

# **What is in a Name? Assessing the limitations in the Conceptualisation of Business Names of Local Small Scale Vending Businesses in Zambia**

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## **Abstract**

*Business names, like brands and trademarks are economic devices that play an instrumental role of differentiating businesses from other businesses in the course of trade. Utilising the doctrinal approach this paper focuses on business names of small scale vending businesses in Zambia and seeks to assess, using the economic theory, the limitations of adopting business names from local languages spoken in Zambia by proprietors of small scale vending businesses that maybe perceived negatively on the strength or ability of the business in the eyes of the general public. This paper argues that in most cases such business names only have utility for the local market and context thus limiting the market power of a business name with regard to expansion beyond community, national and regional boundaries.*

## **Introduction**

There are three main categories of business entities recognised by law in Zambia, namely corporations which may either be public limited companies, private companies limited by shares, or a company

limited by guarantee; partnerships and sole proprietorships. Sole proprietorships are generally referred to as unincorporated businesses. The businesses are recognised under Section 4 of the Companies Act, Cap 388 and the Registration of Business Names Act, No. 16 of 2011. The level of financial investment in the business, since the Companies Act prescribes the minimum share capital for corporations but there is no such requirement for business names, the number of proprietors and the extent of separation between the proprietor of a business and the business principally dictate the type of business that can be established and registered in Zambia. A company is usually a separate legal entity from the directors and/or shareholders and upon registration acquires a separate legal status and is considered to be a 'legal' or 'artificial' person. However, if the intention is not to separate the natural person as the owner of the business referred to as the proprietor of the business, from the business itself the best type of registration is a business name. The registration of a business names also has its advantages for small businesses in that compared to corporations the registration fees for business names are less than the registration fees for corporations. For example, the registration fees, effective from August 2015, for a business names by a firm or individual is K166 while the registration fees for a public company are K25,332.00 and K582 for registering a private limited company with a minimum share capital by a local company and K4,166 for a foreign company.

Secondly, both the regulatory framework for business names and the administrative registration requirements are less onerous than the regulatory framework and the administrative registration requirements for corporations. For example, an applicant for a business name is required to file an application for a certificate for a business name with the Registrar at the Companies Registry of

the Patents and Companies Registration Agency (PACRA). Subject to Section 5(1) of the Act and Regulation 3 of the Registration of Business Names Regulations the prescribed forms for applying for registration of a business name are set out under the First Schedule to the Registration of Business Names Regulations, being Form 1 for corporations, Form 2 for firms and Form 3 for individuals. Notably Section 2 which is the interpretation section of the Registered Business Names Act defines an individual as “a natural person and shall not include a corporation.” Forms 2 and 3 generally require the applicant to, inter alia, indicate the business name to be registered, to specify the general nature of the business, to state the principal place of business, to state the names of the applicant, when the business will commence, to the age and sex of the applicant and to state the usual place of residence of the applicant. Under Section 5(2) the applicant may be requested to submit such other information as the Registrar may determine.

Whereas, subject to Section 6(1) of the Companies Act, when an applicant is filling for registration of a corporation the applicant is required to file at PACRA an application for incorporation which must be accompanied with the proposed articles of the company, a statutory declaration which satisfies the requirements under Section 9 of the Companies Act, a signed consent from each person named in the application as the company secretary or director of the company that they agree to act in that capacity, and if the company is a company limited by guarantee the applicant must also submit, in accordance with Section 6(1), of the Companies Act, a declaration of guarantee by each subscriber. It is important to note that the Articles of the company may impose restrictions on the business that may carry on and regulate the conduct of the company pursuant to Section 7 of the Companies Act.

Additionally, under Section 6(2)(e) of the Companies Act,

the applicant's must specify in the application for incorporation the level of investment by stating the share capital of the new corporation. All these requirements are not required when registering a business name.

### **Definition of a Business Name**

The Registration of Business Names Act No.16 of 2011 of the Laws of Zambia, hereinafter referred to as the Act, defines a business name, under Section 2, as a *“name or style under which any business is carried on, whether in partnership or otherwise, other than the true names of an individual.”* This definition is couched in very broad terms because under Section 2, a business name may also incorporate a sign or initials as abbreviations of a forename. Notably a sign can be anything that represents, indicates or stands for something (Ramello, 2006:547). Pursuant to Section 2, of the Trademarks Act, examples of signs include words which would include forenames, surnames, company names, business names, geographical names or any other word or set of words which words may be invented, unvented or slogans. Business names may utilise and incorporate forenames, surnames, geographical names or invented words. A business name is crucial for a business because it operates as an entrepreneurial landmark that performs two key functions in the course of trade. The first primary function as an information carrier is to identify and differentiate one business from other businesses (Bastos and Levy, 2012). Lack of a clear identity of a business can mislead or confuse consumers which may diminish consumer confidence and impact on profits as other businesses with a similar, nearly resembling or identical business name can free-ride on the reputation of the business. With regard to the second function a business name plays a critical role in developing and strengthening the brand and

reputation of the business since there is market power to make profits in a strong brand and reputation. What is also significant is that business names beyond the depiction are loaded with connotations to be communicated to the consumer. The significance of these connotations is that they may be direct and literal in terms of interpretation or indirect and arbitrary. But what is significant with regard to this paper is asking the question will the meaning of the business name be perceived firstly, negatively so as to take away business utility from the business or alternatively positively by adding business utility to the business. This paper argues that a business name has business utility if it is perceived positively by consumers and has the ability to influence consumer decisions to purchase goods and services supplied by the business.

### **The Economic Theory**

The economic theory is concerned with the explanation of commercial activities of businesses and how an economy functions and works (Thornton, 2010). A key principal of the economic theory is that the nature and meaning of a business name is very important for three reasons. The first is that it is the first thing that consumers see and understand about the business. The second is that the business name gives the overall impression of what the business is about and lastly the business name sums up the character of the business that will attract consumers from competing businesses. So first impressions matter very much and may have a powerful impact for facilitating the first interaction between the consumer and the business. This may also facilitate the continued interaction between the consumer and the business while at the same time providing an opportunity for consumers to retaliate if the consumer's expectations are not met. The business name therefore may have a powerful impact on sustaining demand for

goods or services supplied by the business. Demand for purposes of this paper is an economic principle that describes the consumer's desire and willingness to buy or pay a certain price for goods and services of a business (Whelan and Msefer, 1996). To an extent that consumers can be considered post conceptualisation of a business name to be involved in building the brand and reputation of the business as co-creators (Tierney *et al.*, 2016 and Hatch and Shultz, 2010). The argument being made is that the business name can limit or enhance the business (Aaker *et al.*, 2004). This is because the economic theory presupposes that in the process of conceptualising a business name like a trademark the proprietor of a business must invest in quality. For purposes of this paper Conceptualising or conceptualisation is defined as a process in research through which researchers specify and assign meanings and values to words and concepts. This paper borrows from this definition of conceptualisation but extends it to include in the case of proprietors the subjective and mental process or action of inventing or formulating a business name and includes the explanation of the idea and for purposes of this paper conceptualisation includes the formulation, invention, selection, adoption and explanation of a business name.

Turning to the issue of quality, the meaning ascribed to the word quality, in this paper, is derived from the ordinary English meaning which is "*the standard of something when it is compared to other things in terms of how good or bad something is*" (Hornby, 2006:1187). Quality here depicts a high standard and an important offshoot of quality would be the confidence that the proprietor must exude from the business name to appeal to the public in relation to the nature, characteristics, ability or attributes of the business, its name or the goods or services associated with the business and its name. This investment contributes to the development of recognisable attributes of a business, its name or

good and services provided or manufactured by a proprietor. The proprietor then reaps the benefits of such investments through the reputation the business acquires from the conceptualisation of a high quality business name, trademark, brand as affixed or associated with the business and the products or services of a business. Reaping from the business reputation therefore becomes an important incentive to invest in the process of conceptualising a business name that will exude attributes such as quality and confidence.

In a competitive business environment with different and competing vendors, the confidence in the name is then aimed at influencing and facilitating the purchase decisions of consumers (Ramello, 2006:551 and Landes and Posner, 1987). The business name therefore performs a public good that serves the interests of both the consumer and the business, since consumers are able to access and purchase the goods they desire and the business can earn profits from the business. Profit earnings can therefore be invested in expanding the business beyond the community in which they operate and further beyond provincial, national and regional boundaries. From this expansionist perspective small scale vending business can be transformed into medium or large scale vending businesses that employ more people and pay more taxes thereby enhancing social welfare gains in society that amount to economic growth.

