Companies Tribunal
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Companies Tribunal Bulletin

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From the Editor's desk

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Dear Stakeholders

In this edition of the Bulletin, the Companies Tribunal reflects on the Company Name Disputes seminar held at the Industrial Development Corporation on the 16th February 2018. The objective of the seminar was to engage stakeholders on key issues relating to the adjudication of company name disputes. The seminar presented an opportunity for the Tribunal to engage Intellectual Property Law practitioners and raise awareness about the Tribunal's redress mechanism.

The Bulletin also includes a highlight of cases decided during this quarter and a look at Social and Ethics Committee.

We encourage stakeholders to make suggestions and contributions, such inputs must be sent to Messrs. Simukele Khoza and Dumisani Mthalane at the following email email addresses: SKhoza@companiestribunal.org.za and DMthalane@companiestribunal.org.za, contact us on 012 394 3071 and send email to Registry@companiestribunal.org.za

I hope to hear from you.

Editor: S Khoza
Manager Research

Social and Ethics

- By Curtis Mbhalati

The Social and Ethics Committee (SEC) is a governance committee and plays a vital role in relation to corporate governance. It is advisory and monitoring in nature. SEC provides a good way to protect stakeholder interests and to assist directors and shareholders of companies when protecting stakeholder interests. SEC ensures that companies do indeed monitor and report on whether the business produces social and ethical benefits to the economy, workplace, society, and natural environment. SEC reports contributes to sustainable reporting by business.

Section 72 of the Companies Act No 71 of 2008 (the Act) that deals with the SEC carries the heading: "Board committees". It thus seems that while the SEC is a statutory committee with specific legal duties of monitoring and reporting, it also assists the board in exercising its social and ethics governance responsibility.

Section 72 (4) of the Act authorises the Minister of Trade and Industry to prescribe, through the use of Regulations 2011:

- Categories of companies that must have a social and ethics committee, if deemed desirable having regard to the annual turnover, workforce size or the nature and extent of the activities of such companies;
- Functions to be performed by the social and ethics committee; and
- Rules governing the composition and conduct of social and ethics committees

Regulation 43(1) requires State-Owned Companies as well as Listed Public Companies and any other company that has in any two of the previous five financial years scored above 500 points in terms of their Public Interest Score card to appoint a SEC.

Subsidiary Companies do not need to form a SEC if its Holding Company has a SEC that will substantially performs the functions of a SEC on behalf of a Subsidiary as per Regulation 43 (2) (a).

The Act allows companies to apply to the Companies Tribunal for exemption from the requirement of having a SEC under two conditions. The two conditions are stated in section 72 (5) of the Act as follows:

(a) the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee in terms of this section and the regulations; or

(b) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company.

An exemption granted by the Tribunal in terms of section 72 (5) of the Act, if satisfied that the company meets the

requirements of section 72 (5) (a) or (b) is valid for period of five (5) years or shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of section 72 (7) of the Act.

Factors considered to be material in determining public interest is the company's annual turnover, the size of its workforce, as well as the nature and extent of its activities. Other factors include social, economic and development factors.

In considering whether or not to grant an exemption, such social and economic factors include SEC functions that needs to be fulfilled:

- To monitor the company's activities by having regard to applicable legislation, codes of best practice and any legal requirements as specified;
- To draw matters within its mandate to the attention of the board as occasion requires; and
- To report to the shareholders of the company at the annual general meeting on matters within its mandate.

The committee has the usual powers and obligations of a board committee as it is statutory in nature. However, Regulation 43 is very specific and requires it to monitor matters, relating to:

Social and Economic Development, with a focus on:

- the United Nations Global Compact Principles – these are ten universally accepted principles in the areas of human and labour rights, environmental responsibility and anti-corruption;
- The Organisation for Economic Co-operation and Development recommendations regarding corruption;
- The prescripts of the Employment Equity Act; and
- The Broad Based Black Economic Empowerment Act, Good corporate citizenship, ensuring that the company:
- promotes equality, prevents unfair discrimination and reduces corruption; and
- Partakes in community development and keeps records of sponsorship donations and charitable giving's, considers the Environmental, health and safety concerns:
- In particular, the Impact of the company's activities on its products or services

Consumer Relations:

- Considers the Company's advertising, public relations and compliance with consumer protection laws Labour and Employment:
- considers the company's standing in relation to the International Labour Organisation Protocol on decent work and working conditions; and
- educational development of employees.

