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Members: Eben de Klerk
Carla de Klerk

No 5, Louis Raymond Street, Olympia
PO Box 11618, Klein Windhoek
Windhoek, Namibia
Phone: (+264)(81)1460814
Fax: (+264) 088 620 356
eben@isgnamibia.com
www.isgnamibia.com

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The CEO
Namibia Private Practitioners Forum
Windhoek
Namibia

Dear Dr Coetzee

LEGAL OPINION

“BIPA REGISTRATION NUMBER” NOT REQUIRED FROM SOLE PROPRIETORS

We refer to your request for a legal opinion on whether a healthcare provider, trading as sole proprietor (the “business”) is by law required to register with the Business and Intellectual Property Authority (“BIPA”) to be able to obtain the required certificates and licenses to practice, including certificates to be obtained from the Ministry of Healthcare and Social Services (MoHSS). The opinion is specifically necessitated after MoHSS refused to provide sole proprietors with practice certificates for they do not (and cannot) produce BIPA registration numbers.

Background

The business of a sole proprietor is not registered as a separate legal entity, such as a company or close corporation. Rather, it lawfully operates as a sole proprietorship. The opinion expressed herein is applicable to all healthcare providers practicing as sole proprietors.

Many public entities include in their procurement, licensing, certificate application and other documents a field “BIPA Registration Number” (or similar) to be completed, despite the fact

that sole proprietors are fully entitled to practice as such. In the past this did not prove to be an obstacle for sole proprietors, as they applied to BIPA¹ for the reservation of a defensive name and was then provided with a reference number for such name reservation. This number was seemingly accepted by all public entities as a “BIPA Registration Number”.

Confusion

The number provided by BIPA in respect of name reservations never constituted a BIPA Registration Number as envisaged by the procurement documents of public entities. Such number never referred to the registration of an entity such as a company or a close corporation and could thus never serve as proof that an entity was registered and operated as a company or a close corporation.

The number was merely a reference number to indicate that a specific business name was reserved as a defensive name at BIPA, and that no other entity may, for the period the name is reserved (i.e. two years), register an entity with BIPA by a name that is the same or similar to the one reserved.

The reservation of a defensive name is provided for, and BIPA thus acted in terms of section 49 of the Companies Act (Act 28 of 2004). The relevant parts of section 49 states [own emphasis throughout]:

“Registration of shortened form of name or defensive name

(1) The memorandum of any company to be incorporated may contain one shortened form of the company's name, and any company may, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the registration of that shortened form of its name, if the shortened form of the name is not undesirable.

(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,*

¹ Any reference to BIPA may also refer to the Registrar of Companies, who is also the CEO of BIPA, and the executive functionary under the laws discussed herein.

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.

(3) ...

(4) If the Registrar grants any application referred to in subsection (2), he or she must register the name in question as a defensive name for a period not exceeding two years or renew the registration of the name in question as a defensive name for a period not exceeding two years, as the case may be.

(5) The Registrar must register a shortened form of the name of the company concerned or a defensive name, and where a registration is effected pursuant to an application under subsection (1) or (2), the Registrar must give notice of the registration in the Gazette.”

From the above it is evident that the reservation, and subsequent registration at BIPA (from which a BIPA reference number follows) of a defensive name, is only possible, and should only be considered in respect of a company to be registered in future. Put differently, in order for BIPA to consider an application for or renewal (after every two years) of the reservation of a name, BIPA must be satisfied that the intension of such applicant is to reserve the name while reasonable steps are being taken to register a company under the Companies Act.

Therefore, any entity that does not intend to register as a company in future does not qualify for a reserved name under section 49 of the Companies Act. Similarly, a sole proprietor that has no intention of registering as a company, cannot qualify to register a reserved name, and therefore cannot obtain the BIPA reference number normally issued for a reserved name.

Past practices were erroneous

For many decades in the past BIPA, and its predecessor, the Registrar of Companies under the Ministry of Trade, continued to accept and approve applications by sole proprietors for name reservations. These reservations were automatically renewed (upon application) every two years, despite the fact that such sole proprietors never had the intention of

registering companies in future. As such, the applications were erroneously (i.e. ultra vires) approved, for they did not comply with the prescriptions of the Companies Act.

Similarly, the procurement and licensing officers at public entities grew accustomed to requiring a BIPA registration number and accepting a name reservation number provided by sole proprietors. As stated before, this reservation number is not a registration number of a separate legal entity such as company or close corporation.

We understand that it was never the intention of public entities to exclude sole proprietors from the procurement or licensing process. Sole proprietors also freely competed in the procurement process, for as long as they could provide a “BIPA number”, i.e. the name reservation reference. The procurement and licensing officers seemingly never understood the difference between a BIPA number that indicates the registration of a company or close corporation, and a BIPA number that is merely a reference to a defensive name.

Current situation

BIPA recently informed the public that it cannot continue to consider applications for, or renewals of reservations of name from persons who do not intend to register a company under the Companies Act. BIPA did not change the law. It only informed the public of the correct legal position, and that the past practice was not in line with the prescriptions of the law and can thus not be continued in future.

One would not have envisaged any major implications in BIPA merely stating the correct legal position, but the implications were in fact dire and far-reaching.

There is no legal requirement for sole proprietors (or partnerships) to register with BIPA. BIPA registration is required only by specific statutes governing separate legal entities such as companies and close corporations. Put differently, even if a sole proprietor (or partnership) wanted to, it cannot register the business as a sole proprietor (or partnership) with BIPA. Now that the sole proprietor also cannot get a name reservation reference number from BIPA anymore, he has no number to provide where the public entity procurement and licensing documents require in a field to be completed a “BIPA



Registration Number”. It has now come to light that applications by sole proprietor healthcare providers / facilities for practice certificates are rejected being rejected by MoHSS solely for this reason, the inability to provide a “BIPA number”. This is disastrously detrimental for all sole proprietors (and partnerships) who are now unlawfully refused to practice their profession.

Sadly, this prejudice does not stem from any rationality, from any change in laws, or from any change in licensing requirements, but simply a misguided understanding of the applicable laws. It is simply unlawful to require (and force) a sole proprietor to register a company or a close corporation to be able to practice their profession.

It stems solely from a lack of understanding by licensing officers as explained above, coupled with a practice employed by procurement offices for many years, and an inability to understand that it was always irrational to ask a BIPA number from sole proprietors. It was always irrational to accept a name reservation number in lieu of a business registration number.

Some time ago we requested BIPA to educate the procurement and licensing officers in public entities on the above. We were informed that BIPA did undertake an extensive education exercise, but that it cannot do more if the procurement and licensing officers simply refuse to understand. The problem thus persists (at least within some public entities) and sole proprietors are still being prejudiced; completely irrationally so.

Conclusion

From the above explanations we therefore advise that:

1. Sole proprietors cannot register at BIPA as sole proprietors.
2. Sole proprietors cannot obtain a name reservation if they have no intention to register a company.
3. Sole proprietors can therefore not provide a “BIPA Registration Number” as still required by some public entities.

4. To refuse sole proprietors licenses and certificates solely on the basis of a requirement which sole proprietors cannot possibly meet, is irrational, misguided, discriminatory, and severely detrimental to Namibia's business and economic environment.
5. There is no logical or lawful requirement for any sole proprietor (or partnership for that matter) to be registered as either a company or a close corporation to qualify for participation in public procurement or obtain the required licenses and certificates to be able to practice their profession.
6. I advise sole proprietors (and partnerships) not to change their businesses to separate legal entities, against their will, simply to obtain a BIPA Registration Number to be able to obtain licenses and certificates. The problem stems from a lack of understanding by some procurement and licensing officers, not from the legal status of their businesses.
7. To change a sole proprietorship or partnership to a company or close corporation holds substantial compliance, cost, tax and other implications. This should therefore not be done on an irrational basis, and in this case, simply for reason of licensing officers not understanding the basic laws that govern all businesses in Namibia.

We advise accordingly.

Yours faithfully,



EBEN DE KLERK