

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2022/00064

In the matter between:

**FIRST ST JOHN'S APOSTOLIC FAITH MISSION**

**APPLICANT**

and

**REGISTRAR OF COMPANIES**

**FIRST RESPONDENT**

**THE REGISTRAR OF INDUSTRIAL PROPERTY**

**SECOND RESPONDENT**

**ST JOHN'S APOSTOLIC FAITH MISSION CHURCH**

**THIRD RESPONDENT**

**Neutral citation:** *First St John's Apostolic Faith Mission v Registrar of Companies*  
(HC-MD-CIV-MOT-REV-2022/00064) [2023] NAHCMD 206 (20  
April 2023)

**Coram:** USIKU J

**Heard:** 10 November 2022

**Delivered:** 20 April 2023

**Flynote:** Companies Act 28 of 2004 – s 51(2) – Two companies having similar names – Registrar of Business and Industrial Property ordering applicant company to change its name – Court finds that the name of applicant is likely to lead to confusion on the part of the members of the public in their dealings with the competing parties – Applicant's name declared 'undesirable'.

**Summary:** The applicant is registered in terms of the Companies Act 28 of 2004 under the name of First St John's Apostolic Faith Mission. Thereafter, the third respondent, which is registered under the name of St John's Apostolic Faith Mission Church, lodged an objection with the Registrar of Business and Industrial Property, on the basis that the applicant's name was similar to its name and therefore 'undesirable'. The registrar upheld the third respondent's objection and ordered the applicant to change its name. The applicant thereupon applied to this court for an order reviewing and setting aside the registrar's decision.

*Held:* that there is a similarity between the two names which is likely to lead to confusion on the part of the members of the public as to the entity they are dealing with and therefore, rendering the name of the applicant 'undesirable' within the context of ss 47 and 51(2) of the Companies Act.

*Held further that:* the applicant's application is dismissed with costs.

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### ORDER

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1. The applicant's review application is dismissed.
  2. The applicant is ordered to pay the costs of the first respondent.
  3. The matter is removed from the roll and is regarded finalised.
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### JUDGMENT

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USIKU J:

#### Introduction

[1] This is an application by the applicant for the review and setting aside of a decision taken by the Registrar of Business and Industrial Property <sup>1</sup> ('the registrar'), in terms of which she directed the applicant to change its name.

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<sup>1</sup> The registrar is appointed in terms of s 16 of the Business and Intellectual Property Authority Act 8 of 2016.

## Background

[2] On 18 May 2006, the registrar, on application by the applicant, registered the name 'St John's Apostolic Faith Mission' as a defensive name, valid for a period of one year, expiring on 18 May 2007. The aforesaid name was again registered as a defensive name on 13 July 2007.

[3] On 6 September 2006, the registrar issued a certificate of incorporation in favour of the third respondent under the name of 'St John's Apostolic Faith Mission Church' as a section 21 company.

[4] In 2010, the applicant applied to the registrar to re-register its name as a defensive name. The registrar refused the application on the ground that there is already a company, namely the third respondent, registered under a similar name.

[5] In 2013, the applicant sued the third respondent, in this court under case No 245/2013, seeking the review and setting aside of the decision by the registrar, refusing to re-register the name 'St John's Apostolic Faith Mission' as a defensive name.

[6] On 29 June 2017, this court, having had regard to a settlement agreement concluded by the parties, ordered that:

- (a) the name 'St John's Apostolic Faith Mission Church' is correctly and lawfully registered to the third respondent,
- (b) the application by the applicant is dismissed and that,
- (c) the applicant pays the costs of the respondents.

[7] It appears that, when the court issued the abovementioned order, the registrar had, on 15 June 2017, registered the applicant as a section 21 company, in terms of the Companies Act 28 of 2004 ('the Act') under the name 'St John's Apostolic Faith Mission'.

