

ADJUDICATOR'S DECISION

CASE NUMBER:	ZA2019-0371
DECISION DATE:	17 July 2019
DOMAIN NAME:	eaziaccess.co.za
THE DOMAIN NAME REGISTRANT:	Chris Lee
REGISTRANT'S LEGAL COUNSEL:	None
THE COMPLAINANT:	Eazi Access Rental (Pty) Ltd
COMPLAINANT'S LEGAL COUNSEL:	Adams & Adams – Nishan Singh
2 nd LEVEL ADMINISTRATOR:	ZACR

1. PROCEDURAL HISTORY

- 1.1. The Complainant, Eazi Access Rental (Pty) Ltd, filed its complaint on **16 April 2019** in respect of the domain name EAZIACCESS.CO.ZA, registered in the name of the Registrant, Chris Lee of Johannesburg.
- 1.2. The Registrant filed a response on **23 May 2019** which did not comply with the provisions of Regulation 18. Amongst others, the response was not deposed to under oath and simply consisted of a brief email sent to the Administrator, largely consisting of unsubstantiated denials and averments, excluding the mandatory affirmation contained in Regulation 18(2)(f).
- 1.3. The Administrator transmitted the complaint and the deficient response to the Adjudicator on **27 May 2019**. The Adjudicator delivered an interlocutory decision concerning the admissibility of the Registrant's deficient response on **28 May 2019**, admitting the response, despite its deficiencies, only for the purposes in terms of Regulation 19 of deciding whether a response has been filed to which the Complainant was entitled to reply and whether the dispute should be referred to informal mediation. That interlocutory decision, which includes the Adjudicator's reasons, is attached to this decision marked "**Annexure A**".
- 1.4. The interlocutory decision was transmitted to the parties on **28 May 2019** by the Administrator. The Complainant filed its reply on **3 June 2019**.

2. FACTUAL BACKGROUND

- 2.1. The disputed domain name was registered on **26 January 2015**. The disputed domain name was not in use at the time of this decision, merely redirecting to the disputed domain name ACCESS4SALE.CO.ZA, which resolves to a generic landing page ostensibly provided by the hosting company. This appears to have likewise been the position as at **13 July 2018**, when the Complainant took a screenshot of the page to which the disputed domain name resolved at that time.
- 2.2. The Complainant provides services in South Africa relating to the sale, servicing and training of work-at-height and material handling solutions, including: access

platforms, telehandlers, rotational telehandlers and mini-cranes. The Complainant trades as EAZI ACCESS RENTAL, with its registered company name being Eazi Access Rental (Pty) Ltd.

- 2.3. The Complainant owns a registered South African trade mark for EAZI ACCESS RENTAL (and device) in class 37 covering “*Building construction; repair; installation services; including the rental of plant and equipment*”, the application for which was lodged in 2006.
- 2.4. The Registrant is Chris Lee of Johannesburg. He appears to be the sole director of The High Access Group (Pty) Ltd which operates a business offering the sale and hire of high access equipment under the trading name ACCESS 4 HIRE, which operates a website at <https://www.access4hire.co.za>.

3. PARTIES' CONTENTIONS

- 3.1. In addition to its statutory rights, the Complainant claims common law rights flowing from a reputation acquired through use of the EAZI ACCESS RENTAL mark in South Africa.
- 3.2. The Complainant contends that the disputed domain name is abusive for the following reasons.
 - 3.2.1. the disputed domain name wholly incorporates the dominant elements of the Complainant's EAZI ACCESS RENTAL trade mark registration, without the Complainant's authorisation;
 - 3.2.2. the Registrant may attempt to sell the disputed domain name to the Complainant for an exorbitant price, or may attempt to sell the domain to one of its competitors;
 - 3.2.3. the Registrant is inhibiting the marketing and advertising efforts of the Complainant by intentionally blocking the Complainant's registration of the disputed domain name;
 - 3.2.4. the Registrant's address details in the WHOIS are incomplete and incorrect; and