### **Assessing the Limitations of Local Business Names that may be Perceived Negatively**

Generally, the Act for instance under Section, 4(1)(a) is used to formalise and regulate the registration of small businesses of individuals carrying on business under a business name “*which does not consist of the true surnames of individuals in Zambia without*

*any addition other than the true forename or forenames of the individual or initials of the forenames.”* The Act under Section 4 also extends its application to firms, such as law firms, “*with a place of business in Zambia which does not consist of the true surnames of all the partners who are individuals without any addition other than the true forename or forenames of the individual partners or initials of the forenames*” and for corporations registered under the Companies Act seeking to trade or carry on a business under a different name from the name under which the corporation is registered. For example, DAGON Investments Limited trading as Pizza Hut or Doctor’s Associates, incorporation of the United States owns Subway IP, incorporation which trades as Subway. The Act under Section 8(1) further extends its application to individuals and firms who are carrying on business in Zambia as nominees, trustees or agents of another person, corporation or agent of a foreign firm. In this sense a business name is used as a pseudonym for a corporation to perform business under a simpler brand as opposed to using its original and formal name. This differentiation between the original company name and the business name may also be necessary where the corporation is unable to register the desired original name of the holding or parent corporation in Zambia as a foreign Jurisdiction and may thus be forced to trade under a different name.

A search on the respective Business Names and the Companies Registers at PACRA revealed that there are more business names registered in Zambia compared to Corporations. This is perhaps due to the less onerous registration costs and registration requirements for business names. Many small scale vending businesses in Zambia formalise their legal status as businesses by registering a business name under the Act, as opposed to applying for incorporation under the Companies Act. Consideration must also be given to the fact that corporations can also register business



names in addition to the registration for incorporation.

What is of interest in this paper are business names for small scale vending businesses that utilise words from the various local languages spoken in Zambia and which words maybe perceived negatively by the public. The business names of interest have three key characteristics. Firstly, they are business names that are borrowed from local languages. Secondly, they attempt to depict the source of inspiration for the business or the struggles and personal experiences of the proprietor. Lastly, that the business names have an undesirable connotation which depicts negatively on the strength, quality and ability of the business. Fundamentally because a negative business name would be at odds with the economic theory, referred to above, which would suggest that negative business names that have the potential to undermine the strengths or ability of the business are bad for business. Largely, because negative business names tend to expose the vulnerabilities of the proprietor or the business, with regard to confidence, which may not appeal to consumers and consequently dissuade consumers buying from the business for fear of encountering a poor experience with the business. This defeats the purpose of existence of a business which is to make profits. The legal definition of a business points to this purpose. For example Section 2, of the Act defines a business as a trade, occupation, profession or venture conducted or carried on by one or more persons for gain or profit.

Locally there appears to be no evidence to suggest that negative business names necessarily impact on sales of small scale vending businesses. Perhaps they have other urgent challenges such as the invasion of the local vending business by multinational supermarkets from South Africa (Miller, 2005 and Kolala, 2000). But there is scope to argue that a negative business name may limit growth of the small vending businesses and the scope

for expansion out of the communities where most of the small scale vending businesses operate from. Furthermore, lack of growth will limit the scope for expansion nationally, regionally and internationally. This is because under the economic theory for a business name to have business utility the business must aim to make profits and enhance its brand. To do this, all aspects of the business should capitalise on the strengths and ability of the business, partly through the name of the business.

Here are some examples of business names derived from the Business Names Register at PACRA that may be perceived negatively. The examples include local business names such as '*Kweshako* General Dealers', '*Kweshako*' a Bemba word which when translated means 'trying'; '*Tiyeseke* General Dealers', '*Tiyeseke*' is a Nyanja word which means 'let us try'; '*Zibazako* Wholesale and Retail Shop', '*Zibazako*' means mind your own business may be considered to be rude in ordinary English parlance; and '*Zilizonse* Traders' with *Zilizonse* is a Nyanja word which when translated into English means 'anything'; '*Misozi* Supermarket', '*Misozi*' is a Nyanja word which means tears; and '*Mano Yapwa* General Dealers', '*Mano yapwa*' is from Bemba and means 'we have run out of ideas' suggesting an inability to be innovative. Yet innovation is considered to be an important value for any modern business. An interesting business name on the Business Names Register in English which may be construed negatively is 'Wrong Turn Enterprises.' The business name does not seem to entice consumers to interact with the business. Thus raising questions about the business utility of the business name.

These business names do not exude quality or confidence and as such may be perceived negatively by the general public. A business that is merely trying or conveying the message to consumers that the business has no direction or is incapacitated since they are just trying may not appeal to consumers. Accordingly, such

business names may not have any business utility and therefore are unable to perform any public good. It would follow that such a business name will not be useful to the economy and should be treated as undesirable.

