

Decision

[ZA2017-0276]

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

ADJUDICATOR DECISION

CASE NUMBER:	ZA2017-0276
DECISION DATE:	19 October 2017
DOMAIN NAME:	trackers.co.za
THE DOMAIN NAME REGISTRANT:	Jag Web Marketing CC
REGISTRANT'S LEGAL COUNSEL:	Witz, Calicchio, Isakow & Shapiro Attorneys
THE COMPLAINANT:	Tracker Connect Pty Ltd
COMPLAINANT'S LEGAL COUNSEL:	Lizette Le Roux
2 nd LEVEL ADMINISTRATOR:	ZA Central Registry

1. PROCEDURAL HISTORY

- 1.1 This Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIIPL") on **14 August 2017**. On **15 August 2017** the SAIPL emailed a request to ZA Central Registry (ZACR) to suspend the domain name in issue, and on **15 August 2017** ZACR confirmed that the domain name had 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.
- 1.2 In accordance with the Regulations, the SAIPL formally notified the Registrant of the commencement of the Dispute on **18 August 2017**. The Registrant submitted a formal response on **14 September 2017**, and the Complainant replied to the response on **22 September 2017**.
- 1.3 The SAIPL appointed **Adv Owen Salmon SC** as the Adjudicator on **29 September 2017**. On **29 September 2017** the Adjudicator 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 The Facts

- 2.1 The following facts are not in dispute.
- 2.2 The Complainant is Tracker Connect (Pty) Ltd which, for several years, has been a leading vehicle tracking company in the Republic of South Africa. Vehicle tracking, stolen vehicle recovery and other vehicle and fleet management solutions are its core business. The Complainant currently has a customer base of over one million, and claims to have

recovered over 75 000 stolen and hijacked vehicles in South Africa since 1996.

2.3 The Complainant uses the mark TRACKER both *simpliciter* and in a device form in relation to its services of monitoring and tracing vehicles, as well as the supply of anti-theft devices. It also has the marks TRACKER BUSINESS, TRACKER EXECUFLEET, TRACKER SKYTRAX, TRACKER ALERT and TRACKER RETRIEVE.

2.4 For ease of reference I refer to the "TRACKER trade marks". It is not necessary, for present purposes, to draw any distinctions between the precise logo form of registration and the *simpliciter* entries. It serves mention merely to record that the TRACKER trade marks are registered in accordance with the Trade Marks Act 1993 in relation to a variety of goods and services, including:-

- In Class 9: generally, all hardware, software, installations, apparatus, applications and equipment in the class particularly (but not exclusively) relating to vehicle security, tracking and global positioning.
- In Class 35: advertising; business management; business administration; office functions; information and data collection, compilation, management, processing, verification and retrieval services; services relating to the offering for sale and the sale of goods or services in retail and wholesale trade; merchandising and distribution services.
- In Class 36: insurance; financial affairs; monetary affairs; real estate affairs; financial services or products of all kinds and descriptions.

- In Class 39: transport; packaging and storage of goods; travel arrangements; provision of traffic information; vehicle rental and towing; guarded transport of valuables.
- In Class 45: security services for the protection of property and individuals; protection, guarding and bodyguard services; detective and detection services; emergency response services; monitoring of burglar and security alarms; surveillance, supervisory, checking, monitoring, policing and patrolling services; tracing and recovery of stolen vehicles and other stolen property; security consulting.

2.5 The domain in question is trackers.co.za. The Registrant is Jag Web Marketing CC, a South African close corporation of 1st Floor, Athol Square, Sandton, Gauteng. The domain was registered on 4th August 2007, but the Registrant only commenced its use in May 2015.

2.6 Jag Web Marketing is in the business of lead generation. It is an online digital marketing company specialising in the financial, automotive consumer and retail sectors. Its business model comprises the registration of various generic domain names (including protection.co.za; businessinsurance.co.za; funeral.co.za) which serve to funnel people searching the internet for common products and services to the Registrant and, through the Registrant to its clients. It has invested significant time and resources in the digital marketing platform it has conducted using the disputed domain name.

2.7 The Registrant asserts that it chooses words (as domain names) which are not specific to any brand and that are purely descriptive of the product or service being marketed. Thus, it asserts that the word

'trackers' is a noun that is colloquially and abundantly used to describe the systems installed in motor vehicles to enable them to be tracked by satellite in the event of, *inter alia*, theft.

