

Company name approval under the new Companies Act

In terms of S42 of the current Companies Act 61 of 1973, all companies have to make an application for a name to be approved before the formal incorporation process can be initiated and the founding documents of a company can be lodged with the Companies and Intellectual property registration office (CIPRO).

The name reservation and approval procedure is therefore a mandatory pre-incorporation step undertaken by company registrants on a CM5 form, in order to ascertain whether the name sought for the company does not infringe upon the rights of other registered companies by being undesirable in nature, as ascertained by CIPRO.

This procedure of checking or vetting of names by CIPRO is to protect registered company name holders in order to alleviate instances of passing off of an already existing company by those wishing to coat tail on the goodwill of the company; or by having names so similar that an association of companies might be misconstrued, or by the public not being fully aware of the company to which they are contracting or making enquiries with.

However, as this stand alone procedure requires checking and approval by CIPRO, and as stated that a formal incorporation will not proceed unless a name is approved, this might cause delays in the registration of a company by proposed incorporators of companies, if their proposed names are rejected and there might be instances of a series of continuous rejections.

The new Companies Act 71 of 2008 has revolutionised the name reservation and approval process by removing the name approval process as being a mandatory stand-alone step, prior to formal incorporation of a company.

An incorporator still has the option to apply for a reservation of a name [as per S12 of the new Companies Act], of a company that he/she wishes to register, but that process is by choice.

Persons who might utilise a name reservation process are those persons who intend registering a company in the future, but require name approval and protection prior to a future incorporation. A name is reserved for a period of six (6) months from the date of application.

Basically the new process for the approval of a name will be that an incorporator will submit four choices of names on the Notice of Incorporation, which is the founding incorporation document of a company, containing information on type of business, directors, registered company addresses etc.

The Companies and Intellectual Property Commission [which replaces CIPRO as the registrar and regulator of companies] will then put those name choices through a checking and testing process to determine if they are suitable to be approved.

Suitability for approval of a name will rest on three criteria as per S11 of the new Companies Act namely, that:

1. The name of the company not be the same or confusingly similar to an existing company, close corporation or co-operative name; or a trade mark or mark, word or expression protected under the Merchandise Marks Act.
2. The name of the company not falsely implies or suggests that there is an association with another person or entity or by the state or foreign states or an international organisation or is owned by persons having a particular educational designation.
3. The name of the company does not contain words, expressions or symbols that propagate war, violence or hatred towards others.

If the name choices fail the tests as stated above, then the names are rejected by the Commission.

However, the rejection of all the names does not delay the formal incorporation of the company, as the unique designated company registration number assigned by the Commission, becomes the name of the company.

The Commission will therefore register the company, assign a number to the company and endorse same on a certificate of registration, which will then be returned to the incorporators allowing them to trade on the unique registration number as their name.

Further innovation concerning names in the new Companies Act is that the Commission will now also allow symbols in names and these symbols as contained in the Act are the + & #, % = or any others as per the regulations, and the draft regulations contains the @ and – symbols as additions.

Any language is also now permitted, irrespective of whether the words are commonly used or made up, but such name will require a certified translation into an official South African language.

These innovations regarding the name approval process will therefore reduce the burden of having names submitted only to have them rejected on numerous occasions and allow for faster registration of companies by the Commission.

The Commission is also now granted wide powers in the regulating of the reserving and use of company names. If the Commission has reasonable grounds to believe that a person or related persons are abusing the name reservation process by trading or the selling off of reserved names [regarded as “name squatting”], then the Commission can apply to court to prohibit that person or persons from reserving names.

If a name so wished to be approved is similar to the name of another company, close corporation or co-operative, such will be allowed if the applicant claims and provides proof to the Commission that such companies are part of a group company structure.

The Act now also contains in S12 (5) the ability for reserved names to be transferred from the applicant to another person.

If the Commission rejects a name, further innovations in the dispute resolution mechanics as contained in the Act and draft regulations, provide a recourse to an applicant in that an application can be made to the Companies Tribunal for a determination on whether such name should be allowed to be reserved or approved by the Commission.

The reservation of defensive names as per the current 1973 Companies Act is retained in S12 (9) of the new Companies Act.