

ADJUDICATOR DECISION

CASE NUMBER:	ZA2015-0198
DECISION DATE:	25 June 2015
DOMAIN NAME	theregent.co.za
THE DOMAIN NAME REGISTRANT:	CORNELIA ALETTA TERBLANCHE
REGISTRANT' S LEGAL COUNSEL:	N/A
THE COMPLAINANT:	REGENT MCC PROPERTY MANAGEMENT CC
COMPLAINANT' S LEGAL COUNSEL:	Mr Jacobsberg, of HOGAN LOVELLS (South Africa), Sandton
THE 2 nd LEVEL DOMAIN NAME ADMINISTRATOR:	ZACR (CO.ZA Administrators)

Table of Contents

1) Procedural History	3
2) Factual Background.....	5
3) Parties' Contentions	6
a. Complainant.....	6
b. Registrant	8
4) Discussion and Findings	9
a. Complainant's Rights	22
b. Abusive Registration	23
5) Decision	23

1) Procedural History

- a. The Dispute was filed with the South African Institute of Intellectual Property Law (the “SAIPL”) on **24 April 2015**. On **29 April 2015** the SAIPL transmitted by email to The ZA Central Registry (ZACR) a request for the registry to suspend the domain name(s) at issue, and on **29 April 2015** the ZACR confirmed that the domain name had indeed been suspended. The SAIPL verified that the Dispute [together with the amendment to 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 **30 April 2015**. In accordance with the Regulations the due date for the Registrant’ s Response was **29 May 2015**. The Registrant submitted its Response on **27 May 2015**, and the SAIPL verified that the Response satisfied the formal requirements of the Regulations and the SAIPL’ s Supplementary Procedure. The SAIPL forwarded a copy of the Response to the Complainant on **28 May 2015**.
- c. In accordance with the Regulations the due date for the Complainant’ s Reply was **4 June 2015**. The Complainant did not submit its Reply on **4 June 2015** but requested an extension until **8 June 2015** on the grounds that its legal representative had been unavailable until **4 June 2015** to consult with the Complainant. The Administrator granted an extension for filing the Reply until **08h00** on **8 June 2015** in terms of clause 11 of the SAIPL’ s Supplementary Procedure viz if good cause is shown. On **8 June 2015** at **12h14** the Administrator issued a notification of default and at **13h58** on **8 June 2015** the Complainant’ s legal representative filed its Reply. The Administrator notified the parties

that the appointed Adjudicator will decide whether to accept or reject the Complainant's belated Reply.

- d. The SAIPL appointed **Mr Andre Karel van der Merwe** as the Adjudicator in this matter on **11 June 2015**. 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.
- e. Extensions granted herein
 - i) At the outset, the Adjudicator needs to determine whether to accept or reject the Complainant's Reply that was filed belatedly. The first delay herein relates to the extension requested by the Complainant's legal representative and granted by the Administrator viz from **4 June 2015 to 08h00 on 8 June 2015**. Although no provision is expressly provided in the Regulations for granting such an extension, this appears to be manifestly unjust to the parties, and hence the SAIPL's Supplementary Procedure has provided in clause 11 thereof for granting an extension "if good cause is shown." The Complainant's legal representative was away from office on business and was able to consider the Response and consult with the Complainant only on **4 June 2015**. Hence, in the opinion of the Adjudicator, the abovementioned extension granted to the Complainant by the Administrator is fair and reasonable in the circumstances, and is therefore quite in order.
 - ii) The second delay herein relates to the belated filing of the Complainant's Reply after a notification of default on **8 June 2015**, viz from **08h00 to 13h58** on that date. This is a matter of only about 6 hours, and resulted in the filing of the Reply on the same date. In the reasoning of the Adjudicator, this brief delay resulted in no real prejudice to any party or to the process. Accordingly the Adjudicator finds that this brief delay can be

excused, and hence that the Complainant's Reply can be accepted into the papers filed herein by the parties.

