



Decision  
[ZA2019-0374]  
.ZA ALTERNATE DISPUTE  
RESOLUTION REGULATIONS  
(GG29405)

### ADJUDICATOR’S DECISION

CASE NUMBER:	<b>ZA2019-0374</b>
DECISION DATE:	<b>6 September 2019</b>
DOMAIN NAME	<b>HENDRIKVANWYKVERVOER.CO.ZA</b>
THE DOMAIN NAME REGISTRANT:	<b>Almero Bourbon</b>
REGISTRANT’S LEGAL COUNSEL:	<b>None</b>
THE COMPLAINANT:	<b>Hendrik van Wyk Vervoer (Pty) Ltd</b>
COMPLAINANT’S LEGAL COUNSEL:	<b>Casper le Roux Inc Attorneys</b>
2 <sup>nd</sup> LEVEL ADMINISTRATOR:	<b>ZACR (CO.ZA )</b>

## 1. PROCEDURAL HISTORY

- 1.1. The Complainant, Hendrik van Wyk Vervoer (Pty) Ltd, filed its complaint on **29 May 2019** in respect of the domain name HENDRIKVANWYKVERVOER.CO.ZA, registered in the name of the Registrant, Almero Bourbon of Centurion, South Africa.
- 1.2. The Registrant filed its response on **4 July 2019**. The Administrator duly sent the Registrant's response to the Complainant's representative's email address on **5 July 2019** specifying the deadline for the Complainant's reply as **12 July 2019**.
- 1.3. No reply was submitted by the Complainant by the deadline. The Administrator therefore proceeded to refer the complaint to informal mediation. Subsequently, whilst the mediation was pending, the Complainant's representative indicated to the Administrator that he had not received the Administrator's email of **5 July 2019**, had therefore not received the Registrant's response and indicated a preference to reply to the Registrant's response upon receipt of same.
- 1.4. The Administrator then resent the Registrant's response to the Complainant's representative, who confirmed receipt. The Administrator indicated that if the mediation was unsuccessful, the Adjudicator would rule on the Complainant's request to be permitted to lodge its reply. The Complainant's representative accepted this plan via return email.
- 1.5. The mediation subsequently failed and the Adjudicator was called upon to decide whether the Complainant was entitled to file its reply out of time in the circumstances.
- 1.6. The Adjudicator delivered an interlocutory decision, ordering that the Complainant could submit its reply within five days of receipt of that decision, on **27 August 2019**, which was transmitted to the parties the following day by the Administrator. A copy of that interlocutory decision is attached to this decision as **Annexure A**.
- 1.7. The Complainant filed its reply on **30 August 2019**.

## 2. FURTHER CORRESPONDENCE

- 2.1. As per the Adjudicator's interlocutory decision, on **23 July 2019**, whilst the mediation was still pending, the Complainant's representative sent the

Administrator a letter purporting to be from the previous IT service provider of the Complainant, in which the transfer of the subject domain name from that service provider to the Registrant is confirmed.

- 2.2. On **24 July 2019**, the Registrant emailed the Administrator asserting negligence on the part of the Complainant for not having submitted its reply by the deadline and highlighting what the Registrant considers “*perjurious*” statements allegedly made in the Complainant’s dispute.
- 2.3. In the interlocutory decision, I indicated that I would rule on the admissibility, weight and probative value to be afforded to this further correspondence
- 2.4. The further correspondence was unsolicited, filed out of time and not deposed under oath. However, the letter from the Complainant sent on **23 July 2019** was again annexed to the Complainant’s reply, which was deposed under oath. Accordingly, that letter should be admitted into the record. I find that letter to be convincing in so far as its limited contents are concerned given that the Registrant does not dispute same.
- 2.5. Regarding the Registrant’s email of **24 July 2019**, I am prepared to admit that email, given that it contains statements relevant to the dispute and given my obligations in terms of Regulation 24(1) to ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case. However, that email was not deposed under oath, and appears to have been merely a restatement of the Registrant’s contentions contained in its response. I therefore afford that email little weight and probative value.