In terms of social and economic development factors mentioned above, it means that a company can be denied an exemption from establishing a SEC if the Tribunal is not satisfied that the company has a mechanism to handle corruption.

The Tribunal's concern is with regards to size of the company's workforce, which is not clear for one to say the size of the company's workforce is sufficient to exempt the company from forming a SEC. In some instances, companies will state that the company has one employee and as a result it is not necessary to form a SEC.

In terms of the nature and extent of the activities of companies it is not clear as to what constitutes the nature and extent of the activities of companies. Some companies will justify that they be exempted on the basis that their nature and extent of their activities does not warrant them to have a SEC citing among other reasons "the company is a Ring-Fenced Company with restricted or limited capacity as provided in their Memorandum of Incorporation" and as such only performs certain functions of which does not impact on the functions of SEC as outlined in Regulation 43 (2) and some will indicate that they are Special Purpose Vehicle.

Regarding section 72 (5) (a) of the Act, the Act does not make

mention of other legislations contemplated therein which requires companies to have some form of a SEC, the only Act that one is familiar with, that compels companies to have SEC is the Companies Act No 71 of 2008, itself. In the case of AB Inbev Africa (Pty) Ltd the application was refused on the basis that the applicant did not attach supporting documents or evidence to support the claim that there are structures in place that would perform the functions prescribed by the Social and Ethics Committee and that the applicant is bound by the structures.

Regulation 43 prescribe the minimum membership of a SEC. In terms of this Regulation, the committee must consist of a minimum of three (3) directors or prescribed officers. At least one (1) of these directors must be a director who is not involved in the day to day management of the company's business and who was not involved in the management of the company in the preceding three financial years.

Although some companies are struggling to comply with the requirements of SEC, others are embracing it because they see strategic benefit. By having a SEC, a company stands to benefit in that the company will be applying best practice recommendations of the King III Report by taking board responsibility for the company's social and ethics performance. Furthermore it is likely to bolster shareholder and investor confidence in the company as the corporate responsibility and ethics performance of the company will be enhanced.

The Act also makes provision for actions to be taken against companies that do not comply with the requirement of having a SEC. The failure to comply with the Regulations is a reportable irregularity and breach of the Act. Section 216 of the Act which is the penalty provision, states that a person may be convicted of an offence in terms of the Act and liable where they have contravened sections 213 (1) of the Act which deals with “breach of confidence” or section 214 (1) which deals with “false statements, reckless conduct and non – compliance.” Such liability will result in a fine or imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. Section 216 of the Act goes on to state that in any other case or in instances of any other breach of the Act, the person may be convicted to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment. Therefore, for companies not to form a SEC when it falls into the categories of companies required to do so and not exempted by the Tribunal amounts to contravention of the Act resulting in a fine or imprisonment for a period not exceeding twelve (12) months or to both a fine and imprisonment.

In light of the fact that the Tribunal can only grant exemption under conditions mentioned in section 72 (5) (a) or (b) above, the question is which other legislations are requiring companies to have some form of formal mechanisms within its structures that perform SEC functions? Secondly since it is not clear as to what constitutes the “nature and extent of the activities of the companies” it is therefore proposed that the Act be amended to indicate what constitutes the nature and extent of companies activities.

There is however a view that says it is not necessary to be prescriptive so as to allow the Tribunal to exercise its discretion depending on each case.

The Tribunal has amongst other reasons declined exemption on the basis that companies do not furnish enough or detailed information as to why it is not reasonably necessary in the public interest to appoint a SEC, particularly more emphasize on the nature and extent of their activities. The Tribunal's reasons for declining exemption is mainly that it is not convinced about the company's submission that it has a formal mechanism within its structure that substantially performs SEC functions on its behalf because in most instances the companies do not attach documents or evidence supporting their claim.