2) Factual Background

- a. The Complainant was registered as a close corporation (registration number 2010/026736/23) on 3 March 2010 with the description of its principal business being REAL ESTATE. Two active members were recorded on that date with 50% shareholding each, being Michael Reid Barnes and Cornelia Aletta Terblanche viz the Registrant herein.
- b. The Complainant operates a property rental agency or business, which it commenced in The Regent Luxury Apartment Complex, in Sandton, during or about May, 2010. It had therefore adopted as part of its above close corporation name, and as its business name, the name REGENT/THE REGENT (RENTAL AGENTS).
- c. From or about May 2010 until March 2014 the Registrant was employed as the general manager of the Complainant's business, involving the day-to-day management and running of the business, in addition to her membership of the Complainant at all material times.
- d. After the commencement of her employment with the Complainant, it appears that the Registrant registered the disputed domain name theregent.co.za in her own name, by agreement with the Complainant during May 2010.
- e. While the Registrant was in the employ of the Complainant, she used the disputed domain name in the running of Complainant's business.
- f. The Registrant resigned as a member of the Complainant on or about 26 August 2013.

- g. Since leaving the employ of the Complainant, the Registrant has commenced and operated her own rental agency business, using the disputed domain name in her business.
- h. Despite demand, the Registrant has to date refused to transfer the disputed domain name registration to the Complainant.

3) Parties' Contentions

a. Complainant

- i. The Complainant contends that it had adopted the name and trademark REGENT/THE REGENT for its property rental business from or about 3 March 2010 (viz the date of registration of the Close Corporation), and that it had used this name and trademark until the present time for its business. Accordingly it contends that it has established a reputation in the disputed domain name which is not associated in the market with any other entity.
- ii. The Registrant had been requested, after her employment with the Complainant, by Ms Susan Hall, the accountant of the Complainant, to register the disputed domain name on behalf of the Complainant and for purposes of it being used in connection with the Complainant's business. The Complainant also contends that the Registrant undertook to do so.
- iii. The Complainant contends that Ms Hall had agreed with the Registrant that she would register the disputed domain name in her name and pay the necessary annual renewals, and that the Registrant would be reimbursed for such expenses by the Complainant. Such reimbursements were duly made, as agreed by the parties.

- iv. Accordingly the Complainant contends that the Registrant registered the disputed domain name in her capacity as an employee of the Complainant and on behalf of the Complainant, the understanding being that the Registrant would in due course transfer the disputed domain name to the Complainant.
- v. The Complainant contends that the website associated with the disputed domain name is used by the Complainant to receive requests for accommodation and is the primary point of contact with the Complainant's target market.
- vi. The Complainant contends that the Registrant had undertaken, when she left the employ of the Complainant, to co-operate in all aspects to ensure the proper handing over of all matters to the Complainant (which the Complainant assumed to include transfer of the dispute domain name registration). However, the Registrant has to date refused and/or failed to do so.
- vii. The Complainant contends that it arranged for registration of the domain name theregentmcc.co.za on 3 December 2014, which was necessary for its business, when it became clear that the Registrant had refused and/or failed to transfer the disputed domain name to the Complainant.
- viii. The Complainant also contends that the Registrant has started her own property rental business which is in direct competition with the Complainant; and that her use of the disputed domain name accordingly amounts to an abusive registration.

b. Registrant

- i. The Registrant contends that the Complainant has no statutory trademark rights in and to the disputed domain name, and certainly not before she had registered the disputed domain name.
- ii. The Registrant contends that the Complainant had never instructed, requested or authorized her to register the disputed domain name. She contends accordingly that she did so on her own initiative and “not to improve the business but to make communication within the building easier.”
- iii. The Registrant admits that she is presently operating an accommodation and booking business.
- iv. The Registrant denies that she has used the disputed domain as an abusive domain name.
- v. The Registrant contends that the Complainant now uses the domain name theregentmcc.co.za, and therefore the Complainant should have no problem in respect of the disputed domain name.
- vi. The Registrant contends that she “has always used the disputed domain name in good faith with no derogatory intentions towards the Complainant.”
- vii. The Registrant lastly contends that she has “always reflected a legitimate fair use of the (disputed) domain name and the willingness to transfer the domain to the ‘rightful owners’ which she alleges is the Body Corporate (of The Regent complex).” She also contends that there is an agreement that she would be able to use her mail for a “certain period” after the transfer. However, she goes on to say immediately after this that: ” The Registrant is convinced that she has the right to the (disputed) domain, taking

into account that the Complainant is also just managing other people's units at The Regent - the same thing that the Registrant is doing."

4) Discussion and Findings

In order to make a finding that the disputed domain name is an abusive registration, the Adjudicator is required to find that the Complainant has proved, on a balance of probabilities, in terms of Regulation 3(2), that the required elements in terms of Regulation 3(1)(a) are present viz:

- i) the Complainant has rights in respect of a name or mark
- ii) which is identical or similar to the (disputed) domain name; and
- iii) in the hands of the Registrant the (disputed) domain name is an abusive registration.

An abusive registration is defined in the definition section viz in Regulation 1, to mean a domain name which either -

- a) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of, or was unfairly detrimental to, the Complainant's rights; or
- b) has been used in a manner that takes unfair advantage of, or is unfairly detrimental to, the Complainant's rights.

SUBSTANTIVE ASPECTS

Turning to the substantive aspects of this complaint, the Adjudicator has carefully perused the Complaint, the Response, and the Reply, as well as all annexed documents, and carefully considered the facts and contentions set out therein.

RIGHTS IN RESPECT OF A NAME OR MARK

In terms of Regulation 1 the term “rights” is widely defined. The Regulation states that “rights” and “registered rights” include intellectual property rights, commercial, cultural, linguistic, religious and personal rights protected under South African law but is not limited thereto.

As has been decided by the appeal decisions in www.seido.co.za (ZA2009-0030) and www.xnets.co.za (ZA2011-0077), the notion of “rights” for the purposes of Regulation 3(1)(a) is not trammelled by trade mark jurisprudence. It is a matter of *locus standi* in order to make sure that the person who complains is someone with a proper interest in the complaint. The threshold in this regard should be fairly low.

The Adjudicator needs to determine whether, as set out above, in terms of Regulation 3(1)(a), the Complainant has rights in respect of the name or trademark REGENT and/or THE REGENT. The Complainant claims that it enjoys such rights in this name and mark.

A NAME OR MARK?

The first part of the present enquiry includes a determination whether the Complainant has *locus standi* in the sense of a name or mark that is unique or distinctive of it and its activities (and that is not merely descriptive, general or generic, for example).

DOES THE COMPLAINANT HAVE RIGHTS?

The first element that the Adjudicator needs to establish is whether, on a balance of probabilities, the Complainant has rights in respect of the name or trademark REGENT and/or THE REGENT. The Complainant asserts that it has rights in and to this name and mark.

Under statute law, the Complainant has shown, as set out above, that it had registered its close corporation (including the name REGENT) viz REGENT MCC PROPERTY MANAGEMENT CC on 3 March 2010. In setting up and operating its rental business it would probably, for purposes of brevity, have referred to its business as REGENT and/or THE REGENT rental business. This serves to confirm the adoption (date) of the name and trademark REGENT and/or THE REGENT by the Complainant. It also serves to

show that the date of such adoption by the Complainant predates the registration date by the Registrant of the disputed domain name viz during May 2010 by approximately two months.

Under the common law, the Complainant had adopted and appropriated this name and trademark on or before the aforementioned registration date of the dispute domain name. The Registrant was clearly aware of this because she had signed the close corporation application form CK1 on or before 3 March 2010, confirming that the name REGENT MCC PROPERTY MANAGEMENT CC was correct and requesting registration of the close corporation, as a 50% member on or before that date, as appears from Annexure 6 to the Registrant's Response.

The correct approach to a claim for proprietorship of a trademark is that: "An applicant can rightly claim to be the common law proprietor of the trademark if he has originated, acquired or adopted it and has used it It also applies to one to one who has originated, acquired or adopted the trademark but has hitherto not used it at all, or to the requisite extent, provided he proposes to use it." See the above cited dictum in the unreported decision by the Hon WG Trollip in *Moorgate Tobacco Co Ltd v Phillip Morris Inc*, 21 May 1986 58. This applies to the Complainant and its adoption of REGENT.

In support of the above, see also the reported Supreme Court (as it then was) decisions in *Tie Rack plc v Tie Rack Stores (Pty) Ltd* 1989 4 SA 427 (T); *Victoria's Secret Inc v Edgars Stores Ltd* 1994 3 SA 739 (A); and *Chanson Pere & Fils v JC le Roux & Co Ltd* 1999 BIP 38 (RTM).

