

Decision

ZA2018-0350

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

ADJUDICATOR DECISION

CASE NUMBER:	ZA2018-0350
DECISION DATE:	31 January 2019
DOMAIN NAME	anc.org.za
THE DOMAIN NAME REGISTRANT:	Unwembi Communications
REGISTRANT'S LEGAL COUNSEL:	Van der Merwe & Associates Inc
THE COMPLAINANT:	African National Congress (ANC)
COMPLAINANT'S LEGAL COUNSEL:	None
2 nd LEVEL ADMINISTRATOR:	ZACR

1 Procedural History

- a) The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on **31 October 2018**. There was a minor error on the Dispute, which was brought to the attention of the Complainant on **1 November 2018**, and rectified, by the Complainant, on the same day. As the SAIPL was satisfied that the amended Dispute satisfied the formal requirements of the .ZA Alternate Dispute Resolution Regulations (the "Regulations"), and the SAIPL's Supplementary Procedure, on **2 November 2018** the SAIPL transmitted by email to ZACR a request for the registry to suspend the domain name at issue, and on **2 November 2018** 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 **5 November 2018**. In accordance with the Regulations the due date for the Registrant's Response was **3 December 2018**.
- c) On **27 November 2018**, communication was received from Van der Merwe & Associates Inc, on behalf of the Registrant, objecting to the Alternative Dispute Resolution process and claiming that the Dispute was sent to incorrect address. On **3 December 2018**, a response to the Dispute was submitted. It was not submitted in the format prescribed by Regulation 18, but, in the interests of fairness, the administrator advised that she would forward the response to the Adjudicator appointed in the matter to decide as to whether the response would be accepted in the format submitted.
- d) The SAIPL appointed **Vanessa Lawrance** as the Adjudicator in this matter on **6 December 2018**. 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. The Adjudicator was immediately called upon to decide whether she would accept the Registrant's response.

- e) On **6 December 2018**, the Registrant's representatives addressed correspondence to the Adjudicator, once again complaining that the Registrant was given too little time to respond in light thereof that the Dispute was sent to the incorrect email address. The correspondence bemoaned the requirement that the response be commissioned while the Dispute was not properly commissioned. The Registrant's legal representatives further claimed that the Response submitted complied with most of the provisions of regulation 18(2), barring regulation 18(2)(d).
- f) On **6 December 2018**, the Adjudicator informed the administrator that she would accept the Response, and requested that the Complainant be afforded the opportunity to Reply. The SAIPL forwarded a copy of the Response to the Complainant on **7 December 2018**.
- g) In accordance with the regulations the due date for the Complainant's Reply was **14 December 2018**. The Complainant submitted its Reply on **10 December 2018**.

2 Factual Background

- 2.1 A brief history of this matter is that, from approximately 1995, three staff members of the Department of Information of the Complainant, namely Tim Jenkins, Ferida Jadwat and Duncan Harford, were responsible, *inter alia*, for the administration of the disputed domain name as part of their duties.
- 2.2 In approximately 1997, these three staff members formed Umwembi Communications, the Registrant in these proceedings. The Registrant provided IT services to the Complainant (the ANC), including domain renewal services.
- 2.3 During 2012, Jenkins retired. His shares in the Registrant were to be sold to Cheslyn Mostert.
- 2.4 In 2015, the parties entered into an agreement, called "The Umbrella

Origination Agreement". This agreement was terminated in 2018 by a further settlement agreement. In the settlement agreement, the parties agreed that domain records will remain the property of the Registrant until payment is made. Thereafter, and within 24 hours, the property will be transferred to the Complainant.

- 2.5 At present, the contracts between the parties form matter to be argued before the High Court of South Africa, Gauteng Division, Pretoria under case no. 84798/18.

3 Parties' Contentions

3.1 Complainant

- a) The Complainant mentioned that it was formed in 1912.
- b) The website attached to the domain name anc.org.za was shut down in September 2018, due to non-payment by the Complainant to the Registrant. At that point, the Complainant became aware that ownership of the disputed domain name had been transferred to the Registrant at some point in the past. The Registrant had the authorisation code since its inception, and this code would have allowed the company to either change, delete or edit the details of the domain name.
- c) The Complainant claims that it was never its intention to cede ownership of the domain name to any party, including the Registrant. It never signed any agreement allowing the Registrant to take ownership of the domain name.
- d) It claims that the Registrant signed a settlement agreement with the Complainant in September 2018, in which the final amounts owing to the Registrant were agreed to. Once this amount was paid, the Complainant "will take full ownership of its website, including its

domain". However, the Complainant claims that the Registrant discontinued its services after signing the agreement.

- e) The Registrant posted a malicious notice on the website attached to the disputed domain name, which has a serious impact on the image, brand and business of the Complainant. The Complainant claims that this step was taken in bad faith, notwithstanding agreements entered into between the parties.
- f) The Complainant denies that the Registrant was exercising a lien over the domain records of the Complainant.

