

Decision

[ZA2019-0373]

.ZA ALTERNATE DISPUTE RESOLUTION
REGULATIONS (GG29405)

ADJUDICATOR DECISION

CASE NUMBER:	ZA2019-0373
DECISION DATE:	27 August 2019
DOMAIN NAME:	afribet.co.za
THE DOMAIN NAME REGISTRANT:	Barry Murrell
REGISTRANT'S LEGAL COUNSEL:	Brookes Attorneys - Jonathan Brooks
THE COMPLAINANT:	Afribet (Pty) Ltd
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 **24 May 2019**. On **24 May 2019** the SAIPL transmitted by email to ZACR a request for the registry to suspend the domain name(s) at issue, and on **24 May 2019** ZACR confirmed that the domain name had indeed been suspended. The SAIPL verified that 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 **27 May 2019**. In accordance with the Regulations the due date for the Registrant’s Response was **25 June 2019**. The Registrant submitted its Response on **25 June 2019**, 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 **26 June 2019**.
- c) In accordance with the Regulations the due date for the Complainant’s Reply was **03 July 2019**. The Complainant submitted its Reply on **03 July 2019**.
- d) The SAIPL appointed **Mike du Toit** as the Adjudicator in this matter on **23 July 2019**. 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) On **29 July 2019** the adjudicator requested the Administrator to request the following additional information from the parties in terms of Reg 26:
 1. The Complainant - par 11.1.1 of the Complaint.
 - 1.1 The Complainant is required to provide the full history of the use of AFRIBET. When was it first used, regardless of the date of incorporation

of the company, and where?

1.2 The Complainant is required to provide evidence to support the allegation that several sports betting stores exist, when did they commence business and where in South Africa.

1.3 Was AFRIBET ever used by any third party in the past?

2. The Registrant

2.1 Par 8.1 (e) of the Response- The Registrant is required to provide evidence of their use of AFRIBET since 2014.

2.2 Par 8.1 (g) of the Response-The Registrant is required to provide the number of clients claimed and evidence of the alleged association during the previous 5 years.

Both parties were afforded the opportunity to provide the adjudicator with their comments on the answers provided by the respective parties.

2 Factual Background

2.1 The disputed domain name was registered on **16 April 2016** in the name of the Registrant, Barry Murrell. The domain name was registered for Marshalls World of Sport (Pty) Ltd (“Marshalls”), the beneficial “owner” of the domain. Marshalls’ business is the offering of online betting facilities to South Africans on African and other international events.

2.2 The Complainant was incorporated on **05 February 2018** and operates a group of sports betting stores that operate under the name AFRIBET. The Complainant is also developing an online sports betting website and plans on using afribet.co.za. Online searches using the AFRIBET name, redirects to a competitor of the Complainant.

2.3 On **21 August 2018**, the Complainant enquired from the Registrant whether he was willing to sell the disputed domain name and on **23 August 2018**, the Registrant confirmed that he still owns the domain name on behalf of a client, but has no intention of selling it, then or at any time in the foreseeable

future. The client of the Registrant is Marshalls the owner of www.worldofsport.co.za

- 2.4 On **22 June 2019**, subsequent to the lodging of the complaint, the Complainant was approached by Brookes Attorneys on behalf of their client, Marshalls, referring to the referral of the domain name dispute and indicating that a compromise can be reached. The Complainant did not respond.

3 Parties' Contentions

3.1 Complainant

3.1.1 The Complainant, Afribet (Pty) Ltd is a private company incorporated within South Africa with registration number 2018/052928/07. The company operates a group of sports betting stores that operate under the name Afribet. There is also an online sports betting website under development which would ideally use the afribet.co.za domain name within South Africa. The Complainant is registered with the Gauteng Gambling Board and presented evidence of the licenses granted. The Complainant alleges that the disputed domain, afribet.co.za, is commonly entered by customers of the retail betting stores to view the online offering and to find the locations of the retail stores. However, such enquiries are directed to MBet, a competitor of Afribet at the time of filing the complaint.

3.1.2 MBet (<http://www.mbet.co.za>), is owned by Marshalls. When searching for afribet.co.za, you were directed to the MBet website, which at the time, was inactive. In its reply to the Registrant's response to the complaint, the Complainant provided evidence that MBet has ceased to exist on **01 March 2016** and that all clients were moved to Marshalls. However, the mbet.co.za domain was not redirected to the Marshalls website nor does their website make any reference to MBet.