### 3. FACTUAL BACKGROUND

- 3.1. The parties are in agreement that the Complainant has, since 1997 (when it was incorporated), traded as a transportation business under the name HENDRIK VAN WYK VERVOER in South Africa, Botswana, Swaziland and Namibia. The parties also agree that the Complainant owns over 100 long distance trucks, has a turnover of more than R200 million per year, employs 152 people and displays its name and the disputed domain name prominently on all of its vehicles.
- 3.2. The domain name was registered on 12 September 2007 by the Complainant’s erstwhile IT service provider acting under the Complainant’s instructions.

- 3.3. By March 2018 the Complainant had transitioned to a new IT service provider, namely the Registrant, and the disputed domain name was transferred to the Registrant, in his name, in March 2018.
- 3.4. At some point in late 2018 a dispute arose between the parties and their relationship ended circa November 2018.
- 3.5. The disputed domain name has been used to resolve to a website for the Complainant's business ostensibly since the domain name was registered in 2007. In April 2019 the disputed domain name stopped resolving to the Complainant's website. As of the date of drafting this decision, the disputed domain name does not resolve to any website.
- 3.6. The Complainant has requested transfer of the disputed domain name to the Complainant but the Registrant has refused to transfer the domain name unless the Complainant "*pay[s] the outstanding accounts as well as the registrant's outstanding remuneration*", per page 13 of the Registrant's response.

#### **4. PARTIES' CONTENTIONS**

- 4.1. The Complainant claims to be the proprietor of the HENDRIK VAN WYK VERVOER trade mark through longstanding use of the mark. Although not specified in its dispute, it would appear to be the Complainant's contention that it owns goodwill and a reputation in that name and as such enjoys common law rights to the mark.
- 4.2. The Complainant contends that the disputed domain name was registered as a result of a relationship between the Complainant and the Registrant, the Complainant has been using the domain name exclusively and paid for the registration and renewal of the domain name. The Complainant further contends that the Registrant has intentionally prevented the Complainant from utilising its domain name and/or exercising its rights, thereby disrupting unfairly the business of the Complainant in order to gain some advantage over the Complainant.
- 4.3. On page 6 of its response, the Registrant accepts the facts set out in paragraph 3.1 of this decision. The Registrant also appears to accept the fact that the disputed domain name incorporates the Complainant's trade mark in its entirety and that the domain name is identical in all material respects to the Complainant's

name and trade mark. The Registrant appears to accept the facts as set out in paragraph 3 of this decision.

4.4. The essence of the Registrant's contentions is as follows:

4.4.1 The Complainant does not own the domain name as the Complainant never registered it and never claimed ownership of the domain name until the commencement of this dispute; and

4.4.2 The Complainant has not met its contractual obligations to the Registrant and owes the Registrant outstanding sums of money for services rendered and debts incurred by the Registrant on behalf of the Complainant.

## 5. DISCUSSION AND FINDINGS

5.1. Given that the parties are in agreement regarding the Complainant's use of the name HENDRIK VAN WYK VERVOER as its trading name since 1997 as well as those facts which speak to the Complainant's longstanding and apparently extensive use of the name set out in paragraph 3.1 of this decision, it would appear that the Complainant has common law rights in the trade mark HENDRIK VAN WYK VERVOER.

5.2. The Complainant therefore has rights in a mark which is identical to the disputed domain name in terms of Regulation 3(1)(a). Therefore, in terms of Regulation 5(c), the burden of proof shifted to the Registrant to show that the domain name is not an abusive registration. The Registrant has failed to meet this burden for the reasons set out below.

5.3. The Registrant's primary defence is that the Complainant has not met its contractual obligations owed to the Registrant and in particular owes the Registrant outstanding sums of money for services rendered and debts incurred by the Registrant on behalf of the Complainant.

5.4. As per the panel of three senior adjudicators in SAIPL appeal decision no. ZA2018-0350, this is not the proper forum for the determination of contractual disputes, in particular whether or not money is owed to any party. See the decisions in ZA2010-0054 at para 4(c) and ZA2010-0039 at para 4.5. The Regulations are limited in scope to the question of whether a domain, in the hands of the registrant, is an abusive or offensive registration, within the narrow

meanings ascribed to those terms in the Regulations. The Regulations are thus exclusively concerned with matters of cybersquatting and the like where a complainant's rights in a name or mark (not any rights or obligations to money or other contractual performances) are unfairly taken advantage of or negatively affected. See the decision of the WIPO UDRP panel in D2017-2174 at para 6B.