[8] Aggrieved by the decision of the registrar in registering the applicant under the aforementioned name, the third respondent approached this court, in 2018, under

case HC-MD-CIV-MOT-REV-2018/00416, seeking the review and setting aside of the decision by the registrar to register the applicant under the aforesaid name, on the basis that such name is 'undesirable' in terms of s 51(1) of the Act.

[9] On 7 May 2020, this court upheld the third respondent's application and set aside the registrar's decision to register the applicant.

[10] On 12 March 2021, the registrar registered the applicant under the name of 'First St John's Apostolic Faith Mission' as a section 21 company.

[11] On 15 July 2021, the third respondent lodged an objection with the registrar in terms of s 51(2) of the Act, on the ground that the name under which the applicant is registered as a company, is similar to its name and is therefore 'undesirable'.

[12] On 20 September 2021, the registrar upheld the third respondent's objection and ordered the applicant to change its name within two months from the date of the issuing of the order.

[13] On 22 September 2022, the applicant, through its legal practitioners, responded to the registrar's order and informed the registrar, among other things, it shall not change its name.

[14] On 20 January 2022, the registrar informed the applicant, among other things, that she has, in terms of s 52(3) of the Act made a final order that the applicant should change its name and directed the applicant to submit the necessary documents required to effect the change of its name.

[15] Dissatisfied with the foregoing decision, the applicant, on or about 21 February 2022, brought the present application, seeking an order in the following terms:

'1. An order reviewing and setting aside the 1<sup>st</sup> respondent's final order made on 20 January 2022, directing applicant to change its name;

2. Declaring the actions of the 1<sup>st</sup> respondent directing the applicant to change its name to be in violation of the applicant's constitutional rights as enshrined in Article 18 of the Namibian Constitution, and therefore invalid, alternatively of no force and effect;
3. In the alternative, an order declaring the order made by the 1<sup>st</sup> respondent directing the applicant to change its name to be unreasonable, unfair and therefore unlawful;
4. That the respondents who oppose this application be ordered to pay costs of this application jointly and severally the one to pay the other to be absolved;
5. Further and/or alternative relief.'

[16] The first respondent opposes the application and filed an answering affidavit. The second respondent filed a notice of intention to oppose, but did not file an answering affidavit. The third respondent filed a notice of intention to oppose, but did not file an answering affidavit, nor did it file a notice in terms of rule 66(1)(c) of the Rules of this Court. However, the third respondent filed heads of argument in which it raised, for the first time, certain points of law. In this matter I refer to the first respondent as 'the registrar'.

#### The application

[17] The applicant submits that the registration of the third respondent by the registrar while the same name was reserved by the applicant, was unlawful. The applicant asserts that the registrar should have deregistered the third respondent upon realizing that she made a mistake in registering the third respondent in those circumstances.

[18] The applicant contends that the registrar was involved in the process when the applicant changed its name to the current name and was aware of the High Court judgment delivered on 7 May 2020.

[19] In making the impugned decision, so argues the applicant, the registrar failed to exercise her discretion judiciously and that the conduct of the registrar violates the applicant's constitutional right to administrative justice. It is also the contention of the applicant that the order made by the registrar on 20 January 2021, is unfair, unreasonable and unjust.

[20] In addition, the applicant submits that its name is not undesirable, for the following reasons:

(a) the name 'First St John's Apostolic Faith Mission' is distinguishable from the name 'St John's Apostolic Faith Church Mission Church' because there is a 'prefix' and a 'suffix' which distinguish the two entities. The word 'First' and the word 'Church' are the distinguishing features of the two names.

(b) churches are membership-based organisations. As such, members know where they congregate to worship. The members know the leaders of their respective churches. It is unthinkable that a member would attend the wrong church service or approach the wrong church leader on account of a confusion.

(c) church activities primarily focus on members and not on the general public. These activities include church bazars for raising funds, choir exercises baptisms of members' children and so on.

(d) it is unthinkable that banking institutions with which one of the entities does business would be confused by the 'so-called' similarities in the names.

[21] The applicant therefore, submits that the court grants the relief sought in its notice of motion.

