

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

CASE NUMBER: CT024JUN2015

In the matter between:

JOANNE HORWITZ

APPLICANT

and

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

RESPONDENT

("THE COMMISSION")

Coram: PJ Veldhuizen

Order delivered 19 NOVEMBER 2015

ORDER

1. Introduction

1.1 This is an application brought in terms of section 160 of the Companies Act No 71 of 2008 ("the Act") where the Applicant applies to the Tribunal for a determination on whether the Notice, COR 9.5 – Ref 923079117, issued by the Respondent on 2 December 2014 should be set aside and the Respondent be directed to reserve the name Applicant had applied for.

1.2 The issues to be decided by the Tribunal are:

- 1.2.1 whether the Applicant has an interest in bringing this application;
- 1.2.2 whether the Applicant has satisfied the Tribunal's procedural requirements; and
- 1.2.3 if the issues in 1.2.1 and 1.2.2 are established in the Applicant's favour, whether the Tribunal shall consider the submissions made by the Applicant and any other interested person as to whether:
 - 1.2.3.1 the name reservation satisfies the requirements of the Act; and
 - 1.2.3.2 if the reservation satisfies the requirements of the Act whether the Respondent should be directed to reserve the name.

2. Background

- 2.1 The Applicant is Joanne Horwitz. The Applicant fails to indicate her physical address in the papers filed at the Tribunal.
- 2.2 The Applicant alleges she is the founder of a business which seeks to register as a company under the name "EZCARE".
- 2.3 The Respondent is the Companies and Intellectual Property Commission ("the Commission") established in terms of section 185 of the Act. The Commission is required to *inter alia* maintain a companies register¹ and perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions².
- 2.4 AFRIKA KRAFTS applied to the Commission on 1 December 2014 for the reservation of the company name, EZCARE. In addition, and presumably as a precautionary measure, AFRIKA KRAFTS applied for alternative variations of this company name. AFRIKA KRAFTS was

¹ Section 187(4)(a)(i)

² Section 187(4)(e)

advised by the Commission in terms of a COR 9.5 Notice dated 2 December 2014 that:

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

- 2.5 The Applicant does not indicate in her papers her connection to AFRIKA KRAFTS.
- 2.6 In addition, the Applicant has not complied with Regulation 142 (3) in that she, *inter alia* has not indicated the sections / regulations relied upon for the relief sought.
- 2.7 Furthermore, the Applicant has not indicated why this Application was not brought within three (3) months of the COR 9.5 Notice as required by Section 160(2)(a) nor has the Applicant applied for condonation in this regard.

3. Relief sought

The Applicant seeks the following administrative relief from the Tribunal:

- 3.1 An Order setting aside the COR 9.5 Notice; and
- 3.2 A Directive compelling the Commission to reserve the Applicant's chosen name.

4. Legislation relied upon

- 4.1 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 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.

4.2 The duties of the Commission are set out in Section 12 of the Act:

(2) – The Commission must reserve each name is 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 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 the 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.

- 4.3 The regulation of disputes concerning the reservation or registration of company names and the jurisdiction of the Tribunal is set 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 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.

4.4 Regulation 142(3) –

An Application in terms of this regulation must – (a) indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the Application is made; and...”

5. Issues

5.1 Interest in the application

5.1.1 Section 160 of the Act provides that any person with an interest in the name of a company may make application to the Tribunal in relation to the reservation of a company name.

5.1.2 The Applicant has not indicated an interest on the papers filed at the Tribunal.

5.2 Procedure complied with

5.2.1 Section 160 read with Regulation 142 requires the Applicant to make application to the Tribunal in the prescribed manner and form.

5.2.2 The Applicant has not complied with this requirement, in that she has (a) failed to indicate the section or regulation she relies on in the Application to justify the relief sought (b) failed to explain the delay in bringing this Application and (c) failed to apply for condonation in respect of (b).

5.3 Remainder of Issues

For the reasons set out in 5.1 and 5.2 the remainder of the issues shall not be considered by the Tribunal.

6. Decision

For the reasons above, the Tribunal is not satisfied that the Applicant is entitled to the relief sought and accordingly the following Order is made:

- 6.1 The Applicant is ordered to file a Condonation Application dealing with the issues of delay; and
- 6.2 The Applicant is ordered to file a supplementary affidavit dealing with her interest in the matter.
- 6.3 Should the Applicant fail to file the aforementioned Condonation Application and the Supplementary Affidavit within thirty (30) days hereof, this Application shall be dismissed.



PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN