

## Decision

**[ZA2016-0244]**

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

### ADJUDICATOR DECISION

CASE NUMBER:	<b>ZA2016-0244</b>
DECISION DATE:	<b>23 September 2016</b>
DOMAIN NAME	<b>INTEXPOOLS.CO.ZA</b>
THE DOMAIN NAME REGISTRANT:	<b>DEWAN HATTINGH</b>
REGISTRANT'S LEGAL COUNSEL:	<b>NONE</b>
THE COMPLAINANT:	<b>INTEX MARKETING LTD</b>
COMPLAINANT'S LEGAL COUNSEL:	<b>SOMAYYA KHAN 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 **5 August 2016**. On **8 August 2016** 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 **8 August 2016** ZACR confirmed that the domain name had indeed been suspended.
- b) In accordance with the Regulations, the SAIPL formally notified the Registrant of the commencement of the Dispute on **11 August 2016**. In accordance with the Regulations the due date for the Registrant’s Response was **8 September 2016**. The Registrant submitted a deficient response, and accordingly, the SAIPL notified the Registrant of its default on **15 August 2016**.
- c) The SAIPL appointed **Mike du Toit** as the Adjudicator in this matter on **13 September 2016**. 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.

## 2 Factual Background

- 2.1 The business of the Complainant commenced in the 1970s with the sale of its first inflatable beach ball. The business has grown exponentially over the past 40 years or more, resulting in the expansion of the Complainants trade to inflatable above ground pools, spas, floats and toys, air furniture, boats, airbeds and sporting goods under the INTEX brand. The Complainant's first inflatable above ground pool (mentioned above) was launched in the trade 19 years ago. Today, the Complainant has a global footprint expanding across more than 100 countries, and it is considered the leader in the manufacture and distribution of Inflatable products. Its trade mark INTEX, in relation to inflatable products is one of the trusted brands when it comes to inflatable products.
- 2.2 In South Africa, the Complainant is the proprietor of trade mark registrations:
  - 1991/10946 INTEX in class 12 in relation to " vehicles; apparatus for locomotion by land, air or water; inflatable boats, boat accessories, air

pumps, boat repair kits, paddles and oars; parts of and accessories and components for all the foregoing' dated 30 December 1991;

- 1991/10947 INTEX in class 28 in relation to "games, toys and playthings of every kind or description; gymnastic and sporting articles not included in other classes; decorations for Christmas trees; swim gear, namely, goggles, masks, snorkels, fins, nose clips and earplugs; inflatable pool toys; children's inflatable swim aids; pool floats and riders; children's punching toys; inflatable lounges, mats, rafts and tubes for recreational use; portable inflatable pools and play swimming pools and children's recreational equipment, namely water slides; sporting goods, namely balls, kicking tees, ball pumps; toys, namely miniature model vehicles; parts of and accessories and components for all the foregoing' dated 30 December 1991;and
- 2012/27001 INTEX in class 20 in relation to "inflatable air beds and air mattresses; inflatable chairs, sofas, lounges and other furniture; inflatable pillows' dated 5 October 2012.

2.3 The Complainant's INTEX products are available in more than 100 countries worldwide. In South Africa, the Complainant's products are available directly and/or through its authorized distributor Melbro Trading. The Complainant's INTEX products are widely available for sale to the public through leading retailers and sales outlets. Some of the retail chains who stock and sell the Complainant's products, are listed below:

- The Crazy Store, which operates over 200 stores in South Africa.
- Sportsmans Warehouse, which operates around 35 stores across South Africa.
- Makro, which operates 19 stores in South Africa.
- Toys R Us, which operates more than 67 stores in South Africa.

2.4 The Complainant's INTEX inflatable products are also available at Game stores, which operates 137 stores in South Africa, Cape Union Mart, Outdoor Warehouse, supermarkets and hypermarkets, including Checkers and Pick 'n Pay and, through online sales channels, such as [www.pricecheck.co.za](http://www.pricecheck.co.za), [www.bjdorbuy.co.za](http://www.bjdorbuy.co.za) and [www.takealot.com](http://www.takealot.com).

2.5 The Complainant has, as a result, acquired a substantial goodwill and reputation that

is associated with its business. The trade mark INTEX in relation to inflatable pools and other inflatable products is a household name in South Africa and is associated with the Complainant and its business.

2.6 The Complainant became aware of the Registrant's use and registration of the domain name [intexpools.co.za](http://intexpools.co.za) in January 2016. The domain name [intexpools.co.za](http://intexpools.co.za) leads to the website [www.intexpools.co.za](http://www.intexpools.co.za). The website appears to advertise the business of Bestway Pools, Buzz Pools and/or Buzz Pools International. There is also reference to Intex Pools South Africa.

2.7 The header on the website provides a tab listing for "Home", "Prices", "SALE", "Contact Us". Under the header, the following words appear: "Swimming Pools South Africa." "We supply All Swimming Pool Equipment"

Below those words, the words " Welcome To Bestway Pools Buzz Pools. Pool Prices South Africa" appear.

The website states:

*"Intex Pools South Africa is happy to announce that we usually have stock of most of the pool kits as displayed on our website (See The Intex Pool Price & Catalogue Page By Clicking On The Relevant Button Above).*

*Intex Pools South Africa display all our prices on our website. For more information, feel free to contact us through the contact form above (top right hand side of this website).*

On clicking the "Contact Us" link on the header of the website, the website brings up a page headed Buzz Pools and this web page provides an e-mail icon for enquiries. It also provides information regarding contacting the business and goes on to state:

*"If you would like to purchase any of our products, please let us know exactly which product you would like to purchase and one of our sales staff members will contact you back with an invoice..."*

On clicking the "sale" button on the header, the website advertises the Bestway branded pool for sale. At the bottom of the web page, there is a product listing for "Bestway Pool Maintenance Kit", "Bestway Pool Repair Kit", "Bestway Pools", "Pool Covers - South Africa", "Penguin Pools", "Energy Saving Pool Covers" and "

Intex Swimming Pool Prices", among other listings.

On clicking " Intex Swimming Pool Prices", the website provides information about mobile phones. There are no pool prices for the INTEX swimming pool.

- 2.8 On 2 February 2016, through their attorneys, The Complainant called on the Registrant to stop using the Complainant's INTEX trade mark, delete the registration of or transfer the domain name intexpools.co.za to the Complainant, and undertake never to make any unauthorised use, in any manner or format whatsoever, of the INTEX trade mark, or any other trade mark which may be regarded as being confusingly similar to the Complainant's INTEX trade mark.

On 3 February 2016, the Registrant responded to the Complainant's letter of demand, refusing to adhere to the Complainant's demands. The Registrant went on to state, among other contentions:

*"I am entitled to use the domain name "intexpools.co.za" as I legally acquired it and am using it in good faith. Your client has not registered the domain name and therefore has no entitlement to deprive me of that right by making wrongful claims.*

*...I am merely using the name in connection with offering the pools for sale. I am not portraying myself as representing your client's company and I am not using the domain in a deceptive manner."*

The website under the domain name intexpools.co.za was subsequently suspended, and on 8 February 2016, the Complainant's attorneys addressed a further e-mail to the Registrant and asked if he would transfer the domain name to the Complainant in light of the suspension.

The Registrant responded that he was moving away from selling the "INTEX product line" based on alleged comebacks the INTEX products had during 2015, which he claimed was "a direct reflection of the INTEX brand and product quality', The Registrant went on to state that the website was down for scheduled maintenance.

On 16 February 2016, in another attempt to resolve this matter, the Complainant's attorneys addressed another letter to the Registrant, calling on the registrant to comply with the Complainant's earlier demands.

The Registrant responded and again, challenged the Complainant's position. He went on to indicate, among other claims, that he registered the domain name

intexpools.co.za in good faith and to market his business. The Registrant denied that he portrays himself as the representative of the Complainant.

### 3 Parties' Contentions

#### 3.1 Complainant

- a) The domain name incorporates the mark INTEX, being the Complainant's registered and well-known trade mark INTEX. The reference to "POOLS" in the domain name intexpools.co.za is descriptive and does not serve to distinguish the mark incorporated in the domain name from the Complainant's INTEX trade mark.
- b) There is a direct overlap in the goods offered by the Registrant under the domain name intexpools.co.za and the goods of interest to the Complainant under its registered trade mark INTEX.
- c) The Complainant has expended a considerable amount of time, money and effort in marketing, promoting and building the INTEX brand over the past 40 years or more worldwide. Any person who encounters the domain name intexpools.co.za and the website under the domain name are likely to be misled and deceived into believing that the website is the Complainant's or is associated with the Complainant's business.
- d) It is evident from the content of the website www.intexpools.co.za that the business markets and advertises other branded goods such as Bestway Pools and Penguin Pools, among others, which appear to be competing products of the Complainant's INTEX pools.
- e) Consumers who purchase products from the Registrant whilst under the impression that the business is 'Intex Pools South Africa' or an authorized agent of the Complainant in South Africa, are at risk. Further, the poor quality of the website and the manner of the Registrant's operation of his business reflect negatively on the Complainant.
- f) There is no reason why the Registrant had to register the domain name

intexpools.co.za other than to attract custom by drawing potential consumers to the website under the pretext of being the Complainant or its representative and to ride on the goodwill and reputation of the Complainant.

- g) It is submitted that the registration of the domain name intexpools.co.za is mala fide. The Registrant seeks to acquire rights in the Complainant's trade mark without any entitlement.
- h) It is submitted that the Registrant registered the domain name intexpools.co.za in a way that leads people or businesses to believe that the domain name is registered, operated or authorised by, or otherwise connected with, the Complainant's business under the mark INTEX. The Complainant contends that the Registrant's domain name intexpools.co.za disrupts unfairly the business of the Complainant and blocks intentionally the registration of a name or mark in which the Complainant has rights. Further, the Registrant's registration of the domain name intexpools.co.za prevents the Complainant from exercising its rights in the mark INTEX.

### **3.2 Registrant**

- a) The Respondent did not reply to the Complainant's contentions but this adjudicator did take his responses to the Complainant's attorneys into account in considering this dispute.

## **4 Discussion and Findings**

### **4.1 Complainant's Rights**

- 4.1.1 Complainant has proven registered and common law rights in respect of their trademark INTEX which is identical to the domain name intexpools.co.za in dispute. The reference to "POOLS" in the domain name intexpools.co.za is descriptive and does not serve to distinguish the mark incorporated in the domain name from the Complainant's INTEX trade mark.

4.1.2 In NAF/FA141825 it was held that: “[It] is also well-established under the Policy that a domain name composed of a trademark coupled with a generic term still is confusingly similar to the trademark”.

In WIPO/D2002-0367 the Panel concluded that: “The Disputed domain name contains Complainant’s EXPERIAN trademark in its entirety. The addition of the generic term “automotive” does not distinguish Respondent’s domain name from Complainant’s mark”.

See for example the decisions WIPO/D2000-1598 in which niketravel and nikesportstravel were found to be similar to NIKE; DRS04601 in which nikestore was found to be similar to NIKE; and DRS01493 in which nokia-ring-tones was found to be similar to NOKIA.

4.1.3 Although the Registrant has allegedly stopped selling Intex products, the use of the Intex trademark remains unauthorised and relates to the same of similar goods covered by the Complainant’s registrations and common law reputation.

## 4.2 Abusive Registration

4.2.1 On the evidence presented by the Complainant, the disputed domain name, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainant's rights.

4.2.2 Although the Registrant has, since been confronted by the Complainant, apparently stopped selling Intex products, the domain name is still used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant’s rights.

4.2.3 The evidence illustrates that the Registrant is using the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the Complainant;

4.2.4 This adjudicator finds, on a balance of probabilities that the disputed domain

name is an abusive registration.

## 5. Decision

- 5.1 For all the foregoing reasons, in accordance with Regulation 9, the Adjudicator orders that the domain name [intexpools.co.za](http://intexpools.co.za), be transferred to the Complainant.

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**Mike du Toit**  
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