



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA
("THE TRIBUNAL")**

CASE NUMBER: CT001DEC2015

In the matter of:

MAROPENG a'AFRIKA LEISURE (PTY) LTD

APPLICANT

and

**MAROPENG THEATRE (PTY) LTD
COMMISSIONER OF COMPANIES**

**FIRST RESPONDENT
SECOND RESPONDENT**

Coram: PJ Veldhuizen

Order delivered: 22 MARCH 2016

ORDER & REASONS

A. INTRODUCTION

1. THE PARTIES

- 1.1. The Applicant is **MAROPENG a'AFRIKA LEISURE (PTY) LTD** ("the Applicant"), a private company duly incorporated in terms of the laws of the Republic of South Africa.
- 1.2. The Applicant has its registered offices at R400 just off R563, Hekpoort, Rant en Dal, Krugersdorp, Gauteng, South Africa.
- 1.3. The First Respondent is **MAROPENG THEATRE (PTY) LTD**, ("the First Respondent") a private company duly incorporated in terms of the laws of the Republic of South Africa and having its registered address at 2647 Ebony Park, Kerribos Street, Midrand, Gauteng, South Africa.
- 1.4. The Second Respondent is the Commissioner of Companies appointed in terms of section 189 of the Companies Act No 71 of 2008 ("the Act"). The Second Respondent is cited in their official capacity as the entity responsible for the function of the Commission of Companies, including but not limited to, the registration of companies in terms of the Act.

B. THE APPLICATION

2. This is an application brought in terms of section 160(3)(b)(ii) of the Act, read with sections 11(2)(b)(iii) and 11(2)(c)(i) and read further with regulations 13 and 142 of the Act.

3. The Applicant objects to the name of the First Respondent, Maropeng Theatre (Pty) Ltd, on the basis:

3.1. of their earlier rights in the mark, “Maropeng”, and that the Applicant has not consented to the First Respondent’s use thereof;¹

3.2. that it falsely implies or suggests, or would reasonably mislead a person to incorrectly believe that, the First Respondent, is part of, or associated with the Applicant.²

4. The Applicant seeks an Order directing the First Respondent to change its name to a name that meets the requirements of the Act and does not conflict with the Applicant’s rights.³

C. THE LEGISLATION

5. 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:

(1) –

A person to whom a notice is delivered in terms of this Act with respect to an application for a 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

¹ Section 11(2)(b)(iii)

² Section 11(2)(c)(i)

³ Section 160(3)(b)(ii)

with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for the 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); 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, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and

(b) may make an administrative order directing –

(i) the Commission to –

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended the name that had been contested as the name of the company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; 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.

(4) –

within 20 business days after receiving a notice or decision issued by the Companies Tribunal in terms of this section, an incorporator of a company, a company, a person who received a notice in terms of section 12(3) or 14(3), an applicant under subsection (1) and any other person with an interest in the name or proposed name that is the subject of the application, as the case may be, may apply to court to review the notice or decision.

6. The restrictive criteria for the names that may be chosen by a company is set out in Section 11 (2) of the Act:

(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), or as a business name in terms of the Business Names Act, 1960, (Act 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 trademark belonging to a person other than the company, where mark in respect of which an application has been filed in the Republic for registration as a trademark or a well-known trademark is contemplated in section 35 of the Trade Marks Act, 1993 (Act 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 use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act 17 of 1941), except to the extent permitted by and were in terms of that Act;

(b) not to 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 the company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or 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, will 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 and in terms of the Merchandise Marks Act, 1941;

(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;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) it is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any –

*(aa) foreign state, head of state, head of government ,
government or the administration or any department of such a
government ordered ministration; or*

(bb) international organisation; and

*(d) not include any word, expression or symbol that, in isolation or in context
within the rest of the name, may reasonably be considered to constitute –*

(i) the propaganda for war;

(ii) incitement of imminent violence; or

*(iii) advocacy of hatred based on race, ethnicity, gender or religion, or
incitement to cause harm.*

D. POINTS FOR DETERMINATION AND EVALUATION OF THE EVIDENCE

7. Have the Tribunal's procedural requirements been met?

7.1. An application in terms of section 160(2)(b) has no deadline. Instead an Applicant is required to explain the "delay" on good cause shown.

7.2. This is a departure from the position under the previous Companies Act No 71 of 1973, which required objections to be lodged before the Registrar of Companies within one year and before the High Court within two years. Under that Act no extension was possible. It is suggested that unless the Companies Tribunal issues a directive to the contrary, which it has not to my understanding, it should be lenient to objectors in its interpretation of

what constitutes good cause shown where the objection to a company name is lodged within two years of the date of incorporation.⁴

7.3. According to the dictum of Innes CJ, “Mr Tindall says the court has never defined *good cause*. In the nature of things it is hardly possible, and certainly undesirable, for the court to attempt to do so. No general rule, which the wit of man could devise, would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether *good cause* has been shown”.⁵

7.4. The evidence before the Tribunal was that the Applicant became aware of the registration of the First Respondent in July 2014, through notification by its attorneys, of publication of the registration of the First Respondent in the South African Government Gazette dated 19 April 2013. The Applicant testified that they were concerned about the use of the name by the First Respondent as the “name appeared to be in conflict with its trade mark rights”. As a result the Applicant instructed its attorneys to address a letter of demand to the First Respondent.

7.5. The Sheriff of the High Court served the letter of demand on 23 September 2014 at the First Respondent’s registered address. The First Respondent’s

⁴ South African Law of Trade Marks, Pages 16-18, Para 16.5.3, [Issue 16]

Author: GC Webster BA LLB Patent Agent and Attorney of the High Court of South Africa; NS Page BA LLB Judge of the High Court of South Africa; CE Webster BSc (CompSci) LLB Trade Mark Practitioner and Attorney of the High Court of South Africa

⁵ *Cohen Bros v Samuels* 1906 TS 224

attorneys replied to this letter of demand in October of the same year and disputed the allegations.

7.6. The Applicant filed this Application with the Tribunal in November 2015 in the prescribed form with the necessary supporting documentation. On 8 December 2015 the Application was served on the First Respondent at the address of its attorneys Calvin Maile Attorneys. This service took place more than a year after the last correspondence was exchanged between the respective attorneys and there is no indication that Calvin Maile Attorneys still acted for the First Respondent at the time of service nor that it had ever consented to receive service on its behalf. In fact, the Return of Service while indicating an address of service does not even indicate the firm of attorneys on the return, at all.

7.7. The Applicant, testifies that it 'in good faith, took all reasonable steps to bring its concerns to the attention of the First Respondent. The Applicant has not delayed in bringing this application and submits there are good grounds for alleging that the First Respondent's name offends against the provision of section 11(2) of the Act."

8. While I am prepared to accept on the face of it and without deciding so, that the Applicant:

8.1. enjoys a prima facie right to relief under section 160(3)(b)(ii) the Act, read with sections 11(2)(b)(iii) and 11(2)(c)(i); and

8.2. based on the views of the authors above, may be able to persuade the Tribunal on the issue of leniency being shown on the time delay, bearing in mind the Applicant's alternative would be to apply to the High Court and this would have the effect of burdening a second state resource with similar facts which could be decided effectively by the Tribunal;

8.3. has not met the requirements for service of the Application nor has it evidenced that the First Respondent is aware of the proceedings.

E. DECISION

9. Accordingly the Application for a Default Order is postponed *sine die* and the Applicant is required to serve the Application on the First Respondent at its registered address, alternatively, file a further affidavit confirming the First Respondent's attorneys have agreed to accept service of the Application on behalf of the First Respondent.



PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN