

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

CASE NUMBER: CT00291ADJ2020

In the matter between

COMAIR LIMITED

Applicant

And

KULULA SERVICES AND PROJECTS(PTY)LTD

First Respondent

(2019/408225/07)

COMPANIES AND INTELLECTUAL

Second Respondent

PROPERTY COMMISSION

Decided on: 17 June 2020

DECISION

Introduction

1. Second respondent's administrative decision to register the first respondent's name as KULULA SERVICES AND PROJECTS (PTY)LTD(the contested name) without the applicant's written consent has given rise to the present application which is launched in terms of section 160 of the Companies Act 71 of 2008(the Act/ the Companies Act).
2. Application in terms of Section 160 of the Act is a Companies Act review application against the administrative decision of the CIPC to register a company name which is alleged to be offending against Section 11(2)(b) or (c) of the Act. The relief provided for in the Act is:
 - 2.1. a determination whether registration of the name does not satisfy the requirements of the Act; and
 - 2.2. an administrative order to the owner of the name whose registration is found to be offending the Act, to amend the offending name to a satisfactory name.
3. Additional to the remedies permitted by the Act in respect of such applications, the applicant is seeking a relief which directs the Companies and

Intellectual Property Commission to take certain steps to correct the wrong caused by the administrative action(the additional remedy) , such remedy is not provided for in the Act.

4. There is a conflict of opinion within the Companies Tribunal(the Tribunal), whether the Tribunal has authority to grant the kind of additional remedy sought.
5. I am thus confronted with the question whether the decision of the CIPC is unlawful and if so, whether the Companies Tribunal has the authority to grant the additional remedy.

Parties

6. The applicant is Comair Limited, a South African Company incorporated according to the company laws of South Africa. The applicant is acting in its capacity as the owner of the "KULULA" trade mark and other trade marks incorporating the mark "KULULA".
7. The first respondent is KULULA SERVICES and PROJECTS (Pty) Limited, a South African company incorporated in terms of Companies Act 71 of 2008, the applicant is challenging registration of the first respondent's name KULULA SERVICES and PROJECTS(the contested name/ the offending name).
8. The second respondent is the Companies and Intellectual Property Commission(CIPC), a juristic person established by the Companies Act 71 of 2008. The CIPC is empowered to register company names and amended names on application and to maintain the companies and the trade mark registers . The Commissioner of the Companies and Intellectual Property Commission(the Commissioner) is responsible for all matters pertaining to the functions of the CIPC.
9. None of the respondents is participating in this application.
10. I deal firstly with the question whether the decision of the Companies and Intellectual Property Commission is unlawful and secondly, with the question whether the Tribunal has authority to grant the sought additional order.

Whether the decision of the Companies and Intellectual Property Commission is unlawful

Issue

11. This application is based on the applicant's founding affidavit with supporting annexures.
12. Applicant is challenging the registration and use of the first respondent's name KULULA SERVICES AND PROJECTS (PTY)LTD on grounds that registration of this name does not satisfy the following provisions of the Act:

- 12.1. Section 11(2)(b) which prohibits unauthorised registration of a company name which is confusingly and deceptively similar to another person's name or trade mark; and
 - 12.2. Section 11(2)(c) which prohibits unauthorised registration of a company name which is likely to mislead a person to believe, incorrectly, that the company is part of, or associated with another person or entity.
13. The applicant is seeking the following remedy which is provided for by the Act:
- 13.1. a determination in terms of Section 160(3)(a) whether registration of the contested name does not satisfy the requirements of the Act;
 - 13.2. an administrative order in terms of Section 160(3)(b)(ii), directing the owner of the name whose registration is found to be offending the Act, to amend the offending name to a satisfactory name; and
 - 13.3. a costs order in terms of Regulation 156(1).
14. Further, the applicant is seeking the additional order directing the Commissioner to change the name of the first respondent to the registration number, in the event of the first respondent not complying with the Tribunal order to amend the offending name. This order is not authorized by the Act.