- 2.8 An annexure to the dispute shows a screenshot from the website at the URL www.trackers.co.za/whytrackers. It is annexed to this judgment, marked "A". A further screenshot, of the "About Us" page, is annexed, marked "B". It is convenient to reproduce its text:

ABOUT US

WHAT YOU NEED TO KNOW ABOUT WWW.TRACKERS.CO.ZA

www.trackers.co.za is an online vehicle tracking comparison site which enables users to voluntarily enter their contact information on a single website, to have various vehicle tracking companies contact them.

We have partnerships with numerous vehicle tracking companies, and may submit your details to a number of these service providers in order to find a suitable quotation.

Trackers.co.za is free to use and commission free. We make money simply by charging our partners when a customer chooses to find out more about one of our partners' products. It is important to note that this does not influence the price you pay.

You can read more about how our site and service works by taking a look at our Terms and Conditions here.

You can also contact us here:

Email: info@trackers.co.za

Address: Upper Floor, Athol Square, Cnr Katherine & Wierda Road East,
Sandton, Johannesburg, 2196

WHY USE TRACKERS.CO.ZA?

THE TOP THREE BENEFITS OF INSTALLING A TRACKER

- When you install a reliable vehicle tracker, your insurance risk profile improves resulting in lower monthly car insurance premiums.
- Considering the rate of car theft in South Africa, you'll have peace of mind once you've installed a vehicle tracker.
- The companies we source quotes from offer a wide variety of additional benefits for their customers, allowing you to get more while you save!

2.9 The word "TRACKER" appears in other entries in the Register in relation to class 35:-

- 2008/03117 CAREER TRACKER
- 2008/14166 CORPORATE REPUTATION TRACKER
- 2008/16472 CLIENT TRACKER
- 2008/21086 GLOBAL INDEX TRACKERS
- 2009/16788 WEALTH TRACKER
- 2012/32074 MOMENTUM FINANCIAL WELLNESS TRACKER
- 2013/03017 MONEYFUND TRACKER
- 2013/14784 MYFINTRACKER

As may be surmised, none of these concern vehicle tracking units or services.

2.10 In February 2016, attorneys Webber Wentzel representing the Complainant sent a demand to the Registrant. On the basis that:-

"But for the letter "S", the offending mark is identical to our client's registered trade mark.

It is clear from your website at www.trackers.co.za that you are using the offending mark to promote the same or very similar goods and/or services as those of our client and that you are targeting the same customer base as our client",

the demand alleged infringement in terms of Section 34(1)(a) and Section 34(1)(b) of the Trade Marks Act, as well as a passing-off.

2.11 This elicited a response from attorneys Witz, Calicchio, Isakow & Shapiro Inc. on behalf of the Registrant. On the basis that:-

"4.2 The Oxford Dictionary defines 'TRACK' as a verb in relation to finding someone or something after a lengthy search and 'TRACKER' as a noun in relation to a person who tracks.

4.3 Therefore, the terms 'TRACK' and 'TRACKER' are generic in relation to tracking services of any kind or description and are reasonably required for use in the trade."

and that

"4.5 The state of the Register makes it clear that the term 'TRACKER' in class 35 is common and accordingly your client is not entitled to claim exclusive rights in relation thereto."

the demand was rejected.

2.12 In the Reply in this dispute, the Complainant puts up evidence to show that its competitor:-

- CARTRACK uses the term "tracking unit"; and

- NETSTAR uses the terms “vehicle tracking unit” and “tracking devices”.

It also evidences some listings at www.pricecheck.co.za under the search term “vehicle tracking devices” showing (perhaps, thus, not surprisingly) similar results.

3 Complainant’s contentions

- 3.1 The following is a summary of the Complainant’s contentions.
- 3.2 It is clear that the Registrant is using the Complainant’s trademarks as well as similar marks to promote the same or very similar goods and/or services to those of the Complainant and is targeting the same customer base as the Complainant.
- 3.3 In terms of Section 34(1)(a) of the Trade Marks Act it is an infringement to use a mark which is identical to a registered trade mark (or so nearly resembling it) in connection with the same goods or services for which the registered mark has been registered, where such use is likely to deceive or cause confusion between the marks in the marketplace. Similarly, in terms of Section 34(1)(b) of the Act, it is an infringement to use a mark which is identical or similar to registered trade mark in connection with similar goods or services if this gives rise to a likelihood of confusion between the marks in the marketplace.
- 3.4 In light of the fact that the disputed domain name wholly incorporates the Complainant’s registered trade mark, and given that the Registrant is using the disputed domain name to promote products and/or services which are the same or similar to those of the Complainant, the likelihood

of confusion between the disputed domain name and a large number of the Complainant's trade marks is significant.