- 3.2.5. The Registrant is not making use of the disputed domain name.
- 3.3. The Registrant's contentions are sparse and largely unsubstantiated, in addition to the fact that the Registrant's response is procedurally deficient as addressed above. The Registrant contends that the complaint should be rejected because:
- 3.3.1. The disputed domain name "*is for an unrelated field*";
- 3.3.2. The disputed domain name was registered in 2014 for the purpose of the Registrant's "*business interest*";
- 3.3.3. The Complainant "*cannot lay claim to domain name they chose not to purchase for a full decade*"; and
- 3.3.4. The Complainant "*cannot lay claim to the words Eazi or Access as these are generic words used extensively in a number of applications.*"

4. ADMISSIBILITY OF DEFICIENT RESPONSE

- 4.1. Previous SAIPL panel decisions have recognised that there is a public interest aspect to decisions of this forum. See the appeal decision in ZA2011-0078 at page 7. In particular, the public has an interest in adjudicators having access to all relevant information in deciding disputes such as these given the potential for public confusion resulting from an incorrect decision.
- 4.2. Given this public interest element, and for the further reasons set out in the Adjudicator's interlocutory decision attached hereto as Annexure A, I hold that the Registrant's deficient response should be admitted.
- 4.3. However, as per the Adjudicator in ZA2009-0028 at page 3, this decision is not to be taken as *carte blanche* to lodge irregular submissions. Each case should be decided on its own factual matrix.
- 4.4. In addition, given that the Registrant's response was not deposed to under oath, and given that much of the response is unsubstantiated through evidence, the

weight and probative value of the Registrant's response is low and has been considered accordingly.

5. DISCUSSION AND FINDINGS

- 5.1. The Complainant undoubtedly has statutory trade mark rights in the EAZI ACCESS RENTAL (and device) trade mark. The disputed domain name wholly consists of the first, dominant and most distinctive element of the Complainant's trade mark, the application for which was lodged eight years prior to registrations of the disputed domain. The Complainant therefore has rights in respect of a mark which is similar to the disputed domain name, within the meaning of Regulation 3(1)(a) read with the definition of "rights" in the Regulations.
- 5.2. The Complainant's contention that it has a reputation, and consequently common law rights, in the EAZI ACCESS RENTAL mark is not so easily accepted given the paucity of evidence to that effect contained in the complaint. The only evidence of use of the Complainant's EAZI ACCESS RENTAL mark presented by the Complainant consists of a few screenshots taken from the Complainant's own website, Facebook, LinkedIn and YouTube pages, all dated **13 July 2018**, that is, after registration of the disputed domain name. The screenshots of the social media pages do ostensibly show numbers of followers, "likes" and other indications of the size of the Complainant's social media followings. However, the actual numbers of such followings are not legible in the screenshots provided, no indication is provided of the geographic spread and the Complainant does not reference them in its complaint at all.
- 5.3. The adjudicator in ZA2007-0001 noted that it is trite that the more descriptive a name or mark, the less it is inherently adapted to distinguish the goods or services of a particular trader from those of another. A name or mark which is inherently lacking in distinctiveness can acquire distinctiveness through extensive use. Mere use does not however equate with distinctiveness. The more a trade mark is descriptive of the goods, the less likely it will be capable of distinguishing them in this sense (*Beecham Group plc & another v Triomed (Pty) Ltd* [2002] ZASCA 109; 2003 (3) SA 639 (SCA) at para 15-17).

