

POSITION PAPER
THE CONSUMER PROTECTION ACT, 2008, AND THE
REGISTRATION OF BUSINESS (TRADING) NAMES

1. The Consumer Protection Act, 2008, when it comes into force during the last part of 2010, will prohibit the use of unregistered business names unless a person trades under his or her full name as recorded in an identity document. This merely means that a person who wants to trade under a business or trading name (being a name that is not registered as a company or CC name or registered otherwise under some law) would have to register that business name under the said Consumer Protection Act. The criteria for business names are dealt with in the Act and the process for application for registration would be prescribed in regulations which are currently in the process of being drafted.
2. Item 5 of Schedule 2 to the Consumer Protection Act, however, contains important transitional provisions relating to the date on which the new requirements would become effective as well as their application to existing business or trading names. In the first instance the new provisions requiring registration of business names could only become effective a minimum of one year after the Act comes into operation and the second is that the prohibition on the use of unregistered business names would not apply to business or trading names that have been in use for more than a year from the date on which those provisions came into force.
3. It would of course be advisable to eventually register business names that are in use as such registration would afford the necessary protection to its proprietor. Alternatively, business names could be registered under the Companies Act (both the existing and the new Act) as defensive names. The latter registration would, however, have to be renewed every second year.
4. The relevant extracts from the Consumer Protection Act, 2008, are as follows:

“CHAPTER 4

BUSINESS NAMES AND INDUSTRY CODES OF CONDUCT

Part A

Business names

Identification of supplier

79. (1) A person must not carry on business, advertise, promote, offer to supply or supply any goods or services, or enter into a transaction or agreement with a consumer under any name except—

(a) the person's full name as—

(i) recorded in an identity document or any other recognised identification document, in the case of an individual; or

(ii) registered in terms of a public regulation, in the case of a juristic person; or

(b) a business name registered to, and for the use of, that person in terms of section 80, or any other public regulation.

(2) A person doing anything contemplated in subsection (1) must include the following particulars on any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account that the person issues:

(a) The name, title or description under which the business is carried on;

(b) a statement of the primary place at which, or from which, the business is carried on; and

(c) if the activity is carried on under a business name, the name of the person to whom that business name is registered.

(3) If a person—

(a) does anything contemplated in subsection (1) under a name that is not that person's full name, or a business name registered to that person, the Commission may issue a compliance notice to that person, in terms of section 100, requiring the person—

(i) within a reasonable time, to—

(aa) apply for registration of the business name in terms of section 80; or

(bb) discontinue that conduct under that business name; and

(ii) if the application to register that business name is unsuccessful for a reason contemplated in this Part, to discontinue that conduct under that name within 40 business days after receiving notice of the failure of the application;

(b) fails to comply with any requirement of subsection (2), the Commission may issue a compliance notice to the person in terms of section 100; or

(c) does anything contemplated in subsection (1) under a business name that is registered to another person, that other person may apply to the court for an order contemplated in subsection (4).

(4) The court hearing an application contemplated in subsection (3)(c) may make an order directing a person to stop using a business name within a period, and on any terms, that the court considers just, equitable and expedient in the circumstances.

Registration of business names

80. (1) A person may file a notice with the Registrar in the prescribed manner and form, and with payment of the prescribed fee, to—

- (a) register any number of business names being used, or to be used, by that person in carrying on the person's business;
- (b) register the same business name translated into any number of official languages of the Republic;
- (c) change a registered business name; or
- (d) transfer a registered business name to another person.

(2) The Registrar must register—

- (a) a business name, or translation or change of a business name, as filed, if it satisfies the requirements of section 81; or
- (b) a transfer of a business name, as filed.

(3) If the Registrar believes on reasonable grounds that a person has applied to register a business name, or a translation or change of a business name, that does not satisfy the requirements of section 81—

- (a) the Registrar must notify the applicant accordingly; and
- (b) the procedures set out in the Companies Act, 1973 (Act No. 61 of 1973), for resolving disputed names of companies, read with the changes required by the context, apply to the resolution of the disputed business name.

(4) If, during the time that a business name is registered to a person, the Registrar, on reasonable grounds, believes that the person has not been carrying on business under that name for a period of at least six months, the Registrar—

- (a) by notice in the prescribed form, may require the person to whom the business name is registered to show cause in the prescribed manner and form why the registration should not be cancelled; and
- (b) may cancel the registration by notice in the prescribed form if the person to whom the business name is registered fails to respond to the notice within the prescribed time, or fails to provide—
 - (i) satisfactory evidence that the person is conducting business under the registered business name; or
 - (ii) a reasonable explanation for not conducting business under that name as noted by the Registrar.

(5) A person affected by a decision of the Registrar in terms of subsection (4) may apply to the Tribunal to review the determination.

Criteria for business names

81. (1) Subject to subsection (2), a business name may comprise words in any language irrespective of whether the words are commonly used or contrived for the purpose, together with—

- (a) any letters, numbers or punctuation marks;
- (b) any of the following symbols: +, &, #, @, %, =;
- (c) any other symbol permitted by the regulations made in terms of subsection (3); or
- (d) round brackets used in pairs to isolate any part of the name, alone or in any combination.

(2) A business name—

- (a) must not be the same as, or confusingly similar to—
 - (i) a name of a juristic person incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973), the Close Corporations Act, 1984 (Act No. 69 of 1984), or the Co-operatives Act, 2005 (Act No. 14 of 2005);
 - (ii) a registered trade mark belonging to another person, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the applicant for registration of the mark as a business name either—
 - (aa) is the registered owner or applicant for registration of the mark; or
 - (bb) has been granted a licence to that mark; or
 - (ii) a mark, word or expression, the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted in terms of that Act;
- (b) must not falsely imply or suggest, or be such as would reasonably mislead, a person to believe incorrectly that the business—
- (c)
 - (i) is part of, or associated with, any other person or entity;
 - (ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;
 - (ii) is owned, managed or conducted by persons having any particular educational designation or who are regulated persons or entities;
 - (iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of—

(aa) any foreign state, head of state, head of government, government or administration or any department of such a government or administration or

(bb) any international organisation; or

(c) must not include any words, expression or symbol that, in isolation or in context within the name, fall into the category of expression contemplated in section 16(2) of the Constitution.

(3) The Minister may prescribe additional commonly recognised symbols for use in business names, as contemplated in subsection (1)(c).

SCHEDULE 2

Relief from requirement to register business names

5. (1) Section 79(1), (2) and (3)(a) and (b), and sections 80 and 81, do not take effect until a date determined by the Minister by notice in the *Gazette*, which date must be at least one year following the general effective date.

(2) The Minister must publish a notice contemplated in subitem (1) at least six months before the date on which that notice is to take effect.

(3) The Commission may not take any action to enforce—

(a) section 79(1) at any time against a person for the use of a business name, if that person—

(i) had registered that business name before the general effective date in terms of any public regulation other than a repealed law; or

(ii) was actively conducting business under that business name for a period of at least one year before the date on which section 79 took effect.

(4) Any business name that, as of the general effective date, was registered in terms of any repealed law, must be regarded as having been registered in terms of this Act, as of the effective date.

(5) The register of business names, as maintained by the Companies and Intellectual Property Registration Office in terms of any of the repealed laws, is continued as the register of business names contemplated in this Act.

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