

ADJUDICATOR DECISION

CASE NUMBER:	ZA2008-0017
DECISION DATE:	9 July 2008
DOMAIN NAME	capepointostrichfarm.co.za
THE DOMAIN NAME REGISTRANT:	Punta Di Kappa
REGISTRANT'S LEGAL COUNSEL:	n/a
THE COMPLAINANT:	Cape Point Ostrich Farm (Pty) Ltd
COMPLAINANT'S LEGAL COUNSEL:	n/a
THE 2 nd LEVEL DOMAIN NAME ADMINISTRATOR:	UniForum SA (CO.ZA Administrators)

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1) Procedural History

- a. The Dispute was first filed with the South African Institute of Intellectual Property Law (the "SAIPL") on 14 February 2008. Possibly as a result of logistical difficulties with the SAIPL's postal details, payment was not received until 22 May 2008. Because the SAIPL may have been at fault, it requested Uniforum SA to suspend the domain name at issue before receiving payment, and on 30 April 2008 UniForum SA confirmed that the domain name had indeed been suspended. In the interim, it appeared that the Dispute lodged was incomplete in that all annexures were not attached. The SAIPL drew this to the attention of the Complainant and invited it to complete its Dispute papers, which it did together with a fresh cheque for payment. The SAIPL verified that the Dispute together with the amendment to 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 22 May 2008. In accordance with the Regulations the due date for the Registrant's Response was 20 June 2008. The Registrant submitted its Response on 17 June 2008, 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 19 June 2008.
- c. In accordance with the Regulations the due date for the Complainant's Reply was 26 June 2008. The Complainant did not submit any Reply.
- d. The SAIPL appointed Vanessa Lawrance as the Adjudicator in this matter on 7 July 2008. 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. The Complainant is a company incorporated under the name Cape Point Ostrich Farm (Pty) Ltd on 11 March 1996.
- b. Since 1996, Cape Point Ostrich Farm has traded under this name, *inter alia* in respect of ostrich products.
- c. Andrea Kraus was an employee of the Complainant until 1 May 2006. In the papers before me there appears to be a dispute regarding the terms of her departure from the employment of the Complainant. I do not intend going into any detail in this regard. The only fact of relevance is that Andrea Kraus was an employee of the Cape Point Ostrich Farm.
- d. During Ms Kraus's employment at the Cape Point Ostrich Farm, Florian Ilse co-habited with her on the Complainant's property.
- e. On 14 October 2006, the domain name capepointostrichfarm.co.za was registered by Punta Di Kappa, the Respondent. Florian Ilse is recorded as the administrative contact for the Respondent.
- f. Andrea Kraus is described as the business partner of Florian Ilse, an allegation that has not been denied and, accordingly, will be accepted as correct for purposes of this enquiry.

3) Parties' Contentions

a. Complainant

- i. The Complainant submits that it has acquired a reputation and goodwill in its Cape Point Ostrich Farm name.

- ii. I will accept that the Complainant has acquired a reputation, as this allegation was not refuted.

- iii. The Complainant alleges that it was the owner of the domain name capepointostrichfarm.co.za and that Andrea Kraus, who was the Complainant's domain name administrator, allowed this registration to lapse. The Respondent denies that the domain name was registered before 14 October 2006 (being the date upon which it registered the domain name capepointostrichfarm.co.za). For purposes of this case I do not believe this question to be of importance to the finding and, accordingly, will leave it undecided, as the evidence relied upon by the Respondent in supporting its submissions is incomplete.

b. Registrant

- i. The Respondent contends that Punta Di Kappa means "cape point" in Italian and that the Respondent intends farming ostriches close to the Cape Point.

- ii. It also contends that it owns a store in the Cape Point vicinity that sells ostrich products. This has been verified through a brief perusal of the website linked to the domain name puntadikappa.co.za. The Respondent also sells goods made of crocodile, snake and Nguni hide, to mention merely a few.

4) Discussion and Findings

a. Complainant's Rights

- i. As previously indicated, the Complainant was incorporated under the name Cape Point Ostrich Farm (Pty) Ltd on 11 March 1996. It has, since that date, made use of the name Cape Point Ostrich

Farm in respect, inter alia, of sales of ostrich products (leather, eggs, etc.).

- ii. The Complainant has provided evidence that the name Cape Point Ostrich Farm is fairly well known in the Western Cape. In any event, as Andrea Kraus was employed by the Complainant and Florian Ilse lived with Ms. Kraus on the Complainant's property, at least Ms Kraus and Mr. Ilse were aware of the name Cape Point Ostrich Farm and the value attached to it.
- iii. It is trite law that common law rights are acquired in a name where that name is used to such an extent that it acquires a reputation and goodwill and that it becomes associated with the user (in this case, the Complainant).
- iv. Passing off consists of a misrepresentation by one person that his business is that of another or associated with that of another. The test in determining whether a representation amounts to passing off is whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is or is connected with that of another.
- v. Ms Kraus's employment with the Complainant ended in May 2006 and, shortly thereafter, in October of the same year, the Respondent registered the domain name capepointostrichfarm.co.za which is presently directed to the website of the Respondent. The Respondent sells products similar to those sold by the Complainant.
- vi. As both the Complainant and the Respondent sell ostrich products, direction of the domain name capepointostrichfarm.co.za to the website of the Respondent in my opinion leads to the likelihood that people believe that there is a connection between the Respondent and the Complainant. More so in light of the former

association of Andrea Kraus and Florian Ilse with the Complainant and presently with the Respondent.

- vii. The fact that there was this prior association leads me to believe that there is a further species of unlawful competition in question in this matter. Ms Kraus and Mr Ilse's actions in registering a domain name equivalent to the name of a prior employer and directing it to their own site, which advertises products identical to those of the previous employer are clearly unfair and dishonest.
- viii. The Respondent does not require the domain name capepointostrichfarm.co.za to further its business.

b. Abusive Registration

- i. The domain name capepointostrichfarm.co.za was registered or otherwise acquired in a manner which, at the time when registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's rights.
- ii. It has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.

5) Decision

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

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