

## Decision

**[ZA2012-0105]**

.ZA ALTERNATE DISPUTE RESOLUTION  
REGULATIONS (GG29405)

### ADJUDICATOR DECISION

CASE NUMBER:	<b>ZA2012-0105</b>
DECISION DATE:	<b>17 April 2012</b>
DOMAIN NAME:	<b>bolandlandmark.co.za</b>
THE DOMAIN NAME REGISTRANT:	<b>The Business Shop</b>
REGISTRANT'S LEGAL COUNSEL:	<b>N/A</b>
THE COMPLAINANT:	<b>Jan Frederik Phillips</b>
COMPLAINANT'S LEGAL COUNSEL:	<b>N/A</b>
2 <sup>nd</sup> LEVEL ADMINISTRATOR:	<b>UniForum SA</b>

## 1. Procedural history

- 1.1 The domain in issue is <bolandlandmark.co.za>, which was registered on 20 October 2002.
- 1.2 The Complainant is **Mr Jan Frederik Phillips**, and the Registrant is **Mr Alex Anderson** of 1 McGregor Close, Paarl.
- 1.3 This dispute was filed with the South African Institute of Intellectual Property Law (“SAIPL”), on **30 January 2012**. On the **09 February 2012** the SAIPL transmitted by email to UniForum SA a request for the registry to suspend the domain name, and on **10 February 2012** UniForum SA confirmed the suspension.
- 1.4 In accordance with the Regulations, the SAIPL formally notified the Registrant of the commencement of the Dispute on **14 February 2012**. The due date for the Registrant’s Response was **13 March 2012**.
- 1.5 The Registrant submitted its Response on **13 March 2012**, 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 who submitted a Reply on **19 March 2012**.
- 1.6 The SAIPL appointed **Adv Owen Salmon** as the Adjudicator in this matter on **22 March 2012**. 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

- 2.1 The facts in this matter are relatively simple. The complainant in this matter is the principal member of Boland Landmark CC (Registration No. 1998/069430/23) which conducts business as an estate agent from premises in Paarl, Western Cape. The history of the close corporation dates back to 1985 when it was registered as Boland Landmark Eiendomme (Pty) Ltd and thereafter converted to a close corporation.
- 2.2 The domain name in question, <bolandlandmark.co.za>, was registered by Mr Phillips on 31<sup>st</sup> December 2002 with the idea that the site would be used as the sole and main cyber-marketing and advertising effort for his business.
- 2.3 During 2009 Mr Phillips wanted to upgrade the website operated at the site and engaged the services of Mr Alex Anderson, the proprietor of The Business Shop which operates as an IT service provider in Paarl. Mr Anderson was contracted accordingly.
- 2.4 There was falling-out between Mr Phillips and Mr Anderson (the reasons of which are not relevant for present purposes) and accordingly the services of Mr Anderson were terminated during October 2009. A new IT service provider was contracted by Mr Phillips to continue the upgrade, but he encountered difficulties because it was discovered that Mr Anderson had transferred registration of the domain into his name.
- 2.5 From the Registrant's response, it appears that it is not really in dispute that the domain is to be held by the Complainant. This appears from the following allegations made by Mr Anderson:-

- The domain in dispute is not being used for any other purpose but for the Complainant's benefit and is not and has not transgressed any trade marks or patents (sic)."
- The domain is not being used in any abusive way since it is displaying the Complainant's products and services as uploaded by the Complainant ... We would like to list the following reasons for the delay in the transfer of the domain ...
- The Complainant is using the regulation in bad faith because of his refusal to pay the outstanding amount due to us as a small business and refusing to apologise for verbal abusing and humiliating us within hearing distance of staff members. (sic)

2.6 On 7<sup>th</sup> December 2011, an estate agent employed by Boland Landmark CC, Johan Visagie, contacted Mr Anderson to discuss why the domain registration was not 'returned'. According to Mr Visagie, Mr Anderson reacted angrily to this and suggested that he would retain the registration until all his *"demands were met and he would decide when he knows what we bring to the table"*.

2.7 In requesting that the Adjudicator deny the dispute, the Registrant tenders:-

"In order to solve the dispute he would like to receive an apology in writing and be paid for the outstanding amount of R4 800.90 which includes our hosting and domain fees for a period of more than 3 years."

### 3 Discussion and Findings

- 3.1 In the Adjudicator's view, the question of monies owing to Mr Anderson forms no part of a determination as to whether the registration of the domain by the Registrant is abusive, *vis á vis* the right of the Complainant as contemplated by the Regulations. Remedies are available to the Registrant which ought to be exercised, if advised, elsewhere.
- 3.2 The facts, including the tacit acknowledgement in the statements by the Registrant quoted above, indicate, in the Adjudicator's view, that the registration is indeed abusive as contemplated by the Regulations.
- 3.3 Section 1 of the Regulations provides that an abusive registration means that the domain name which either:-
- 3.3.1 Was registerable 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
- 3.3.2 Has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.
- 3.4 In terms of Section 4 of the Regulations, factors which indicate whether a registration could be consider abusive 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.”

3.5 As pointed out in <vawaterfront.co.za> ZA2011-0099:-

“According to Nominet decisions there are two potential abuses:-

- registration with abusive intent; and
- abusive use.

In the Adjudicator’s view, moreover, 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.”

3.6 In the Adjudicator’s view, the present circumstances postulate abuse as contemplated by the Regulations.

#### 4 Decision

4.1 For the foregoing reasons the Adjudicator orders that the domain name <bolandlandmark.co.za> be transferred to the Complainant.

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