(the previous Act), while the applicant's pending trade mark registrations fall to be considered in terms of the current Act.
28. The Companies Act 71of 2008 (the current Act) is the successor of The Companies Act 61 of 1973(the previous Act). The current Act repealed the previous Act with a provision for transitional arrangements..
29. In order to establish whether the applicant has showed good cause for the application in as required by Section 160(3)((2)(b) of the current Act, I need to

traverse the provisions of the previous Act, which correspond with the provisions of the current Act regarding names disputes on grounds of non-compliance with the current Act and consideration that the name was undesirable in terms of the previous Act. Having done that, I will consider relevant provisions of Transitional Arrangements set out in Schedule 5 of the current Act. I do so because Section 224(3) of the current Act provides that the repeal of the previous Act does not affect the transitional arrangements which are set out in the current Act.

30. Relevant provisions pertaining to non-compliance with the current Act are already on record, hence, unless necessary, I will only record relevant provisions of the previous Act while making reference to the corresponding provisions of the current Act.

31. Section 12 and Section 14 of the current Act correspond with Section 41, Section 42 and Section 43 of the previous Act in that:

31.1. Section 12 read with Section 14 of the current Act:

31.1.1. require the CIPC to, upon written application, reserve and/or

register a company name provided that the name complies with the requirements of the Act;

31.1.2. empower the CIPC to, after reserving a name that it considers to

be contestable on grounds of non-compliance with the Act, require applicant for registration of the contestable name to give written notice of the name reservation to persons identified by the CIPC as being likely to have an interest in the contestable name

- 31.2. Section 41, Section 42 and Section 43 of the previous Act required the Registrar of companies to:
- 31.2.1. on written application, reserve and/or register a company name unless if in the opinion of the Registrar the name was undesirable;
and
 - 31.2.2. upon registration of a company name, give notice of such registration in the Government Gazette.
32. Section 45 of the 1973 Act made provision for relief in the event that the registered name was, in the opinion of the Registrar considered to be undesirable or the name was considered by an interested party to be undesirable.
33. Section 160 of the current Act corresponds with Section 45 of the previous Act in that they avail a remedy in respect of issues pertaining to reservation or registration of names which do not comply with the requirements of the Act or are in the opinion of the Registrar or any interested party undesirable or are in the opinion of the Registrar deceptively misleading on the nature of activities undertaken by the company.
34. For completeness, I record the provisions of section 45 of the previous Act to the extent necessary:
- 34.1. Section 45(1) provides that If *within a period of one year after the registration* of any memorandum, or a name of a company it appears that the name contained in the memorandum is *in the opinion of the Registrar undesirable*, he shall within such period order the company concerned to change the name concerned(my emphasis);

- 34.2. Section 45(2) provides that if *within a period of one year after the registration* of any memorandum, or name of a company *any person lodges an objection* in writing with the Registrar against the name contained in the memorandum, on the grounds that such name is calculated to cause damage to the objector or is undesirable, the Registrar may, if he is satisfied that the objection is sound, order the company concerned to change the said name(my emphasis;
- 34.3. Section 45(3) provides that if, *at any time, the Registrar is of the opinion* that the name of a company, or the translated name or shortened form of a name or translated name of a company, gives so misleading an indication of the nature of its activities as to be calculated to deceive the public, he may order the company concerned to change its name or translated name, as the case may be(my emphasis).
35. Section 48. of the 1973 Act provides that any company or person aggrieved by any decision or order of the Registrar under section 41, 42, 43, 44 or 45 may, *within one month after the date of such decision* or order, apply to the Court for relief, and the Court shall have power to consider the merits of any such matter, to receive further evidence and to make any order it deems fit.
36. It is clear from the above that the previous Act provided, according to my view, adequately for protection of any proprietor of any name appearing or established to be undesirable.

