



South African Institute of Intellectual Property Law

**Decision
ZA2007-0001**

**.ZA ALTERNATE DISPUTE RESOLUTION REGULATIONS
(GG29405)**

ADJUDICATOR DECISION

CASE NUMBER:	ZA2007-0001
DECISION DATE:	7 JUNE 2007
DOMAIN NAME:	mrplastic.co.za
THE DOMAIN NAME REGISTRANT:	Mr. Plastic & Mining Promotional Goods, of 26 Boom Street, Jeppestown, Gauteng.
REGISTRANT'S LEGAL COUNSEL:	None
THE COMPLAINANT:	Mr Plastic CC, of 13 Geldenhuys Road, Malvern East, Bedfordview, Gauteng.
COMPLAINANT'S LEGAL COUNSEL:	Yaman Hammond & Inc.
THE 2 ND LEVEL DOMAIN NAME ADMINISTRATOR:	UniForum SA (CO.ZA Administrators)

1. Procedural History

The Dispute was filed with the South African Institute of Intellectual Property Law (the "SAIPL") on 11 April 2007. On 13 April 2007 the SAIPL transmitted by email to UniForum SA a request for the registry to suspend the domain name(s) at issue, and on 13 April 2007 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.

In accordance with the Regulations, the SAIPL formally notified the Registrant of the commencement of the Dispute on 13 April 2007. In accordance with the Regulations the due date for the Registrant's Response was 14 May 2007. The SAIPL forwarded a copy of the Response to the Complainant on 3 May 2007.

In accordance with the Regulations the due date for the Complainant's Reply was 11 May 2007. Upon application by the Complainant, a one day extension was granted by SAIPL and the Reply was filed on 12 May 2007.

The SAIPL appointed Dr Owen Dean as the Adjudicator in this matter on 24 May 2007. 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

The Complainant was incorporated as Mr Plastic (Pty) Limited under the Companies Act, 1973, in 1976 under No. 76/02335/07. The founder of the company was a Mr Gerry Evans, who was the sole shareholder. In 1986 the entire shareholding in the company was transferred to Eugene Snyman. In 1991 Eugene Snyman converted company No. 76/02335/07 to a close corporation under No. CK91/27219/23 under the name Mr Plastic CC. On 22 June 1994 Eugene Snyman, being the sole member of the close corporation, sold the whole of his interest in it to Hilda van Niekerk. Hilda

van Niekerk was the mother of Melville van Niekerk. Melville van Niekerk purchased the share of Hilda van Niekerk in the close corporation on 1 July 1996 and has since then remained the sole member of the close corporation.

In 1980, Gerry Evans commissioned the design of a logo for the Complainant. The logo comprised a cartoon character of a man in dungarees and cap standing on the letters "Mr Plastic". The man holds a flagpole with a pennant flying above his head; the pennant could incorporate a slogan. The Complainant allowed others, including the Registrant, to use this logo.

In 1989 the Complainant gave permission to the Registrant to register the close corporation name "Mr Plastic Mining and Promotional Goods CC" and in 1991 it gave permission for an unrelated company to be registered under the name "Mr Plastic Manufacturing (Pty) Limited". Further companies/close corporations having names incorporating "Mr Plastic" were registered on the dates indicated as follows:

Mr Plastic, Durban	2000
Mr Plastic, Cape Town	2000
Mr Plastic (Natal)	1990
Mr Plastic Properties	1989
Mr Plastic "East Rand"	1988
Mr Plastic (Cape)	1987

The trade mark MR PLASTIC & Device and the trading style Mr Plastic is, and has for several years been, used by the Complainant, the Registrant, Mr Plastic (Natal) CC, and Mr Plastic (Cape) CC. There exists close corporations having the names Mr Plastic Manufacturing CC, Mr Plastic Properties CC, Mr Plastic Display CC and Mrs Plastic CC, of which Melville van Niekerk is the sole member. The trade mark has not been registered and no licensing arrangements with the Complainant have been shown.

The Registrant, under the name Mr Plastic Mining & Promotional Goods CC, was incorporated under the Close Corporations Act on 27 November 1989. Its sole

member is currently Jennifer Bitirimoclu (née Scott). Jennifer Bitirimoclu became the sole member of the Registrant on 19 January 1996 and replaced Dimitri Bitirimoclu, her husband, in that capacity, who ceased to be a member, having been the sole member prior to that date. It uses the trade mark MR PLASTIC & Device and the trading style Mr Plastic, and has done so since 1989. The Complainant granted permission to the Registrant to use this name and trading style (at a time when Eugene Snyman was the sole shareholder/member of the complainant) but such use has not been subject to any licensing arrangement and is currently objected to by the Complainant (at a time when Melville van Niekerk is the sole member of the Complainant).