Companies Tribunal: A better way

Dr Mohamed Alli Chictay: Chairperson of the Tribunal

This article was first published on the Trade and Industry Matters Newsletter

On average it takes 240 court days for civil cases to reach a conclusion. In a fast-moving business world, this is too long and, inevitably, expensive. The Companies Tribunal, says Chairperson Dr Mohamed Alli Chicktay, is a faster and cheaper option.

Despite a record of success, the Companies Tribunal remains little known – a deficiency that Chairperson Dr Mohamed Alli Chicktay would like to change.

Dr Chicktay points to public awareness of the Commission for Conciliation, Mediation and Arbitration (CCMA) and says that level of familiarity is what he would like for the tribunal. “Why can't people say 'Let's go to the Companies Tribunal and try to resolve issues there'?

“The question is, who do we need to reach? There are different role-players when it comes to educating people about the Companies Tribunal,” says Dr Chicktay.

The tribunal's natural audience are within companies – the directors and accounting officers. They are reached through meetings or via business conferences. The tribunal also hosts its own conferences such as the one mooted for February on name disputes.

In addition, the tribunal meets on an ongoing basis with attorneys, advocates and members of the judiciary.

An agency of the Department of Trade and Industry (the dti), the Companies Tribunal was established to provide speedy resolution of company disputes.

The chairperson says that resolutions obtained through the tribunal have the added benefit of not leaving any party aggrieved. Decisions are made through discussion, giving both parties a sense of ownership over the outcome – as opposed to litigation where “a judge makes a decision”.

The Companies Tribunal is staffed by experts in company law trained to mediate disputes. “The beauty of the Companies Tribunal mediation is that it is able to offer a free service, confidentiality and help parties come to their own settlement.”

Dr Chicktay, an academic at the University of the Witwatersrand lecturing on Alternative Dispute Resolution, explains the tribunal's ultimate goal is for more cases to be resolved through mediation. “For that, we need buy-in from the legal profession. Sometimes we are competing with the legal profession, and that is one of the difficulties. We've got to change the mindset and create a new kind of legal profession where lawyers are allowed to present matters at mediation.”

Protection of investor rights

The Companies Tribunal is part of a suite of agencies, laws and defined separation of powers that have allowed South Africa to remain an attractive investment destination.

Dr Chicktay catalogues the attributes that have helped: the country is strategically placed in Africa; it has good transport infrastructure and a sophisticated banking system; and a court system that works.

“The way business works, you want something done quickly and often the court system takes too long and is expensive. This is where the Companies Tribunal comes into play. It allows quick easy access to justice and, at the moment, you do not pay for the service. It's not just the adjudicatory function, but the mediation and arbitration work that is also important.”

Apart from his duties as the head of the Companies Tribunal, Dr Chicktay teaches classes on dispute resolution and labour law at Wits University. Working with students – future leaders – allows him to guide their thinking about alternative dispute resolution. “We have to change the mind-set of people we are producing as lawyers. In company law classes we need to talk about the Companies Tribunal more at undergrad and Masters levels.”

Legislation like the Companies Act is subject to the Constitution and the fundamental rights they protect, he explains. Access to justice, however, remains expensive and protracted. He believes that rethinking the way we look at resolving conflict will make not only our country stronger but lead to a more robust economy.

“In a university setting we talk about decolonised education. We should apply that thinking not only to education but to our legislation, to our law, in the way in which we treat each other with respect and dignity.

“We need to balance it. Our company law has to take into account where we are as a country and our Constitution, but it also has to encourage investment. So there is a fine balance between our interests as a country, investor interests and labour laws. Remember all other areas of law have an impact on company law.”

South Africa's law system is a fusion of English common law, and Roman Dutch and African customary law, which makes it unique in the way it tries to balance social justice with protecting investor rights. “There are different dynamics at play (when doing business in South Africa), not just rules of company law but of the Constitution, our labour legislation and employment equity legislation which have an impact on where we want to be, and that is quite unique.”