- 3.5 In addition to a trade mark infringement claim under the Act, the Complainant has a passing off claim against the Registrant as customers will erroneously believe that any of the products and/or services on the website of the disputed domain name are associated, or there is an association, connection or agreement between the Complainant and the Registrant. This is clearly not the case and the actions of the Registrant are causing, or are likely to cause, the Complainant loss through a diversion of business and/or damage to its goodwill.
- 3.6 The disputed domain name purports to be a price comparison portal for stolen vehicle recovery solutions between the major vehicle tracking companies in South Africa. In fact the website states that *"we help you find the vehicle tracking options for your specific needs at the best price by comparing quotes from different car tracking companies in South Africa"*.
- 3.7 The Complainant contends that the purported and advertised purpose of the disputed domain name is factually incorrect and amounts to incorrect and false advertising. The Registrant has not concluded or purported to conclude an arrangement with the largest and most prominent vehicle tracking company on the continent, being the Complainant. Accordingly the alleged comparison of quotes specifically excludes the most prominent vehicle tracking company and can therefore not purport to be providing the "best price by comparing quotes from different tracking companies in South Africa".

- 3.8 The Complainant further contends that the available options provided by the website are only three of the vehicle tracking companies in South Africa. Taking into consideration the vast number of vehicle tracking companies in South Africa, the false claim of providing the “best price” is misinformed and unsubstantiated, as this would not be an accurate reflection of such best price or an accurate comparison of prices within the market. This false contention is a clear indication of bad faith on the part of the Registrant and the Complainant contends that the disputed domain name is utilised by the Registrant to facilitate confusion, false advertising, and deception and interrupt the business of the Complainant.
- 3.9 The most important indication of evidence of bad faith is the fact that any personal contact details provided by an internet user on the website are not in any way used for the alleged comparison of quotes by the Registrant but are:
- (i) used as a lead source to one vehicle tracking company, namely Netstar; and
 - (ii) used to promote and sell the products and/or services of one vehicle tracking company, namely Netstar.
- 3.10 Several attempts by the Complainant to obtain quotes from several vehicle companies (as the website purports to do) have yielded no results. In fact, they have simply provided personal details to Netstar for the further promotion and marketing of Netstar’s products and/or services. Upon entering one’s personal details on the website (in the hopes of obtaining a comparison for “the best price” of a vehicle tracking solution, as promised by the website) the user will instead receive a text message stating the following:-

"Trackers.co.za; Hi [name of internet user] you have taken the first step to getting a car tracking solution. Netstar will call you shortly".

3.11 The Complainant contends that the registration of the disputed domain name is in bad faith in that the personal information of the internet user as captured through the website is used as a lead source to one vehicle tracking company and does not, in actual fact, provide quotes or comparisons of prices between vehicle tracking companies. Netstar is a major competitor of the Complainant and the use of the domain name amounts to abusive registration and an unfair disadvantage and infringement of the trade mark rights of the Complainant. In addition, the Complainant contends that the disputed domain name purposefully disrupts the business of the Complainant and other vehicle tracking companies offering the similar products and/or services.

3.12 The website of the disputed domain name falsely states the following to the consumer:-

"We have partnerships with numerous vehicle tracking companies, and may submit your details to a number of these service providers in order to find a suitable quotation."

"trackers.co.za is free to use and commission-free. We make money simply by charging our partners when a customer chooses to find out more about one of our partners' products."

3.13 The above statements made on the website amount to inaccurate statements made to consumers and are made in bad faith. The Complainant, as a vehicle tracking company listed on the website, has no arrangement, partnership or agreement with the Registrant nor does it gain income in the form of leads from the website.

3.14 Ultimately, the Complainant contends that the disputed domain name amounts to abusive registration and was registered in bad faith by the Registrant. Furthermore, the information provided on the website amounts to false advertising and purports to interrupt the rights of the Complainant (and other vehicle tracking companies) and further infringe on the registered trade mark rights of the Complainant.