The Registrant registered the domain name mrplastic.co.za in October 2000 and subject to a brief interlude which will be discussed below has owned it from that time up to the present. The domain name is in regular use and incorporated in a website operated by the Registrant as mrplastic.co.za.

In 1989, Eugene Snyman, the sole shareholder at the time of the Complainant, and Dimitri Bitirimoclu, the sole member of the Registrant at the time, purchased the building at 26 Boom Street, Jeppestown with the intention that the Complainant and the Registrant should conduct their businesses from the same premises. The Complainant at the time manufactured so-called "hard plastics" (e.g. Perspex cut to size) while the Registrant manufactured so-called "soft plastics" (e.g. underground pouches for mines, bags, files, ringbinders, pockets, etc).

Melville van Niekerk was in or around 1990 a customer of the Registrant as a partner in a business called "Stargaze". Melville van Niekerk and David and Jenny Bitirimoclu became personal friends. Melville van Niekerk, initially through his mother, Hilda van Niekerk, and then later in his personal capacity became the owners of all the shares in the Complainant. A close corporation, Plastic Fabrication Centre CC, was registered on 10 May 1996 with Jenny Scott (Bitirimoclu) as the original member, and her brother, Craig Scott, subsequently became the sole member in 2002. This close corporation also occupied the premises and manufactured hard plastics. Subsequently, the Registrant withdrew from the premises and moved to its present

premises. Relations between the Complainant and the Registrant thereafter deteriorated and conflict developed between them.

The Complainant has used its name and trade mark MR PLASTIC for 27 years and at the present time it has approximately 250 daily transactions and a turnover of approximately R18 million. The Complainant has a substantial reputation. The Registrant has used the trade mark and trading style MR PLASTIC for 18 years and it is estimated that its turnover, together with that of Plastic Fabrications Centre (with which it works closely) is roughly 25% of the turnover of the Complainant.

The mark and name MR PLASTIC is in use by several other entities in the plastics business but the extent of such use and the reputation generated by it is not known. Such use spans a period of roughly 27 years.

The Complainant was not able to register the domain name mrplastic.co.za by virtue of the registration of the domain name in dispute in the name of the Registrant. The Complainant has thus registered several other domain names, namely mrplastics.co.za; mrplastics.info.co.za; mrplasticsa.co.za; misterplastic.co.za; mrplastic2.co.za; mrsplastic.co.za; mrplasticperspex.co.za; mrplasticcc.co.za; mrplastic.za.com. The Complainant operates a website under the name www.mrplastics.co.za.

The Registrant's use of the domain name in dispute has given rise to instances where the members of the trade have communicated with the Registrant through its domain name believing that the Complainant operates that domain name. An example of such instance of confusion involves Speedheat (Pty) Limited which on 15 March 2007, having previously communicated with the Registrant via its domain name, addressed an e-mail to the Complainant in which the comment was made that it must be very difficult to work with two different companies with the same name.

On 8 February 2007 Melville van Niekerk, purporting to act on behalf of the Registrant, requested UniForum to make changes to the Registrant's website. UniForum transferred the ownership of the website to the Complainant pursuant to

that request by means of a manual change. When the Registrant became aware of this unauthorised change to its website and the ownership of the website was changed back to the Registrant, some two and a half weeks later. The Registrant laid a criminal charge of fraud against the Complainant with the Midrand Police on account of Melville van Niekerk's aforesaid conduct and this matter is under investigation by the Germiston Commercial Crimes Unit of the South African Police Services. During the period that the website was registered in the name of the Complainant, certain changes were made to it by the Complainant.

The Complainant first formally objected to the Registrant's use of the domain name in dispute and the trading style Mr Plastic on 26 January 2007 when the Registrant received a hand delivered letter from P Yaman attorneys, dated 24 January 2007, demanding immediate cessation of use of the domain name in dispute and all e-mails ending with @mrplastic.co.za. Discussions ensued between the parties but the conflict between them was not resolved. The lodging of the present objection followed.