The first difference in the respective contentions of the parties, as set out above, is that the Registrant alleges that the proposal to register the disputed domain name was at her initiative, while the Complainant's accountant, Ms Susan Hall, alleges that the Complainant had requested the Registrant to attend to such registration. In the Adjudicator's view, nothing revolves on this difference, and it is irrelevant who first thought of this proposal. What is relevant and important is the fact that the disputed

domain name was both registered and used by the Registrant on behalf of, and for the benefit of, the Complainant in its business.

Both in registering and using the disputed domain name as above, it appears to the Adjudicator that the Registrant had acted in good faith on behalf of the Complainant and used the disputed domain name in its property renting/letting business for a period in excess of about four years. This statement is premised on the simple situation that, at all material times, the Registrant was not only employed as the general manager of the Complainant but was also, and more importantly, a member of the Complainant. In this latter capacity she was required by statute to stand and act in a fiduciary relationship to the Complainant (close corporation) viz in terms of section 42 of the Close Corporation Act of 1984. More particularly, this section required the Registrant *inter alia* to act honestly and in good faith, to manage or represent the close corporation in the interest and for the benefit of the corporation; to avoid any material conflict between her own interests and those of the corporation; and not to compete in any way with the corporation in its business activities. An inevitable conclusion from the above facts is therefore that she had acted in good faith and had both registered and used the disputed domain name for, and for the benefit of, the Complainant in its business (and not for herself or as her own property).

In support hereof see the textbook Cilliers & Benade: Corporate Law, 3rd Edition, paragraph 36.14 *et seq* and the court decisions cited therein.

Such actions and usage by the Registrant was, and in any event, clearly not use by a competitor to the Complainant, as is usually the case in domain name disputes, but was in fact use by and on behalf of the Complainant in its business. In further support hereof, the Registrant admitted reclaiming her expenses in registering and renewing the disputed domain name registration from the Complainant's accountant, Ms Sue Hall, from time to time.

Incidentally the employment of the Registrant by the Complainant as its general manager (-a senior and highly responsible position) was based on an unwritten agreement between the parties, and no written agreement was required for this appointment.

However, in that capacity, it also bears mention that the Registrant owed the Complainant a duty of care, loyalty, and skills consistent with her abilities and professional and business skills, which apparently she carried out dutifully.

The aforementioned factors point convincingly to the conclusion that, although the Registrant had registered the disputed domain name in her own name, and then had used the disputed domain name in the Complainant's business, the overall rights of ownership therein had clearly vested in the Complainant at all material times by agreement between the parties (although the Registrant appeared *ex facie* the registration details in the WHOIS server to be the owner thereof).

In addition to the above, by the time that the Registrant left the employ of the Complainant in March 2014 and then started her own property rental business, the Complainant had, through use (and no doubt promotion) of the name and trademark REGENT and/or THE REGENT in its business, developed a repute or reputation, and hence goodwill, through such use (and promotion) in terms of the common law.

In the above circumstances, the Adjudicator finds that the Complainant has proved, on a balance of probabilities, that it had common law rights in and to the name and trademark REGENT (and probably also to a limited extent iro THE REGENT), at all material times. Hence the Complainant has also established that it has the necessary *locus standi* to bring this Complaint.

NAME OR MARK IDENTICAL OR SIMILAR TO DOMAIN NAMES?

The second element that the Adjudicator needs to establish is whether, on a balance of probabilities, the Complainant has proved that its name or mark REGENT (and possibly also THE REGENT), in which it has rights as set out above, is identical or similar to the (disputed) domain name.

Firstly, to the extent that the Complainant had rights in the name and trademark THE REGENT, this is of course identical to the disputed domain name.

Secondly, the Complainant's notable name or mark, in which it clearly has rights, is REGENT, while the disputed domain name is theregent.co.za. Ignoring the first and second level suffixes, in terms of Regulation 5(c), the comparison becomes REGENT v THE REGENT.

The disputed domain name contains the Complainant's name and mark REGENT in its entirety. This is undeniably the distinctive, dominant and memorable element of the domain name, and this is the feature that will be known to a number of members of the public in respect of the rental business of the Complainant. The Registrant has merely added a descriptive (or generic word) viz "the" to the distinctive REGENT name/mark. The Registrant cannot escape the inevitable conclusion that the Complainant's name and mark REGENT is essentially identical to the disputed domain name.

In support of the above, see the following foreign domain name decisions - 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 also 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-ringtones was found to be similar to NOKIA.

