

DEPARTMENT OF TELECOMMUNICATIONS AND POSTAL SERVICES

NO. 1419

18 NOVEMBER 2016

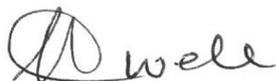
ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2002
(ACT NO. 25 OF 2002)PROPOSED AMENDMENT OF THE ALTERNATIVE DISPUTE RESOLUTION REGULATIONS
ISSUED IN TERMS OF SECTION 69 READ WITH SECTION 94 OF THE ELECTRONIC
COMMUNICATIONS AND TRANSACTIONS ACT, 2002 (ACT NO. 25 OF 2002)

The Minister of Telecommunications and Postal Services intends to amend the Alternative Dispute Resolution (ADR) Regulations (published in Government Notice No. R. 1166, Government Gazette 29405, 22 November 2006) in terms of section 69 read with section 94 of the Electronic Communications and Transactions Act, 2002, as amended by Government Notice No. 1228, Government Gazette 39504, 11 December 2015 and wishes to consult the public in this regard.

Interested persons are invited to provide written comments on the proposed amendments in the Schedule, within 30 calendar days of the date of publication, addressed to -

The Acting Director-General, Department of Telecommunications and Postal Services; For attention: Mr. Alf Wiltz, Chief Director: Telecommunications and IT Policy
First floor, Block A3, iParioli Office Park, 1166 Park Street, Hatfield, Pretoria
Private Bag X860, Pretoria, 0001
awiltz@dtps.gov.za; Tel: (012) 427-8070/ 8191/ 8047

Comments received after the closing date may be disregarded.



Dr Siyabonga Cyprian Cwele, MP
Minister of Telecommunications and Postal Services

SCHEDULE**AMENDMENT OF THE ALTERNATIVE DISPUTE RESOLUTION REGULATIONS ISSUED IN TERMS OF SECTION 69 READ WITH SECTION 94 OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2002 (ACT NO. 25 OF 2002)****1. Amendment of Arrangement of Regulations**

The Arrangement of Regulations which occur before Regulation 1 of the Alternative Dispute Resolution Regulations is hereby amended—

(a) by the substitution for item 7 of the following item:

“Dispute procedure **7**”; and

(b) by the insertion after item 19 of the following item:

“Informal mediation **19A**”.

2. Amendment of regulation 1

Regulation 1 of the Alternative Dispute Resolution Regulations is hereby amended by the insertion after the definition of “decision” of the following definition:

“‘**informal mediation**’ means impartial mediation which the Authority conducts to facilitate a resolution acceptable to both Parties;”.

3. Amendment of regulation 4

Regulation 4 of the Alternative Dispute Resolution Regulations is hereby amended –

(a) by the substitution for subregulation (3) of the following subregulation:

“(3) There shall be a rebuttable presumption of abusive registration if the complainant proves that the registrant has been found to have made an abusive registration in three or more disputes in the two years before the dispute was filed.”; and

(b) by the insertion of the following subregulation:

“(4) In order to succeed with rebutting the presumption of abusive registration as contemplated in regulation 4(3), the registrant must prove that the registration of the domain name is not an abusive registration.”.

4. Substitution of regulation 5

The following regulation is hereby substituted for regulation 5 of the Alternative Dispute Resolution Regulations:

5. Factors, which may indicate that the domain name is not an abusive registration, 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; and

(c) that the registrant has demonstrated fair use, which use may include web sites 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. Substitution of regulation 7

The following regulation is hereby substituted for regulation 7 of the Alternative Dispute Resolution Regulations:

“Dispute procedure

7. The procedure in Chapter III prescribes the process for initiating, conducting and concluding a dispute.”.

6. Substitution of regulation 9

The following regulation is hereby substituted for regulation 9 of the Alternative Dispute Resolution Regulations:

“9. (1) The possible decisions pursuant to a dispute before an adjudicator are limited to -

(a) in the case of abusive registrations the refusal of the dispute or the transfer of the disputed domain name to the complainant;

(b) in the case of offensive registrations the refusal of the dispute or the deletion and prohibition of the domain name from future registration;

(c) a refusal of the dispute as the dispute constitutes reverse domain name hijacking;

(d) cancellation of the disputed domain name as contemplated in subregulation (3).

(2) If three disputes from a Complainant were refused within a period of two years based on reverse domain name hijacking, the provider will not accept any further complaints from the complainant for a period of two years from the date of the last decision, except on good cause shown.

(3) In the case of abusive registrations, the cancellation of the domain name may be considered by the adjudicator when the complainant and a third party have rights or registered rights and it is a more appropriate remedy than the refusal or transfer of the domain name.”.