### The opposition

[22] The registrar states that her decision to order the applicant to change its name is grounded in her opinion that the applicant's name is bound to cause confusion and is therefore undesirable. She is further of the opinion that the word 'First' before the applicant's name does not substantially differentiate its name from that of the third respondent.

[23] She submits that the confusion about the names is not limited to members of the two churches, but includes the wider public. People might ascribe conduct or activities, whether good or bad to one entity, when in fact it was the other.

### Third respondent's heads of argument

[24] As was stated earlier, the third respondent has filed a notice of intention to defend but did not file any answering affidavit. However, on 27 October 2022, the third respondent filed its heads of argument, in which it raised certain points of law, for the first time.

[25] The applicant submits that, as the third respondent did not alert other parties and the court, to the issues it intended to raise, its heads of argument and oral argument be disregarded in this matter.

[26] I agree with the submission made by the applicant. The third respondent did not file any opposing affidavit nor did it deliver a notice of intention to raise any point of law in terms of rule 66(1)(c). It is therefore, unacceptable for it to raise points of law, for the first time, in its heads of argument, knowing very well that the other parties would not have opportunity to respond thereto. For that reason, the court shall disregard the third respondent's heads of argument in this matter and treat the matter as if it was not opposed at all by the third respondent. For that reason, I am not going to make any costs order either in favour or against the third respondent.

### Analysis

[27] Section 47 of the Act provides that the registrar must not register a memorandum containing a name for a company to be incorporated if the registrar reasonably believes that the name is undesirable.

[28] Section 49 of the Act governs the registration of shortened form of name of a company or defensive name. The relevant portion of s 49 is subsection (2) which provides that:

'(2) Any person may on application on the prescribed form and on payment of the prescribed fee apply to the Registrar -

(a) to register any name as a defensive name; or

(b) to renew the registration of a name as a defensive name, which the Registrar reasonably believes is not undesirable and in respect of which that person has furnished proof, to the satisfaction of the Registrar, that he or she has a direct and material interest.'

[29] Section 51(2) makes provision for an objection against a registered name and provides that:

'(2) If within a period of one year after the registration of any memorandum or shortened form of a name of a company or a name referred to in section 49(2) or after the date of an amended certificate of incorporation or a certificate of change of name or shortened form of a name referred to in section 50(2), any person lodges an objection in writing with the Registrar against the name contained in the memorandum or shortened form of that name or the name referred to in section 49(2) or the changed name or the shortened form of that changed name referred to in the last mentioned certificate, on the grounds that that name or shortened form of a name is calculated to cause damage to the objector or is undesirable, the Registrar may, if he or she is satisfied that the objection is sound, order the company concerned or the person referred to in section 49(2) to change the said name or shortened form of a name.'

[30] Section 52 of the Act deals with provisions relating to registrar's order to change name and provides as follows:

'Provisions as to order to change name

52. (1) The order issued by the Registrar under section 51, including the reasons for that an order, for the change of a name of a company or a shortened form of a name of a company or a name referred to in section 49(2) must be issued by the Registrar in writing and sent by registered post to the company at its registered office, or to the person referred to in section 49(2) at that person's last-known address, and must require that company or person -

- (a) to comply with the order within two months from the date of its issue; or
- (b) to give reasons within two months from the date of its issue to the Registrar as to why that name or shortened form of a name of a company should not be changed.

(2) The Registrar may, on good cause shown, extend the period of two months referred to in subsection (1) for any further period not exceeding two months.

(3) If a company or a person has submitted reasons as to why the name or shortened form of a name of a company should not be changed, the Registrar may, after consideration of those reasons, either withdraw that order or make a final order and subsections (1)(a) and (2) do, with the necessary changes, apply with regard to that final order.