3.1.3 In response to the adjudicator's request for additional information, as set out above in par 1e, the Complainant provided the following

additional information:

- In 2015 Afribet started operations in Nigeria;
- In 2015 the application process started in South Africa for four BBBEE licences in Gauteng province with the Gauteng Gambling Board (GGB);
- The Nigerian operation was launched successfully and easier as regulatory red tape is less;
- South African applications of four licences with GGB using the entity Mzanzi (Pty) Ltd ended up to be two licences in the entities Vilabase (Pty) Ltd and Afribet (Pty) Ltd both trading as Afribet;
- The process in SA is very time consuming and tedious with the GGB taking months to approve changes at certain times;
- Claim Street store (Johannesburg) opened to public **01 July 2019** (Vilabase t/a Afribet);
- Sandton shop (Kgoro) is to open in August 2019;
- The websites for both Nigeria and South Africa have been delayed due to a service provider not completing the task timeously;
- Currently Nigeria has 20 stores operational and website launching in August 2019;
- South Africa has 1 store and 1 opening in August and website August / September 2019, the disputed domain name has a direct impact to the launching of the SA website;

3.1.4 The Complainant provided the following documents to support the information supplied above:

- CDP Gaming technologies (Pty) Ltd invoice, dated **19 April 2015**, a betting platform provider. The invoice was addressed to Mr Lawrence Kourie from Afribet, Nigeria.
- Afribetnigeria.com domain whois records, reflecting that the domain name was registered on **04 October 2016**;
- Vegas Kings invoice to build Afribet websites, dated **09 July**

- 2017, addressed to Afribet Nigeria, Mr Lawrence Kourie;
- GGB licences Vilabase and Afribet (changes), dated **12 December 2018**;
 - GGB application cover sheet for Mzanzi (Pty) to trade as Afribet later, dated **19 June 2015**
 - Rent invoice for Nigeria for a single shop, dated **21 April 2016**;
 - Approval from the Gauteng Gambling Board for Aardvark software for Claim Street store in South Africa, dated **13 June 2019**;
 - Sign off sheet for Aardvark for Claim Street store to open, dated **28 June 2018**;
 - Claim street store (in Johannesburg) lease in the name of Vilabase (Pty) Ltd, signed but undated.

3.1.5 The Complainant alleges that, at the time of the lodging of the complaint, the afribet.co.za domain name redirected to Mbet, (<http://www.mbet.co.za>), a website owned by Marshalls. The Complainant was requested to comment on the information supplied by Marshalls in terms of reg 26. The Complainant states that until the early part of August 2019, the domain afribet.co.za pointed to www.mbet.co.za. The website for MBet was inactive during the period **26 December 2018 - 03 August 2019**. This was confirmed in an extract from archive.org. The afribet.co.za domain name currently directs traffic to www.worldofsport.co.za as compared to the date when the complaint was lodged, when it was pointing to the dormant www.mbet.co.za website.

The Complainant contends that this illustrates that Marshalls only started re-directing traffic to their website after the dispute was lodged to illustrate that it allegedly adds value to their business. The Complainant states that the Registrant's domain (afribet.co.za) was pointing to a website that did not work (www.mbet.co.za), had no links to any revenue generating functionality and the Registrant cannot prove that they even generated revenue from it let alone

benefited at all from the domain.

- 3.1.6 The Complainant contends that the disputed domain name is identical or similar to a name or mark in which it has rights and that the domain, in the hands of the Registrant, is an abusive registration.

3.2 Registrant

- a) The Registrant contends that the mark AFRIBET is generic and descriptive and consists of words which are not registered and are used by different entities or individuals worldwide. It claims that the Complainant does not have exclusive rights to use AFRIBET, internationally or within South Africa and has no particular trade mark rights in South Africa.
- b) It states that, on the date of registration of the domain name the Complainant didn't exist, having only been registered in 2018. The Registrant claims to have been using the mark AFRIBET since 2014. The Registrant claims to have a legitimate interest in the disputed domain name and is using it fairly for its business as a registered and licensed bookmaker which offers bets on African and other contingencies. The Registrant alleges it registered afribets.co.za to protect its trade mark in South Africa, which resolves to its website at www.mbet.co.za. The disputed domain is relevant to the Registrant as its main business is offering online betting facilities to South Africans on African and other international events. Although it claims that it has clients, many of whom associate the AFRIBET mark with the Registrant over the preceding 5 years, it could not provide any evidence in support when requested.
- c) The Registrant denies any bad faith, nor that it is using the disputed domain name to disrupt the Complainant's business. It states that the Complainant has only been granted a license from GBB in December 2018, in excess of 4 years after the Registrant registered and commenced use of the domain. It claims that the Complainant is attempting to reverse hijack the disputed domain.