4 **Registrant's contentions**

4.1 The following is a summary of the Respondent's contentions.

4.2 In reference to a 'tracker', it is denied that the Complainant's specific brand thereof has become synonymous with every option available in the same way Vaseline or Google have become everyday parlance. The Registrant contends that it is a generic, descriptive term, common in the English language and that it is not open for the Complainant to prohibit the use thereof.

4.3 The Complainant was allowed to register the mark 'tracker' as a trade mark but subject to the admission that it could not claim exclusive use over the word 'track' or debar other persons from its *bona fide* descriptive use in the ordinary course of trade. This is exactly because of the descriptive, generic nature of the word. 'Trackers' and 'tracker' are derivatives of 'track' and it should be argued that the admission as applicable to both these words. The Complainant accordingly cannot preclude the Registrant from making use of the word 'trackers'. In fact, the Complainant does not have rights in and to the generic words 'track', 'tracker' or 'trackers'.

4.4 Secondly, the Complainant has registered the following further trademarks:-

- THE TRACKER THAT KNOWS;
- THE TRACKER THAT PUTS YOU IN CONTROL;
- THE TRACKER THAT'S ALWAYS BY YOUR SIDE;
- THE TRACKER IN YOUR POCKET.

This is a clear indication that the Complainant itself understands the generic, non-distinctive nature of the word 'tracker'.

4.5 It is also clear from the (supplied) extracts from the South African Trade Marks Register, just how common the word 'tracker' is in relation to class 35, with many examples reflected of the word in use in the ordinary course of trade. A few examples are Trolley Tracker, Career Tracker and Global Index Trackers.

4.6 The Registrant is not posing to provide anything – it does in fact provide a legitimate marketing service and will contact whichever companies are willing to respond. The purpose of the drop-down menu mentioned by the Complainant¹ is to ensure that contact is not made with the same company, if any, that a consumer already has a contract with. It is true that the Registrant has an agreement with Netstar but it is denied that that is the only service provider that the Registrant has contracted in connection with the website. It is a condition of use of the Registrant's website, stipulated in the terms and conditions that appear on the site,

¹ Note: This is seen on Annexure "A" hereto.

² Section 3(1)(a) of the Regulations.

³ See Century City Apartments Property Services CC and Another v Century City Property Owners

that all personal information submitted by a consumer can be used for marketing purposes and is submitted voluntarily.

- 4.7 The Registrant's website has been in operation for nearly two and a half years. The Complainant has been aware of the Registrant's website at least since the letter of demand two years ago, in October 2015. In all that time, not one example of actual confusion has come to the attention of the Complainant or the Registrant. This is also evidence of the fact that the registration of the disputed domain name does not prevent the Complainant from exercising any rights it claims to have in its mark.
- 4.8 The Registrant and its website have an entirely different corporate identity to that of the Complainant and bear no resemblance to the look or feel of the Complainant or its website. Importantly, the Registrant also does not offer the same service as the Complainant. The Registrant denies that the use of the disputed domain name is passing off and denies any bad faith in the conduct of its business operations. For, *inter alia*, these reasons, the domain name does not take unfair advantage of and is not detrimental to the Complainant.
- 4.9 The Registrant provides marketing services and in so doing refers interested consumers to various service providers, including those that sell such vehicle trackers. To attract customers, the Registrant has made use of the most generic word to describe the product it is marketing. The Complainant is challenged to produce another word which so clearly and colloquially describes the product it sells. The Registrant contends that the word 'tracker' is synonymous with (and descriptive of) the device itself and not with the Complainant.

4.10 The Registrant's defence, and business, falls squarely within the ambit of, *inter alia*, Regulation 5(b) in that the disputed domain name is used generically and in a descriptive manner and the Registrant is making fair use of it. For that reason too, the Registrant denies that its domain name was registered in a manner which, at the time when the registration took place, or at any time thereafter, took unfair advantage of or was unfairly detrimental to whatever rights the Complainant can prove it has. The Registrant furthermore denies that it is using the domain name in a manner which takes unfair advantage of or is unfairly detrimental to the Complainant or to whatever rights the Complainant can prove it has.