7. Amendment of regulation 11

Regulation 11 of the Alternative Dispute Resolution Regulations is hereby amended—

(a) by the insertion after subregulation (1) of the following subregulation:

“(1A) Any party that institutes legal action on any related matter in the High Court of the Republic of South Africa must inform the second level domain administrator in writing either by facsimile, registered post or courier.”; and

(b) by the substitution for subregulation (3) of the following subregulation:

“(3) A second level domain administrator must implement the decision, as contemplated by regulation 30, unless the second level domain administrator has been informed as contemplated in subregulation (1A) that either party has commenced legal action in the High Court of the Republic of South Africa concerning the domain name.”.

8. Amendment of regulation 16

Regulation 16 of the Alternative Dispute Resolution Regulations is hereby amended by the substitution in subregulation (2) for paragraph (l) of the following paragraph:

“(l) conclude with the following statement followed by the signature of the complainant or his or her authorised representative and be administered as an oath or affirmation by a Commissioner of Oaths, or person holding a similar public office when signing the complaint in a foreign country:

“The complainant certifies that the information contained in this dispute is, to the best of complainant's knowledge, both complete and accurate, that this dispute is not being used for any improper purpose, such as to harass the registrant, and that the assertions in this dispute are warranted under these Regulations and under applicable law.

Signature of Complainant

Date:

Place:

I certify that before administering the oath/affirmation I asked the deponent the following questions and wrote down her/his answers in his/her presence:

(i) Do you know and understand the contents of the declaration?

Answer:

(ii) Do you have any objection to taking the prescribed oath or affirmation?

Answer:

(iii) Do you consider the prescribed oath or affirmation to be binding on your conscience?

Answer:

I certify that the deponent has acknowledged that she/he knows and understands the contents of this declaration. The deponent utters the following words: "I swear that the contents of this declaration are true, so help me God." / "I truly affirm that the contents of the declaration are true". The signature/mark of the deponent is affixed to the declaration in my presence.

Commissioner of Oaths/ Person holding similar public office

Full Name:

Designation:

Area:

Office held *ex officio*:

Business address:

Date:

Place: "".

9. Amendment of regulation 18

Regulation 18 of the Alternative Dispute Resolution Regulations is hereby amended –

- (a) by the substitution in subregulation (2) for paragraph (f) of the following paragraph:

“(f) conclude with the following statement followed by the signature of the registrant or his or her authorised representative and be administered as an oath or affirmation by a Commissioner of Oaths, or person holding a similar public office when signing the response in a foreign country:

"The registrant certifies that the information contained in this response is, to the best of registrant's knowledge, both complete and accurate, that this response is not being presented for any improper purpose, such as to harass the complainant, and that the assertions in this response are warranted under these Regulations and under applicable law.

Signature of Registrant

Date:

Place:

I certify that before administering the oath/affirmation I asked the deponent the following questions and wrote down her/his answers in his/her presence:

- (i) Do you know and understand the contents of the declaration?

Answer:

- (ii) Do you have any objection to taking the prescribed oath or affirmation?

Answer:

(iii) Do you consider the prescribed oath or affirmation to be binding on your conscience?

Answer:

I certify that the deponent has acknowledged that she/he knows and understands the contents of this declaration. The deponent utters the following words: "I swear that the contents of this declaration are true, so help me God." / "I truly affirm that the contents of the declaration are true". The signature/mark of the deponent is affixed to the declaration in my presence.

Commissioner of Oaths/ Person holding similar public office

Full Name:

Designation:

Area:

Office held *ex officio*:

Business address:

Date:

Place:"";

(b) by the substitution for subregulation (3) of the following subregulation:

"(3) If the registrant does not submit a response, the adjudicator must decide the matter based on the dispute contemplated in regulation 16(1) and issue a summary decision in accordance with regulation 9(1)(a) or (b)."; and

(c) by the insertion after subregulation (3) of the following subregulations:

"(4) A summary decision will, however, only be granted by the adjudicator if the following requirements are met-

(a) that the registrant has been notified of the dispute in accordance with regulation 15(1);

(b) that the complainant has to the reasonable satisfaction of the adjudicator shown that he or she has rights in a name or mark, which is identical or similar to the domain name and, in the hands of the registrant the domain name is an abusive registration, or offensive registration; and

(c) that there are no other factors or circumstances present in the dispute that would unfairly deprive the registrant of the domain name.

(5) A summary decision is regarded as a decision as contemplated in regulation 29."

10. Amendment of regulation 19

Regulation 19 of the Alternative Dispute Resolution Regulations is hereby amended-

(a) by the substitution for subregulation (1) of the following subregulation:

“(1) Within five days of receiving the response from the provider, the complainant may submit a reply to the registrant's response to the provider, which the provider must forward to the registrant.”; and

(b) by the substitution for subregulation (3) of the following subregulation:

“(3) Upon the expiry of the five days, but no later than two days thereafter, the provider will inform the Authority to conduct informal mediation in accordance with regulation 19A.”.