See also the following South African domain name decisions - in ZA2007-0003 telkommedia was found to be similar to TELKOM; in ZA2007-0010 mwebsearch was found to be similar to MWEB; in ZA2008-0025 suncityshuttle was found to be similar to

SUN CITY; in ZA2009-0034 absapremiership was found to be similar to ABSA; in ZA2010-0048 etravelmag was found to be similar to ETRAVEL; and in ZA2013-00149 autotraderauction was found to be similar to AUTOTRADER.

Accordingly the Adjudicator finds that the Complainant has proved, on a balance of probabilities, that its name and mark REGENT is virtually identical, and certainly confusingly similar, to the disputed domain name.

IS THE DOMAIN NAME AN ABUSIVE REGISTRATION?

The third element that the Adjudicator needs to establish is whether, on a balance of probabilities, the disputed domain name, in the hands of the Registrant, is an abusive registration. The Complainant asserts that the disputed domain name is an abusive registration.

The Adjudicator is required to determine whether the disputed domain name is an abusive registration as defined in the definition section of the Regulations viz in Regulation 1, and as set out above. According to the definition, and to various Nominet decisions, there are two potential abuses (or two types of abuse) viz:

- a) Registration with an abusive intent; and/or
- b) Use in an abusive manner.

The Adjudicator refers to DRS 02464 (Aldershot Car spares v Gordon); and to DRS 00658 (Chivas Brothers Ltd v David William Plenderleith) in which the Expert found that:

“Where a Respondent registered a domain name

- 1) which is identical to a name in which the complainant has rights;*
- 2) where that name is exclusively referable to the complainant;*
- 3) Where there is no obvious justification for the Respondent having that name for the domain name; and*
- 4) Where the Respondent has come forward with no (reasonable) explanation for having selected the domain name; it will ordinarily be reasonable for an expert to*

infer first that the Respondent registered the domain name for a purpose and secondly that such purpose was abusive.”

See also ZA2007-007 (FIFA v X Yin) in this regard. The Adjudicator concurs with the view that the nature of “abusive” in the Regulations does not necessarily require a positive intention by the Registrant to abuse the Complainant’s rights but that such abuse can be the effect or consequence of the registration or use of the disputed domain name.

Regulation 4 provides a list of (non-exhaustive) factors which may indicate that a disputed domain name is an abusive registration. More particularly, Regulation 4 lists circumstances that indicate that the Registrant has registered the disputed domain names primarily to achieve certain objectives. The Complainant has asserted or referred to some of these factors or circumstances that will be discussed below viz:

- a) That the Registrant has registered the disputed domain name primarily to block intentionally the registration of a name or mark in which the Complainant has rights**

The Complainant has clearly established that it has rights in and to the name or mark REGENT and/or THE REGENT (from its close corporation name, its location, and its usage). The Registrant was fully aware of such rights although she has, by her actions viz after leaving the employ of the Complainant, disputed such rights.

It is clear to the Adjudicator that the circumstances and facts, as set out above, surrounding the registration and the subsequent use of the disputed domain name while the Registrant was still employed by the Complainant cannot be considered to have had any “blocking” effect on the Complainant and its business. As indicated above, such registration and use appears to have been made in good faith by the Registrant - essentially because these actions were carried out for the benefit, and in support, of the Complainant and its business. However, when the Registrant left the employ of the Complainant, this situation changed radically when she commenced operating her own property rental business in competition to the Complainant’s property rental business,

of which she was fully aware, and more particularly when she subsequently commenced using the disputed domain name in and for her own business and hence to the detriment of the Complainant's business). By this subsequent usage, the Registrant's earlier intentions, actions and use clearly changed from good faith into bad faith.

Although the Regulations (and definitions) are silent on what a "blocking registration" is or involves, it is clear both in general terms and from various Nominet decisions that a blocking registration appears to have two critical features. The first is that it must act against a name or mark in which the Complainant has rights. The second is intent or motivation and suggests some knowledge and hence a purpose in registering or using a domain name to prevent the Complainant from doing so. See the foreign domain name decisions DRS00583 and DRS01378.

The disputed domain name undeniably prevents, and thereby blocks, the Complainant from registering its name REGENT and/or THE REGENT, and thereby the disputed domain name for itself whether through the intent of the Registrant and/or as an unintended consequence or effect of the disputed domain name registration.

