

ADJUDICATOR DECISION

CASE NUMBER:	ZA2015-0196
DECISION DATE:	15 July 2015
DOMAIN NAME	timbavatigamereserve.co.za
THE DOMAIN NAME REGISTRANT:	CSABA BORZON
REGISTRANT'S LEGAL COUNSEL:	Russel Luck, SwiftTechLaw
THE COMPLAINANT:	The Association of the Timbavati Private Nature Reserve
COMPLAINANT'S LEGAL COUNSEL:	Schreuder Attorneys
THE 2 nd LEVEL DOMAIN NAME ADMINISTRATOR:	ZACR (CO.ZA Administrators)

1) Procedural History

- a. The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on **16 April 2015**. On **23 April 2015** 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 **23 April 2015** ZACR confirmed that the domain name had indeed been suspended. [In response to a notification by the SAIPL that the Dispute was administratively deficient, the Complainant filed an amendment to the dispute on 23 April 2015. 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 **28 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 **29 May 2015**.
- c. In accordance with the Regulations the due date for the Complainant's Reply was **5 June 2015** but on application by the complainant, the SAIPL extended this date to **12 June 2015**.
- d. The SAIPL appointed **Mike du Toit** as the Adjudicator in this matter on **29 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.

2) Parties' Contentions

a. Complainant

- i. The Complainant was established in 1956 by a group of landowners who owned farms located on the western boundary of the Kruger National Park and whose main purpose and concern was the conservation of land. The Complainant is comprised of more than fifty members which together make up the Timbavati Private Nature Reserve.
- ii. There are 12 lodges on the reserve. The Timbavati Private Nature Reserve is one of South Africa's most renowned private game reserves and its services are highly regarded by the public. In addition thereto, some of South Africa's best known safari lodges lie within the Reserve.
- iii. The trade names or trademarks "Timbavati" and "Timbavati Private Nature/Game Reserves" have been in continuous use by the Complainant since 1956 and the Complainant extensively uses these trade names or trademarks in South Africa and around the world. The Complainant has built up a substantial reputation therein and the said trade names or trade Marks are exclusively associated with or referable to the Complainant. The Complainant enjoys protectable common law rights in respect to the "Timbavati" and "Timbavati Private Nature/Game Reserve" which it has acquired through its continuous use since 1957. The Complainant has also registered and is using the domain name timbavatiprivenaturereserve.co.za
- iv. On or about October 2014, the Complainant discovered that the Registrant is currently the registered owner of the domain name timbavati.gamereserve.co.za and operating a website under the said domain name. The said domain name is confusingly or deceptively similar to the Complainant's trade names or

trademarks and to its domain name
timbavatiprivatenaturereserve.co.za

- v. Upon inspection of the Registrant's said website, the Complainant discovered that the website prominently features information, content, images, lay out and get-up related to the Complainant's game reserve and lodges and offers services similar to services offered by the Complainant on its website. Furthermore, the said website appears to be designed to recreate the look and feel of the Complainant's website. Moreover, the said website contained copyright text titled "The History of Timbavati Private Game Reserve" which appeared to be copied directly from the Complainant's website without the Complainant's permission or consent.
- vi. These factors indicate that the Registrant is using and registered the domain name in such a way that leads people and businesses to believe that the domain name is registered to, operated or authorised by, and/or otherwise connected with the Complainant
- vii. On 3 November 2014, the Complainant's attorneys sent the Registrant a letter of demand demanding, amongst other things, that it immediately cease the use of the domain name of timbavatigamereserve.co.za and provide the Complainant's attorneys with an undertaking that it would de-register the said domain name.
- viii. On 4 December 2014, the Complainant's attorneys addressed a letter to the Registrant's attorneys wherein they demanded that the Registrant immediately transfer the abovementioned domain name to the Complainant.
- ix. The Complainant, by virtue of extensive use and promotion of its trade names or trademarks in South Africa, has developed a considerable repute or reputation therein, as an asset of its business which involves amongst other things, operating a private

nature reserve and lodges in South Africa. Its trade names or trademarks are well known in South Africa. Such reputation, or more particularly goodwill stemming from that reputation, in respect of its trade names and trademarks, could be damaged by means of unlawful competition or specifically passing off under the common law by another party wrongly representing that it is, or is associated with, or part of, the Complainant and its business.