Facts

15. The applicant is the owner of the trade mark KULULA and marks incorporating KULULA, which it has registered in various classes covering a wide range of goods and services. Amongst others the applicant has registered trade mark number 2002/05945 KULULA.COM in class 37 in respect of building construction; repair; installation services.
16. The applicant is listed on the Johannesburg Stock Exchange since 1998, offering airline services in South Africa, sub-Saharan Africa and the Indian Ocean Islands as its core business. It has operated successfully in South Africa since 1946.
17. The applicant has, at least since 2001, been making widespread and extensive use of its KULULA trade mark in respect of its business as an airline. The applicant operates under the trading style KULULA and KULULA.COM and is well known to the public at large as an airline with exceptionally low fares online bookings and easy checking-in-facilities. The applicant is in partnership with complementary services including vehicle hire, hotels and a medical aid scheme.
18. Applicant's airline has earned several awards in recognition of, amongst others, the quality of its service.
19. The applicant's use of its KULULA trade mark includes prominent and very successful advertising campaigns including national television, radio, printed media and outdoor billboards.

20. The applicant has, through marketing and promoting of its name, trade marks, goods and services established a substantial reputation and goodwill, and therefore owns, in addition to its statutory rights, its common law rights in its KULULA trade mark.
21. The applicant has spent considerable amounts of money on promotion and advertising, and has as a result, acquired a substantial reputation and common law rights in its KULULA trade mark.
22. The applicant's KULULA trade mark has become an asset of considerable commercial value and importance to the applicant. Any unauthorised use of this trade mark, or of confusingly or deceptively similar marks is damaging to this asset and to the business of the applicant in South Africa.
23. The first respondent's name was registered on 15 August 2019. The first respondent's enterprise type is registered as "Private Company" therefore it is not possible to ascertain the first respondent's field of business from the registration documents.
24. The applicant undertook steps to establish the first respondent's field of business. Upon investigation and site-inspection at the first respondent's registered address, the applicant established from Ndhlovu, the sole director and member of the first respondent, that the first respondent had not commenced trading, and further that once trading commences, the first respondent would provide construction services, specifically in relation to laying of concrete flooring. The first respondent's registered address is also the residential address of the aforesaid Ndhlovu.
25. The applicant, through correspondence, notified the first respondent of its objection to the registered name and unsuccessfully sought to have the dispute resolved amicably. Getting no joy from the first respondent, the applicant proceeded to launch the present application.

Grounds of application

26. The dominant and memorable portion first respondent's name is identical to the applicant's trade mark "KULULA". The remaining portion of the company name being "services and projects" is purely descriptive, does not serve adequately to distinguish the company name from the applicant's mark "KULULA". The first respondent's name is therefore confusingly and deceptively similar to the applicant's registered trade mark KULULA;
27. The first respondent's intended business is building construction; the first respondent will therefore, be rendering services covered by the applicant's trade mark in Class 37. Use of first respondent's name therefore amounts or will amount to trade mark infringement in terms of Section 34(1)(a) or alternatively Section 34(1)(b) of the Trade Marks Act;
28. Use of first respondent's name in trade is also likely to take unfair advantage of, or be detrimental to, the distinctive character and repute of the applicant's well-known KULULA trade mark. The use of first respondent's name is likely

to dilute the applicant's trade mark rights. Therefore, use of the first respondent's name amounts, or will amount, to trade mark infringement in terms of Section 34(1)(c) of the Trade Marks Act;

29. The applicant has no control over the activities of the first respondent and the quality of its services. If the first respondent's products or services are of unacceptable standard, this is likely to expose the applicant to reputational risk based on the incorrect assumption of the existence of association; and
30. The use of the first respondent's name is not authorised by the applicant.