3.2 Registrant

- a) The Registrant claims to have been the lawful owner of the disputed domain name since approximately 1997, when it was established.
- b) The Registrant claims that, at no point prior, during or after the existence and/or termination of the contractual relationship between the parties, had the Complainant disputed ownership of the domain name vesting in the Registrant. It claims that the Complainant was fully aware and approved of the Registrant's ownership of the disputed domain name.
- c) The Registrant claims that during or about June 2015, the parties concluded an agreement, in terms of which the relationship between them would continue for 5 years. During or about September 2018, the parties entered into settlement negotiations regarding the terms of termination of the relationship between them. In terms of this agreement, the Registrant claims, that "all relevant domain records will remain the property of Umwembi until final account payment is received".

4 Discussion and Findings

- a) As a preliminary point, the Adjudicator wishes to express her discontent with the behaviour or both parties in this matter. As has been pointed out by the Registrant, the Complainant's initial dispute documents were not properly commissioned. This does not, however, in her view allow the Registrant carte blanche not to comply with the provisions of the regulations, particularly regulation 18(2)(f), to which it claims to have adhered, but hasn't (this regulation calls for a response to be submitted under oath). The Registrant furthermore, on more than one occasion, complains that the dispute was sent to the incorrect address. It is for the Registrant of a domain name to ensure that the contact details as appear on the WHOIS register are correct. These are the details that are used by the administrator when sending correspondence regarding the domain name. If they are incorrect, as the Registrant's legal advisors aver, then the Registrant has only itself to blame. In short, the Adjudicator is of the view that a judge of the High Court would not have tolerated behaviour of this nature from the parties. Notwithstanding this, the Adjudicator proceeds with her discussion and findings.
- b) It is common cause that there was an agreement between the parties entered into during June 2015. This agreement is called "The Umbrella Project Organisation Agreement". The extracts from this agreement supplied in the papers do not specifically refer to the disputed domain name (or any other domain name), or services to be rendered by the Registrant to the Complainant in respect of the disputed domain name. It is common cause, however that the Registrant provided "IT services" to the Complainant.
- c) In September 2018, a "settlement" agreement was entered into to arrange the termination of the relationship between the parties. The extract from the agreement annexed to the papers seems to indicate that the Registrant was offering "web services" to the Complainant. There is not any clear indication, in the extract of this agreement presented in the papers, whether these web

services included any services in relation to any domain name.

- d) The Registrant claims that the settlement agreement was not timeously completed, and payment was not properly made in terms thereof. It was accordingly obliged to approach the court.
- e) The contractual dispensation between the parties is now the subject of High Court proceedings, and the Adjudicator believes it unnecessary, and, indeed, unwise to express any opinion on the merits of this contractual dispute.

4.1 Complainant's Rights

- 4.1.1 The Complainant makes a meal thereof that the Registrant provides no documentary evidence of its right to register the domain name in its own name. Similarly, the Complainant has provided no document evidencing any instruction to the Registrant to register the domain name on its behalf.
- 4.1.2 The Complainant has given no indication of its rights to the domain name. Its sole allegation is that it was the owner of the domain name at some point in the past, and that ownership of the domain name had passed to another party (the Registrant, with whom it had a business relationship) in some manner and at some time since 1995. It has provided no evidence of any rights in the domain name, nor has it provided evidence that it owned the domain name at any point. All that it has proved is that there was some relationship between it and the Registrant. It has not proven that it gave the Registrant instructions to register or renew the domain name on its behalf.
- 4.1.3 The Registrant claims that the Complainant was aware that it was recorded as registrant of the disputed domain name, but has also not provided any evidence of this claim. There seems to be a dispute of fact on this point.

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- 4.1.4 The Complainant has given no evidence of any rights that it has in "ANC". It merely made the bald allegation that "The African National Congress (ANC) was formed in 1912 as a liberation movement". No further evidence of its rights to the mark/name ANC was submitted.
- 4.1.5 The Adjudicator is limited to making a decision based on the facts that have been presented. In terms of regulation 29(1), read with regulation 27, the Adjudicator must decide the dispute in accordance with the principles of law on the basis of the dispute, response and reply, if any, and further statements or documents submitted (mares.co.za [SAIIPL Case 2008-0016]).
- 4.1.6 To succeed in an application to this forum, in terms of regulation 3(1) of the Alternative Dispute Resolution Rules, a Complainant is required to prove, on a balance of probabilities, that:
- a) it has rights in respect of a name or a mark which is identical or similar to the domain name and, in the hands of the Registrant, the domain name is an abusive registration; or
 - b) the domain name, in the hands of the Registrant, is an offensive registration.
- 4.1.7 In terms of earlier decisions, the threshold of proof of rights is "fairly low" (see WIPO decisions surfcult.com [2002-0381] and dinkybomb.com [D2004-320], and SAIPL decisions suncityvacation.co.za [ZA2008/0023] and appeal decision seido.co.za [ZA2009/0030]).
- 4.1.8 Notwithstanding the fact that the threshold to prove rights in a mark or name similar to the domain name is "fairly low", the Adjudicator finds that it is not possible to determine that even this low threshold was reached by the Complainant in the papers submitted. The Adjudicator is prevented from taking cognizance of matter extraneous to the documents submitted to her.

4.1.9 The Adjudicator therefore finds that the Complainant has not proven its case, and cannot therefore succeed in its complaint.

5. Decision

5.1 For all the foregoing reasons, the Dispute is refused.

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VANESSA LAWRENCE
SAIIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za