- d) The Registrant denies that the Complainant has a case based on Regulation 3(1) (a). The Registrant denies that the Complainant has any rights which are protected under South African law and has not overcome the threshold of establishing that the mark AFRIBET is exclusively associated with the Complainant, for purposes of establishing common law rights in the mark. The Registrant claims that it adduced evidence that at least two other entities are referred to or known as Afribet internationally.
- e) The Registrant claims to have demonstrated that it has established rights in the Afribet trade mark in South Africa, having utilised and operated the disputed domain for 5 years in the South African marketplace.

The Registrant claims that AFRIBET is laudatory of the services offered by both parties. It submits that the Complainant did not overcome the threshold of establishing that the mark AFRIBET is exclusively associated with the Complainant in South Africa, for purposes of establishing common law rights in the mark.

The Registrant denies that, on a balance of probabilities, that the Registrant's usage of the domain name has taken unfair advantage of or is unfairly detrimental to the Complainant's rights and can therefor not be held to be abusive.

- f) The Registrant claims that at all material times, both in the years prior to the registration of the Complainant and subsequent thereto, the Registrant's interest in the disputed domain name has been legitimate and there has been no evidence or allegation to the contrary.
- g) In response to the adjudicator's request for additional information in terms of regulation 26, the Registrant could not provide any substantiation of its claims of use of Afribet since 2014, blaming the shortcomings of the website www.afribet.co.za which is hosted by Axxess. It also states that there is no specific report which can

confirm that the link has been active for the previous 5 years. Despite alleging that the third party domain registrant Pro-IT-Support can provide confirmation and that Axxess Africa can provide such confirmation, no confirmation was provided.

4 Discussion and Findings

- a) At the outset, it must be recorded that the submissions by the Complainant and the response by the Registrant/Marshalls, were sub-standard and that the Adjudicator was obliged to request both parties to deal with specific questions relating to *lacunas* in both sets of papers. Both parties were then offered the opportunity to comment on the counter party's answers to ensure that the *audi alteram partem* rule was adhered to. The adjudicator is satisfied that both parties had the opportunity to comment on the submissions made by the counter party and accordingly considered the evidence so produced in terms of reg 26.

4.1 Complainant's Rights

4.1.1 This is not your normal run of the mill matter as will be borne out by the facts. The Complainant set out the steps taken to establish its business which operates a group of sports betting stores under the name AFRIBET. The Complainant was incorporated on **05 February 2018** and one of the directors is Lawrence Paul Kourie. This information was acquired by the adjudicator from the CIPC company records. This individual features on a tax invoice provided by CDP Gaming Technologies (Pty) Ltd and Vegas Kings CC, both service providers to the business at a time prior to the incorporation of the Complainant. Based on the timeline provided by the Complainant, Afribet started its operations in Nigeria in 2015. The timeline as provided is set out below:

- In 2015 Afribet started operations in Nigeria;
- In 2015 application process started in South Africa for four BBBEE licences in Gauteng province with the Gauteng

Gambling Board (GGB);

- The Nigerian operation was launched successfully and easier as regulatory red tape is less;
- South Africa application of four licences with GGB using the entity Mzansi (PTY) Ltd which later ended up to be two licences in the entities Vilabase and Afribet both trading as Afribet;
- Claim Street store (Johannesburg) opened to public **01 July 2019** (Vilabase T/A Afribet)
- Sandton shop (Kgoro) is to open in August 2019
- The websites for both Nigeria and South Africa have been delayed due to service provider not completing the task timeously.
- Currently Nigeria has 20 stores operational and website launching in August 2019
- South Africa 1 store and 1 opening in August and website August / September 2019, the co.za has a direct impact to launching of SA website.
- The CDP and Vegas Kings Invoices show clearly the intention to use the name Afribet and the process for getting approvals in SA is just tedious, cumbersome and takes forever, not mention it had many hurdles along the way which delayed the process.

4.1.2 This was provided by the Complainant in response to the adjudicator's further questions. The Registrant did not dispute any of the facts provided by the Complainant apart from commenting that none of these "rights" existed at the time when the disputed domain was registered. The adjudicator received two emails from the case administrator, which was submitted by the Complainant. The parties were informed that it would be sent to the adjudicator, which now rules that it would be taken into consideration as both parties had knowledge of the content at the time.