Name Disputes Case Highlights

- By Simukele Khoza

ABSA LIMITED (Applicant) **versus DJ ABSA BOCHUM (PTY) LTD** (Respondent)

The Applicant brought an application in terms of Section 160 of the Companies Act 71 of 2008 ("the Act") requesting an order directing the Respondent to change its name as it does not satisfy the requirements of section 11 of the Act.

The Applicant is a company incorporated in accordance with the company laws of South Africa with registration number 1986/004794/06 while the Respondent was incorporated in 2016 with the following registration number 2016/066447/07.

The Applicant indicated that it became aware on or about November 2016 that the Respondent had registered its company name which contains the word "ABSA". The Applicant made the application to the Tribunal within approximately ten months of becoming aware of the Respondent's name.

The Applicant filed an objection to the use of the words "ABSA" together with supporting affidavit as required by regulation 142 (1)(b) dated 01 September 2017. The application was properly served by the Sherriff on the Respondent's principal place of business by affixing a copy of the application at the door of the business. The Tribunal is therefore satisfied that the Respondent's lack of participation in the proceedings is not due to lack of knowledge of the process and that the application was unopposed. The Respondent failed to respond to the application hence the application for default order in terms of regulation 153.

The Applicant is the registered proprietor of the trademark "ABSA" and ABSA logo which was registered as classes 35, 36, 9, 16, 41 and 42 in respect of the Trade Marks Act No.194 of 1993. The Applicant stated that it is one of the biggest retail banks in South Africa, operational in a number of African countries and has over nine million customers.

The Applicant is uncertain of the nature of the Respondent's business, it appears from his Facebook profile that he could be a Disk Jockey and no other information was presented on the Respondent's business. Furthermore, the Applicant stated that it advertises the "ABSA" trademark on all forms of the media; in 2016 they spent R 721.4 million on advertising.

The Applicant argued that the Respondent's name is likely to deceive or create confusion as its business activities are not restricted. The Applicant sought an order that the Respondent change its name as the use of the Respondent's name in commerce constitutes an infringement on the Applicant's trademark. It is the Applicant's believe that the registered name of the Respondent prejudices the Applicant's "ABSA" trademark and can be viewed as undesirable "riding" on the reputation built up by the Applicant in respect of its "ABSA" trademark.

It is the Tribunal's view that the Applicant has satisfied the requirements of section 11(2) of the Act as contemplated. The Applicant's application was granted in terms of section 160(3) of the Act. The Respondent was directed to:

- Change its name to one that does not incorporate and is not confusingly and or deceptively similar to its ABSA company name and trademark.

- Amend the Memorandum of Incorporation within 60 days of receipt of the order.

ORDER: Granted

COMAIR LIMITED (Applicant) **versus KULULU INVESTMENTS (PTY) LTD** (Respondent)

The Applicant applied to the Tribunal in terms of section 160 read with regulation 13 and 142 of the Act. The application dated the 04 December 2017 sought an order that the Respondent be directed to change its name, alternatively, that the Companies and Intellectual Property Commission change the Respondent's name to its registration number on a default basis. The application was served by the Sherriff on the 08th December 2017. The Tribunal was satisfied that the application was adequately served. The Respondent failed to file an opposing or answering affidavit. The Applicant filed an application for default order with the Tribunal on the 14th February 2018.

The Applicant highlighted amongst others the following reasons in support of the application:

- They are listed with the Johannesburg Stock Exchange since 1998.
- The Applicant's use of its KULULA trademark includes various prominent and very successful adverting campaigns. The trademark has become an asset of considerable commercial value. .
- The Applicant has received several awards and has through constant marketing and promotion of its name, trademarks, good and services and has established a substantial reputation and goodwill.
- The dominant and memorable feature in the Respondent's name is KULULU and the term INVESTMENTS is descriptive and incapable of distinguishing the trademark and the name.
- The Respondent is registered as a private company therefore allowed to conduct any type of business. The Respondent is operating a taxi business transporting passengers. The Applicant's main business is to transport passengers and these services are covered by the Applicant's trademark registration in class 39.
- The use of the Respondent's name KULULU can affect the good name and reputation of the Applicant if the products and services are of an unacceptable standard or even standard that is not identical to the Applicant's standard.
- The Applicant has not authorised the Respondent to use its company name; the Respondent's name would reasonably mislead a person to believe incorrectly that the Respondent is part of or associate with the Applicant.