5 **Discussions and Findings**

5.1 In terms of Section 1 of the Regulations, an abusive registration means a domain name which either –

5.1.1 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; or

5.1.2 Has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.

5.2 An indication is given in the Regulations as to what could be considered an abusive registration. In terms of Section 4(1), such factors include:-

“(a) Circumstances indicating that the registrant has registered or otherwise acquired the domain name primarily to –

- (i) Sell, rent or otherwise transfer the domain name to a complainant or to a competitor of the complainant, or any third party, for valuable consideration in excess of the registrant's reasonable out-of-pocket expenses directly associated with acquiring or using the domain name;
 - (ii) Block intentionally the registration of a name or mark in which the complainant has rights;
 - (iii) Disrupt unfairly the business of the complainant; or
 - (iv) Prevent the complainant from exercising his, her or its rights;
- (b) Circumstances indicating that the registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorized by, or otherwise connected with the complainant;
- (c) Evidence, in combination with other circumstances indicating that the domain name in dispute is an abusive registration, that the registrant is engaged in a pattern of making abusive registrations;
- (d) False or incomplete contact details provided by the registrant in the Whois database; or
- (e) The circumstances 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."

5.3 An indication is also given as to what would not be an abusive registration. In terms of Section 5, factors which may indicate this include:-

- “(a) before being aware of the complainant’s cause for complaint, the registrant has –
 - (i) used or made demonstrable preparations to use the domain name in connection with a good faith offering of goods or services;
 - (ii) been commonly known by the name or legitimately connected with a mark which is identical or similar to the domain name; or
 - (iii) made legitimate non-commercial or fair use of the domain name;
- (b) the domain name is used generically or in a descriptive manner and the registrant is making fair use of it;
- (c) that the registrant has demonstrated fair use, which use may include websites operated solely in tribute to or fair criticism of a person or business: Provided that the burden of proof shifts to the registrant to show that the domain name is not an abusive registration if the domain name (not including the first and second level suffixes) is identical to the mark in which the complainant asserts rights, without any addition”

5.4 In terms of Section 9, one of two outcomes is possible in the case of a complaint that the domain is an abusive registration: refusal of the dispute, or transfer of the disputed name.

5.5 To succeed in this complaint the Complainant has to prove,² on a balance of probabilities, the following:-

- It has rights in respect of a name or mark which is identical or similar to the domain name; and
- The domain name, in the hands of the Respondent, is an abusive registration as defined.

5.6 I do not think that the domain name <trackers> is identical to the mark in which the Complainant asserts it has rights, namely TRACKER. Although it is a close call as to whether the plural form falls within the *de minimis* notion,³ the contention is not advanced by the Complainant. In any event, both visual and aural identity is required⁴ and that is not the case *in casu*. The mark is, however, similar within the meaning of the Regulations.

5.7 The next question is whether the Complainant has 'rights' in the mark TRACKER. Clearly it does, if only by virtue of the trade mark registrations.

5.8 The question therefore to be decided is whether the domain name:-

- was registered or otherwise acquired in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's rights; or
- has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.

² Section 3(1)(a) of the Regulations.

³ See Century City Apartments Property Services CC and Another v Century City Property Owners Association 2010 (3) SA 1 (SCA) at paragraph [12].

⁴ Reed Executive PLC v Reed Business Information Ltd [2004] RPC 40 CA at paragraph 32.

5.9 There are two potential abuses:-

- registration with abusive intent; and
- abusive use,

and the nature of “abusiveness” as contemplated by the Regulations does not require a positive intention to abuse the Complainant’s rights, but that abuse was the effect of the use or registration. Moreover, as has been established by previous adjudications, the abuse can succeed the registration or acquisition.

5.10 To facilitate the discussion on whether the domain is abusive, it will be useful to dispose of some of the contentions raised by the parties.

5.11 The Registrant contends that the endorsement entered against the Complainant’s registration for the mark TRACKER⁵ is because of the descriptive, generic nature of the word of the word track. Consequently, as “TRACKERS” and “TRACKER” are derivatives of “TRACK”, the endorsement should be applicable to both these words. The problem with this contention is that the Register does not reflect such an endorsement; the only limitation (if such an endorsement is a limitation) on the rights relates to the word track. It does not reflect upon the word tracker – which is, indeed, the registered trade mark.