37. When considering this application, I am mindful of the fact that the previous Act required the Registrar to publish notice of registration of company names in the Government Gazette.
38. The applicant was entitled to exercise its right of contesting registration of the name in terms of the following provisions of the previous Act:
- 38.1. Section 45(2) by lodging a written objection against continued registration of the contested name within a period of one year from date of registration of the contested name. Such period lapsed on 25 August 2005.
- 38.2. Section 48. of the previous Act if the applicant had unsuccessfully lodged the objection with the Registrar and the applicant was not satisfied with the Registrar's decision, the applicant ought to have applied to court for a relief, within one month after the Registrar's decision.
39. For unknown reasons and in the face of transitional arrangements set out in the Transitional arrangements, the applicant has decided to begin the chapter of its objection at May 2018 and ignore all the statutory provisions that were available in relation to the name dispute issues before 11 May 2018. Also, the applicant seems to be ignoring the fact that in the commercial world, a company name is both an identity and an asset of the company.
40. Turning to the Transitional Arrangements, I refer to Item 2 thereof which provides that as of the general effective date, every pre-existing company that was, immediately before that date incorporated or registered in terms of the Companies Act on 1973 continues to exist as a company with the same

name and registration number previously assigned to it. It is my understanding that the pre-existing company also continues to enjoy security of the use and continued registration of its name especially considering that in this case, the periods stipulated for objection to the Registrar and the Courts respectively had long expired when the application was launched.

41. In light of the above, I find it unnecessary to conduct the second enquiry being whether the applicant qualifies as an interested party in terms of Section 160(1) of the current Act and the third enquiry which is whether there is merit in the applicant's application.

Findings regarding good cause and reasons

Notwithstanding the fact that the application is unopposed, I am enjoined to consider the total sum of the facts, the law, fairness and justice for my decision.

42. The Companies name disputes fell to be adjudicated in terms of the previous Act because:

- 42.1. The contested name was registered in 2004;
- 42.2. The Registrar was required to give public notice of registration of the name in the Government Gazette;
- 42.3. The applicant was entitled to file an objection of the name registration with the registrar by 25 August 2005;
- 42.4. In the event the objection was lodged and the Registrar decided to overrule the objection, the applicant was entitled to launch a court application within one month of the Registrar's ruling;
- 42.5. The applicant has failed to exercise its right of objection in terms of section 45 and 48 of the previous Act;

- 42.6. The previous Act was only repealed in May 2011;
 - 42.7. The current Act only commenced in May 2011;
 - 42.8. The Transitional arrangement preserve the rights of existing companies as at May 2011 as much as possible; and
43. The applicant basis its entitlement to adjudication of the application on the merits on:
- 43.1. A claim that the Commissioner's failure to cause applicant to be notified of the reservation of the contested name has resulted in the name at issue being registered. This claim is illogical regard being had to the registration date of the second respondent's name as against the date on which the power of the Commissioner to direct that notice took effect, such date was in 2011;and
 - 43.2. A claim that the second respondent's name offends against the provisions of Section 11 of the current Act. On the same reasons as above, this claim is illogical, the applicant ought to have timeously challenged the registration on the strength of Section 45(2) and/or Section 48 of the previous Act.
44. Other considerations for my decision are that:
- 44.1. The real object of the mechanisms incorporated in the Acts regarding expedient resolution of the names contestations is to bring certainty to the companies name owners and/or regarding their company names sooner; One of the essential reasons for registration of companies is to safeguard the security of company name and enjoy protections that are facilitated by registration of the names;

44.2. It is inconceivable that the applicant did not know the fact that the second respondent's name was long registered before commencement of the current Act and further that the issue raised by the applicant ought to have been attended long ago in terms of Section 45 and 46. I say so because it is the applicant who has attached the respective disclosure certificates which contain amongst others, the dates of registering the respective companies.

Conclusion

45. The applicant has failed to show good cause for the application to be considered on the merits;
46. Entertainement of the application must end here because the applicant has shied away from making out a case to show cause for failing to challenge the registration from as early as in October 2005. In the result, the applications falls to be dismissed.

Order

Accordingly the following is ordered;

1. The application is dismissed;
2. This decision must be served on all the cited parties

Signed on this the 21st day of August 2019

Ms M Ramagaga
Member of the Tribunal