The Tribunal found that KULULU Investments is confusingly similar to the Applicant's trademark KULULA and that there is a reasonable likelihood of confusion. The Respondent was directed to change its name within sixty (60) days from the date of the order to a name which does not incorporate and is not confusingly similar to the Applicant's trademark. Furthermore, if the Respondent fails to comply with the order, the Companies and Intellectual Property Commission is directed to change the name of the Respondent to its registration number.

ORDER: Granted.

IMPERIO (PTY) LTD (Applicant) **versus IMPERIO (PTY) LTD** (Respondent)

The Applicant filed an application on the 07th November 2017 seeking an order in terms of section 11(2) of the Act. The Applicant objected to the use of the name “IMPERIO” by the Respondent as it is the same name as the Applicant. The Applicant argued that the Respondent's name denotes association between the Applicant or its business and the Respondent which is not permissible in terms of sections 11(2)(c)(i) of the Act.

The Respondent was served through the Sherriff of the High Court by affixing to the principal gate at the Respondent's registered office address. The Sherriff's return stated that the premises at the address are “kept locked and thus prevents alternative service”. The Respondent failed to file an answer within the period envisaged by regulation 143 of the Act. The Applicant filed a request for default order in terms of regulation 153 of the Act on the 29th January 2018. The Tribunal is satisfied that the application was adequately served.

The Applicant was incorporated on the 10th November 1993. The Applicant indicates that the ground for objection to the Respondent's use of the name is that:

- For the past twenty-four (24) years the Applicant has been actively and extensively providing services in industrial, commercial and all immovable property related construction, building and project development.
- The Applicant is a subsidiary of Improvon Group of companies, currently has a property portfolio in excess of R 4 billion.

The Respondent was incorporated on the 28th August 2017. The Applicant became aware of the existence of the Respondent on the 02nd November 2017 but did not disclose how the Applicant became aware of such existence.

The Tribunal found that the use of the impugned name does not satisfy the requirements of section 11(2)(b)(i) of the Act. It is clearly the same, constant and vowel as the Applicant's name (it wholly incorporates the Applicant's name as submitted). The Respondent was directed to choose a new name and file a notice of amendment to its Memorandum of Incorporation.

ORDER: Granted.

The Tribunal hosted Seminar on Company name Disputes

- By Simukele Khoza

The Companies Tribunal (Tribunal) hosted a seminar on Company Name Disputes on the 16th February 2018. About 133 delegates attended the seminar. Since 2015, the Tribunal hosted seminars ranging from the mandate of the Tribunal, Social and Ethics and

Alternative Dispute Resolution as a way of raising awareness about Tribunal's services.

The Tribunal decided to host a seminar on name disputes as it constitute the highest number of applications filed on yearly basis. The seminar was aimed at engaging stakeholders on key issues relating to the adjudication of company name disputes. Section 160 of the Companies Act 71 of 2008 (the Act) empowers the Tribunal to adjudicate applications on name disputes.

Speakers at the seminar were: Judge Lebogang Modiba, Gauteng Local Division of the High Court; Mrs Debbie Marriott, President of the South African Institute of Intellectual Property Law (SAIIPL); Adv. Rory Voller, Commissioner of the Companies and Intellectual Property Commission and Professor Kasturi Moodaliyar, Tribunal member.

Judge Lebogang Modiba's topic focused on *the approach of the courts in dealing with name disputes*. The Judge made reference to cases taken to the High Court for review as they were unopposed. She highlighted that only the aggrieved parties appeared before the court in terms of the 11 cases taken on review. Had the Tribunal defended those review applications, it may have well succeeded. The Judge also wanted to understand why the Tribunal was not defending the cases taken on review as it is very important to develop jurisprudence.