In addition, the effect of the disputed domain name in the hands of the Registrant is to block e-mail access to key personnel of the Complainant, coupled with the Registrant's access to confidential company and client information. This takes unfair advantage of the Complainant's rights and is unfairly detrimental to the Complainant and its business.

The Adjudicator is obliged to conclude that the registration and use of the disputed domain name, as presently in the hands of the Registrant, has the simple consequence of barring the Complainant from using and registering this domain name for itself, as the owner of rights in and to the relevant name or trademark.

In support of the above, see WIPO/D2000-0545; and the leading United Kingdom authority dealing with domain names and their "blocking" effect viz *British Telecommunications plc v One in a Million Ltd* [1999] FSR 1 (CA). In this case, the Court of Appeal held that the disputed domain name registrations were unlawful on the grounds of both trademark infringement and passing off, and interdicted One in a Million Ltd and

those who controlled it from such conduct, and ordered them to transfer the disputed domain name registrations to the companies that in reality traded under those names.

In support of the above, see also the foreign decision WIPO/D2000-0766 (Red Bull GmbH v Harold Gutch) which is cited in the South African decision ZA2008-0014 (Automobiles Citroen v Mark Garrod).

Accordingly the Adjudicator comes to the conclusion that this factor applies in the present dispute, and that this factor indicates that the ongoing use of the disputed domain name is abusive and/or amounts to use of an abusive registration in the hands of the Registrant.

b) That the Registrant has registered the disputed domain name primarily to prevent the Complainant from exercising its rights

The Complainant contends that, because the disputed domain name blocks it from registering its own domain name, as set out above; the disputed domain name prevents the Complainant from exercising its legitimate rights in South Africa by registering its own .co.za domain name.

Besides the factual question of the disputed domain name preventing the Complainant from exercising its rights ie by registering its own domain name, this raises the general question that the Registrant had acted in bad faith in not transferring the disputed domain name to the Complainant at the time that she left the employ of the Complainant.

In addition to the aforementioned, the Registrant had warranted, when applying to register the disputed domain name, in terms of the Uniform SA terms and conditions (clause 5.1) that:

- I. “It has the right without restriction to use and register the Domain Name”
- II. “The use or registration of the Domain Name (by the Registrant) does not or will not interfere with, nor infringe the right of any third party in any jurisdiction with respect to trade mark, service mark, trade name, company name, close corporation name, copyright, or any other intellectual property right.”

Clause 5.1.1 of the Uniform SA terms and conditions state further (-to which the Registrant had agreed): “Applicant (the Registrant) hereby irrevocably represents, warrants, and agrees that its statements in the Application are accurate and complete.”

It appears undeniable that the Registrant had, at all material times, known of the Complainant and its rights in and to its name and trademark REGENT. Hence it appears both from this knowledge and directly from the above false statements or warranties by the Registrant that, although the disputed domain name was not registered in bad faith, her ongoing use thereof is in bad faith (*inter alia* since she has been made aware of the Complainant’s rights).

Accordingly the Adjudicator comes to the conclusion that this factor also applies in the present dispute, and that it indicates that the ongoing use of the disputed domain name is abusive and/or amounts to use of an abusive registration in the hands of the Registrant.

c) That there are circumstances indicating that the Registrant has registered the disputed domain name to disrupt unfairly the business of the Complainant

The disputed domain name has the effect that the Complainant is barred from registering or using the disputed domain name, which it is reasonably required to do in the circumstances.

In addition, the existence of the dispute domain name has the potential to erode the distinctive character of the Complainant. This can, and will, ultimately decrease the value of the Complainant’s brand.

From the activities of the Registrant set out in paragraph a) above, which she apparently believes she is entitled to do, it is clear that she is interfering with the business and business activities of the Complainant. In fact it appears that she is unlawfully taking away business from the Complainant. In this way, her use of the disputed domain name clearly and unfairly disrupts the business of the Complainant.

In support of the above, the Adjudicator points out that various foreign decisions have found that disruption of a business may be inferred in situations when the Registrant has registered a domain name containing the Complainant's name or mark plus a generic term - such as in the present case. See for example the foreign decisions in WIPO/D2000-0777, NAF/FA94942, NAF/FA94963, NAF/FA95402; and the above cited NIKE and NOKIA decisions. See also the WIPO cases d2005-0604 and D2007-0424.

