

ADJUDICATOR DECISION

CASE NUMBER:	ZA2010-0039
DECISION DATE:	20 March 2010
DOMAIN NAME	Henningsrefrigeration.co.za
THE DOMAIN NAME REGISTRANT:	Cheryl Katz
REGISTRANT'S LEGAL COUNSEL:	none
THE COMPLAINANT:	Hennings Refrigeration
COMPLAINANT'S LEGAL COUNSEL:	None
THE 2 nd LEVEL DOMAIN NAME ADMINISTRATOR:	UniForum SA (CO.ZA Administrators)

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1) Procedural History

- a. The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on 8 December 2009. On 9 December 2010 the SAIPL transmitted by email to UniForum SA a request for the registry to suspend the domain name(s) at issue, and on the same day UniForum SA 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 8 January 2010. In accordance with the Regulations the due date for the Registrant's Response was 5 February 2010. The Registrant did not submit any formal response, but advised the Administrator that it would relinquish ownership of the domain name upon certain terms. The SAIPL notified the Registrant that, if it wished to avoid a formal examination of the merits of the dispute, it must provide a signed settlement agreement by no later than 2 March 2010. No settlement agreement was received.
- c. The SAIPL appointed Vanessa Lawrance as the Adjudicator in this matter on 10 March 2010. 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.

2) Factual Background

- a. Cheryl Katz, the Registrant, is employed by GDS, a company that provides internet hosting services and website creation services.
- b. In August 2008, the Complainant instructed GDS to register the domain name and create a website.

- c. The domain name henningsrefrigeration.co.za was registered in the name of the Registrant, an employee of GDS, on 13 August 2008.
- d. By August 2009, no website had yet been created and the Complainant terminated its arrangement with GDS.

3) Parties' Contentions

a. Complainant

- i. The Complainant claims that Hennings Refrigeration was founded and registered in 1939. The name is well known in the North West Province. Substantial amounts are spent every year in the promotion and advertisement of the name (eg through promotional calendars, business cards & letterheads, also signwriting on 7 vehicles). Common law rights accordingly vest in the name Hennings Refrigeration. These allegations were not disputed and must accordingly be accepted
- ii. Any unauthorised use of the domain name henningsrefrigeration.co.za will lead to confusion or deception in the marketplace that there is some connection between the user and Hennings Refrigeration (the Complainant).
- iii. There was a relationship between GDS/the Registrant and the Complainant, and the Registrant would have had knowledge of the value that the Complainant attaches to the trade mark Hennings Refrigeration as a result of that relationship.

b. Registrant

- i. The Registrant answered the Complainant's contentions informally. These answers must be treated with circumspection, as the opponent has not had an opportunity to Reply to them.

- ii. The instruction from the Complainant regarding cancellation of the domain name henningsrefrigeration.co.za as received by the Registrant allegedly read:

Sheryl Cats

Please cancel our domain with GDS as discussed on the phone.

www.henningsrefrigeration.co.za

Regards

Mrs. Harmse (sent and received on 17/08/2009)

- iii. The Complainant allegedly owes the Registrant money in respect of services rendered in relation to the domain name in question.
- iv. Another customer of GDS gave instruction to register the domain name henningrefrigeration.co.za, but that person is now willing to relinquish the domain name.

4) Discussion and Findings

4.1) As the Registrant filed no formal response, what was contained in the complaint will generally be accepted as true.

4.2) The Registrant made some informal allegations, but the Complainant has not been granted the opportunity to Reply to them, so those allegations must be treated with caution.

4.3) The Complainant has common law rights in the trade mark Hennings refrigeration. The Registrant had knowledge of the Complainant's rights and yet allegedly transferred ownership of the corresponding domain name to a third party, Mr Bani of Venatu. This is not borne out by Uniform's official records, which still record the Registrant as owner of the domain name.

4.4) The Registrant claims that she withheld ownership of the domain name henningsrefrigeration.co.za from the Complainant because monies were owing by the

Complainant to GDS. The Registrant has failed to separate herself from GDS. At no time was the allegation made that the Complainant owed money to the Registrant.

4.5) Even had the Complainant owed money to the Registrant, withholding ownership of the domain name from the rightful owner is not an acceptable remedy. A claim should have been made through the courts as is customary when one party owes money to another. There is no right in common law to withhold goods until payment therefor has been received, and the Registrant has not proved any contractual arrangement between the parties that varies this position.

4.6) Furthermore, mention must be made that it seems highly unlikely that a party in Vanatu would be interested in the domain name henningsrefrigeration.co.za and, if such a party were to exist, and have gone to the effort of acquiring this rather unusual domain name for itself in the South African webspace, that he would be willing to relinquish it with such ease when a domain dispute is lodged, rather than at least putting forward a case setting out details of his bona fide claim, which could have been done at no cost. Furthermore, it is curious that this intrepid cyber-adventurer (whose existence has thus far only been attested to by the Registrant), who obviously has quite an admirable knowledge of cyberlaw, had no objection thereto that he was never recorded as registrant of this hard-fought-for domain name, but that the Registrant was allowed to remain recorded as owner on his behalf.

a. Complainant's Rights

The Complainant has alleged that it has rights in respect of the name Hennings Refrigeration, which is identical or similar to the domain name in dispute.

b. Abusive Registration

Ownership of the domain name henningsrefrigeration.co.za was withheld in a manner which was unfairly detrimental to the Complainant's rights.

5) Decision

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

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VANESSA LAWRENCE
SAIIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za