

What are the legal aspects when using 'trading as' names?



It is not uncommon for a company to use a trading name which is not the same as the registered name of the company as recorded at the Companies and Intellectual Property Commission (“CIPC”).

Trading names are used by companies that do not wish to operate under their registered name, for instance where a trading name was previously used by a company (private incorporation) and a business does not want to confuse their customers by changing its name and brand.

It is possible to officially register a company name at the CIPC, while the organisation uses one or more 'trading names' specifically if there are more than one sub-division or branch of the company. Some company divisions often trade under different names, with the name registered at CIPC belonging to the original company.

What the restrictions for businesses when deciding on using a 'trading as' name?

Section 11 of the Companies Act 71 of 2008 sets certain requirements if a company wants to register an official name with CIPC. The requirements can be summarised as follows:

- A business name may not be the same as, or confusingly similar to, the following:
 1. A name of an incorporated company, close corporation or co-operative;
 2. A pending or registered trademark belonging to a person other than the company, or well-known trademark in terms of section 35 of the Trade Marks Act 194 of 1993; or
 3. A mark, word or expression protected under the Merchandise Marks Act 17 of 1941; or
 4. A business name that falsely implies or suggests that the business is associated with or part of, inter alia, other persons or entities, the State and its related bodies, or persons or bodies with any particular educational designation.

Should the official name to be registered fail the test as stated above, the Registrar may refuse to register the name or request that a notice of the name be sent to any party who may have an interest in objecting to it.

With regard to trading names which are not registered at CIPC, the following should be borne in mind:

The Business Names Act 1985 imposes certain legal requirements on companies adopting a business practice to use a trading as name which is not officially registered. The most obvious provision is that the trading name may not be the same as, or similar to, another company or business name in a way that might be confusing. In the same way that you may not register a company using the same name as a company that is already registered, you cannot register one company name (which is completely different) and then use a 'trading as' name which is the same as a company name already registered with CIPC.

In terms of chapter 4 of the *Consumer Protection Act 68 of 2008 ("CPA")* and, more specifically, sections 79 to 81, companies may no longer trade under names which are not the same as their registered names. The provisions of section 79(1) stipulate as follows:

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.

3) If a person— 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 any 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.

What are the legal implications when using a 'trading as' name wrongfully?

It is important for companies to understand the legal implication when using a 'trading as' name wrongfully.

The implication is that, should any business operate with any name other than those in section 79 of the Consumer Protection Act 68 of 2008 ("CPA") as set out above, the National Consumer Commission ("**the NCC**") can issue a compliance notice and failure to comply will result in a fine or prosecution as a criminal offence.

However, the CPA provides a certain degree of leniency for businesses that had been trading before the business name provisions of 2008 came into force. The NCC may not enforce the business name requirements against a business if it had been trading under the business name for a period of at least one year prior to 2008.

These provisions may cause difficulties for franchises because there are normally multiple franchisees trading under the same name as the franchisor. However, the registered name for each franchisee may be completely different. The new requirements therefore force each separate franchisee to register the same business name, resulting in multiple entries of the same name being reflected in the records of the CIPC. This could be somewhat counter-intuitive since the confusion that it creates may defeat the purpose of the consumers' right to information in the first place. Furthermore, franchisors may not be happy allowing each and every franchisee to incorporate what is effectively their 'trademark' as the franchisee's business name.

In conclusion

It is advisable not to continue using a trading name in isolation and, instead, to register a trademark and/or name of the company which can also be used as the trading name. It is obviously important to conduct a company name search to ensure that the 'trading as' name is not already registered at CIPC. Sensible business people would also conduct other searches in local business directories, on the internet and in the phone book to make sure that they do not step on anyone's toes. Because a 'trading as' name is not registered at CIPC, it is not properly protected. There is always the danger that someone else may in future register the 'trading as' name incorporating a new company and then stake their claim. This could cause complications for your business as they will have the right to the name and therefore could force you to stop using the name as a 'trading as' name. It is therefore wise to conduct a company information search and then register the 'trading as' name to retain a proprietary interest in respect of that name. In order to minimise any risks associated with using a 'trading as' name, a business should also indicate on all marketing material, invoices, letterheads and documents involving outside parties, the official registered name of the business.

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