The first string of emails was sent by the Complainant or on behalf of

the Complainant, on **21 August 2018**, enquiring from the Registrant whether aribet.co.za still belongs to him and whether he was willing to discuss selling it. On **23 August 2018**, the Registrant confirmed that he still owned it, on behalf of a client but that he had no intention of disposing of it.

The second email was sent by Brookes attorneys, acting on behalf of Marshalls. This email, sent on **22 June 2019**, invited the Complainant's representative to discuss the referral of the dispute and commenting that they believe the parties can reach a compromise. The relevance of these emails will be discussed below.

- 4.1.3 An aspect that needs to be ventilated fully, is the relevant time of the establishment of rights, in this case, the rights claimed by the Complainant.
- 4.1.4 The Registrant denies that the Complainant had any rights at the time of the registration of the disputed domain name, i.e. **16 April 2014**.
- 4.1.5 However, as determined in **ZA2008/00020 Mxit Lifestyle (Pty) Ltd v Andre Steyn**, the adjudicator found, with reference to Nominet and UDRP policies, that the date on which rights must exist, is the date of the complaint and not the registration date of the disputed domain. The adjudicator held that the issue of the registrant's registration of the disputed domain name prior to the establishment of the rights of the complainant is only relevant to questions concerning the registrant's legitimate interest and bad faith. In **ZA2007/0008 Homefront Trading 272 CC v Ian Ward**, the adjudicator held that the fact that a registrant's domain name registration date predates the complainant's (trade mark) registration, was irrelevant. Accordingly, the contention of the Registrant that the Complainant didn't have any rights at the time of the registration of the disputed domain, is of no consequence.
- 4.1.6 Regulation 3(1) requires a complainant to prove that it has rights in respect of a name or mark, which is identical to the disputed domain

name, and in the hands of the registrant, an abusive registration. The Complainant provided evidence of its business activities relating to the trading name AFRIBET. It illustrated that the initial use started in Nigeria where one of the directors of the Complainant, Mr Lawrence Kourie, traded as AFRIBET. The timeline provided by the Complainant illustrated the steps taken since the early beginnings until the approval of their betting licenses by the Gauteng Gambling Board. The one common denominator is the use of AFRIBET, whether in the afribetnigeria.com domain, the name of the Complainant or the trading name of Vilabase (Pty) Ltd. These rights existed at the time of the lodging of the dispute and is not in dispute.

Registrant, in its response, dealt with the nature of the mark AFRIBET. It claims, inter alia, that it is generic and a descriptive combination of words that are not registered and used by two entities worldwide. Later on, it claims trade mark rights in AFRIBET, based on its use of AFRIBET for its business, but then alleges that the mark is laudatory of the services offered by both parties. It is clear that the Registrant grappled with the nature of the mark AFRIBET, and in the process contradicted its arguments put forward.

In so far as the nature of the AFRIBET mark goes, this adjudicator finds that it is sufficiently distinctive so as to serve as a trade mark, to distinguish services of a similar nature. Had it been wholly descriptive, the Complainant had to show extensive use to have given rise to the acquisition of a secondary meaning. This adjudicator finds that it is inherently sufficiently distinctive to serve as a trade mark. It certainly isn't wholly generic, nor wholly descriptive. It goes without saying, that the AFRIBET mark is identical to the disputed domain name for purposes of reg 3(1)(a).

Having found that the Complainant established rights in AFRIBET, which existed at the time of the filing of the complaint and which functions as a trade mark, the enquiry does not end there. The Complainant must prove on a balance of probabilities, that the disputed domain name is an abusive registration either as a result of

a bad faith domain registration **or** as a result of the bad faith use of the domain name.

4.1.7 In this matter, there is no allegation by the Complainant that the disputed domain name is an abusive registration based on a bad faith registration. The evidence that the Complainant provided in its complaint as supplemented in its answers in terms of reg 26, is in support of the bad faith use of the disputed domain name. Although the complaint was not eloquently drafted, the elements of an allegation of an abusive registration based on the way it was used subsequent to registration, has been presented and proven. The Registrant, given the opportunity to dispute the facts presented by the Complainant, failed to present evidence to the contrary.