5.5. Accordingly, I express no opinion on the merits of the Registrant's claims regarding the contractual dispute it has with the Complainant and the alleged indebtedness of the Complainant to the Registrant. The Registrant is free to pursue those claims before a court of competent jurisdiction but has not apparently done so on the information before the Adjudicator.

5.6. Regulation 4(1)(e) of the Regulations provides one factor indicating that the domain name registration is abusive in this instance:

*(e) the circumstance that the domain name was registered as a result of a relationship between the complainant and the registrant, and the complainant has: (i) been using the domain name registration exclusively; and (ii) paid for the registration or renewal of the domain name registration.*

5.7. Despite the fact that the regulation uses the word "registered", it is still applicable to the Registrant even though the Registrant was not the original registrant. WIPO UDRP panels have consistently held that a subsequent acquirer of a domain name is held to have "registered" that domain name. See the WIPO decision in Case No. D2007-1921.

5.8. The applicability of the provisions of Regulation 4(1)(e) has not been addressed by the Registrant, despite being referenced by the Complainant in paragraph 11.1.1.8 of its dispute.

5.9. As per the appeal panel in SAIPL appeal decision ZA2018-0350, Professor Tana Pistorius, in her article *Cyberbusters versus Cybersquatters: Round II in the ZADNA Ring* (2009) 21 SA Merc LJ 661, addresses what she terms "techno-jacking" at page 673. This refers to the trend of service providers registering domains on behalf of their clients in the service provider's name and then refusing to transfer it to the client because of non-payment or contractual issues. Professor Pistorius's view is that techno-jacking is abusive and that the most appropriate listed factor is Regulation 4(1)(a)(iv). That provision provides that circumstances

indicating that the registrant has registered or otherwise acquired the domain name primarily to prevent the complainant from exercising its rights indicates abusiveness. This appears to be directly applicable in the current matter.

- 5.10. There have been numerous decisions in this forum where techno-jacking has been held to be abusive. See the decision in *Drs van Rensburg & Partners SA Inc v Webintellect (Pty) Ltd* available at <https://www.zadna.org.za/uploads/documents/uansen.pdf>. See also ZA2009-003; ZA2008-0024; ZA2010-0041 and ZA2010-0039.
- 5.11. It appears to be considered good practice in the IT industry for domains to be registered in the name of the client and not the service provider. See the advisory of the Internet Service Providers' Association here: <https://ispa.org.za/domain-registrations/> as well as the .CO.ZA domain name registry here at question 7: <http://co.za/legal-FAQ.shtml>.
- 5.12. There is no common law right to a lien, hypothec or right of retention over a domain name as security for any debt, and the Registrant in this matter does not assert any contractual rights to a lien, hypothec or right of retention.
- 5.13. On page 8 of his response, the Registrant refers to having been instructed by the Complainant to take over from the Complainant's previous IT service provider. In that reference, the Registrant refers to the Complainant's domain names as "his...domains". The underlining is my emphasis and it's clear from that paragraph in the Registrant's response that the reference to "his" was to the Complainant, and betrays the Registrant's own thoughts that the disputed domain name accrued to the Complainant.
- 5.14. At page 13 of the Registrant's response, the Registrant states:
- "The complainant needs to honour his contract with the registrant and pay the outstanding accounts as well as the registrant's outstanding remuneration."*
- 5.15. At page 11 of the Registrant's response, the Registrant states:
- "In various ensuing conversations with the complainant's service provider and legal representative various requests had been made to get the complainant to discuss resolution and settlement of the outstanding payments. All to no avail."*

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- 5.16. It therefore appears clear that the Registrant is holding the domain name as leverage for payment, and in the course of doing so, disrupts the business of the Complainant and prevents the Complainant from exercising its rights over a domain name that is identical to the Complainant's trade mark and which the Complainant has used exclusively for many years. Regulations 4(1)(a)(iii) and (iv) are therefore applicable.
- 5.17. Accordingly, I find that the Registrant has not met the burden of proof in terms of Regulation 5(c) and 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](http://www.DomainDisputes.co.za)

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## ANNEXURE A

### SAIIPL DOMAIN NAME DISPUTE

#### INTERLOCUTORY DECISION

Case no. ZA2019-0374

Domain name: HENDRIKVANWYKVERVOER.CO.ZA

The Registrant filed its response on 4 July 2019, within the prescribed deadline.