Analysis

31. The presented evidence is uncontroverted and the facts of this application appear to be uncomplicated and straight forward. It shows that:
 - 31.1. the applicant's KULULA trade mark was registered about eighteen(18) years before the first respondent's contested name was registered, therefore it is justiciable for the applicant to claim statutory protection of its proprietary rights to the KULULA trade mark; and
 - 31.2. the applicant has established a substantial reputation and goodwill, and therefore owns common law rights in its KULULA trade mark;
32. The words "services and projects" in the name " KULULA SERVICES and PROJECTS " are purely descriptive and do not serve adequately to distinguish the company name from the applicant's mark "KULULA". In fact once the descriptive words are removed, what remains of the second respondent's name is KULULA, which is identical to applicant's mark. Accordingly, I find in favour of the applicant that the first respondent's name is confusingly similar to the applicant's registered trade mark and therefore falls foul of the provisions of Section 11(2)(b) of the Act;
33. Based on the above observation that once the descriptive words "SERVICES and PROJECTS " are removed, what remains of the second respondent's name is KULULA, which is identical to applicant's mark I agree that use of the respondent's name in trade is likely to deceive or confuse members of the public, into believing that there is some connection between the first respondent and the applicant, or that the first respondent was formed for the purpose of rendering services on behalf of the Applicant. Use of the first respondent's registered name therefore also amounts to passing-of at common law. Accordingly, I find that the registration of the contested name does not comply with the provisions of Section 11(2)(c) of the Act.
34. Therefore, the applicant has made out a case for a determination that registration of the contested name does not meet the requirements of the Act and is thus unlawful. The applicant requests that the determination be followed by, amongst others, a prohibitory directive that the first respondent choose a name which does not consist of, or incorporate the mark KULULA, or any other mark which is confusingly or deceptively similar to the applicant's

KULULA trade mark. The import of this suggested prohibitory directive is that, by implication, use of, or incorporation of the word KULULA in a company name registered or sought to be registered after the applicant acquired the KULULA trade mark would automatically be seen as disqualifying that name for registration. The prohibitory interdict would impliedly force the CIPC to, without any consideration, refuse the registration, also it would force the Tribunal, the courts and any other forum with authority, to rely on the general banishment of the inclusion or the incorporation of the word, for review of the company name registration. To my knowledge, the word "kulula" means "it is easy" or "release", the word may also have other meanings unknown to me in other languages. Therefore, it is important that the principle of protection of company names, trade marks or marks be not confused with the idea of promoting the monopoly of words, worst still, words that are common and not uniquely conceptualized by the one who seeks exclusive use of such word. It is still possible to develop a name that incorporates the word "kulula", without blurring the distinction between the applicant's trade mark and that name. The hand of the Commissioner must not be tied to an almost pre-determined decision when considering any name registration applications, including names that consist of or incorporate the word "kulula", he must bow to only one authority, the Supreme law of South Africa.

35. The applicant has also made out a case for an effective order to correct the wrong caused by the unlawful registration. I will deal with the question of effective administrative order, later in this decision. What remains to be decided is whether the tribunal has authority to grant the additional order which is not provided for by the Act.

Whether the Tribunal has authority to grant the sought additional order

36. As already stated, the tribunal is divided on this issue. Tribunal members may differ on legal conclusions to be drawn on the subject matter of adjudication, however if there is a disagreement regarding the parameters of the powers of the Tribunal as a functionary, it is crucial that the matter be given due attention and settled. The interpretation of the Companies Act is the basis on which the Tribunal carries out its functions. There should be a focussed engagement in the interpretation of the provisions that divide the Tribunal until a common ground is found.
37. The first question is whether the relief provided for in the Act is adequate to remedy the effect of the unlawful administrative decision of the CIPC. The authorised relief is, to pronounce on the unlawfulness of the administrative decision of the CIPC and to direct the owner of the offending name to take steps to remedy the violation of rights infringed by the conduct of the Commissioner.
38. Overall, the relief provided for is not adequate, to me, the permitted administrative order also comes through as being absurd in that:

- 37.1. A determination that registration of the offending name is unlawful is ineffective unless coupled with the appropriate order directing the competent authority, in the present case, the Commissioner, to take specific steps to vindicate the rights infringed by the administrative action. The effect of this short coming is to leave it in the hands of the very administrator whose action is found to be unlawful, to deal with the determination in the manner she/he deems fit, this comes through to me as an absurdity in terms.
- 37.2. The relief is also contrary to the spirit and purport of the just administrative action law as regulated by the Promotion of Administrative Justice Act 3 of 2000(the PAJA) as appears later in this decision when dealing with the relief permitted by the PAJA.
- 37.3. A free-standing administrative order to the owner of the offending name, without a corresponding order directed at the Commissioner, is absurd in that: The subject of review is the Commissioner's administrative action, not the action of the owner of the offending name;
- 37.4. The CIPC, not the owner of the offending name is statutorily responsible for registration and amendment of company names as well as maintenance of the companies register;
- 37.5. Issuance of the administrative order to the owner of the offending name only, implies that correction of the reviewed action depends entirely in the hands of the owner of the offending name, what if the administrative order is ignored? Should the owner of the offending name ignore the tribunal order, the party whose rights are infringed will remain empty handed until it seeks enforcement from the High Court;
- 37.6. The Commissioner is the indispensable authority to give legal effect to the Tribunal determination and should thus be directly given a corresponding order with clear directions on the correction of the unlawful action.
- 37.7. I doubt whether the CIPC would be bound to implement an order that is directed at a third party but implicating the CIPC for execution, such as provided for in Section 160(3)(b)(ii), without a