- x. The Complainant has rights under the common law in respect of its name and trademarks that can be enforced against others who infringe or would be likely to damage such rights.
- xi. The Complainant's trade names or trademarks "Timbavati" and "Timbavati Private Nature/Game Reserve" are incorporated almost in their entirety within the disputed domain name and although the words "private" and "nature" have been omitted, the words "Timbavati game reserve" form a prominent part of the Complainant's trade name and/or trademarks. This is both phonetically and visually identical and alternatively similar to the names and trademarks "Timbavati" and "Timbavati Private Nature/Game Reserve". Consequently, there is an overall similarity between the respective trade names or trademarks and the disputed domain name.
- xii. The disputed domain name is confusingly similar to the Complainant's well-known trade name and trademark "Timbavati" or "Timbavati Private Nature/Game Reserve". Accordingly there is a substantial likelihood that internet users and consumers will be misled into thinking that there is some association between the Complainant, on the one hand, and the Registrant, on the other hand, when, in fact, there is no such relationship.
- xiii. The domain name in the hands of the Registrant is an abusive registration as defined in the definition section of Regulation 1 of the Regulations.

- xiv. The Registrant registered a domain name which is identical and/or similar to the Complainant's trade names or trademarks and to which it has rights and the said trade names or trademarks
- xv. The Registrant's only reason for having registered the domain name was to intentionally block the registration of the names or marks in which the Complainant has rights, to unfairly disrupt the business of the complainant and to prevent the Complainant from exercising its rights.
- xvi. The Registrant therefore operates a website which is in competition with the Complainant, due to the fact that the Complainant also operates a website in which it promotes its private nature reserve and offers bookings for its game lodges.
- xvii. The Registrant's use of a domain name that is identical or substantively similar to our client's trade names or trademarks is calculated to confuse and/or deceive internet users and the complainant's potential customers and users of its services into believing that the Registrant's website is operated or is in some way connected to the Complainant, which is not the case.
- xviii. It must be pointed out that because of the extensive reputation of the Complainant's names and trademarks, it is highly likely that the public or internet users will be confused and will believe that the disputed domain name is somehow associated or linked with the Complainant.

b. Registrant

- i. Timbavati is a geographic area within South Africa which shares a common unfenced border with the Kruger National Park
- ii. Privately owned lodges are situated within the Timbavati area which offer guest accommodation to visitors. These lodges are autonomous businesses which operate for a profit.

- iii. The Registrant registered the domain name and operated the website since 2008 in order to promote accommodation and other goods and services by the lodges.
- iv. The lodges market themselves individually with their own websites. Most lodges use the registrant's website to market themselves to the public. The registrant has specialised online marketing skills and powerful search engine optimisation, high website conversion-to-sales ratios and good organic listings rankings.
- v. All the lodges featured on the website authorised the registrant to advertise their accommodation and services on its website. The registrant receives a commission for any referral booking it generates for a specific lodge
- vi. In doing so, the registrant promotes and enhances the business of the lodges.
- vii. The registrant's website bears no similarity to the complainant's website and has made every effort to alert visitors to its website that it is not connected in any way to the complainant's website.
- viii. The complainant's website serves a different purpose and is styled in a completely different get-up to the registrant's website. Complainant's website provides information to visitors about the Timbavati's wildlife research projects, the Timbavati's conservation foundation and the protected wildlife that inhabit the Timbavati area. It mentions tourism and accommodation as an ancillary aspect of its website.
- ix. The Complainant has no proprietary rights or interests whatsoever in business or profit oriented objectives. It is incorporated solely to safeguard and promote conservation within the Timbavati area. It is precluded from having any proprietary interest relating to the accommodation services offered by the lodges and does not

compete with the registrant's website which is profit motivated and operated for the benefit of the Timbavati lodges.

- x. Complainant is the registrant of the domain timbavatiprivategamereserve.co.za and has taken no steps to link it to an existing website since 1998. It demonstrates no signs of making a good faith offering of goods and services to the public. Its prohibitive registration of that domain coupled with the present complaint may demonstrate signs of attempting to block others from making fair use of domains referencing the Timbavati area.
- xi. The registrant denies that the websites are similar adding that the banners on its website addresses any such issues.
- xii. The complainant is not entitled to trademark protection of the geographical location Timbavati and cannot claim it to be an asset of its business as it is a non-profit organisation. For this reason, it cannot allege passing off or unlawful competition.
- xiii. The registrant denies that the domain names are identical or that it is trading off the goodwill of the complainant.
- xiv. It denies that the domain name amounts to an abusive registration.
- xv. It denies that the complainant has rights in Timbavati as it is a generic geographical area within the Republic of South Africa and not capable of protection in terms of sec 34 of the Trademarks Act.
- xvi. As an indication that its domain name is not an abusive registration, the registrant has used the domain name since 2008 in good faith, it has done so with the consent of the lodges, has various contracts in place with each lodge where the registrant receives a commission if the website was the effective cause of the online booking.