In its dispute at paragraph 3.1.4, the Complainant specified a preferred means of communication, specifically its representative's email address, in terms of Regulation 15(2).

The Administrator duly sent the Registrant's response to the Complainant's representative's email address on 5 July 2019 specifying the deadline for the Complainant's reply as 12 July 2019.

No reply was submitted by the Complainant by the deadline. The Administrator therefore proceeded to refer the complaint to informal mediation. Subsequently, whilst the mediation was pending, the Complainant's representative indicated to the Administrator that he had not received the Administrator's email of 5 July 2019, had therefore not received the Registrant's response and indicated a preference to reply to the Registrant's response upon receipt of same.

The Administrator then resent the Registrant's response to the Complainant's representative, who confirmed receipt. The Administrator indicated that if the mediation was unsuccessful, the Adjudicator would rule on the Complainant's request to be permitted to lodge its reply. The Complainant's representative accepted this plan via return email.

On 23 July 2019, whilst the mediation was still pending, the Complainant's representative sent the Administrator a letter purporting to be from the previous IT service provider of the Complainant, in which the transfer of the subject domain name from that service provider to the Registrant is addressed.

On 24 July 2019, the Registrant emailed the Administrator asserting negligence on the part of the Complainant for not having submitted its reply by the deadline and highlighting what the Registrant considers "perjurious" statements allegedly made in the Complainant's dispute.

The mediation subsequently failed and the Adjudicator is now called upon to decide whether the Complainant is entitled to file its reply and whether the correspondence sent by the Parties on 23 and 24 July 2019 is admissible.

The deadline for submitting a reply is set at five days from the Complainant "*receiving*" the response, in terms of Regulation 19(1). The Regulations do not appear to define "receiving" or "receipt", although the date a communication is deemed to have been "sent" is defined in Regulation 15(7).

Section 23(b) of the Electronic Communications and Transactions Act provides that a data message must be regarded as having been received when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.

There is no information before the Adjudicator in this instance that would allow the Adjudicator to rule whether the Administrator's email of 5 July 2019 was in fact ever technically capable of being retrieved or processed by the Complainant's representative, within the meaning of section 23(b) of the Electronic Communications and Transactions Act.

The Complainant's representative is nevertheless an admitted attorney bound by professional ethics and there is no reason to doubt his assertion that the response was not in fact received by him, which would appear to indicate, on balance of probabilities, that the response was not technically capable of being retrieved and processed by him.

The Regulations contemplate Adjudicators adjusting or establishing time periods – see Regulation 28(1).

Prior SAIPL domain name decisions have also found that Adjudicators are empowered to adjust or establish time periods. See for instance the decision in ZA2015-0201 (SASOLREWARDS.CO.ZA) at paragraph 1.11.

In addition, the following Regulations are relevant to my decision as to whether the Complainant should be permitted to file its reply:

1. Regulation 24(1) requires an Adjudicator to ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case;
2. Regulation 24(2) requires an Adjudicator to ensure that the dispute is handled as expeditiously as possible; and
3. Regulation 26 empowers an Adjudicator to request further statements or documents relevant to the dispute, response or reply.

In the words of the learned Adjudicator in ZA2015-0201, "*Fairness postulates a balancing of interests, in which prejudice plays an important role.*" In this case, it's not clear what the prejudice to the Registrant will be if the Complainant is permitted to lodge its reply, given that the Registrant continues to enjoy control of the subject domain name.

On balance, in order to give the Complainant a fair opportunity to present its case in the circumstances, I make the following rulings:

1. The Complainant is given five days from receipt of this interlocutory judgement to lodge its reply with the Administrator;
2. Given that the Parties have already unsuccessfully undergone informal mediation, there is little point in insisting that the dispute be referred to informal mediation again in terms of Regulation 19(3). In fact, doing so in the circumstances would only delay resolution of the dispute even further, which would unduly prejudice the parties in the circumstances; and
3. Upon expiry of the five day period referenced in ruling 1 above, the Administrator shall, within two days, notify the Adjudicator whether a reply has been lodged, and forward the Complainant's reply, if any, to the Adjudicator, who shall render his decision within 14 days, in terms of Regulation 29(2).

I make no ruling now on the admissibility, weight or probative value to be afforded to the correspondence of 23 and 24 July 2019, which will be assessed in my final decision.

Jeremy Speres  
SAIPL Senior Adjudicator