corresponding direct order to the Commissioner. The status of that order in relation to the CIPC is, in my view, tantamount to a hearsay order granted to a third party for the initiation of the remedy and remittance to the CIPC, much can be said about the Section 160(3)(b)(ii) anomaly, however, I do not intend burdening this decision with that discussion, tomorrow is another day;

37.8. The goal of the applicant is to get redress rather than just a pronouncement of the unlawfulness of the registration. If the Tribunal cannot grant an effective redress then there is no point for it to adjudicate, because there is little or no value in a relief that does not wipe a tear from the eye of the grievant;

37.9. The legislature's failure to authorize the Tribunal to grant the appropriate order to the CIPC is inconsistent with the underlying intention of Section 160 which is to expeditiously restore the rights that are adversely affected by the unlawful administrative decision of the CIPC;

37.10. In the exercise of its powers to impose conditions that the Tribunal considers just, equitable and expedient, the tribunal may impose conditions that require the Commissioner to depart from standard requirements and/or rules relating to the registration of amendment of names. It would indeed be absurd to issue such directive indirectly, through an outsider who is not statutorily bound to carry out the orders of the Tribunal.

38. Based on the preceding deliberations, I agree that, there is justification for the applicant to seek an additional relief directing the CIPC as the administrative body, to take steps to give legal effect to the determination made by the Tribunal.

39. Section 195(1)(a) of the Act provides for orders that the Tribunal may grant, it limits the Tribunal to making *any order provided for in the Act in respect of such an application*(my emphasis).

40. Arising from the said provisions of Section 195(1)(a) the next question is whether the Tribunal, a creature of the legislation has the power to cure the apparent defect in the relief provisions.
41. This question calls for proper interpretation of Section 160 of the Companies Act on a narrow point of remedies for unlawful administrative action by the CIPC.
42. Before proceeding to answer the question under enquiry, which is whether the Tribunal has authority to grant the administrative order that is not provided for in the Act, it is apposite to state the following which is common cause:
 - 42.1. The Constitution is the Supreme law of the Country- Section 2 of the Constitution;
 - 42.2. Therefore, The Companies Act 71 of 2008 and all institutions created by it, are subject to the Constitution;
 - 42.3. One of the purposes of the Act is to promote compliance with the Bill of Rights provided for in the Constitution- Section 7(a) of the Companies Act. Even if Section 7(a) was not promulgated, the Act would still be bound by Section 8(1) of the Constitution, to promote compliance with the Bill of rights;
 - 42.4. The interpretation of the Companies Act is the basis on which the Tribunal carries out its functions- nature of the Tribunal functions; and
 - 42.5. The Companies Tribunal is independent and subject only to the Constitution and the Law, therefore, the Tribunal must always function in a constitutional way-Section 193(1) of the Companies Act.
43. In light of the above, the starting point for guidance on the interpretation of Section 160 should then be Section 39(2) of the Constitution. Section 39(2) of the Constitution provides that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of rights". The

predecessor of Section 39(2) of the Constitution is Section 35(3) of The Constitution of the Republic of South Africa, Act 200 of 1993 (The Interim Constitution). Section 35(3) provided that “In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter 3”(Fundamental Rights are provided for in Chapter 3).