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- 5.4. It must be shown that the consequence of the use has brought about a situation where the name or mark has acquired a "secondary meaning" which in fact denotes one trader, and no other. Relevant evidence of such "secondary meaning" may include evidence related to length and amount of sales under the mark. The nature and extent of advertising, consumer surveys and media recognition are also relevant (see Prof. Tana Pistorius ".za Alternative Dispute Resolution Regulations: The First Few SAIPL Decisions", available at https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/pistorius1, and the authorities cited therein).
- 5.5. Where the name concerned is descriptive rather than fancy, invented, or made up, it will, generally speaking, be more difficult for a trader to establish that a substantial number of members of the public or of persons in the trade concerned will regard the goods or services bearing that name as coming from a particular single source (*New Media Publishing (Pty) Ltd v Eating Out Web Services 2005 5 SA 388 (C)* at p402).
- 5.6. The Complainant's EAZI ACCESS RENTAL mark is inherently on the weaker end of the spectrum of distinctiveness, being largely descriptive and/or laudatory of the Complainant's services. In so far as the misspelling of EASY is concerned, reference is made to the decision in *Dinnermates (Tvl) CC v Piquante Brands International & another (401/17) [2018] ZASCA 43 (28 March 2018)* where the Court accepted that a misspelling of "pepper" in the form of "peppa" is still in itself descriptive in the context of peppers. As such, in order to support its claim to common law rights and a reputation, it was incumbent upon the Complainant in this case to adduce convincing evidence that its mark has acquired the requisite secondary meaning and a reputation in the marketplace, through use, which the sparse evidence it has presented fails to do. No clear indication or evidence is provided as to the length or extent of such use or the mark's recognition in the marketplace at all.
- 5.7. The WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, at para 1.3 available at : <https://www.wipo.int/amc/en/domains/search/overview3.0/#item13>, provides as follows:

“Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.”

5.8. The Complainant has provided no such evidence.

5.9. The WIPO Overview goes on to state:

“In cases involving unregistered or common law marks that are comprised solely of descriptive terms which are not inherently distinctive, there is a greater onus on the complainant to present evidence of acquired distinctiveness/secondary meaning.”

5.10. It is also to be noted that all of the evidence of use of the Complainant’s mark presented in the complaint is dated **13 July 2018**. This post-dates the registration date of the disputed domain name by over three years and is accordingly unhelpful insofar as establishing whether the disputed domain name was registered 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, as per the definition of “abusive registration” in the Regulations.

5.11. There is therefore insufficient evidence in the papers to support the Complainant’s contention that its mark enjoys a reputation and consequently common law rights.

5.12. Nevertheless, Adjudicators are permitted to undertake limited factual research into matters of public record, especially if this is in the interests of justice. See the decision in ZA2015-0193 at para 4.2.9. As indicated above, there is a public interest element in these proceedings, namely, the need to avoid confusion of the public. See also the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition at para 4.8 at <https://www.wipo.int/amc/en/domains/search/overview3.0/#item48> where independent reference to the Internet Archive, as well as other matters of public record, is accepted as part of the WIPO dispute resolution panel’s consensus.

- 5.13. As is evident from the screenshots attached to the complaint, the Complainant operates its website from the domain name EAZI.CO.ZA. The Complainant claims, under oath, which remains uncontested, to have been established in 2003, and the WHOIS page for EAZI.CO.ZA indicates a registration date in 2003. In addition, I have established through use of the Internet Archive that use of the Complainant's website for its EAZI ACCESS RENTAL business began at that site at least as early as 2007 (being the earliest example of an archived version of the Complainant's website).
- 5.14. A historical Google search, limited to South African webpages and limited to the date range of one year immediately preceding the registration date for the disputed domain name, for the words "eazi access" (as constituting the disputed domain name) reveals results almost exclusively relating to the Complainant. See the search results here:
https://www.google.co.za/search?lr=&cr=countryZA&tbs=ctr%3AcountryZA%2Ccdr%3A1%2Ccd_min%3A1%2F26%2F2014%2Ccd_max%3A1%2F26%2F2015&ei=XJEsXanblou11fAP1JGRsAE&q=eazi+access&oq=eazi+access&gs_l=psy-ab.3..0i67j0l2i0i67j0l6.4455.5573..6422...0.0..0.267.518.2-2.....0....1..gws-wiz.R7uhQQMTato. The results include a High Court judgement in favour of the Complainant, instituted in 2013, in which reference is made to a witness giving testimony (almost certainly under oath before a Judge) that he had been a logistics manager for the Complainant in 2010 and for eight years prior to his testimony. The judgement is available here:
<http://saflii.org/za/cases/ZAKZDHC/2018/30.html>.
- 5.15. Accordingly, as at the registration date of the disputed domain name, it would appear that the Complainant had used its EAZI ACCESS RENTAL mark, at least on its website, for at least eight years since 2007 (as per the Internet Archive), and probably longer given the Complainant's unchallenged assertions, under oath, that it was founded in 2003. In fact, the Registrant would appear to accept, in his response, that the Complainant had been in operation for "a full decade" prior to registration of the disputed domain name by the Registrant. This much is implicit in the following statement in his response: "*Eazi access rental cannot lay claim to domain they chose not to purchase for a full decade.*"

