

## ADJUDICATOR DECISION

CASE NUMBER:	<b>ZA2014-0180</b>
DECISION DATE:	<b>20 October 2014</b>
DOMAIN NAME	<b>FLASHPOWER.CO.ZA</b>
THE DOMAIN NAME REGISTRANT:	<b>Lorna Kane</b>
REGISTRANT'S LEGAL COUNSEL:	<b>N/a</b>
THE COMPLAINANT:	<b>Lizu Trading Handels GmbH</b>
COMPLAINANT'S LEGAL COUNSEL:	<b>Adams &amp; Adams (Dale Healy)</b>
THE 2 <sup>nd</sup> LEVEL DOMAIN NAME ADMINISTRATOR:	<b>ZA Central Registry (CO.ZA Administrators)</b>

## 1) Procedural History

- a. The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on **29 May 2014**. On **26 June 2014** the SAIPL transmitted by email to ZA Central Registry a request for the registry to suspend the domain name(s) at issue, and on **26 June 2014** 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 **26 June 2014**. In accordance with the Regulations the due date for the Registrant's Response was **23 July 2014**. The Registrant did not submit any response, and accordingly, the SAIPL notified the Registrant of its default on **24 July 2014**.
- c. The SAIPL received an informal statement from a third party, Kevin McDonald ("McDonald"), on 24 July 2014 and on 5 August 2014 the SAIPL invited McDonald to submit a formal response to the Dispute as provided for in the Regulations before 7 August 2014. No such response was received.
- d. SAIPL appointed **Deon Boucher** as the Adjudicator in this matter on **6 October 2014**. The Adjudicator has submitted a 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 the registered proprietor in South Africa of the trade mark FLASH POWER, including trade mark registration numbers 2001/07672-3 FLASH POWER in classes 32 and 33 in relation to "*beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks*

*and fruit juices; syrups and other preparations for making beverages” and “advertising; business management; business administration; office functions; offering for sale and the sale of goods in the retail and wholesale trade”, respectively*

- b. The Complainant further distributes a range of non-alcoholic beverages under the name FLASH POWER, which has been sold internationally, for many years and the Complainant has achieved substantial sales, internationally.
- c. The Complainant’s FLASH POWER products have been available in South Africa since 2005 and the period 2005 – 2010 the Complainant has achieved sales of some €130,000 in South Africa.
- d. In September 2012, it came to the attention of the Complainant that the website situated at the Disputed Domain Name contained a claim that a company, Trustco (Pty) Ltd (“Trustco”), a former distributor of the Complainant, was the sole distributor of Flash Power Austria for Africa.
- e. Investigations conducted by the Complainant’s attorneys confirmed that the Complainant’s FLASH POWER trade mark was used on the above website to advertise the Complainant’s products.
- f. Subsequent investigations initiated by the Complainant also revealed that:
  - i) a Mr Ian Strydom *“was behind the registration of the disputed domain name as well as the entity Trustco Limited”*; and
  - ii) Although the website at the Disputed Domain Name was “under construction” in October 2013, it was, subsequently, activated, and promoted the FLASH POWER products of the Complainant and contained a claim that Trustco was the distributor of the Complainant’s products.

### **3) Parties’ Contentions**

#### **a. Complainant**

The Complainant has made the following submissions, namely:

- i. The FLASH POWER trade mark is well known;
- ii. The Disputed Domain Name is identical or similar to the FLASH POWER trade mark;
- iii. Neither the Registrant nor Trustco is a distributor of the Complainant;
- iv. The Registrant is not authorised to use the Complainant's FLASH POWER trade mark;
- v. The Registrant has no legitimate reason to hold, and to continue holding, the Disputed Domain Name; and
- vi. The Registrant registered or is using and intends to use the Disputed Domain Name in a manner which will mislead people to believe that the Disputed Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant

The Complainant accordingly contends that the Registrant acquired the Disputed Domain Name, primarily to:

- vii. block, intentionally, the registration of a mark in which the Complainant's has rights, as contemplated by Regulation 4(1)(a)(ii);
- viii. disrupt, unfairly, the business of the Complainant as contemplated by Regulation 4(1)(a)(iii); and
- ix. prevent the Complainant from exercising its rights, as contemplated by Regulation 4(1)(a)(iv).

and requests that the Disputed Domain Name must be transferred to it.

**b. Registrant**

- i. The Registrant did not respond to the Complainant's contentions.

#### 4) Discussion and Findings

- a. Regulation 3(1)(a) requires that a Complainant proves each of the following elements in order for the Disputed Domain Name to be transferred, namely that:
  - i) The Complainant has established rights in respect of a name or mark which is identical or similar to the Disputed Domain Name; and
  - ii) In the hands of the Registrant, the Disputed Domain Name is an abusive registration.
- b. The Adjudicator will draw such inferences from the Registrant's failure to respond to the Complaint as he considers appropriate. This will include the acceptance of plausible evidence of the Complainant, which has not been disputed.

##### 4.1 Complainants' Rights

- a) Regulation 1 defines "rights" to include intellectual property rights, commercial, cultural, religious and personal rights protected under South African law, but are not limited thereto.
- b) The definition is broad and "rights" is not restricted to rights founded on the principles of trade mark law, but recognises rights going beyond those in terms of the Trade Marks Act No. 194 of 1993 or the requirements at common law for passing off. Such rights must, however, find recognition in law. See [ZA2007-0008 \(privatesale.co.za\)](#).
- c) The Complainant is the proprietor of trade mark registrations nos. 2001/07672 – 3 FLASH POWER in classes 32 and 35, which cover the goods and services for which the Registrant used or intends using the Disputed Domain Names.
- d) The Complainant further submits that it has built up a suitable reputation in the FLASH POWER trade mark by virtue of it having used the FLASH POWER trade mark, in South Africa since 2005 but did not submit

extensive documentary evidence substantiating the aforementioned claim.

- e) The Adjudicator, however, finds that the Complainant has discharged the onus which rests on it and showed, on a balance of probabilities, that it has established suitable rights in respect of the FLASH POWER trade mark, by virtue of the FLASH POWER trade mark registrations which it holds in South Africa.
- f) The adjudicator also finds that the Disputed Domain Name is identical to the Complainant's FLASH POWER trade mark as required in terms of Regulation 3(a).

#### **4.2 Abusive Registration**

- a) Regulation 4(1) provides for a number of grounds (non-exhaustive) on which the Complainant can rely in showing that the Disputed Domain Name is an abusive registration. For purposes of this dispute, the Complainant relies on Regulations 4(1)(a)(ii) to 4(1)(a)(iv), namely that the Registrant:
  - i) blocks, intentionally, the registration of a name in which the Complainant has rights;
  - ii) disrupts, unfairly, the business of the Complainant; and
  - iii) prevents the Complainant from exercising its rights.
- b) In the absence of any evidence to the contrary, the Adjudicator accepts the evidence submitted by the Complainant and finds that the Registrant has registered the Disputed Domain Name, primarily, with an intention to disrupt, unfairly, the business of the Complainant and prevent the Complainant from exercising its rights.

**5) Decision**

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

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**DEON BOUWER**  
SAIPL SENIOR ADJUDICATOR  
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