3. Parties' Contentions

a. Complainant

1. The Complainant contends that it has rights in respect of the name or mark MR PLASTIC and that the domain name in dispute is identical or similar to this name or mark and it is therefore an abusive registration.
2. The Complainant basis its claim to rights in respect of the name or mark MR PLASTIC on the fact that it (being a close corporation) is registered under the name Mr Plastic CC and that it has used the name or mark on an extensive scale in relation to soft plastics over a period of 27 years. As a result of such use common law rights subsist in the name and those rights vest in it.
3. The Complainant further asserts that it is affiliated with various other close corporations (through the fact that Melville van Niekerk is the sole member of each of such close corporations), namely Mr Plastic CC, Mrs

Plastic CC, Mr Plastic Durban CC, Mr Plastic Cape Town CC and Mr Plastic Properties CC. Furthermore, the Complainant is the registrant of further domain names, i.e. mrplastics.co.za; mrplastics.info.co.za; mrplasticsa.co.za; misterplastic.co.za; mrplastic2.co.za; mrsplastic.co.za; mrplasticperspex.co.za; mrplasticcc.co.za; mrplastic.za.com.

4. It is contended that the presence of the feature "Mr Plastic" in the domain name under dispute is not generic but is a direct reference to the Complainant's company name and mark.
5. The Registrant was aware of the repute enjoyed by the Complainant's name at the date of registration of the domain name in dispute.
6. It is contended that the Registrant has registered the domain name in dispute to disrupt the business of the Complainant and to lead the public and businesses to believe that the domain name in dispute is registered to, operated and authorised by, or otherwise connected with, the Complainant, which it is not.
7. It is claimed that the structure of the Registrant's website so closely resembles that of the Complainant that the inference can be drawn that it has been copied. The result of such similarity is that the impression is created that the Complainant and the Registrant are affiliated with each other or are members of a common group. It is contended that the domain name in dispute takes unfair advantage of, and is unfairly detrimental to, the Complainant's rights in its name or mark MR PLASTIC.
8. The Complainant and the Registrant compete in the same market, namely plastic goods and the public do not know the difference between so-called "hard plastic" and "soft plastic" goods. Furthermore, the parties are situated in the same geographic area.
9. Not only does the Registrant use the domain name in dispute but it also uses the trading style "Mr Plastic" and this leads to the Registrant's business being passed off as that of the Complainant.
10. The Registrant works in close collaboration with Plastic Fabrication Centre CC to which it refers enquiries received by it for "hard plastics". This has the effect that the confusion caused through use of the domain name in

dispute by the Registrant has resulted in business intended for the Complainant being diverted to the Registrant.

11. The registration by the Registrant of the domain name in dispute blocked the Complainant from registering a domain name incorporating its own name or mark and made it necessary for it to register a domain name comprising "mrplastics", in the plural. The fact that the Complainant's domain name did not correspond with its business name caused it to lose e-mails which should have been directed at it but were instead directed at the Registrant.
12. As a result of the Registrant's use of the domain name in dispute, a Google search in respect of "mrplastic", yields various results which indicate the Registrant's business. This is the direct result of the confusion caused amongst customers and prospective customers of the Complainant by the similarity between the domain name in dispute and the Complainant's name or mark.
13. The Registrant deliberately obstructs the Complainant's business by failing to re-direct e-mails to it which the Registrant knows to be e-mails intended for the Complainant.
14. The Registrant when signing the "Terms & Conditions for Domain Name Registration" failed both in 2000, when it originally obtained the domain name in dispute, and in 2007 when it reversed the unauthorised transfer of the domain name to the Registrant, to declare in terms of paragraph 5.1.4 of the UniForum SA Terms & Conditions for Domains Delegated in the CO.ZA Domain Names Space that the domain name in dispute would, inter alia, interfere with and infringe the rights of the Complainant relating to its "trade mark", its "close corporation" name and "other intellectual property rights".
15. In general, the domain name in dispute has been used by the Registrant in a manner that takes unfair advantage and is unfairly detrimental to the Complainant's rights.
16. The relief sought by the Complainant is that the Adjudicator issues a directive for the transfer of the domain name to the Complainant on the grounds that it is an abusive registration in the name of the Registrant.

b. Registrant

The Registrant defends the Complainant's claim on the following grounds:

1. The Registrant denies that the registration of the domain name in dispute in its name is an abusive registration. It accordingly also denies that the Complainant is entitled to the relief sought.
2. The Complainant cannot claim exclusivity in the use of the name or mark MR PLASTIC, and indeed it is used by several other entities as part of their names and as a trading style, namely the following: Mr Plastic, Durban; Mr Plastic, Cape Town; Mr Plastic (Natal); Mr Plastic Properties; Mr Plastic (East Rand); Mr Plastic (Cape).
3. The name or mark MR PLASTIC is thus not necessarily denotive of the Complainant and does not distinguish the Complainant's goods and services from others. The Registrant thus denies the Complainant's claim that it has established ownership of the name or mark MR PLASTIC under the common law.
4. The Registrant contends that it registered its name, Mr Plastic Mining and Promotional Goods, in 1989 with the consent of the Complainant and that it also commenced use of the trading style MR PLASTIC and the trade mark MR PLASTIC & Device at that time with the consent of the Complainant. The Complainant has been well aware of such use of the aforementioned name, trading style and trade mark by the Registrant and did not seek to interfere with, or curtail, such use until 2007, some eighteen years after it commenced. The Registrant thus claims that it is entitled to use its corporate title, the trading style Mr Plastic and the trade mark MR PLASTIC & Device and has made extensive use of these indices and has itself acquired a reputation in respect of them.
5. The Complainant stood by while the Registrant registered and used the domain name in dispute from 2000 until 2007, a period of seven years, without objecting thereto.
6. Melville van Niekerk, acting on behalf of the Complainant, acted dishonestly in holding himself out to be a representative of the Registrant

to UniForum, when this was not the case, and improperly effected the transfer of the registration of the domain name in dispute to the Complainant. This transfer was subsequently reversed but that does not detract from the Applicant's dishonest and unlawful conduct.

7. The Registrant does not deny that the public and trade have apparently been confused in making approaches to it thinking that it was the Complainant but says that it has re-directed all such erroneous communications to the Complainant. He also claims that the confusion has partly been caused by changes made by the Complainant to the Registrant's domain during the time that it had been misappropriated by the Complainant.
8. The Registrant denies that it registered the domain name in order to disrupt the Complainant's business. It says that at the time of registering the domain name, in October 2000, the Registrant was known as Mr Plastic and it will always be known by that name or trade mark. There was no malice on the part of the Registrant in registering the domain name in dispute nor any intention to disrupt the business of the Complainant.
9. Any similarity between the websites of the two parties is due to the Complainant copying the Registrant's website, since it dates from an earlier time than the Complainant's website.
10. The Registrant's wish has at all times has been to run its business in the same manner that it has done for many years, commencing in 1989, without any harassment or intervention by the Complainant.

4. Discussion and Findings

The Complainant's case is that it has rights in respect of a name or mark, namely Mr Plastic CC, which is identical or similar to the domain name in dispute, i.e. mrplastic.co.za, and that, in the hands of the Registrant, the domain name is an abusive registration. (See Regulation 3(1) of the Alternative Dispute Resolution Rules).

The Complainant is required to prove, on a balance of probabilities, to the Adjudicator that the required elements of the aforementioned complaint are present (See Regulation 3(2)). The Adjudicator must decide the dispute on the documents placed before him (See Regulation 27).

The term “abusive registration” is defined in the Rules to mean a domain name which either

- “(a) was registered 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
- (b) has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the complainant’s rights;”

It follows from the foregoing that the cornerstone of the Complainant’s case is that it must prove that it has rights in the name or mark MR PLASTIC.

The Complainant in 1976 registered a company name “Mr Plastic (Pty) Limited” and in 1991 it converted that company to a close corporation having the name “Mr Plastic CC”. The registration of a company name or a close corporation name, per se, conferred upon the entity in question no rights in that name enforceable against third parties in the sense that third parties can be restricted from using it (See **Webster and Page** “South African Law of Trade Marks”, Fourth Edition, paragraph 15.8). The Complainant seeks to substantiate holding rights in the name or mark MR PLASTIC by relying on use of its corporate title, the trading style Mr Plastic and the trade mark MR PLASTIC & Device which it adopted in or about 1980. It is the Complainant’s contention that, through having acquired repute as a result of use, the name or mark MR PLASTIC is part of the goodwill of its business.

In essence and in effect the Complainant is relying on the common law cause of action passing-off as the grounds of its objection. Indeed, the Complainant categorises its objection as being passing-off. A claim of passing-off by the Registrant, if sustained, would render the domain name in dispute and its use by the Registrant an abusive registration.

Passing-off consists of a representation by one person that his business or merchandise is that of another or that it is associated with that of another; in order to determine whether a representation amounts to passing-off one enquires 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. (See **Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc** 1977 (2) SA 916 (A)).