5.12 The Registrant further asserts that *“to attract customers ... [it] has made use of the most generic word to describe the product it is marketing”*. There are some difficulties with this contention, in my view. First, in regard to vehicle tracking devices and services, the evidence does not

⁵ i.e. that the registration will not debar other persons from the *bona fide* descriptive use in the ordinary course of trade of the word “TRACK”.

bear this out. Moreover, in a number of online dictionaries consulted,⁶ the word "tracker" does not have the definition which the Registrant would give it except in a few isolated and almost hidden references. The point to be made is not that a vehicle tracking unit cannot be termed a tracker; just that the word "tracker" does not show to be *"the most generic word"*.⁷ Even Wikipedia, which does reflect as one of scores of diverse meanings for 'tracker' a 'vehicle tracker'; links that term to a dedicated Wikipedia page instead headed *"vehicle tracking system"*. Indeed, it seems that a domain named <trackingdevices.co.za> might more likely fit that bill – and, of course, is one which could not be offensive to the Complainant.

- 5.13 A further point needs to be noted in connection with the contention advanced by the Registrant. The TRACKER trade marks are presumed to be distinctive of the goods and services for which they are registered,⁸ and this postulates a notion antithetical to the Registrant's suggestion of utter genericness.
- 5.14 The Complainant contends that the domain name results in a passing-off because customers (read: internet users) will *'erroneously believe that any of the products and/or services on the website ... are associated, or there is an association, connection or agreement between the Complainant and the Registrant. This is clearly not the case and the*

⁶ www.dictionary.com/browse/tracker; <https://en.oxforddictionaries.com/definition/tracker>; dictionary.cambridge.org/dictionary/english/tracker; <https://www.collinsdictionary.com/dictionary/english/tracker>; www.yourdictionary.com>Dictionary>Definitions>tracker; www.thefreedictionary.com/tracker; www.macmillandictionary.com/dictionary/british/tracker.

⁷ I assume the Registrant's point is not that it is the most generic (single) word, as opposed to the most generic term (comprising potentially more than one word). In a domain name, it doesn't matter, and – in any event – this interpretation would be inconsistent with, for example, its domain businessinsurance.co.za, allegedly a 'generic' domain name.

⁸ Luster Products Inc. v Magic Style Sales CC 1997 (3) SA 13 (A).

actions of the Registrant are causing, or are likely to cause, the Complainant loss through a diversion of business and/or damage to its goodwill". It is not necessary to adjudicate this contention, although my perception is that it confuses issues. Passing-off is no more and no less a misrepresentation. The complaint is that the domain 'trackers' is what causes the misrepresentation, but it is accepted – if not trite – that whether a misrepresentation takes place depends on a consideration of the whole thing together, and that includes looking at the website itself.⁹ If the website does nothing to dispel what might be an erroneous assumption created by the domain name, then there can well be an actionable misrepresentation. But the enquiry in a case of passing-off does not stop at the domain name.

5.15 Whether the enquiry is to be so engaging in the case of statutory infringement is not going to be visited for the purposes of this adjudication. What is of concern is the fact that the domain is used "*to attract customers*" on the premise of a comparative array of options (to the internet user) yet the premise is unfulfilled. On the contrary, it is the Complainant's major competitor, Netstar, who acquires the benefit.

5.16 *Prima facie*, there may well be infringement. Although not pointedly raised by the Registrant, the answer to this would be that it is a *bona fide* offering employing a recognized generic term. This would, so the contention would proceed, fall within the purview of Section 34(2)(b) of the Trade Marks Act. This provides:-

"A registered trade mark is not infringed by – the use by any person of any *bona fide* description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics

⁹ cf. Online Lottery Services (Pty) Ltd & Another v National Lotteries Board & Another 2010 [5] SA 349 (SCA) at paragraphs [37] *et seq.*

of his goods or services, or the mode or time of production of the goods or the rendering of the services.”

