

Decision

[ZA2021-0433]
.ZA ALTERNATE DISPUTE RESOLUTION
REGULATIONS (GG29405)

ADJUDICATOR DECISION

CASE NUMBER:	ZA2021-0433
DECISION DATE:	23 February 2022
DOMAIN NAME:	Aquanetsa.co.za
THE DOMAIN NAME REGISTRANT:	Chris Henning
REGISTRANT'S LEGAL COUNSEL:	Kisch Africa Inc - Liani Taljaard
THE COMPLAINANT:	Netking Holdings (Pty) Limited
COMPLAINANT'S LEGAL COUNSEL:	Rademeyer Attorneys - Jean Van Vuuren / Kim Rademeyer
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 **19 November 2021**. On **22 November 2021** the SAIPL transmitted by email to ZACR a request for the registry to suspend the domain name(s) at issue, and on **25 November 2021** 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 **25 November 2021**. In accordance with the Regulations the due date for the Registrant’s Response was **24 December 2021**. The Registrant sought an extension of time for the filing of the Response until **14 January 2022**. The extension was granted by the SAIPL on **25 November 2021**. The Registrant submitted its Response on **14 January 2022**, 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 **14 January 2022**.
- c) In accordance with the Regulations the due date for the Complainant’s Reply was **21 January 2022**. The Complainant did not submit any Reply.
- d) The SAIPL appointed **Mariëtte du Plessis** as the Adjudicator and **Kareema Shaik** as the Junior Adjudicator in this matter on **8 February 2022**. The Adjudicator and Junior Adjudicator have submitted the Statements of Acceptance and Declarations of Impartiality and Independence, as required by the SAIPL to ensure compliance with the Regulations and Supplementary Procedure.

2) Factual Background

- 2.1 The contested domain name <aquanetsa.co.za> was registered on 2 June 2007. The Registrant is Chris Henning of 5 Tumberry Close, Die Built Ext, George, 6530. The contested domain name was registered for the use and benefit of Suid Kaap Boeredienste (Pty) Limited t/a Aquanet Irrigations of Farm Gwaing, George, 6530. Mr. Henning and Suid Kaap Boeredienste (Pty) Limited t/a Aquanet Irrigations will hereinafter collectively be referred to as “*the Registrant*”.
- 2.2 The contested domain name resolves to the website of Aquanet Irrigations on which the Registrant advertises its services in respect of the design, supply and installation of irrigation products.
- 2.3 The Complainant is Netking Holdings (Pty) Ltd of Unit 26, Federal Industrial Park, 138 Albertina Sisulu Drive (Cnr of Nywerheid Drive), Roodepoort, 1734.
- 2.4 The Complainant is the proprietor of South African trade mark registration no. 1982/09273 AQUANET in class 9 covering “*Nautical, life-saving, diving and swimming equipment and apparatus; safety nets including safety nets for swimming pools*” dating back to 30 November 1982.
- 2.5 The Complainant was established in 1985 and is a supplier of netting applications for industry and sport. The Complainant’s AQUANET trade mark has been used, under licence, for the goods covered by the trade mark registration, by its subsidiary, Netking (Pty) Limited t/a Aquanet, since 1972. Netking Holdings (Pty) Ltd and Netking (Pty) Limited t/a Aquanet will hereinafter collectively be referred to as “*the Complainant*”.
- 2.6 The Complainant is also the registrant of the domain name aquanet.co.za which was registered in 1999.

3) Parties’ Contentions

3.1 Complainant

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- a) The Dispute is based on Regulation 3(1)(a) which requires a complainant to assert that:
- 3.1(a)(i) it has rights in respect of a name or mark which is identical or similar to the domain name; and
- 3.1(a)(ii) in the hands of the registrant the domain name is an abusive registration.
- b) Regulation 3(2) requires the Complainant to prove on a balance of probabilities that the elements in paragraph 3.1(a) are present.
- c) An abusive registration is defined in Regulation 1 as being a domain name that:
- “(a) 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 (b) has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the complainant's rights”.*
- d) The Complainant alleges that, as a result of its trade mark registration and its reputation in its AQUANET trade mark, the registration of the domain name constitutes an abusive registration in terms of Regulation 3(1)(a). It further alleges that the domain name was both registered and has been used in an abusive manner which is taking advantage of and/or causing unfair detriment to the Complainant's rights.
- e) The Complainant contends that the contested domain name is confusingly similar to the mark in respect of which the Complainant has rights, i.e. AQUANET. It argues that the main element of the contested domain name is “aquanet” which is visually, phonetically and conceptually identical to its trade mark. It also contends that the services offered by the Registrant under the contested domain name

are similar to those in respect of which the Complainant has established rights.

- f) It argues that the contested domain name was registered and is being used by the Registrant in a way that leads consumers into believing that the contested domain name is registered to, operated, or authorised by, or otherwise connected with the Complainant, in accordance with Regulation 4(1)(b).
- g) In support of this argument, the Complainant adduces the following evidence:
 - i) a Google search for “aquanet”. The Complainant’s website is the first result and the Registrant is listed as the fourth result. As such, it is reasonable to expect that a consumer, with imperfect recollection, ordinary intelligence and eyesight, may be led to the contested domain name in attempting to reach the Complainant’s website;
 - ii) copies of 16 emails which were allegedly intended for the Registrant but sent to the Complainant in error – some of which contains sensitive and confidential information.
- h) The Complainant further alleges that, in light of its earlier rights, the Registrant anticipated that the Complainant would “*possibly consider registering the domain name aquanetsa.co.za to further its business*” and that the Complainant’s business has been unfairly disrupted as it is unable to exercise its rights to register a domain name incorporating its trade mark.