A representation cannot lead to the making of an erroneous connection in the course of trade with a particular person unless that business or person is well known and the representation can thus be interpreted as referring to him or his business. Where a trade mark or name is relied upon in order to make the connection with a person or his business, that trade mark or name must enjoy a substantial repute and it must as a result be capable of denoting the goods or business of that trader. In other words, it must be distinctive of that trader (See **Webster & Page**, *op cit* paragraphs 3.4.3 and 15.10). For the Complainant to succeed with its ground of objection to the domain name in dispute it must establish that the name or mark MR PLASTIC is distinctive of it. In other works, it must show that the name or mark MR PLASTIC is a sign by means of which the trade or the public necessarily connects trading activities with the Complainant.

In order to establish the distinctiveness of its name or mark MR PLASTIC, the Complainant relies on the use which it has made of that name or mark, whether in word form or as part of the MR PLASTIC & Device trade mark, over a period of 27 years. It has established constant use of the mark over this period and it has shown that currently that use amounts to 250 transactions per day and a turnover of R18 million per annum. The Registrant has admitted that the Complainant's business under its name MR PLASTIC enjoys a reputation. However, this situation must be viewed in the light of the fact that the Registrant has also used the name or mark MR PLASTIC for a period of 18 years and the extent of such use is estimated at being approximately 25% of the Complainant's use of the name or mark. Furthermore, the name or mark has been also used by at least Mr Plastic (Natal)

(established in 1990) and Mr Plastic (Cape) (established in 1987). There are also in existence entities named Mr Plastic Durban, Mr Plastic (Cape Town), Mr Plastic Manufacturing, Mr Plastic Properties and Mr Plastic (East Rand) who may have used their names and trading style Mr Plastic. It is true that Mr Plastic Cape Town, Mr Plastic Durban and Mr Plastic Properties are close corporations of which Melville van Niekerk is the sole owner, but they are nevertheless separate entities in law and are distinct from the Complainant.

In the absence of a trade mark being registered (the Complainant's mark MR PLASTIC is not) and a licensee being recorded as a registered user of that registered trade mark, in the case of use prior to 1995, or it being in terms of a licence granted by the registered proprietor of the mark after 1995, use of a mark or name by another party inures to the benefit of the actual user under the common law (See "**Webster and Page**", op cit. paragraphs 11.1 to 11.5). There is nothing in the evidence to show that at least the Registrant, Mr Plastic (Natal) and Mr Plastic (Cape), (all of whom have used the trading style Mr Plastic and the trade mark MR PLASTIC & Device) have used the signs under the supervision, or control and subject to the dictates, of the Claimant or that the Complainant has conducted itself in any way towards such use as a licensor of the signs. Indeed, the evidence suggests the contrary.

Use of the name or mark MR PLASTIC by the aforementioned other entities, including the Registrant, has inured to the benefit of the users in each instance, and not to the Complainant, with the result that there is a situation where several traders, including the Registrant, are, and have for many years, been using the mark MR PLASTIC independently and in their own right. This has caused the name or mark MR PLASTIC to be diluted and it is thus highly questionable whether the name or mark MR PLASTIC in the circumstances is distinctive of the Complainant and necessarily denotes the goods or services of the Complainant.

The dubious distinctive nature of the name or mark MR PLASTIC is compounded by its inherent descriptive qualities. It is trite that the more descriptive a name or mark is the less it is inherently adapted to distinguish the goods or services of a particular

trader from those of another (See **Reddaway v Banham** (1886) RPC 218 of 224). A name or mark which is inherently lacking in distinctiveness can acquire distinctiveness through extensive use but then that use and its resulting in distinctiveness must be clearly established. Mere use and a reputation does not equate with distinctiveness (See **Berkelder Bpk v Shoprite Checkers (Pty) Ltd** 2006 (4) SA 275 (SCA), paragraph 18). It must be shown that the consequence of the use and reputation has brought about a situation where the name or mark in fact denotes one trader, and no other.

It is significant that the Complainant in its Reply concedes that it has not licensed any of the other users of the name or mark MR PLASTIC of which Van Niekerk is not the owner, to use that mark, which confirms that each of such users have used the mark independently and in its own right (See paragraph 11.1.1.1 of the Complainant's Reply) and that MR PLASTIC is wholly descriptive of the Complainant's business (See paragraph 11.1.1.1.7 of the Complainant's Reply).