11. Insertion of regulation 19A

The following regulation is hereby inserted in the principal Act, after regulation 19:

“Informal mediation

19A. (1) Within two days of being informed by the provider as contemplated in regulation 19(3), the Authority will begin to conduct informal mediation. Informal Mediation will be conducted in a manner which the Authority, in their sole discretion, considers appropriate. No informal mediation will occur if the Registrant does not file a response.

(2) Negotiations conducted between the Parties during informal mediation (including any information obtained from or in connection to negotiations) shall be confidential, that is they will not be shown to the adjudicator. Neither the Authority nor any Party may reveal details of such negotiations to any third parties unless a court of competent jurisdiction orders disclosure, or the Authority or either Party are required to do so by applicable laws or regulations. Neither Party shall use any information gained during mediation for any ulterior or collateral purpose or include it in any submission likely to be seen by any adjudicator or judge in this dispute or any later dispute or litigation.

(3) If the Parties reach a settlement during informal mediation then the existence, nature and terms of the settlement shall be confidential, unless the Parties specifically agree otherwise or a court of competent jurisdiction orders otherwise.

(4) No binding verbal agreements can be reached as part of the informal mediation: any settlement reached by the Parties must be in writing or similar electronic form to be enforceable.

(5) If the Parties reach a settlement and agree that a disputed domain name should be transferred to the complainant, the Authority must communicate the decision to the second level domain administrator to be implemented as contemplated by regulation 30(4).

(6) If the Parties do not achieve an acceptable resolution through informal mediation within five days, the Authority must within two days inform the provider to appoint an adjudicator in accordance with regulation 20, which appointment must be done by the provider within two days.

(7) No Party may ask the Authority (including their directors, officers, employees, contractors, agents) to reveal information or materials gained as a result of any informal mediation under these Regulations unless such disclosure has been ordered by a court of competent jurisdiction. Neither Party shall call the Authority (including their directors, officers, employees, contractors, or agents) as a witness (either in person or to produce documents or other materials) in any proceedings which arise from, or are in connection with, the matters discussed in the mediation.”.

12. Amendment of regulation 21

Regulation 21 of the Alternative Dispute Resolution Regulations is hereby amended by the insertion of the following subregulation:

“(4) Any party may inform the provider of circumstances that affect or may affect the impartiality or independence of the adjudicator, following which the provider should determine whether an alternate adjudicator should be appointed.”.

13. Amendment of regulation 32

Regulation 32 of the Alternative Dispute Resolution Regulations is hereby amended-

(a) by the substitution for subregulation (1) of the following subregulation:

“(1) Either party shall have the right to appeal a decision by submitting a statement of intention to appeal within four days after the receipt of the decision as contemplated in regulation 30(1), together with the appeal fee provided for in regulation 34(3), which must within 15 days be followed by an appeal notice: Provided that only a decision by a single adjudicator, and not a decision of three adjudicators, can be appealed.”; and

(b) by the substitution for subregulation (5) of the following subregulation:

“(5) Within 15 days of receiving the appeal notice from the provider the other party may submit an appeal notice response to the provider.”.

14. Amendment of regulation 33

Regulation 33 of the Alternative Dispute Resolution Regulations is hereby amended-

(a) by the substitution for subregulation (1) of the following subregulation:

“(1) If legal proceedings are initiated during a dispute in respect of a domain name that is the subject of the dispute, the provider must suspend the dispute immediately unless an adjudicator has already been appointed in which event the adjudicator must continue to decide the dispute.”; and

(b) by the insertion after subregulation (1) of the following subregulation:

“(1A) If the adjudicator continues to decide the dispute as contemplated in subregulation (1), the implementation of the decision is subject to the provisions of regulation 11(4).”.

15. Amendment of regulation 34

Regulation 34 of the Alternative Dispute Resolution Regulations is hereby amended-

(a) by the substitution for subregulation (1) of the following subregulation:

“(1) A complainant must pay a fixed fee in the sum of R10,000-00 to the provider for one adjudicator as contemplated in regulation 20(3) or a fixed fee in the sum of R24,000-00 for three adjudicators to decide the dispute, if the complainant elects to have the dispute decided by three adjudicators, provided that the fixed fee is reduced by 50% in the case of summary decision as contemplated in regulation 18(3).”;

(b) by the substitution for subregulation (5) of the following subregulation:

“(5) Upon receipt of the fees required in terms this regulation, the provider must immediately pay 10% of the fees to the Authority, which fees the Authority must use exclusively to fund other complainants and registrants seeking financial assistance, provided that the fees payable to the Authority are reduced to 5% in the case of summary decision as contemplated in regulation 18(3).”; and

(c) by the insertion after subregulation (5) of the following subregulation:

“(6) If the Parties reach a settlement during informal mediation as contemplated in regulation 19A, no fees are payable.”.