

**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT009Oct2015**

**In the matter between:**

**NEDBANK LIMITED**

**APPLICANT**

**And**

**MYBIZSA PROPRIETARY LIMITED**

**RESPONDENT**

**Presiding Member of the Tribunal: Kasturi Moodaliyar**

**Date of Decision: 21 APRIL 2016**

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**DECISION (Reasons and Order)**

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**INTRODUCTION**

[1] This application is in terms of section 160 of the Companies Act 71 of 2008 (the “Act”). The Applicant requests an order directing the Respondent to change its name because it does not comply with section 11 of the Companies Act.

**BACKGROUND**

[2] The Applicant is NEDBANK LIMITED (“Nedbank”), (Reg No.1951/000009/06), a company incorporated in in accordance with the company laws of South Africa, with its registered and principle place of business at 135 Rivonia Road, Sandown, Sandton, Gauteng.

[3] The Respondent is MYBIZSA PROPRIETARY LIMITED (“MYBIZSA”), (Reg No. 2013/217754/07), a private company duly incorporated in terms of the Companies Act with is registered business address at 19714 Pupudu Street Section O, Mamelodi, Pretoria, Gauteng.

## ISSUES

- [4] The Applicant is the registered proprietor of the trademark “IT’S MY BIZ” and derivatives of this name and trademark and various other categories in the Republic of South Africa. The trademark registration/s is in terms of the Trade Marks Act No.194 of 1993 (“Trade Marks Act”).
- [5] It is averred by the Applicant that on or about May 2015, the Applicant became aware that the Respondent had registered its company name that contains the words “MYBIZSA”.
- [6] The Applicant filed an objection to the use of “MYBIZSA” in the name of the Respondent with the Companies Tribunal on 16 October 2015 on form CTR 142 as prescribed by regulation 142(1)(a), together with a supporting affidavit as required by regulation 142 (1)(b) by Simone Federicks, Senior Legal Advisor of the Applicant and Charné Le Roux an Attorney at Adams and Adams law firm, which firm was given power of attorney on 8 December 2010. There are no additional documents to show a special resolution for any other authority to depose an affidavit in this case.
- [7] The Applicant submits that the Respondents name MYBIZSA is confusingly similar to the trademarks of the Applicant being MY BIZ.
- [8] According to the Applicant “MY BIZ” and its other derivatives “BIZZ” “BIZ” have been in use in relation to its products and services since February 2010. The Trade mark “IT’S MY BIZ” has specifically been used as the name of a reality television show offered by the Applicant whereby entrepreneurs offer business and financial advice to small business owners.

[9] The Applicants argue that the trademarks “MY BIZ, BIZZ and BIZ” and the goodwill that they represent are assets of considerable commercial values and importance to the Applicant.

[10] Furthermore, it is asserted that the Registration of the Respondent’s name is contrary to sections 11(2)(b) and 11 (2)(c)(i) of the Act.

[11] The Applicant submits that it is clear that the Respondent’s name MYBIZSA is almost identical, and hence confusingly similar to the Applicant’s registered MY BIZ trademark in sight, sound and meaning.

[12] The Applicant requests the Companies Tribunal to make an order that the Respondent change its company name because the use of the Respondent’s name in commerce would constitute an infringement on the Applicant’s MY BIZ trademark.

## **APPLICABLE LAW**

[1] Section 11(2) of the Act is primarily about protection against infringement of a registered company name or trademark, 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;”*

[2] The Applicant seeks remedies in terms of 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."*

## **PROCEDURE**

- [3] A copy of the application must be served on the Respondent at its registered address within 5 days of filing it with the Companies Tribunal as required by regulation 142(2).
- [4] The Tribunal is not in receipt of a Sherriff's proof of return of service as required by Rule 4 (1)(a)(v) of the High Court Rules.
- [5] The Applicant has nonetheless applies on FORM CTR 145 for a default order in terms of regulation 153.
- [6] An affidavit filed by Ms Le Roux at Adams & Adams Attorneys informs us that the Attorneys sent the application to the Respondent via registered post on 16 October 2015, giving the Respondent till 16 November 2015 to respond to the Applicant's name objection.
- [7] We are further informed by Ms Le Roux that contact was made Sherriff of Wonderboom in Pretoria to ascertain whether it would be possible for this Sherriff to effect service on this address. The Sherriff informed the law firm that the address of the Respondent was incomplete and because the township of Mamelodi is large and expansive it will be impossible to find the location if the address is not specific.

[8] The Tribunal has not received any written confirmation from the Sheriff's office in this regard.

[9] We are further not aware of whether the Sherriff of Wonderboom, or a Sheriff of any other jurisdiction for that matter, was indeed instructed to issue service of the application upon the Respondent.

## **EVALUATION AND FINDINGS**

[10] The process as followed by the Applicant is not in accordance with the peremptory provisions of regulation 142.

[11] There is no evidence that the application was properly served upon Respondent's principle place of business, if at all. The registered mail is not proper service. This is especially of concern considering that the Sheriff of Wonderboom has indicated that the address given was incomplete.

[12] It is possible that Respondent's lack of participation in these proceedings is due to the lack of service or knowledge of the process and that this application is unopposed.

[13] I am not satisfied that the application was adequately served as per Regulation 153(2)(b) as there is no proof of service attached to the record, nor is there record of proof that a registered letter was served to the Respondent.

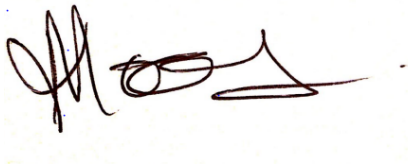
[14] The grounds upon which the default order is sought is also deficient as regulation 153 can only be applied if regulation 142 has been complied with.

[15] It is for these reasons I am unable make a finding on the name dispute as requested by the Applicant.

## **ORDER**

I proceed to make the following order;

- a) The Applicant's application is dismissed in terms of Section 160(3) and Regulation 153 of the Companies Act.
- b) Should the Applicant wish to pursue this dispute, the Applicant is directed to comply with Regulation 142(2) and Regulation 153(2)(b). Proof of service must be furnished to the Tribunal.
- c) If service is not possible, the Applicant must advertise this application in the Government Gazette and the local newspaper in the area of the Respondent's registered address. Proof thereof must be furnished to the Tribunal.



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**KASTURI MOODALIYAR**  
**COMPANIES TRIBUNAL: MEMBER**