

## Decision

**[ZA2014-0163]**

**.ZA ALTERNATE DISPUTE RESOLUTION  
REGULATIONS (GG29405)**

### ADJUDICATOR DECISION

CASE NUMBER:	<b>ZA2014-0163</b>
DECISION DATE:	<b>11 April 2014</b>
DOMAIN NAME	<b>Khululaconstruction.co.za</b>
THE DOMAIN NAME REGISTRANT:	<b>Themba Shezi</b>
REGISTRANT'S LEGAL COUNSEL:	<b>N/A</b>
THE COMPLAINANT:	<b>Comair Limited</b>
COMPLAINANT'S LEGAL COUNSEL:	<b>Adams &amp; Adams</b>
2 <sup>nd</sup> LEVEL ADMINISTRATOR:	<b>ZA Central Registry (CO.ZA )</b>

## 1 Procedural History

- a) The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on **19 February 2014**. On **21 February 2014** the SAIPL transmitted by email to ZA Central Registry (ZACR) a request for the registry to suspend the domain name(s) at issue, and on **21 February 2014** ZACR confirmed that the domain name had indeed been suspended. The SAIPL verified that the Dispute satisfied the formal requirements of the .ZA Alternate Dispute Resolution Regulations (the "Regulations"), and the SAIPL's Supplementary Procedure.
- b) In accordance with the Regulations, the SAIPL formally notified the Registrant of the commencement of the Dispute on **24 February 2014**. In accordance with the Regulations the due date for the Registrant's Response was **25 March 2014**. The Registrant did not submit any response, and accordingly, the SAIPL notified the Registrant of its default on **26 March 2014**. On **26 March 2014**, Hetzner, the ISP instructed to register the domain name on behalf of the Registrant contacted the SAIPL advising that it had received a request to delete the domain name in question. SAIPL advised Hetzner that a response is required from the Registrant, and a response from an ISP is not sufficient or acceptable.
- c) The SAIPL appointed **Vanessa Lawrance** as the Adjudicator in this matter on **31 March 2014**. The Adjudicator has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the SAIPL to ensure compliance with the Regulations and Supplementary Procedure.
- d) The Adjudicator noted that the complaint has not been properly commissioned and pointed this out to the Administrator. The Administrator returned the complaint to the Complainant, who rectified the deficiency and re-submitted the complaint, with the contents substantially unchanged, on 8 April. As the Adjudicator's concern was in respect of a minor technicality, she has accepted the re-submitted complaint without requiring re-submission to the Respondent

- e) The Respondent submitted a terse response on **15 April 2014**. By this stage the Adjudicator had already made her findings and, indeed, the decision had already been submitted to the Administrator for formatting. Fortuitously, the response makes no substantial change to the decision reached, and shall be dealt with below. The Adjudicator notes her disapproval at the late submission of this response without any explanation of the delay.

## **2 Factual Background**

- 2.1 The Complainant is Comair Limited, a South African company that provides travel services, most reputedly air travel services under the trade mark KULULA (and associated trade marks such as KULULA.COM JETSETTERS and KULULAMOOLAH.
- 2.2 The disputed domain name khululaconstruction.co.za comprises the word KHULULA, which is virtually identical to the Complainant's trade mark KULULA in conjunction with the descriptive word "CONSTRUCTION". The distinctive part of the disputed domain name is virtually identical to the Complainant's trade mark.

## **3 Parties' Contentions**

### **3.1 Complainant**

- a) The Complainant claims that it has registered trade mark rights in the mark KULULA in various classes.
- b) The Complainant also claims common law rights in that it has extensively used the trade mark for 13 years in South Africa and in other countries, and the mark has acquired a reputation and goodwill.
- c) The Complainant goes further to claim that its KULULA trade mark is a well known trade mark in terms of the provisions of the South African Trade Marks Act, No. 194 of 1993.

- d) The Complainant claims that the domain name complained of is virtually identical to its trade mark KULULA.
- e) The Complainant alleges that the disputed domain name therefore was registered with the intention to take advantage of the goodwill and reputation of the Complainant's KULULA trade mark, and that the domain name is accordingly an abusive registration in terms of the Regulations.
- f) The Complainant claims that the addition of the descriptive word "CONSTRUCTION" has no substantial impact on the overall impression given by the dominant part of the domain name KHULULA.

### 3.2 Registrant

- a) Massively out of time, and indeed once the Adjudicator had already written her decision, and was merely awaiting formatting thereof (on 15 April), the Respondent responded as follows:  
***"Khulula Construction was registered in 1998 as a construction company and as such no other entity could claim the name and its subsequent use.***  
  
***I view this as bullying by those with abundant resources and should be stopped".***
- b) No evidence in support of the incorporation of the entity in 1998 was submitted and no explanation of the tardiness of the response was provided. The Respondent has not denied the allegations made by the Claimant.
- c) The Adjudicator took it upon herself to conduct some research, and discovered, from the website of the Commissioner of Companies, that Khulula Construction CC, with registration number 1998/029201/23 was indeed incorporated in May 1998, but its status at present is "AR Final Deregistration".

- d) Without further evidence or explanation, the Adjudicator cannot find that the Respondent has any rights in the name Khulula Construction.
- e) In addition, as the Respondent has not denied any of the allegations made and evidence submitted by the Complainant, the veracity of this evidence must, *prima facie*, be accepted, provided that it appears acceptable and probably true (ZA2007-0010 MULTICHOICE SUBSCRIBE MANAGEMENT vs J P BOTHA, and ZA2013-0117 ANTHONY GOOSEN v SARS).

## 4 Discussion and Findings

### 4.1 Complainant's Rights

- 4.1.1 It is accepted that the Complainant has rights in the trade mark KULULA and that it is a well known trade mark, which is virtually identical to the distinctive part of the disputed domain name.

### 4.2 Abusive Registration

- 4.2.1 There is much case law that supports the contention that the addition of a generic term (like "CONSTRUCTION") does not reduce the possibility of confusion if the distinctive part of the domain name is identical or virtually identical to a trade mark in which another has rights. *Inter alia*, reference is made to the SAIPL Decisions ZA2007-0003 Telkom SA Limited vs Cool Ideas, 1290 CC and ZA2007/0004 Telkom SA Limited and TDS Directory Operations (Pty) Ltd vs The Internet Corporation
- 4.2.2 It accordingly appears that the disputed domain name is confusingly similar to a trade mark in which the Complainant has rights.
- 4.2.3 As the Complainant uses its well known trade mark in relation to a variety of services, use of the disputed domain name, even if that use is restricted to construction services, is likely to give rise to confusion or deception among the public that there is some connection between

the domain name Registrant and the Complainant.

4.2.4 With this in mind, it appears that the disputed domain name is an Abusive registration as envisaged by Regulation 4(1).

## 5. Decision

5.1 For all the foregoing reasons, in accordance with Regulation 9, the Adjudicator orders that the domain name, khululaconstruction.co.za be transferred to the Complainant.

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**VANESSA LAWRENCE**  
SAIIPL SENIOR ADJUDICATOR  
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