44. The significant shift brought by Section 39(2) is that the predecessor provision recognized the courts only, for interpretation and development of the common law and customary law, while the current provision recognizes the courts, the tribunals and any other forum that performs functions similar to those of the court and the tribunal, for interpretation and development of the common law and customary law. It is also significant that the provision provides the said institutions with the same measure for interpretation and development of the law.
45. In *Hyundai Directorate Serious Economic Crime* At paragraph 21 the Constitutional Court explained that the provisions of Section 39(2) dictate that all statutes be interpreted through the prism of the Bill of rights. All law-making authority must be exercised in accordance with the Constitution.
46. Drawing from the provisions of Section 39(2), a tribunal is a law-making authority within its specialised field in that the provision recognises the responsibility of a tribunal to interpret the legislation in a constitutional way *and* to develop the common law in a constitutional way. Accordingly, it is my view that this Tribunal does have the power to get out of the box created by section 195 to limit its Constitutional power and fall into the generous Constitution to cure a defect in the Companies Act provisions that fall within the jurisdiction of the Tribunal. I fully understand that my word may not be the last on the issue, of importance is that it has initiated the debate.
47. Section 38 of the Constitution is relevant to the present enquiry because it guarantees a right to enforcement of rights through appropriate relief. It thus

becomes necessary to establish the meaning of “appropriate relief” in the context of the Constitution, the Supreme law of the land.

48. The first time that the Constitutional Court had to rule on the meaning “appropriate relief” in the Constitutional context was in the case of *Fose v Minister of Safety and security 1997(7) SA 786(CC)*. The provision that was under scrutiny was Section 7(4) of the Interim Constitution, which is the predecessor of the Section 38 provision of the Constitution. The two provisions are substantially the same, consequently, the meaning given in respect of Section 7(4) also applies to Section 38. In *Fose supra at paragraph 19* the Court gave the following meaning to the “appropriate relief” expression: “Appropriate relief” will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.” Agreeing with this meaning, Kriegler J summed it up as follows “the core meaning of s 7(4)(a) is clear: *violations of chapter three rights must be remedied*.”
49. The remedy provided by Section 160 of the Act does not meet the threshold of the constitutional meaning of “appropriate relief” in that it fails to adequately provide an adequate remedy for the violated right to be remedied.
50. Section 160 of the Companies Act is concerned with the Right to Just Administrative Action. The purpose of the provision is to give effect to the Section 33 provision of the Constitution, which guarantees the right to Just Administrative Action. Section 33(3) of the Constitution required Parliament to enact a national legislation in order to give effect to the Right to Just Administrative Action. In compliance, Parliament enacted The Promotion of Administrative Justice Act 3 of 2000(The PAJA). The PAJA therefore has a particular constitutional status. It makes the rights effective by providing an elaborated and detailed expression of the rights to just administrative action and

providing remedies to vindicate them. Therefore, Section 160 of the Companies Act must meet the requirements of PAJA being the legislation enacted to give effect to the skeletal Constitutional provision of Section 33.

51. The PAJA is the mandated product of the Constitution, therefore it is safe to say that all administrative actions must be considered through the prism of the PAJA. In Paragraph 25 of *Bato Star Fishing v Minister of Environmental Affairs and Tourism 2004(4) SA 490 CC*, the Constitutional Court held that the cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past, and the authority of PAJA to ground such causes of action rests squarely on the Constitution. Since its Commencement, the PAJA has become the legislative foundation of Administrative law in South Africa.

52. So, in the event of a lacuna, including the under-inclusiveness in any administrative law, deference must be had to the PAJA for supplementation. The principle of supplementation of any administrative law, by the PAJA has been adopted and applied by the Constitutional Court, in particular, I refer to:

52.1. *Fuel-Retailers-Association CCT 67/06 [2007] ZACC 13 at par 37*
Where the Court was dealing with a case where the legislation expressly granted a right to review but without specifying any grounds of review, the Court stated that Section 6 of The PAJA, which provides for Judicial Review of Administrative Justice supplements that legislation.