The Adjudicator also refers to the South African decision ZA2012-0117 in which the adjudicator confirmed that the disruption of a business may be inferred if the registrant has registered a variant of the complainant's mark by merely adding a generic word. This applies particularly if the disputed domain name is identical to the Complainant's name or (house) mark.

Hence the Adjudicator comes to the conclusion that this is a real and present factor in the present dispute, and that it indicates that the ongoing use of the disputed domain name is abusive and/or amounts to an abusive registration in the hands of the Registrant.

- d) That there are circumstances indicating that the Registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorized by, or otherwise connected with the Complainant**

The abovementioned use or misuse by the Registrant of the disputed domain name to access information intended for the Complainant, enables the Registrant to access requests for accommodation arranged via the relevant website and she is able to intercept request e-mailed directly to key personnel of the Complainant. The Registrant then can, and does, offer the relevant accommodation service to the customers under the guise of being associated with, or acting on behalf of, the Complainant. This not only leads people or businesses to believe that the disputed domain name is connected with

the Complainant but also results in a significant loss of business intended for the Complainant - through the diversion and exploitation of such business to the Registrant. Accordingly the Adjudicator finds that this is a factor or circumstance in the present dispute, and that it indicates that the ongoing use of the disputed domain name is abusive and/or amounts to an abusive registration in the hands of the Registrant.

GENERAL COMMENTS

The Adjudicator finds that the domain name decisions cited by the Complainant support its complaint viz situations where an employee had registered a domain name and recorded himself as the registrant and/or where a contractual relationship had previously existed for the registrant to use a trademark/domain. These decisions are ZA2012-0110 (Dedrego Trading CC v Pierre Roux); and ZA2013-0147 (De Greef' s Wagen Carrosserie & Machinebouw B.V. v Greefa SA Ltd).

A third cited decision in which bad faith had been present is the decision in WIPO/D2009-0699 (Media 24 Limited v Llewellyn Du Randt) - also relating to a former employee who had registered a domain name that incorporated the company name of his employer.

The Adjudicator refers to a second difference between the parties' contentions in respect of the ownership of the disputed domain name. As set out verbatim in paragraph vii) of the Registrant' s contentions (above), the Registrant firstly contends that she is prepared to transfer the disputed domain name to the "rightful owners" thereof - that she alleges is the Body Corporate (of the Regent apartment complex), and then immediately states that she is convinced that "she has the right to the domain." The Registrant is clearly confused (and uninformed) about the rights in and to the disputed

domain name. The Adjudicator refers to the reasoning as set out above, and the findings in this regard herein.

A final issue to be dealt with herein is the statement made in paragraph 5 of the Complainant's Reply, to the effect that the Commissioner of Oaths by whom the Registrant's signature in the Registrant's Response was attested, is the Registrant's husband. Hence the further allegation is made that the attestation is irregular. The relevant Regulations governing the Administering of an Oath or Affirmation provide that:

“A Commissioner of Oaths is not allowed to administer an oath or affirmation relating to a matter in which he or she has an interest.”

Although it is not clear to the Adjudicator that the Commissioner was or is the Registrant's husband, it appears that the Commissioner may have overlooked, or been unaware of, this requirement. The Adjudicator is prepared to accept that the Commissioner, a man of the cloth, would not have perjured himself, or allowed his wife to perjure herself, and hence that no injustice had resulted from this oversight. In any event, if this point had been taken or applied seriously, the Registrant could simply have had her Response, in the exact form as filed, re-commissioned before another Commissioner.

a. Complainant's Rights

- i. By way of summary, the Adjudicator finds, as required by the Regulations, that the Complainant has rights in respect of the

name or mark REGENT which is identical or similar to the domain name in dispute.

b. Abusive Registration

- i. The Adjudicator also finds, as required by the Regulations, that the disputed domain name has been used in a manner that takes unfair advantage of, or is unfairly detrimental to, the Complainant's rights. More particularly, such use has taken place after the Registrant had left the employ of the Complainant and particularly after she had started her own property rental business.
- ii. Accordingly the Adjudicator finds, as required by the Regulations and on a balance of probabilities, that the disputed domain name, in the hands of the Registrant, is an abusive domain name registration.

5) Decision

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

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A K VAN DER MERWE
SAIPL SENIOR ADJUDICATOR
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