(4) If a company or person referred to in subsection (1), as the case may be, fails to comply with any order issued by the Registrar under subsection (1) or (3) within the period or extended period referred to in subsection (1) or (2), as the case may be, or if that company



or person has applied to Court for relief under section 54 and the Court has upheld the Registrar's order and that company or person fails to comply with that order within two months from the date of the final decision by the Court, that company or person commits an offence and is liable to a fine which does not exceed N\$40 for every day during which the contravention continues.'

[31] In the matter of *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd 2001 (3) SA 1268 (SCA)*, the court described the circumstances under which a company-name may be found to be 'undesirable' and stated that:

'... where the names of companies are similar and where there is a likelihood that members of the public will be confused in their dealings with the competing parties, these are important factors which the court will take into account when considering whether or not a name is 'undesirable'.<sup>2</sup>

[32] In *St John's Apostolic Faith Mission Church v Business Intellectual Property Authority*<sup>3</sup>, this court endorsed the foregoing approach in determining whether or not a name is undesirable.

[33] The mischief sought to be guarded against by the Act, insofar as it provides that a company may be ordered to change its name if it is undesirable, is to protect the public from being confused as to the entity they are dealing with.<sup>4</sup>

[34] In the present case, the applicant argues that it is lawfully entitled to use the name used by the third respondent because when the third respondent was registered, the applicant had already registered a similar name as a defensive name.

[35] The foregoing argument cannot be entertained on the ground that the court order dated 29 June 2017 binds the parties, including the applicant. In that order, the issue that the name 'St John's Apostolic Fourth Mission Church' was correctly and lawfully registered to the third defendant, was finally determined and cannot be revisited or challenged in the present proceedings.

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<sup>2</sup> *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd 2001 (3) SA 1268 (SCA)* at 1274C-G.

<sup>3</sup> *St John's Apostolic Faith Mission Church v Business Intellectual Property Authority (HC-MD-CIV MOT-REV-2018/00416) [2020] NAHCMD 141 (23 April 2020)* para 46.

<sup>4</sup> *Ibid.*

[36] The applicant also submits that its name is not 'undesirable', and that the registrar's decision should for that reason be set aside.

[37] In my view, the dominant part of the third respondent's name is 'St John's Apostolic Faith Mission'. Both the applicant and the third respondent are religious entities. The only difference between the names of the two entities is the word 'First' added to the beginning of the name of the applicant, and the word 'Church' added to the end of the third respondent's name.

[38] In my opinion, the name adopted by the applicant for registration, is almost identical to that of the third respondent. Adding the word 'First' to its name does not substantially differentiate its name from that of the third respondent. Having regard to both names, I am of the view that there is a likelihood that the members of the public will be confused in their dealings with the competing parties.

[39] I am further of the view that, confusion will exist when members of the public wonder as to which of the two entities they are or want to deal with. The argument put forth by the applicant that churches are membership-based entities, and therefore, the risk of confusion is non-existent, is not persuasive. Membership-based entities do not operate in isolation. They interact with the members of the public. They source their members from the members of the public. During such interactions, there should not be confusion on the part of the members of the public as to the entity they are interacting with.

[40] I therefore, come to the conclusion that the similarity between the two names is likely to lead to confusion of the members of the public as to the entity they are dealing with. In my view, the registrar correctly applied the provisions of the Act. Her decision did not violate the applicant's constitutional rights. Furthermore, her decision is neither unfair nor unreasonable. I am, therefore, of the opinion that the decision by the registrar to order the applicant to change its name cannot be faulted in the circumstances and stands to be upheld.

[41] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the event must find application.

[42] In the result, I make the following order:

1. The applicant's review application is dismissed.
2. The applicant is ordered to pay the costs of the first respondent.
3. The matter is removed from the roll and is regarded finalised.

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B USIKU  
Judge

## APPEARANCES

APPLICANT: K Kangueehi  
Of Kangueehi & Kavendjii Inc, Windhoek

## FIRST &amp; SECOND

RESPONDENT: L Mokhatu  
Of Du Pisani Legal Practitioners, Windhoek

## THIRD

RESPONDENT: N Marcus  
Nixon Marcus Public Law Office, Windhoek