52.2. *Minister of Health v New Clicks South Africa (Pty)Ltd 2006(2) SA 311 (CC)* the Court held at Paragraphs 150, 484 and 672 that:
Where legislation is silent on the procedures to be followed in making regulations, the applicable procedure is the one prescribed by Section 4(1) of PAJA

52.3. *Sidumo V Rustenburg Platinum Mines Ltd [2007]ZACC 22*

The Constitutional court accepted that PAJA has a supplementary effect on legislation providing for administrative action that

materially and adversely affects the rights of the public. We are thus required to read PAJA as providing generally applicable fair procedure to supplement specialised administrative procedures and remedies. This case raised constitutional issues which among others involved the interpretation of the Labour Relations Act(LRA) and the PAJA. Clarification of the Bato Star Fishing Principle that Section 6 of the PAJA revealed a clear purpose to codify the grounds of judicial review of administrative actions. It was accepted that while PAJA was of general application, variation should be allowed in respect of reviews concerning specialized fields.

53. Section 6 and 8 of The PAJA provide for remedies in the proceedings for judicial review. They make reference throughout to “a court or a tribunal. This is in line with the Constitutional Interpretation provision which provides the same measure to the courts and tribunal in execution of their interpretation and development of the common law functions.
54. The PAJA is the source for supplementation in the event of a lacuna in the administrative law, lack of a provision for an administrative order and directive creates an anomaly of under-inclusiveness in Section 160 and should be remedied by supplementation in accordance with the kinds of remedies authorised by the PAJA. While the PAJA is to be relied upon for interpretation, such should be done with the understanding of the object of the Act and the purpose of the provision under scrutiny.
55. Section 8 of PAJA provides for remedies in judicial review proceedings governed by the PAJA. It provides for the general power to set aside, to remit to the administrator and the power, in exceptional circumstances, to correct administrative action that is contrary to the Act.
56. In *Steenkamp No v Provincial Tender Board Eastern Cape 2007(3)SA 121 CC* The Court gave guidance at paragraph 29 that the relief must be fair to those affected by it and yet *vindicate effectively* the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles be appropriate relief. At paragraph 30 thereof, the Court goes on to indicate that,

“Examples of public remedies suited to vindicate breaches of administrative justice are to be found in section 8 of the PAJA. It is indeed so that section 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are “just and equitable”.

57. I am thus obliged to look to the section 8 of PAJA for an answer to regarding the appropriate remedies that I may consider to cure the defect in the remedial provision of Section 160. Section 8 of (1)(a) (ii) authorizes the tribunal to grant orders directing the administrator to act in the manner the Tribunal requires. This kind of remedy is identified as being the appropriate remedy in the circumstances of this case. Accordingly, I agree with the essence of the requested additional administrative order directed at the Commissioner.
58. In order to establish the suitable content of the supplementing remedy, I will draw from similar provisions of the Companies Act. This will help to maintain the course that the legislature sought to pursue, and to avoid trespassing into the legislative field by springing in the provision that is incompatible with the intention of the legislature. The general principle of *in pari materia*, a rule of statutory interpretation, says that legislative provisions of the same matter and on the same subject must be construed with reference to each other. The intent behind applying this principle is to promote uniformity and predictability in the law.
59. Turning to the relevant legislative provisions for purposes of developing an appropriate supplement to the Section 160 remedies: The criteria for reservation and registration of company names is provided for in Section 11 of the Act. Section 11(2) provides categories of company names which must not be registered.
60. Section 11(2)(a) –(c) provides for categories of company names which must not be registered, in that:
 - 60.1. Sec11(2)(a) prohibits registration of a names that is the same as a trade mark or a name registered as a defensive, name without

written consent by the owner and a name that is the same as the name of another company;

60.2. Section 11(2)(b) prohibits registration of a confusingly similar name to another registered company name, trade mark, mark or business name without written consent by the owner of such name; and

60.3. Section 11(2)(c) prohibits registration of a misleading name.

61. The purpose of the above provisions is, to protect the rights of the owners of company names, trade marks, marks, restricted names and business names from the infringement of their rights. Section 14(2)(b) of the Companies Act provides for the process that the CIPC must follow in the event that the proposed name for registration on incorporation, is a name that the company is prohibited, in terms of section 11(2)(a), from using. The aforesaid section 14(2)(b) mandates the CIPC to:

61.1. Accept and endorse the incorporation of the company using the company's registration number, followed by "Inc." "(Pty) Ltd", "Ltd", "SOC" or "NPC" as the interim name of the company in the companies register and on the registration certificate;