4.1.8 In terms of Reg 3(1)(a), the Complainant must prove, on a balance of probabilities, that the disputed domain name has been used in a manner that takes unfair advantage of or is unfairly detrimental to its rights. This will be dealt with in more detail below.

4.2 Abusive Registration

4.2.1 If one considers the timeline of events leading up to the lodging of the complaint, the evidence in the complaint, the evidence supplied in reply to the Registrant's response and in answer to the reg 26 questions, the following is relevant:

4.2.2 MBet, the former online sports book operator, ceased to exist on 1 March 2016 and all clients were moved over to Marshalls. At that stage the domain mbet.co.za was not redirected to the Marshalls site;

The Complainant, having established its AFRIBET business, approached the Registrant on 21 August 2018, with the view of purchasing the disputed domain name, which was rejected. The following is relevant;

1. At the time when the complaint was lodged, 24 May 2019, the afribet.co.za domain was redirecting to www.mbet.co.za,

owned by the Registrant. Neither party provided any evidence as to whether the domain already redirected to the MBet site on 21 August 2018.

2. Until 3 August 2019, the aribet.co.za domain still directed to www.mbet.co.za, which was a non-functional website having closed down on 1 March 2016. The Complainant provided proof that the status of www.mbet.co.za website remained unchanged from 26 December 2018 until 3 August 2019. Thereafter, the www.mbet.co.za site was updated to direct all traffic to www.worldofsport.co.za, the website of the Registrant/Marshalls, using the disputed domain name.

- 4.2.3 Against the background of the timeline set out above, the question that remains to be answered is whether the disputed domain has been used in a manner that takes unfair advantage of or is unfairly detrimental to the Complainant's rights. The Complainant and the beneficial owner of the disputed domain, Marshalls, are direct competitors in the market.

At the time when the first approach was made to purchase the disputed domain on 21 August 2018, the disputed domain was passively used to direct traffic to the non-functional www.mbet.co.za website. The Registrant/Marshalls claimed in their response to the complaint that they have an unknown number of clients which associate the AFRIBET mark with the Registrant, which association has been built up over the preceding 5 years. In reply to the adjudicator's request for further detail regarding this statement in terms of reg 26, the Registrant was unable to provide any proof. This evidence is accordingly rejected.

The complaint was lodged on 24 May 2019. On 22 June 2019, the attorneys of Marshalls approached the representative of the Complainant with the view of discussing the referral and expressed the view that they can reach a compromise. The Complainant did not respond and on 25 June 2019, Marshalls filed their response to the

complaint.

On 3 July 2019, the Complainant filed its answer to the Marshalls response, which included evidence of the fact that the MBet website closed down. The evidence produced by the Complainant, illustrated that the www.mbet.co.za website started directing traffic to the www.worldofsport.co.za website after 3 August 2019, i.e. after the complaint was lodged and therefor during the time when the adjudicator requested additional evidence in terms of reg 26. This conduct by the Registrant was not to further its business or utilise the disputed domain name in a *bona fide* manner. On the contrary, it is indicative of the Marshalls' bad faith.

On a balance of probabilities, at the time when Marshalls started taking steps to redirect traffic to the www.worldofsport.co.za website, using the disputed domain, it was fully aware of the steps taken by the Complainant to launch its business under the AFRIBET name. This was disclosed by the Complainant on or about 7 August 2019 and the Registrant commented on it on 14 August 2019. There can be no denying that the redirecting of traffic was done purposefully and with the intention to direct potential AFRIBET clients to Marshalls' website.

The only conclusion that one can come to is that Marshalls intended to disrupt the business of the Complainant by ensuring that all AFRIBET based online traffic, is directed to its website. It never conducted any business using the AFRIBET mark or domain name and the use that it started making, was taking unfair advantage of the rights of the Complainant, alternatively, its use is unfairly detrimental to the rights of the Complainant.

On a balance of probabilities, having considered all the evidence, the adjudicator finds that the disputed domain name in the hands of the Registrant, on behalf of Marshalls, has been used in a manner that takes unfair advantage of or is unfairly detrimental to the Complainant's rights and accordingly is an abusive registration.

The Registrant alleged that the Complainant is attempting to reverse hijack the aribet.co.za domain name. Based on the evidence considered, there is no indication that the Complainant is using the process in bad faith to deprive the Registrant of its domain name. There is no evidence to support any unlawful intent by the Complainant. This allegation is baseless and accordingly rejected.

5. Decision

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

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MIKE DU TOIT
SAIPL SENIOR ADJUDICATOR
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