Furthermore, the Judge mentioned that the Act does not oust the jurisdiction of the High Court in relation to company name disputes. The litigant chooses whether they approach the Tribunal or the High Court as stipulated in section 156(c) of the Companies Act. The Judge also referred to the Tribunal's limited mandate which makes it ineffective while the High Court has inherent jurisdiction. When the aggrieved party goes to the High Court is actually not limited to just asking for that prayer. The aggrieved party may ask for additional prayers, for example it may seek an interdict prohibiting the other party from using the name that it's complaining about.

Review applications may not only be brought under the Act, they may also be brought under the Promotion of Administrative Justice Act (PAJA). In terms of PAJA, the review application is brought within 180 days, and beyond that, you may even bring a review application later on good cause shown.

Mrs Debbie Marriott reflected on *the lessons learnt from Tribunal's decisions*. SAIIPL is a trade association of attorneys from different firms, big and small, representing big and small clients from overseas and local. Company name disputes have been identified as important because of the interplay between them and trademark law. Given that company names are an asset and they are essentially a brand. Names are used to identify companies in the same way that they are used to identify specific products.

Mrs Marriott mentioned that as trademark attorneys they objected to company names on the basis of prior registered or prior used trademarks in which people had built up the requisite reputation and goodwill. The first lesson learnt is that in filing an application, the application must have an affidavit (sworn under oath). The advantage of the new framework (Tribunal) is that objecting to a company name is much quicker, cheaper and easy.

SAIIPL highlights that currently they file applications on behalf of clients in terms of Section 11(2)(b) and (c). This section stipulates that:

- Section (b) that a company's name may not be confusingly similar to an existing name or trademark of another person; and
- (c) that the company name must not be such that it would reasonably mislead a person to believe incorrectly that the company is part of, or associated with another person or entity.

Trademark attorneys, focus on trademark infringement where they compare the name and trademark, they

simultaneously compare which industry of goods and services are both parties offering their product or services. SAIIPL acknowledges that the Tribunal does take into consideration whether the company operates in the same space and it also recognises that where a company is not yet trading.

Mrs Marriott stated that in terms of the Trade Marks Act 194 of 1993, trademarks and names can be compared on the following three grounds, whether it's phonetically similar, whether it sounds the same and whether it looks the same. SAIIPL has observed that in terms of Tribunal's decisions, the Tribunal wants proof that the Respondent has been served and is aware. The fact that the respondents have not filed an answer is because they don't want to defend the name or are not otherwise in a position, but that they are at least aware.

The second lesson learnt is that the general trademark principles in case law does apply. SAIIPL approaches CIPC to determine whether the name dispute cannot be resolved amicably, as a result a lot of disputes are resolved without the knowledge of the Tribunal. The third lesson learnt is the requirement to explain the delay in lodging the application for name objection with the Tribunal as most matters are settled amicably as indicated above.

It is SAIIPL's view that since Tribunal members are not trademark attorneys they may not have the necessary understanding of trademark law hence it is important for trademark practitioners to explain why they think confusion could exist. SAIIPL recommends that when the Tribunal considers an application, decide whether the name satisfy the Act, the Tribunal can then direct the company to change the name to a new name without having to pay CIPC. The fourth lesson learnt is that it's always a good idea to cite and serve a copy of the name objection on CIPC as the second respondent.

The Tribunal's review cases in the High court are in the unopposed roll and dealt with very swiftly with no written reasons. These unopposed matters do not then help the Tribunal to understand why their decisions were overturned.

Adv. Voller focused on *name reservation and registration*. The Commissioner stated that the Tribunal reviews CIPC's decisions. The CIPC highlighted that in the names area, the Tribunal has provided consistent judgements and they utilise them in improving their processes of approving names. CIPC is a regulator of company law, meaning it regulates the names area and applies strict rules.

The CIPC raised a challenge they face regarding passing off trademark. Currently there is no synergy between Trademark Register and Companies Register hence well-known trademarks are registered and utilised. CIPC places a lot of emphasis on company names because of the reputation and goodwill that goes with it. The Commissioner highlighted that names are reserved for six months while in the old Act it was four months. This is informed by the fact that those reserving names have no idea exactly what they are going to do with business and what type of business they are going to run.