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- 5.16. In addition, there is prima facie evidence that the abbreviation EAZI ACCESS, constituting as it does the disputed domain name, was associated with the Complainant immediately prior to the registration of the disputed domain name, as per the historical Google search referenced above.
- 5.17. As such, I am prepared to accept, on balance of probabilities, that the Complainant had a reputation and common law rights in EAZI ACCESS RENTAL prior to registration of the disputed domain name.
- 5.18. It may be questioned why I have independently investigated whether the Complainant had a reputation in its mark as at the registration date of the disputed domain name when I have already accepted that the Complainant had statutory trade mark rights at that time. The reasons are manifold. Here are a few. Firstly, the Complainant relies on the provisions of Regulation 4(1)(a), in particular, the blocking registration provisions of Regulation 4(1)(a)(ii). It has been widely recognised by panels in this forum (see ZA2008-00021 for e.g.) and by Nominet DRS panels (see DRS00583 for e.g.) that the blocking provisions, and indeed the other provisions of Regulation 4(1)(a) and their equivalents have a subjective component, that is, the intent or motivation of the registrant. In the absence of any evidence whatsoever in the complaint in this matter showing that the Complainant's mark had been used, let alone had acquired a reputation, as at the registration date of the disputed domain name, it would accordingly be impossible to assess the Complainant's claims in respect of the blocking provisions. Secondly, it is trite that the extent of the monopoly in a trade mark is broadened, and consequently confusion is more likely, where the mark enjoys enhanced distinctiveness through actual use. This is all the more important where a mark consisting of relatively weak (in terms of distinctiveness) elements is concerned, as in this case.
- 5.19. I am also prepared to accept, incorporating as it does the first, dominant and most distinctive part of the Complainant's reputed name, being EAZI ACCESS, that the disputed domain name will call to mind the Complainant's business and thus quite probably lead to confusion in the marketplace. This much is evidenced by the historical Google search referenced above. Indeed, although not referenced in the complaint, I have independently established that one of the Complainant's own staff members appears to assume that the disputed domain name is that of the

Complainant. See the contact details listed on the following LinkedIn profile for one of the Complainant's employees in Mpumalanga, which incorrectly lists the disputed domain name as that of the Complainant:

<https://www.linkedin.com/in/steven-hasselbach-ba898843/detail/contact-info>.

- 5.20. As evidenced by the companies register extract attached to the complaint, the Registrant's competing company, The High Access Group (Pty) Ltd, was registered in 2014. I have also independently established that the Registrant's domain name ACCESS4HIRE.CO.ZA, which he uses in relation to a competing business, was registered on **25 April 2014**, according to the WHOIS page for that domain. As such, prior to registration of the disputed domain name in 2015, it is quite probable that the Registrant had been involved in the relevant industry, being the same industry as the Complainant, and was thus more likely to have been aware of the Complainant's reputed name EAZI ACCESS RENTAL at the time of registering the disputed domain name, given that I have independently established that the Complainant had in fact been trading for some time at that point.
- 5.21. Moreover, in the Registrant's response, he states that the disputed domain name was registered for "*an unrelated field*" and was for the purpose of "*my business interest*". He does not, however, and despite being given an opportunity to do so, indicate what his purpose for the disputed domain name was at the time of registration. An Internet Archive search for the disputed domain name reveals no archived entries. This, coupled with the evidence referenced at paragraph 2.1 above, strongly indicates that the disputed domain name has not been put to use to date by the Registrant.
- 5.22. In WIPO Case No. D2007-1412, available at <https://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1412.html>, the panel held that the respondent holds no right or legitimate interests over the disputed domain name as he had not developed any real website at the domain name and is therefore not using the domain name in connection with offering any goods or services. (See also WIPO Case No. D2006-0483, available at <https://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0483.html>). Moreover, in WIPO Case No. D2000-1195, available at <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1195.html>, the