A review of the Act reveals that the Act does provide some restrictions with regards to business names that may be refused registration in Zambia. Section 9 of the Act provides for the circumstances when an application for the registration of a business name will be rejected by the Registrar. For instance, under Section 9(1)(a), of the Act a proposed business name will be refused registration if it is “*identical with the business name of another existing business name*; Secondly, under Section 9(1)(b), if the business name *is similar to or identical to another business name and thus likely to mislead the public*; thirdly, under Section 9(1)(c), if the business name *is repugnant or otherwise undesirable*; fourthly, under Section 9(1)(d)i if the business name *includes the words ‘Zambia,’ ‘Government,’ ‘State’ or such other words or abbreviation of words to import or suggest patronage of the Head of State, the government , a foreign government and or its administration, any government department or institution*. The fifth instance, under Section 9(1)(d)ii, is where the business name is conceptualised with the view to *mislead the public to believe that the business is under Zambian ownership or control*. The sixth instances, under Sections 9(1)(c) and (f), are where a business name may be refused registration if the business name is conceptualised with a view to deceive or mislead the public or to cause annoyance or offence to any person or class of persons or is suggestive of blasphemy or indecency or if the business name suggests a connection with a political party or a leader of a political party.

Additionally, under Section 9(2)(a), the Registrar will also reject an application for registration of a business name were the

activity or business to be carried out contravenes any law in force; or under Section 9 (2)(b) the certificate of a business name previously held by the applicant had been revoked by the Registrar; or, Under Section 9(2)(c), were the applicant submits false information to the Registrar.

Interestingly Section 9(1)(c), refers to the non-registrability of undesirable business names. The term undesirable under the Act is not defined but it is a term that could be widely construed to capture the refusal to register proposed business names that could be negatively perceived by the public on grounds of undesirability due to lack of business utility. However, in practice the Registrar of business names has construed and operationalised the meaning of undesirability of business names by expanding on the restrictions under Section 9(1)(e) and (f) by focussing on refusing to register business names that are offensive or have political connotations. The term undesirable has not been extended to business names with no business utility.

Subject to the aforesaid it would appear that the overarching theme for non-registration under Section 9 of the Act is simply to prevent confusion, deception or offending the public with very little premium attached to the significance of desirability of business names based on their business utility and ability to contribute to economic growth.

Consequently, in Zambia a business name with no business utility can be registered as shown above as long as it is available for registration regardless of whether it has business utility or not. The decision to adopt a business name without business utility or otherwise is entirely left to the proprietor without additional checks by the Registrar. There are two detrimental effects with this laxity in the regulatory regime for business names. First the regulatory regime of business names does not encourage local proprietors to invest the requisite time and effort required in con-

ceptualising business names that have business utility. Furthermore, the lax regulatory regime does not encourage proprietors to have a long term vision for expansion and reduces the ability of small scale businesses to contribute to economic growth.

Accordingly this paper proposes legal reform to the Act in order to enhance its utility in contributing to economic growth of the country. Lessons for enhancing the business utility of business names of small scale vending businesses in Zambia can be drawn from the legal framework that regulates business names of law firms in Zambia. This is with specific to the Legal Practitioners' Practice Rules, Statutory Instrument No. 51 of 2002 which mandates all practitioners in the course of practice to develop business names and business image with business utility. This is because Legal Practitioners' Practice Rules establishes a three tiered filter mechanism for scrutinising and preventing the registration and use of undesirable business names. This filter mechanism reduces the chances for the registration of business names of law firms that have no business utility. In the first instance Rule 3(2)(d) provides that *'legal practitioners shall not do anything in the course of practice that is likely to prejudice the good repute of the profession.'* In addition Rule 10(1) prevents law firms from adopting business names that are likely to mislead or bring the profession in disrepute. Furthermore, pursuant to Rule 10(4), firms are not allowed to register business names unless the name is approved by the Legal Practitioners Committee of the Law Association of Zambia. Lastly, the Rules provide guidelines for 'registrable' business names and those business names that are unlikely to be approved for registration.

## Conclusion

Put simply, from the aforesaid discussion a business name is not just a name there is more that ought to be captured in the name of a business in order that its identity and character represents the entire brand of the business with confidence that will appeal to customers. The failure to recognise the significance of a business name in the Act means that proprietors of small scale vending businesses are not encouraged to invest the requisite time and effort required to conceptualise business names that have business utility. This paper therefore proposes policy and legislative reform to strengthen the permissive regulatory regime for business names in Zambia. Strengthening of the regulatory regime could be achieved by expanding the scope of undesirable business names so as to capture business names without business utility. This will encourage all proprietors of businesses including small scale vending businesses to invest in the conceptualisation of business names with business utility capable of pre-empting the transformation of these businesses into medium and large scale businesses. This will lead to the expansion of small vending businesses beyond the communities in which they operate from and beyond national and regional boundaries as viable pathway to economic growth.

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