While there have been instances of the use of the domain name in dispute by the Registrant causing confusion in that customers or potential customers have contacted the Registrant in the belief that they were dealing with the Complainant, "*confusion per se does not give rise to an action for passing-off. It does so only where it is the result of a misrepresentation by the Defendant that the goods which he offers are those of the Plaintiff or are connected with the Plaintiff*" (per Nicolas AJA in *Hoechst Pharmaceuticals (Pty) Ltd v Beauty Box (Pty) Ltd* (in liquidation) 1987 (2) SA 600 (A) at 619D). Confusion may arise from the mere fact that the parties are conducting the same trade and using descriptive titles of which neither can claim any legitimate monopoly (see **Webster & Page** *op cit* paragraph 15.19). Where a trader adopts a descriptive designation as a name or mark he must reconcile himself to the fact that a measure of confusion may ensue if other traders use the same descriptive name (see *Office Cleaning Services v Westminster & General Cleaners Ltd* (1946) 63 RPC 39). In the present situation it is considered that the confusion which has taken place has been due to the fact that the Complainant and the Registrant are conducting essentially the same trade, and are using largely descriptive names in respect of which neither can claim exclusive rights, by virtue of the non-

distinctiveness of the name and the concurrent rights which each party enjoys in its name or trading style.

Weighing up all relevant considerations the Adjudicator holds that the Complainant has failed on the evidence to show that the name or mark MR PLASTIC is distinctive of its business and necessarily denotes its business to members of the trade and public and thus that it has a valid claim of passing-off against the Registrant under the common law. It follows that it has also not discharged the onus of showing on a balance of probabilities that it has rights in respect of the name or mark MR PLASTIC enforceable against any third party, and in particular against the Registrant.

In WIPO Arbitration and Mediation Center Case Case No. D2001-0831 **PowerTV Inc v PowerNet Internet Group**, and Case no. D2002-0241 **The Leading Hotels of the World v Online Travel Group** the issue of whether the Complainants had established rights in names or marks which could serve as the basis for objections to domain names was considered but in each instance it was found that the Complainants had indeed established rights in the names or marks in question. The principle that relief could be refused if the Complainant fails to establish rights in the name or mark on which it relied was however recognised.

Furthermore, it is considered that the evidence shows that the Registrant has been commonly known by the name or trading style "Mr Plastic" and has been legitimately connected with that mark and its trading style "Mr Plastic" for a period of 18 years. It has used the trading style MR PLASTIC and the trade mark MR PLASTIC & Device since 1989, not as a licensee of the Complainant, but as a concurrent user and has thus acquired concurrent rights in the name and mark MR PLASTIC (See **Webster and Page** op cit. 15.29.2). This is explicitly a circumstance which in terms of Regulation 5(a) of indicates that the domain name in dispute is not an abusive registration.

The Registrant's use of the trading style "Mr Plastic" and the trade mark MR PLASTIC & Device was authorised by the Complainant in 1989 and approved or condoned by the Complainant until very recent times. There is nothing in the evidence to suggest

that the Complainant was entitled to revoke that authorisation unilaterally, or that it purported to do so prior to the letter of demand dispatched on its behalf on 26 January 2007. In any event it is considered that in the circumstances the Complainant is precluded from restraining the Registrant from using the signs on the grounds of estoppel or acquiescence (see **Webster & Page** *op cit* paragraph 12.49 and **Policansky Brothers v Hermann & Canard** 1910 TPD 1265), having stood by while the Registrant used these signs for 17 years.

It is considered that the Complainant conducted itself fraudulently and improperly in this matter in that Van Niekerk, acting on behalf of the Complainant, misrepresented in stating under oath to UniForum that, as a representative of the Registrant, he was authorised to transfer the domain name in dispute to the Complainant, and purported to do so. This conduct attributable to the Complainant raises the question of whether the Complainant should be non-suited on the basis of it having unclean hands (see **Webster & Page** *op cit* paragraph 15.29.5). The Adjudicator makes no finding in this regard.

For the reasons advanced above, the Adjudicator holds as follows:

a. The Complainant has failed to show that it has established rights in respect of a name or mark which is identical or similar to the domain name in dispute.

b. Abusive Registration

The domain name in dispute:

- i. Was not registered 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;**
- ii. Has not been used in a manner that takes unfair advantage of, or is unfairly detrimental to the Complainant's rights.**

5. Decision

For all the foregoing reasons, dispute is refused.

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[OWEN DEAN]
SAIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za