CIPC has observed changes in the new Act with regard to the transfer of names. Parties are allowed to transfer a name and such transfer process is regulated. There are also other categories ranging from ring-fencing, business or trading names, defensive names. CIPC stated that they protect the interest of intellectual property holders. It further stated that it has an obligation to protect the public against hateful or other negative names hence such names are identified and rejected.

Adv. Voller mentioned that symbols are allowed in name registration. However they have been deferred due to the fact that the Banking Association of South Africa says that the systems of the banks cannot recognise symbols when it comes to the opening of business accounts and therefore it will cause confusion. CIPC further state that all languages are accepted and that if none of the official languages of South Africa is used they ask for translation.

The Commissioner also raised the issue of name squatting, this is a process where people block names to on-sell them. For instance an individual would register "Emirates Airline" and when such airline wants to fly to South Africa, the individual on-sell that particular name to the airline for a lot of money because it is a business transaction. In terms of the current framework (the Act), anyone found to be name squatting is dealt with decisively by the CIPC removing those names and are not allowed to register any further.

CIPC indicates that offensive names are forwarded to the South African Human Rights Commission (SAHRC) for investigation, seven years later not a single name has been referred as the Commission has the capacity to determine such. CIPC's application for name reservation and registration is multi-channelled approach. The following channels are utilised i.e. website, third parties (accounting or and law firms) and company secretarial practitioners. Furthermore, CIPC has a dedicated self-service centres in nine provinces. Interested parties can utilise the big four banks to apply for name reservation. CIPC has auto-name approvals. It is a built intelligence system to accept or reject names which helps in approval of names far quicker.

The CIPC receives approximately 45 000 applications on monthly basis and over 500 000 annually, 378 000 were registered in the last year. This number is the highest in the history of CIPC and this number is increasing on an annual basis. Approximately 32% of those go through the automatic system where there is no human intervention and out of the whole number of 45 000 on a monthly basis or an annual basis more than 500 000 approximately 10% of those names get refused. It is for that reason that there are reviews to the Companies Tribunal. In contrast, CIPC also deregister companies in the region of 500 000 because people just register; many of these are dormant and will never trade.

CIPC has service delivery standards or turnaround times e.g. for names is two working days. In practice it is far less than that, it is just few hours because of the automation. CIPC refuse names on the grounds of confusingly similarity i.e. the predominant part or the common element of the proposed name. Secondly, CIPC refuse names on the grounds that it falsely implies or it is associated with a very well-known brand or trademark.

Certain names relate to geographic descriptions, CIPC does ascertain if indeed the business is located in that geographic location; the applicant is requested to submit proof that they reside in the area mentioned. CIPC prides itself in that out of all the years that it has been taken on review it has not lost a matter in Court.

There are other rules applicable to names that fall into the sphere of other regulators. It is not allowed to register a name, which is a bank e.g. the Bank of Johannesburg. The CIPC requires proof that the Registrar of Banks has accepted that company as a legitimate bank and thereafter register the company with the use of the word "Bank". The same principle applies in the Financial Services Board. CIPC rejected an application that had Pensions Africa (PA), PA failed to provide proof that they are a pension fund. The matter was brought to the Tribunal for review and CIPC's decision was altered, CIPC is taking the matter to court for review.

Professor Moodaliyar reflected on *application of the Act in relation to name disputes*. She highlighted that the Tribunal is established in terms of section 193 of the Act to adjudicate applications made in terms of the Act. The Tribunal was envisaged as an alternative to Court as stipulated in Section 34 of the Constitution of the Republic of South Africa.

Since inception majority of cases that the Tribunal has handled has been name disputes. Statistics reflect an increase in the number of applications filed with the Tribunal. Company name disputes have also increased year on year and this is not alarming as many company names have economic or sentimental value attached to them. The economic value of the company name constitutes part of the company's goodwill which can amount to thousands of Rands. Company

names are also vital for branding and they distinguish the company from others and are also used to identify products and services.

