

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT020MAY2015

In the matter between

MEV ENERGY SYSTEMS (PTY) LTD

APPLICANT

AND

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION RESPONDENT

Presiding Member of the Tribunal: Kasturi Moodaliyar

Date of Decision: 28 September 2015

DECISION (Reasons and Order)

INTRODUCTION

[1] This application is a name reservation dispute where the Applicant requests that the Tribunal vary Notice COR 9.5 issued by the Companies and Intellectual Property Commission ("CIPC) in terms of section 11(2)(b)(i) and 11(2)(b)(ii) of the Companies Act 71 of 2008 to convert its name from MEV Energy System (Pty) Ltd to PLC System South Africa (Pty) Ltd.

BACKGROUND

[2] The Applicant is MEV ENERGY SYSTEM (PTY) LTD ("MEV"), a company incorporated in terms of the Act with registration number 2012/179762/07.

[3] The Applicant's shareholders are PLC System S.r.l (an Italian company holding a 65% majority share), Mr Masilo Morris Ramaphakela and the MEV Energy System Empowerment Trust.

ISSUES

- [4] On 26 April 2015 the Applicant has applied to the CIPC for the reservation of the name “PLC System South Africa (Pty) Ltd.
- [5] The reservation of the name was refused by the CIPC on 20 April 2015 on the basis that a comparative name exists. A Notice COR 9.5 was issued in this regard. No further reasoning was furnished by the CIPC.
- [6] The Applicant, through an affidavit provided by Mr Masilo Morris Ramaphakela, state that it requested the name change to “PLC System South Africa (Pty) Ltd” because in February 2003 its holding company, PLC System S.r.l, acquired a majority stake in MEV.
- [7] Mr Ramaphakela states that he and some members of the Applicant had previously run a close corporation called MEV Electrical Contractors (Gauteng) CC which was subsequently placed in liquidation. He does not want any negative perception from that company following them to the new MEV company.
- [8] With its new majority shareholder in tow, the Applicant now wishes to rebrand itself to reflect the name of the holding company.
- [9] The applicant now applies to the Companies Tribunal on Form CTR 142 lodged on 19 May 2015 to “approve” the name “PLC System South Africa (Pty) Ltd”.

APPLICABLE LAW

- [10] Section 12 of the Companies Act reads as follows:

“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.

(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 determination and order in terms of S160; or...

Section 11 of the Companies Act provides, as far as it is relevant, provides as follows:

“Criteria for names of companies.— (1) ...

(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), 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;

(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...

(c) Not falsely imply or suggest to be such as would reasonably mislead a person to believe incorrectly, that the company or close corporation:

(i) is part of or associated with any other person or entity.”

[11] Therefore, the Act provides that the CIPC *must* reserve the names applied for, except for names that are the same as existing names (section 12 (2) (a)).

[12] In respect of names as in section 11 (2) (b) and (c), the CIPC however has two alternatives.

[13] In the first instance the CIPC can refuse to reserve the name if it does not satisfy any of the requirements of s 11 (regulation 9 (3) (c) (i) of the Companies Regulations, 2011 in terms of section 223 of the Companies Act (“regulations”).

[14] In the second instance it *must* register the name but if there are reasonable grounds for considering that the name may be inconsistent with the requirements of section 11 (2) (b) or (c), it *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 that person can apply to the Tribunal in terms of section 160 to determine if the name satisfies the requirements of the Act. The name is therefore reserved, but the Tribunal can give an order to cancel the reservation in terms of

section 160 (3) (b) (i) (cc).

[15] The powers of the Companies Tribunal in respect of company names and, especially, contested name reservations, are provided for in section 160, which reads as follows:

"Section 160.

(1) A person to whom a notice is delivered in terms of section 12(3) or section 14(3) 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 satisfies the requirements of section 11.

(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 satisfies the requirements of section 11; and

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name for the applicant in terms of section 12;

(bb) register the contested name, or amended name as the name of company; or

(cc) cancel a reservation granted in terms of section 12, if the reserved name has not been used by the person entitled to it; 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."

[16] The persons who can apply are therefore the person notified by the applicant in terms of section 12 (3) (a) (i) or any interested person, who can be the applicant or any person who has an interest in the name not being reserved, other than the person notified as above.

PROCEDURE

[17] If an order is sought against the CIPC for registration of the name reservation, a copy of the application must be served on the CIPC (regulation 142 (2) and (3)).

[18] The Tribunal is satisfied with proof service upon the CIPC.

[19] The Respondent was given the opportunity to respond to the application and failed to do so.

[20] The Applicant therefore applies on FORM CTR 142 for a default order in terms of regulation 145.

EVALUATION AND FINDINGS

[21] The name reservation can only be cancelled by the CIPC. The CIPC has therefore been correctly cited as a respondent in this case.

[22] In terms of section 12(2) and (3) the CIPC must reserve the name and it can require the Applicant to notify the interest person as in section 12(3).

[23] The CIPC can also, in terms of regulation 9(3)(c) refuse to register the reserved name.

[24] In this case the only reason the CIPC rejected the name reservation is because there was a comparable name in existence. The CIPC does not give any indication what that comparable name is. On form COR 9.5 the CIPC informed the Applicant that none of the names “can be approved due to the fact that it is confusingly similar to the name/s already registered within the meaning of our name register in particular section 11(2)(b) of the Companies Act. A list of such “confusingly

similar” or contestable names should have been furnished to the Applicant.

[25] The CIPC indicates that some comparable names to the Applicant’s proposed “PLC SYSTEM SOUTH AFRICA” on their database are:

ENGEN-P-L-TECHNOLOGY DATA SYSTEMS
DPL SYSTEMS
JMPL SYSTEMS AND CONSULTING SERVICES
PLC CONTROL SYSTEMS
PLC C SYSTEMS ENGINEERING
PLC AIR SYSTEMS

[26] This reasoning provided by the CIPC are inadequate. These may appear to be similar names but it is not exactly the same name.

[27] The Respondent’s lack of participation in these proceedings cannot be due to the lack of service or knowledge of the process and that this application is unopposed.

[28] The Tribunal has considered the Applicant’s reason for requesting the name change to be a valid one.

[29] Section 12(2)(a) of the Act provides that the CIPC must reserve the names applied for, except the names that are the same as an existing name.

[30] If the CIPC has accepted the reservation of a name that it considers to be contestable on a ground contemplated by section 12(3), the CIPC when issuing form COR 9.4 in response to that application, must also issue form COR 9.6 to the applicant which is a Notice of a Potentially Contested Name.

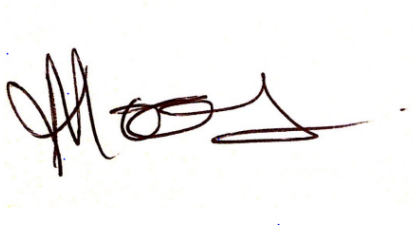
[31] Any company with a similar name will then have the opportunity within three months of the COR forms being issue to contest the name.

ORDER

[32] I proceed to make the following order:

[31.1] The reasons provided by the CIPC to the Applicant for turning down the name reservation in form COR 9.5 are inadquate. The names given are potentially contestable names and not the exact same name.

[31.3] The CIPC ordered to comply with section 12(2) and regulation 9 (4)(a) and issue a COR 9.4 together with a COR 9.6.

A handwritten signature in dark ink, appearing to read 'Kasturi Moodaliyar', is written over a faint, light-colored rectangular stamp or watermark.

KASTURI MOODALIYAR
COMPANIES TRIBUNAL: MEMBER