panel stated that as “*the domain has been registered since mid-March 2000, it is fair to infer that the [r]espondent has not made, nor taken any preparatory steps to make” any legitimate use of the domain name.*”

5.23. Therefore, on balance:

5.23.1. It would appear that the Registrant has no rights or legitimate interests in the disputed domain name, and has not demonstrated any of the factors indicating that the domain is not an abusive registration listed in Regulation 5;

5.23.2. There is a real likelihood that consumers will assume that the disputed domain name is that of, or otherwise connected to, the Complainant, resulting in confusion which is relevant to the factor listed in Regulation 4(1)(b); and

5.23.3. It appears likely that the Registrant was aware of the Complainant’s trading name at the time of registration of the disputed domain name, which is relevant to the factors listed in Regulation 4(1)(a).

5.24. Accordingly, I find that the disputed domain name, in the hands of the Registrant, is an abusive registration and should be transferred to the Complainant.

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JEREMY SPERES

SAIIPL SENIOR ADJUDICATOR

www.DomainDisputes.co.za

ANNEXURE A

SAIIPL DOMAIN NAME DISPUTE

INTERLOCUTORY DECISION

28 May 2019

Case no. ZA2019-0371

Domain name: eziaccess.co.za

The Registrant's response was due on **22 May 2019**. On **23 May 2019** the Registrant filed a response that does not meet the requirements of Regulation 18. Amongst others, it has not been deposed to under oath.

Adjudicators are empowered to determine the admissibility, relevance, materiality and weight of evidence (Regulation 24(3)).

The Adjudicator notes that numerous Adjudicators have in the past admitted deficient responses, in particular, responses not deposed to under oath. See for instance the decisions in ZA2008-0024 (embassytravel.co.za); ZA2009-0031 (finmedia24.co.za) and ZA2011-0070 (outsource.co.za).

For the time being, only for the purposes in terms of Regulation 19 of deciding whether a response has been filed to which the Complainant is entitled reply and whether this dispute should be referred to informal mediation, I am prepared to admit the response. My decision in this regard is informed by the following factors:

1. The Registrant is not represented by attorneys;
2. The Complainant will have an opportunity to reply to the response;
3. Adjudicators must ensure that each party is given a fair opportunity to present its case (Regulation 24(1));
4. The deficient response addresses issues that are relevant to the dispute;
5. The present proceedings are "*very different from court proceedings*", as per the Adjudicator in ZA2008-0024;
6. To ignore the response would be to put form above substance, as per the Adjudicator in ZA2009-0031;
7. I am in respectful agreement with the learned Adjudicator's rationale in ZA2008-0024 at paragraphs 2(e) and (f) regarding the effect of non-compliance with prescribed forms and procedures; and
8. Regulation 18(3) addresses the issuing of a summary decision where no response is submitted. It does not refer to a response that is complaint with

Regulation 18(2). Rather, it merely refers to a “*response*” per se not having been submitted.

I make no ruling now on the weight or probative value to be afforded to the deficient response, which will be assessed in my final decision if the matter is not resolved in informal mediation.

Accordingly, the Complainant should submit its reply to the deficient response within the timeframe specified in Regulation 19(1), that is, within five days of receiving this decision. The Complainant is invited, in its reply, to also address the Adjudicator on the admissibility, weight and probative value to be afforded to the deficient response.

The Case Administrator should refer the matter to informal mediation upon expiry of the time frames set out in Regulation 19(3).

Jeremy Speres
SAIPL Senior Adjudicator