3) The complainant's response to registrant's reply

- i. It is correct that there are privately owned lodges situated within the Timbavati Private Nature /Game Reserve and that they operate to make a profit. However, it is not correct to say that the lodges operate autonomous from the Complainant. All of the lodges operate under the requirements of the Complainant's constitution and are required to comply with all of the clauses of the constitution and contribute towards the conservation of the Reserve.
- ii. Each of the lodges collects a fixed amount from every booking as a contribution to the conservation of the Reserve, which is transferred into its account.
- iii. The complainant submitted statements by two lodges who appear on the Registrant's domain, confirming that they have no agreements in place with the Registrant and that the Registrant's domain contains incorrect pricing information. It also submitted a screenshot dated 4 June 2015 of the Registrant's lodges and camps and another screenshot dated 11 June 2015 which shows that information pertaining to certain lodges have since been taken down by the Registrant.
- iv. African Synergy, one of the lodges situated within the Timbavati Private Nature/Game Reserve contacted the Registrant on their contact number as advertised on their domain and the phone was answered as "Timbavati Game Reserve Reservations – good morning". This furthermore creates a clear confusion to people or businesses to believe that the domain name is registered to, operated or authorised by or otherwise connected with the Complainant.
- v. Although the Registrant has amended its website under the History tab, the Registrant's website still contains the same or similar wording to that contained on the Complainant's website,

which in turn creates the impression that the two domains are affiliated.

- vi. The banners referred to by the Registrant are unremarkable and "lost" in the contents of the website. Furthermore, the banners referred to conflict with the remainder of the contents of the website and a reasonable person will be confused by the wording used by the Registrant. For example, the first sentence of the banner reads "This website is not affiliated, associated or connected in any way with the Timbavati Private Nature Reserve" but above the banner the following words appear "TIMBAVATI PRIVATE NATURE RESERVE OFFERS SUPERIOR AFRICAN BUSH EXPERIENCE."
- vii. There is substantial goodwill in the Timbavati name which has been built and sustained at great economic costs for over 60 years. The Registrant makes no contribution thereto yet, he seeks to derive economic benefit from the Timbavati name. The Complainant is burdened with the full costs of conserving and protecting the Reserve as well as upholding the good name attributed thereto and the Registrant is using the goodwill to his own commercial advantage. The Registrant's activity is detrimental to the ability of the Complainant to earn similar income should it wish to do so.
- viii. The Timbavati Private Nature/Game Reserve is demarcated and falls within the geographical area of Mpumalanga province and a small section in Limpopo province. The Timbavati Private Nature/Game Reserve is not at all like the West Coast or the Garden Route. It is a specific contractual nature reserve (originally proclaimed as a game reserve under the Government Gazette Proclamation No.229 of 1962, erroneously referred to as "Government Gazette Proclamation No.228 of 1962", in paragraph 11.1.1.1 of the dispute papers. with registered servitudes over a

number of properties which has a regulatory defined management authority. There is no other nature reserve or area so named.

- ix. The Registrant, by the use of that specific domain name as well as the e-mail address of reservations@timbavati-games-reserve.co.za associated with the domain name is passing off that the Registrant is affiliated to the Complainant. This is misleading to the public.
- x. The Registrant's modus operandi appears to be the registration of domain names in the name of well-known game reserves and operating the websites in such a similar confusing way in order to create an impression of association with these game reserves and thereby directing internet traffic and customers to the Registrant's websites for bookings and reservations on behalf of lodges situated in the said game reserves. For example, in addition to having registered a domain name using the Complainant's trademarks or trade names, the Registrant has registered a number of domain names in the name of other well-known game reserves. The Registrant is currently the registrant of blackrhinogames-reserve.co.za, sabisandsgames-reserve.co.za and pilanesberggames-reserve.co.za
- xi. Not only is the aforementioned an indication of bad faith on the part of the Registrant, it also suggests that it is highly probable that the Registrant is engaged in a pattern of making abusive registrations.