61.2. Invite the company to file an amended Notice of incorporation using a satisfactory name; and when the company files such an amended notice of incorporation, the CIPC must

61.3. Register the amended name in the companies register; and

61.4. Issue and deliver to the company an amended registration certificate showing the amended name of the company.

62. The Commissioner, being responsible for maintenance of the companies and trade marks registers, is able to establish on incorporation that the proposed name, is the same as the name, trade mark, or mark that is already in use or is restricted. Section 14(2)(a) effectively prevents infringement of the rights of the owners of the company names, business names, marks or trade marks. While Section 14(2)(a) is geared at prevention of infringement of rights, Section 160 is geared at remedying the infringement suffered as a result of the unlawful registration of names that are prohibited, in terms of Section 11(2)(b) and (c)

63. In my view, in the spirit of the *in pari materia* principle, an administrative order along the lines similar to the provisions of Section 14(2) is the appropriate relief required to supplement the remedies provided by Section 160 and thus cure the defect in the remedies provided in respect of the Section 160 application. The relief shall be couched in a manner that is consistent with Section 8(1)(a) (ii) of the PAJA. Accordingly I find the appropriate order to be granted in the present application being an order to the effect that the Commissioner must invite the first respondent to file an amended notice of amendment within a specified time and use the first respondent's registration number followed by "(Pty) Ltd", as the interim name of the company and enter such changes in the companies register.
64. Turning to the request for costs order: Regulation 156 empowers the tribunal to grant a costs order. A party seeking for costs must persuade the tribunal to grant the costs. The Companies Act introduced the Companies Tribunal with the intention of facilitating dispute resolution expeditiously and cost effectively. The Tribunal should be cautious not to discourage parties from participating in the development of jurisprudence for fear of the risk of costs. The action that is reviewed is that of the CIPC, not the first respondent and the respondents have not participated in the process. Even if they had participated in the application, their participation alone should not automatically attract a costs order. The applicant has not made out a case for a costs order.

Conclusion

In conclusion, the following findings are made:

1. Registration of the first respondent's name is inconsistent with the provisions of section 11(2)(b) and (c) and is thus unlawful.
2. The Tribunal has the authority to grant the administrative order directing the Commissioner to take steps to correct the breach caused by the unlawful name registration;

3. The applicant has successfully made out a case for the appropriate administrative orders; and
4. The applicant has not made out a case for the costs order and should thus not succeed in this respect.

Accordingly, the following is ordered:

A.

- a. The administrative decision of the second respondent to register the name of the first respondent as Kulula Services and Projects Pty(Ltd) is unlawful and therefore reviewed and set aside;

B. The Commissioner must:

- b. Within ten(10) days of receipt of this order, invite the first respondent to file an amended notice of amendment of the Company Memorandum, with specific reference to the name;
- c. Process the first respondent's amendment application for change of name expeditiously, at no cost;
- d. If the first respondent's name amendment application has not been received by the Commissioner within forty(40) of the first respondent's receipt of this order, *alternatively*, if the amendment application has not been finalized within sixty(60) days of the second respondent's receipt of this order, whichever occurs first, the second respondent must:
 - i. Amend the company register by removing the registered name of the first respondent;
 - ii. Use the Company's registration number of the first respondent followed by "(Pty) Ltd", as the interim name of the company in the companies register and on the registration certificate.

- iii. Issue and deliver to the first respondent, an amended registration certificate showing the interim name of the first respondent;
- e. Upon acceptance of an acceptable amended name, the Commissioner must:
 - i. enter the first respondent's amended name in the companies register; and
 - ii. Issue and deliver to the first respondent, an amended registration certificate showing the amended name of the first respondent.

C. The first respondent is ordered to:

- f. Apply for the amendment of the Memorandum of Incorporation specifically for purposes of amending the company name, at no cost;
- g. Cease using the name Kulula Services and Projects Pty(Ltd) upon the lapse of forty(40) from the date of receipt of this order;
- h. Use the interim company name in the form of the first respondent's company registration number until its name amendment application is approved and the Commissioner has issued the amendment registration documents; and
- i. Co-operate with the Commissioner for execution of this order

DATED at Pretoria on this theday of June 2020.



Ms M Ramagaga
Tribunal Member