



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT012NOV2016

In the matter between:

NICO VAN NIEKERK

APPLICANT

And

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

RESPONDENT

Presiding Member of the Tribunal: Kasturi Moodaliyar

Date of Decision: 3 January 2017

DECISION (Reasons and Order)

INTRODUCTION

[1] This is an application in terms of section 160 of the Companies Act 71 of 2008 (“the Act) read together with regulation 13 of the Companies Regulations of 2011 (the Regulations). The Applicant is seeking an order that the Tribunal set aside the decision of the Respondent’s refusal to reserve either of its proposed names “**Van Niekerk**”.

[2] The Applicant is Nico Van Niekerk, who wishes to register the name “Van Niekerk Attorneys Incorporated”, as a company registered under

the Company Laws of South Africa, with its registered address at No 3 Rhodes Avenue, Howick, 3290.

- [3] The Respondent is the Companies and Intellectual Property Commission of South Africa (CIPC) appointed in terms of section 189 of the Companies Act No 71 of 2008 ("the Act"). The Respondent is cited in its official capacity as the entity responsible for the function of the Commission of Companies, including but not limited to, the reservation of company names and the registration of companies in terms of the Act.

ISSUE

- [4] The Applicant sought to reserve the company name "**Van Niekerk**" (and any variations thereof as reflected on the COR 9.1 application.
- [5] The Respondent advised the Applicant on 9 November 2016 on the prescribed COR 9.5 form that a confusingly similar name exists and that the name reservation was refused in the following terms:

"We regret to inform you that no name has been approved for your use for the following reason(s):

Kindly insert the distinguishing element that will sufficiently be capable of differentiating your name from names already registered within the meaning of our name register in terms of Section 11(2)."

- [6] An email dated 5 December 2016 from Mr Emanuel Manyelo of the CIPC to Mr Van Niekerk sought to expand the explanation to the above reason by stating"

"Unfortunately in view of the confusingly similar name/s identified, your proposed name cannot be allowed. ... The approval of your proposed name as it now reads is contrary to section 11(2)(a) of the Companies Act 71 of 2008".

- [7] This is an application brought in terms of section 160 of the Act, read with sections 11 and 12 of the Act and read further with regulations 13 and 142 of the Act.

APPLICABLE LEGISLATION

- [8] The regulation of disputes concerning the reservation or registration of company names and the jurisdiction of the Tribunal is set out in Section 160 of the Act:

"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."

[9] The reservation of company names by the Respondent is set out in Section 12 of the Act:

“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 (my emphasis) 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.”*

[10] Section 11(2) of the Act primarily sets out the criteria for names that may be reserved by an Applicant and the applicable sections reads as follows:

“Section 11(2): The name of the company must:

- a) not be the same as:*
 - (i) the name of another company, domesticated company, registered external company, CC 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, 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 trademark belonging to a person other than the company, or mark in respect of which an application has been filed in the Republic for registration as a trademark or a well-known trademark as contemplated in section 35 of the Trade Marks Act, 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, except to the extent permitted by or in terms of that Act;*
- b) not be confusingly similar to a name, trademark, 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 trademark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trademark, 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;

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;”

EVALUATION

[11] The Respondent refused the name “**Van Niekerk**” are be confusingly similar to other companies which have names with the suffix “**Van Niekerk**”.

[12] The Applicant, through an affidavit filed by Nico Van Niekerk, states that the name “Van Niekerk Attorneys Incorporated” do not have the same meaning, and that these words are sufficiently distinguishable to justify the name reservation. It is uncertain from the filing if this name was also provided to the CIPC.

[13] The Respondent refused the Applicant’s name reservation on the basis of section 11(2) without stipulating which particular subsection it is referring to. Section 11(2) (a) and section 11(2)(b) have different applications and consequences in respect of this order.

[14] In terms of section 11(2) (b) the Respondent will be justified if it refuses to reserve a name that is the same as another company. However the Respondent’s reasons for refusing to reserve the

Applicant's name is that they are of the view that they are confusingly similar to other companies names. Section 11(2)(b) has not been listed in Section 12(2) as a ground upon which the CIPC can refuse to reserve a name applied for but only refers to section 11(2)(a). If the legislature intended to include the one that is confusingly similar, it would have done so.

[15] The provisions of Section 12(2) are peremptory and do not give the Respondent a discretion to apply additional requirements or qualifications to the applications for the reservation of company names.

[16] Section 12(3) importantly states that: “

“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.”

[17] According to the Concise Oxford Dictionary, “similar” is defined as of the same in kind of appearance, character, or quantity, without being identical, whilst “same” is defined as identical or unchanged. In other words, the mere fact that the names are similar, does not mean

that they are identical, they can still be differentiated without causing confusion.

[18] In my view, although the Respondent has not made it clear the subsection it is relying upon under section 11(2) in the COR 9.5 form, Mr Manyelo's email does provide clarity and confirms that Section 11(2)(a) is the section relied upon, which in my view, the correct subsection in this particular circumstances. "Van Niekerk" is perhaps confusingly similar to the existing company names already registered.

[19] The COR 9.5 also directs the Applicant to submit a name that is not conflicting with the existing names, and it gives the Applicant an opportunity to submit a name with the distinguishing element. Perhaps the suffix "Attorneys Incorporated" will be that distinguishing element that the CIPC would consider. As stated earlier, it is uncertain if that particular suffix was submitted in the application for name reservation. The Applicant is welcome to do so under the CIPC COR 9.5 ruling.

ORDER

[20] For reasons above, the order prayed for by the Applicant is refused and the decision of the CIPC is upheld.



KASTURI MOODALIYAR
COMPANIES TRIBUNAL: MEMBER