4) Discussion and Findings

- i. The Complainant claims that the trade names or trademarks "Timbavati" and "Timbavati Private Nature/Game Reserves" have been in continuous use by the Complainant since 1956 and the Complainant extensively uses these trade names or trademarks in South Africa and around the world and as such, Complainant

enjoys protectable common law rights in respect to the "Timbavati" and "Timbavati Private Nature/Game Reserve"

- ii. This adjudicator finds that the complainant has proven that it has rights in the trademarks Timbavati or Timbavati Private Nature/Game Reserve. This is based on its use thereof and the fact that it is a specific contractual nature reserve originally proclaimed as a game reserve under the Government Gazette Proclamation No.229 of 1962. Although the Complainant can be criticized for not providing sufficient supporting evidence to support a passing off case, it has proven the requisite rights for purposes of this complaint.
- iii. The Registrant's contention that the complainant is not entitled to trademark protection of the geographical location Timbavati is rejected for the following reasons:
 1. The geographical location of Timbavati is not an undefined generic description of an area in South Africa such as " the Lowveld" or "the Bushveld" or " Weskus". It is indeed a defined area in terms of The Association of the Timbavati Private Nature Reserve and the Government Gazette Proclamation No.229 of 1962.
 2. The reliance by the registrant on weskusmall.co.za[ZA2009-0029] and va.co.za[ZA2011-0098] in support hereof can be distinguished on the facts. In both those references, the complainants did not prove any rights.
 3. Although the registrant didn't submit as a defence that it made bona fide and descriptive use of the Timbavati trademarks, it would have failed in such a defence. The use made of Timbavati is not bona fide descriptive use. The evidence as submitted by the registrant in its founding complaint and response to the registrant's reply, bears this out.

-
- iv. The disputed domain name is confusingly similar to the Timbavati and Timbavati Private Nature/Game Reserve marks of the complainant. The registrant's attempts to distinguish the domain and the marks of the complainant is rejected.
 - v. Having established that the complainant has rights in Timbavati and Timbavati Private Nature/Game Reserve and that the disputed domain name is similar to the Complainant's trademarks to which it has rights, what remains is to establish whether the disputed domain name is an abusive registration.
 - vi. This adjudicator finds that, at the time when the disputed domain name was registered, it took unfair advantage of or was unfairly detrimental to the complainant's rights or has since been used in a manner that takes unfair advantage of the complainant's rights in that:
 1. The Registrant's website appears to be designed to recreate the look and feel of the complainant's website and has duplicate and overlap of information, content, images, lay out and categories as covered in the complainant's website.
 2. It claims to have agreements with all the lodges but on the facts as submitted by the complainant, appears not to be for all.
 3. Based on submissions by the Complainant in its response to the Registrant's reply, the Registrant's contact number as advertised on their domain was answered as "Timbavati Game Reserve Reservations – good morning".
 4. The Registrant has positioned itself as the official on-line booking site for the lodges situated in the Timbavati Private Game Reserve, trading off the goodwill and reputation of the Complainant.

-
5. Such use is not bona fide and descriptive use of the trademarks, it is aimed at directing traffic to its website based on the reputation of the Timbavati trademarks.
- vii. The previous decision of [telkommedia.co.za](#) [ZA2007-0003] and *South African Medical Devices Industry v Saints Web Design* (ZA2011-0069) as referred to by the complainant is accepted and applied.
- viii. In so far as the Registrant avers that the Complainant is a non-profit organisation as such is not able to use its domain name for commercial or profiteering purposes, is rejected. It follows that a non-profit organisation can acquire rights in a trademark which are protectable under common law against abuse by third parties. See *Williams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal* 1996 (3) SA 408 (SCA) the minority judgment held at 421G – 422A.
- ix. The Complainant has provided evidence that the Registrant has registered similar domain names based on third party names in the furtherance of its business. In the cases of [blackrhinogamerreserve.co.za](#), [sabisandsgamerreserve.co.za](#) and [pilanesberggamerreserve.co.za](#), the registrant has a similar modus operandi. It does seem if the Registrant has a history of registering abusive registrations.

b. Abusive Registration

This adjudicator finds that the disputed domain name 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, in the alternative, has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.

5) Decision

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

.....
Mike du Toit
SAIIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za