3.2 Registrant

- a) The Registrant alleges that it has made use of the mark and name AQUANET IRRIGATION since 1995 when its business was established with the aim to design irrigation systems for farmers and installing pump and filter systems. Today, the Registrant provides a wide range

of services and its target market is the agricultural industry in Africa with a focus on quantity surveying, design, supply and installation of computerised irrigation systems.

- b) As a result of its use of the name Aquanet Irrigations for over 20 years, the Registrant has acquired its own reputation in the name.
- c) In response to the Complainant's allegations, the Registrant denies that there is any risk of confusion as a result of its registration and use of the contested domain name as the parties' goods and services are different.
- d) At the time of registering the domain name, the Registrant was unaware of the existence of the Complainant. The Registrant contends that it has used the contested domain name, since its registration in 2007, in good faith and with no complaint or confusion until now. The parties' have peacefully co-existed for about 14 years.
- e) Insofar as the Google search results are concerned, the Registrant submits that each search result contains a subject line and an overview of the contents of the website. As such, a consumer looking for AQUANET pool nets is unlikely to be deceived or confused into believing that the Registrant's irrigation system business belongs to the Complainant or that the contested domain name is registered to, operated or authorised by, or otherwise connected with the Complainant.
- f) The Registrant also denies that the emails annexed to the Complaint, save one, were intended for the Registrant. There appears to be a third party located in Rayton using the domain name aquanet.co in relation to shade and house netting. The Registrant contends that the emails appear to have been sent to the Complainant due to clerical errors and were not the consequence of an abusive registration within the meaning of Regulation 4.

- g) Based on the above contentions, the Registrant denies that its registration and use of the contested domain name was registered to take advantage of the Complainant's rights or that it unfairly disrupts the Complainant's business and/or prevents the latter from exercising its rights. It also denies that the contested domain name is abusive and that it leads to confusion in the marketplace.

4) Discussion and Findings

4.1 Complainant's Rights

4.1.1 Regulation 3(2) requires that a Complainant prove, on a balance of probabilities, that –

- (a) the Complainant has rights in respect of a name or mark;
- (b) the name or mark is identical or similar to the domain name.

4.1.2 We find that the Complainant has rights in respect of the trade mark AQUANET as contemplated by Regulation 3(1)(a). The Complainant has tendered proof of its South African trade mark registration for the mark in class 9 and the Registrant has admitted the allegations in this regard [see paragraph 8.8.1.1 of the Response]. In view of this finding, it is not necessary for us to consider whether the Complainant has tendered evidence sufficient to establish, on a balance of probabilities, a reputation in the mark AQUANET, as alleged.

4.1.3 Given the geographical descriptiveness of “sa”, we are satisfied that the contested domain name, aquanetsa.co.za, has the requisite identity or similarity to the Complainant's trade mark, as required in Regulation 3(2)(b).

4.1.4 The Registrant also concedes, at paragraph 8.8.1.3 of the Response, that the *“respective marks used within the parties' respective domain names are identical, subject to the addition of 'sa' in the Registrant's domain name”*. To our mind, this is an admission that the contested domain name is identical to the Complainant's AQUANET trade mark.

4.2 Abusive Registration

4.2.1 The Complainant relies on the provisions of Regulations 4(1)(a)(iii), 4(1)(a)(iv) and 4(1)(b) and submits that the contested domain name is an abusive registration on the basis that there are:

(a) Circumstances indicating that the Registrant has registered or otherwise acquired the Disputed Domain Name primarily to-

(iii) disrupt unfairly the business of the Complainant;

(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 authorised by, or otherwise connected with the complainant.

4.2.2 We do not find that the contested domain name prevents the Complainant from using its trade mark in a corresponding domain name in the .co.za name space. In fact, the Complainant does own a domain name registration for aquanet.co.za. There is also no evidence that the Registrant was aware of the Complainant's trade mark at the time of the registration thereof. The Registrant denies having knowledge of the Complainant's rights at the time.

4.2.3 Regulation 5 sets out a number of factors that a Registrant may rely upon to indicate that the domain name is not an abusive registration.

Those factors include:

5(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;

4.2.4 The Registrant defends its registration and use of the contested basis on the basis that it has made good faith use of the domain name in

relation to its own goods and services since 2007 and that it has been trading as AQUANET IRRIGATION for over 14 years. As such, it has been legitimately connected with a mark which is identical or similar to the domain name, as envisaged by Regulation 5.

4.2.5 There is no evidence to suggest that the Registrant was aware of the Complainant's trade mark when the contested domain name was registered, or that it intended to take unfair advantage or unfairly interfere with the Complainant's rights. Furthermore, the evidence tendered by the Complainant does not prove, 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.

4.2.6 The Registrant has demonstrated, in our view, that its interest in the domain name has been legitimate and that the domain name has been used in relation to a good faith offering of goods and services.

4.2.7 Furthermore, there is no evidence on record that would justify the conclusion that the Registrant's use of the disputed domain name is likely, on a balance of probabilities, to lead internet users to believe that the domain name is registered, operated, authorised or in some way connected with the Complainant.

4.2.8 The Registrant also relies on the provisions contained in Regulation 5(1)(c) which relate to fair use, criticism and tribute but those provisions do not apply here.

5) Decision

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

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MARIËTTE DU PLESSIS

SAIPL SENIOR ADJUDICATOR

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KAREEMA SHAIK

SAIPL TRAINEE ADJUDICATOR

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