

Registration of Business names in terms of the Consumer Protection Act – Part 1

One of the more contentious chapters of the Consumer Protection Act (the Act) deals with the registration of business names. Sections 79 to 82, which deal with business names, have received significant exposure in the media and in academic circles with a number of prominent commentators expressing diverging opinions on the interpretation and potential implementation of these sections.

It should also be noted that, at the time of writing, the sections were not yet in force, as the Minister has not yet announced the date of commencement. As with so many other sections of this Act it is however prudent to get one's house in order before the sections become active. It is unclear when this is likely to be.

On the face of it, the sections appear to be simple enough to understand. Intense studying of the sections however, reveals various complexities and potential ambiguities.

In this article we will explore the rationale behind this section and look into what a supplier should be registering in order to adhere to the Consumer Protection Act. As usual, we will place a specific emphasis on the likely impact it will have on franchisors and franchisees respectively. In a follow up article, we will set out the procedure which will need to be followed to obtain a business name registration in terms of section 80 (read with regulation 39) and the criteria which the registrations must adhere to.

For this article however, our focus will be on section 79 dealing with the identification of a supplier.

Section 79(1) states that 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 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.

Of further importance is the definition of 'public regulation' in chapter 1 of the Consumer Protection Act. This term is defined as any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority.

The reason for the inclusion of this section in the Act appears to be the protection the consumer by ensuring that he is always aware of whom he is contracting or transacting with.

This is underlined by sub-section 2 which states that the following particulars must be included in any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account:

- The name, title or description under which the business is carried out;
- Statement of the primary place at which, or from which, the business is carried on; and
- If the activity is carried under a business name, the name of the person to who the business name is registered.

A 'business name' is defined as follows in terms of section 1:

'...a name under which a person carries on a business other than the person's full name...'

Sections 79(3) and (4) further sets out the powers which are granted to the Consumer Commission or the Court to force suppliers to adhere to the section.

The question is now, how do these provisions affect the persons in a franchise relationship? More specifically, should either the franchisor or the franchisee apply to have the individual business names registered in terms of section 80?

On the face of it, and depending on certain additional information which may differ in each instance, this appears to be the case. The simple and probably most practical approach would be for the franchisor to register the names of all of its franchisees, which should then be licensed back to the franchisee in the franchise agreement.

It would be appropriate and prudent for the franchisor to register the business names in its own name, as it owns the trade mark and to ensure that the franchisee does not have any registered rights to the name during and after termination of the franchise agreement. As an example, the franchisor of the MULTISERV franchise may wish to consider registering all of the names of its individual franchisees, for instance: MULTISERV ROSEBANK and MULTISERV NELSPRUIT. This will also have an added, admittedly limited, defensive function once registered.

Registration in the name of the franchisor does however raise the question whether this still performs the function of identifying the supplier (which is the franchisee *vis-à-vis* the consumer) in terms of section 79? The answer is not clear and this will be discussed fuller in a following article.

Questions have been raised about this rather simplistic interpretation of section 79. These include, for instance, whether the registration of a trade mark would negate the necessity for registering a business name in terms of section 80. The Trade Marks Act does after all qualify as a 'public regulation'.

There is no indication that this was the intention of the legislator and a wide interpretation of this nature can lead to a number of difficulties. It is, for instance, conceivable that multiple different proprietors may claim concurrent rights to an identical trade mark provided it is registered in unrelated classes.

To borrow an example from a famous UK domain name decision: a sporting company may have a trade mark registration for PRINCE in class 28 for sporting goods, while a third party may have a completely legitimate right to an identical PRINCE mark in class 42 for computer software design services. Both therefore have concurrent rights to identical marks. This also opens the door on what exactly happens if one PRINCE registers the name as a business name to the detriment of the other PRINCE.

The likely difficulties in this interpretation do however not detract from the fact that it is an entirely conceivable analysis of section 79 if read with the definitions. The wide nature of the definitions may lead to even more absurd interpretations, for instance: would the registration of MONKEYNASTIX (assuming for a moment that it is not a registered trade mark or a registered company name) as a domain name in terms of the Electronic Communications Act qualify as a business name registration in terms of section 79?

At this stage, the answer is not clear. It does however seem very unlikely that it was the intention of the legislature to afford such wide registration possibilities. Although the regulations to the Act set out certain provisions relating to the registration process, it does

not clarify the position with regard to what exactly should be registered. It is hoped that guidelines will be published once the business name register is operational.

There is a school of thought that obtaining a 'registered business name' is only possible in terms of the Consumer Protection Act or possibly the new Companies Act, and that the catch all in section 79(1)(b) of 'any other public regulation' was merely included to make provision for future legislation changes to the registration of business names. Practically, this interpretation is probably correct although only time will tell which approach is followed by the Commission and the Courts.

In the interim, it seems that the target for business name registrations is small businesses who either do not trade in their registered business name (thus trade under a 'trading as' name) or who do not have any registered name. The most likely scenario is that, for instance, where ABC Investments 526 CC is trading as "Craig's Clocks" – CRAIG'S CLOCKS will need to be registered as a business name.

In conclusion, it seems that even though difficulties may arise or restrictions may prevent this in certain instances, franchisors should certainly consider registering the trading names of all its franchisees, or at the very least the franchisor's primary and core name and trade mark on the CPA business name register, as soon as it is possible to do so.

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