IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT001Aug2014

Ex parte application:

Johan Oelofse Applicant

ID [...]

Coram: Delport P.A.

Decision handed down on 11 November 2014

Decision

INTRODUCTION

[1] The applicant "applied for" certain names. Apparently the application was for the reservation of certain names in terms of section 12 of the Companies Act 71 of 2008 ("Companies Act"/ "Act").

[2] The reservation of the names was refused by the Companies and Intellectual Property Commission ("CIPC").

[3] An application is now brought to the Companies Tribunal as a result of the refusal by the CIPC to reserve the particular name.

[4] The applications in respect of the names are virtually identical, but to exclude possible confusion, will be treated as separate applications.

BACKGROUND

[5] The applicant, Johan Oelofse ID 6906285017085 is a natural person.

[6] He applied for the reservation of the name "Integrated Healthprof Solutions".

[7] In his affidavit dated 17 April 2014 he gives certain reasons for the reservation, but those are not important as the Companies Act ("the Act") does not require any motivation.

[8] The reservation of the name was refused by the CIPC on 27 March 2014 due to the fact that a comparative name exists.

ISSUES

[9] The applicant now applies to the Companies Tribunal on Form CTR 142 lodged on 9 May 2014 to "approve" the name "Integrated Healthprof Solutions".

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 a determination and order in terms of section 160; or..."

[11] 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."

[12] 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)).

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

[14] 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")).

[15] 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).

[16] 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 (the emphasis is mine):

"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.

(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—

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name..."

[17] 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.

EVALUATION and FINDING

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

[19] It can also, in terms of regulation 9 (3) (c) outright refuse to register the reserved name.

[20] The interested person referred to in section 12 (3) or any other interested person may then apply to the Companies Tribunal, where after the Tribunal can make an administrative order directing the CIPC to reserve the contested name.

[21] The Tribunal, however, cannot approve the name as requested in the CTR 142.

[22] If an order is sought against the CIPC for registration of the name reservation, the CIPC must be named

as a respondent (regulation 142 (1)) and a copy of the application must be served on the CIPC (regulation 142 (2) and (3)).

[23] Copies of the application were apparently served only on the holders of the names that the CIPC identified as those that would fall within section 11 (2) (b) and (c), but this is of no consequence as the applicant, as opposed to the situation in terms of section 12 (3) if the CIPC requires it, is not required to do so.

[24] In any case, the relief sought is not against those persons who are the holders of the relevant names.

ORDER

[25] As a result the application is refused on the grounds, *inter alia*, that the CIPC was not duly served.

Signed: P.A. Delport

MEMBER OF THE COMPANIES TRIBUNAL