- 5.17 However, for this statutory defence to apply, the use complained of must be consistent with fair practice. In this regard, I think the Complainant’s objection has some merit. It is reasonably conceivable that the notional internet user, looking for the TRACKER company (or just the company which sells/supplies/installs TRACKER devices) could find himself at the TRACKERS website. SEO and/or autocomplete, for example, might see to this; if so, perhaps all good and well. But the user knows no better, and now finds himself at a site which, for example, talks of the benefits of installing a TRACKER, and offers him the option to get comparative quotes. The problem is that he won’t get a quote from the TRACKER company; on the contrary, his personal details have been forwarded to the NETSTAR company, which now follows up the lead.
- 5.18 I think this is unfair *vis à vis* the Complainant. It has not gone unnoticed that, whilst the Registrant admits that it has “*an agreement with NETSTAR*”, it does not disclose what terms and conditions the agreement has, and nor does it say why it could not disclose them. This has some import, because the several attempts the Complainant submitted for the promised comparative quote all met with an SMS text message to the effect that “*Netstar will contact you shortly*”. One wonders why this is the constant result.
- 5.19 This may be good for the Registrant’s lead generation business, but in my view it takes advantage of a domain name which is confusingly similar to the Complainant’s mark in a way which is unfair.

6 **Decision**

- 6.1 In the circumstances, my finding is that the domain name is abusive. The complaint is upheld, and I order that the domain be transferred to the Complainant.


.....
ADV OWEN SALMON SC
SAIIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za

www.trackers.co.za/why-trackers

Companies and Int'l Advertising Standard

z Domain Name A. AFSA - Abbreviation F. CASES & DECISIONS Trade mark/law Car CMS Tracker Intranet - Tr

Home Why Trackers Benefits How it Works Safety Tips About Us



ASK YOURSELF:

"CAN I AFFORD TO BE WITHOUT A VEHICLE TRACKER IN SOUTH AFRICA?"

While purchasing a car tracker won't guarantee that your car or motorcycle won't get stolen, it does improve the chances of retrieving a stolen vehicle by a massive margin. And, with more than 55,000 cars and motorcycles stolen in South Africa in 2015 as well as over 14,000 hijackings, you should ask yourself: "Can I afford to be without a vehicle tracker in South Africa?"

A vehicle tracker offers you greater peace of mind when it comes to the safety of your vehicle. Research has shown that up to 95% of stolen vehicles armed with a tracking system are returned to their owners, and 86% of these are recovered within 24 hours. This should be reason enough to install a tracking system immediately.

Due to the high rate of theft and hijackings in the country, South Africa has a myriad of tracking and stolen vehicle recovery systems in place. Whether you're looking for the Ferrari of tracking systems or if you're only in the market for the most basic of GPS trackers, we will help you find the vehicle tracking options for your specific needs at the best price by comparing quotes from different car tracking companies in South Africa.

WHAT OUR CLIENTS HAVE TO SAY:

GET QUOTES HERE

Fill in the form to get FREE quotes and start saving

First Name	Surname
Email Address	Contact Number

Current tracking service provider (if applicable)

Current tracking company -

None

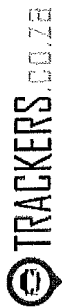
Netstar

Tracker

C-track

Other

"A"



ABOUT US

WHAT YOU NEED TO KNOW ABOUT WWW.TRACKERS.CO.ZA

www.trackers.co.za is an online vehicle tracking comparison site which enables users to voluntarily enter their contact information on a single website, to have various vehicle tracking companies contact them.

We have partnerships with numerous vehicle tracking companies, and may submit your details to a number of these service providers in order to find a suitable quotation.

Trackers.co.za is free to use and commission free. We make money simply by charging our partners when a customer chooses to find out more about one of our partners' products. It is important to note that this does not influence the price you pay.

You can read more about how our site and service works by taking a look at our [Terms and Conditions](#) here.

You can also contact us here:

Email: info@trackers.co.za

Address: Upper Floor, Altoli Square, Cnr Katherine & Wierda Road East, Sandton, Johannesburg, 2196

WHY USE TRACKERS.CO.ZA?

THE TOP THREE BENEFITS OF INSTALLING A TRACKER

- When you install a reliable vehicle tracker, your insurance risk profile improves resulting in lower monthly car insurance premiums.
- Considering the rate of car theft in South Africa, you'll have peace of mind once you've installed a vehicle tracker.
- The companies we source quotes from offer a wide variety of additional benefits for their customers, allowing you to get more while you wait!

GET QUOTES HERE

Fill in the form to get FREE quotes and start saving

First Name	Surname
Email Address	Contact Number

Current tracking service provider (if applicable)
- Current tracking company -

QUOTE ME

Accept Terms and Conditions

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