Most applications for name dispute received by the Tribunal are based on sections 11(2)(b) and 11(2)(c)(i) of the Act. A name dispute can be filed in instances where the name is the same or confusingly similar to an existing company. Section 160 of the Act concerns name objections. Provisions have been made for the application to be lodged with the Tribunal as to whether the reservation, registration or use of a name, alternatively a transfer of a name meets the Act's requirements.

The Tribunal adjudicates name disputes based on the procedure and merits of the case. In filing an application for name dispute, the Applicant must serve the Respondent within five business days and provide the Tribunal with proof of service to confirm that the Respondent has been notified of the application. The Respondent has 20 days within which to answer. Thereafter, the Applicant may reply within 15 days. In instances where the Respondent does not answer, the Applicant may seek default order. The Tribunal has received a lot of such default order applications.

Cases adjudicated by the Tribunal are only reviewed by the High court. The Tribunal's challenge regarding these reviews is that the High Court issues decision in the form of an order without attaching further reasons as to why the decision was overturned.

Prof Modaliyar indicated that there was a challenge with the interpretation of Section 12(2) CIPC still refuses to reserve names on the basis of existence of what is called comparative names. She indicated that the current practice by the CIPC of refusing names because of the existence of so-called comparative names, is not only a relic from the past but it is actually a breach of the Act. Currently there is no protection of reserved names, except only in respect of another person applying for the similar name. The Act offers no protection in this regard and it is unfair to a person who clearly conceptualises the name before and the trademark.

Prof Modaliyar indicated that the CIPC has no authority to refuse to reserve a name on any basis, including that it appears similar to the reserved or registered name. As as a result, most cases the Tribunal members find against the CIPC in this nature. Section 160(b) as it currently stands is open to abuse. A registered name may be challenged as long as the Applicant can show good cause. She is of the view that this does not provide certainty with regard to the names registered with the CIPC. Furthermore, it is not far fetched to suggest that this may discourage investment in the goodwill of company names.

Prof Moodaliyar mentioned that in some applications the Tribunal finds that there is not enough evidence to make a determination whether the name satisfies the Act or not. She further stated that currently there is no mechanism to ensure compliance with the orders of the Tribunal as they can be ignored with impunity.

Left: Ms Fleurette Coetzee Senior Manager Trademarks answering questions. Right: Tribunal members, managers and seminar speakers

University of North West Guest Lecture

- By Dumisani Mthalane

Mr Lehlohonolo Rabotapi Registrar at the NCT presenting at the Mafikeng campus

A guest lecture was held by the Companies Tribunal (CT) in conjunction with the National Consumer Tribunal (NCT) at the University of North West (UNW) in Potchefstroom and Mafikeng Campuses on 12 and 13 April 2018.

UNW is one of the biggest academic institutions in the country which came about in January 2004 as a result of the South African government's plan to transform higher education through merging a historically white university and a historically black university. The guest lecture was attended by lecturers and law students in their final year towards completing their Degrees. It was aimed at raising awareness about both entities' services and highlight important principles arising from the Companies Act No. 71 of 2008, Consumer Protection Act, 68 of 2008 and National Credit Act, 34 of 2005. It provided an opportunity for both entities to share practical experience on how these legislations are implemented, develop strategic relations which will enable students to do either vacation work the NCT offers or internship and further assist those who want to undertake further research on consumer credit as well as company law. The lecture also exposed students to different aspects of mercantile law as well as the practical application of the law in these fields. It was important for students to understand the mandate of the Tribunal because as future lawyers and legal practitioners, they will advise their clients to utilized the expeditious CT services and understand that there is an alternative quasi-judicial body besides a court.

Mr Douglas Mokaba, Legal Advisor of the CT made a presentation highlighting applications that can be made to the CT for adjudication and filing processes. Mr Lehlohonolo Rabotapi who is the Registrar at the NCT focused on amongst others, international principles dealing with Consumer Rights, referral of matters to the NCT and types of disputes falling under the jurisdiction of the NCT and opportunities at the NCT.

The lecture presented a good opportunity for both Tribunals and the academia to robustly engage. It was proposed that this lecture should take place annually. The CT will continue to partner with other academic institutions throughout the country.

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