

Decision

ZA2013.0141

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

ADJUDICATOR DECISION

CASE NUMBER:	ZA2013-0141
DECISION DATE:	24 June 2013
DOMAIN NAME	rostruct.co.za
THE DOMAIN NAME REGISTRANT:	Rosond (Pty) Ltd
REGISTRANT'S LEGAL COUNSEL:	None
THE COMPLAINANT:	Rostruct Mining (Pty) Ltd
COMPLAINANT'S LEGAL COUNSEL:	Berdou Attorneys
2 nd LEVEL ADMINISTRATOR:	UniForum SA (CO.ZA)

1 Procedural History

- a) The Dispute was filed with the South African Institute of Intellectual Property Law (the “SAIIPL”) on **18 April 2013**. On **22 April 2013** the SAIIPL transmitted by email to UniForum SA a request for the registry to suspend the domain name(s) at issue, and on **24 April 2013** UniForum SA confirmed that the domain name had indeed been suspended. The SAIIPL 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 SAIIPL’s Supplementary Procedure.
- b) In accordance with the Regulations, the SAIIPL formally notified the Registrant of the commencement of the Dispute on **24 April 2013**. In accordance with the Regulations the due date for the Registrant’s Response was **23 May 2013**. The Registrant did not submit any response, and accordingly, the SAIIPL notified the Registrant of its default on **24 May 2013**.
- c) The SAIIPL appointed **Megan Reimers** as the Adjudicator in this matter on **11 June 2013**. The Adjudicator has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the SAIIPL to ensure compliance with the Regulations and Supplementary Procedure.

2 Factual Background

- 2.1 The Complainant is Rostruct Mining (Pty) Ltd.
- 2.2 The Registrant is Rosond (Pty) Ltd.

2.3 Aside from who the parties are, the facts are not clear from the papers. The facts which can be gleaned are:

2.3.1 In 1991, a company called Rosond (Cape) (Pty) Ltd was incorporated in South Africa.

2.3.2 In 2004, Rosond (Cape) (Pty) Ltd changed its name to Rodio (Cape) (Pty) Ltd.

2.3.3 In 2009, another company, Rostruct (Africa) Limited, acquired the shares in Rodio (Cape) (Pty) Ltd.

2.3.4 In 2010, Rodio (Cape) (Pty) Ltd changed its name to Rostruct Mining (Pty) Ltd, the Complainant in this dispute.

2.3.5 In 2010, the Registrant, Rosond (Pty) Ltd, registered the domain name *rostruct.co.za*.

2.4 Paragraph 11.1.11 of the Complaint reads: *“The Complainant was incorporated in 1991. During 2009, Rostruct (Africa) Limited (situate in Mauritius) acquired the shares of the company from the holding company of the Registrant, and the Complainant's name was changed from RADIO (CAPE) to ROSTRUCT MINING in keeping with the purchaser's name. The Complainant's name had changed from ROSOND (CAPE) to RADIO (CAPE) in 2004. Copies of the relevant documentation from the Companies Office is attached marked annexure “R2”.* The facts outlined above have been taken from this paragraph. What is not clear from this paragraph or from anywhere else in the Complaint is who “the holding company of the Registrant” is and how the Registrant, Rosond (Pty) Ltd is linked to the original Rosond (Cape) (Pty) Ltd which was incorporated in 1991.

2.5 A letter of demand was sent by the Complainant to the Registrant and it appears that the Registrant refused to transfer the domain name. However, no copies of correspondence, including the demand or any response, are provided. No detail on the nature of the dispute is given in the Complaint.

2.6 The Complainant is the Applicant in South Africa of trade mark application no. 2013/01279-80 ROSTRUCT in classes 37 and 42. These applications were filed only in January 2013.

2.7 The disputed domain name was registered on 6 September 2010.

3 Parties' Contentions

3.1 Complainant

- a) The Complainant alleges that it has rights in the ROSTRUCT trade mark based on the applications which it filed in January 2013. The Complainant also refers, in paragraphs 11.11.5 and 11.1.1.6, of the Complaint, to business conducted by the Complainant. Financial statements for the financial years ending 2011 and 2012 are attached in support.
- b) The Complainant asserts that it has statutory and common law rights based on these allegations and that the disputed domain name is identical to the Complainant's ROSTRUCT trade mark.
- c) The Complainant asserts that the Registrant has no *bona fide* claim to the ROSTRUCT trade mark and that there is a dispute between the parties.
- d) The Complainant alleges that the domain name in the hands of the

Registrant is abusive because the Registrant has registered the domain name with an intention to block the Complainant from registering it. Second, the Complainant alleges that the registration of the disputed domain name has unfairly disrupted the business of the Complainant in that it has been prevented from setting up a website at the disputed domain name to advertise, promote and provide information regarding its business. Finally, the Complainant alleges that the Registrant's registration of the disputed domain name is a clear and intentional attempt to prevent the Complainant from exercising its rights in the name ROSTRUCT.

3.2 Registrant

- a) The Registrant did not reply to the Complainant's contentions.

4. Complainant's Rights

- 4.1 The Adjudicator finds that the Complainant has not established that it has rights in the ROSTRUCT trade mark and that these rights trump the Registrant's rights.
- 4.2 The Complainant has only submitted proof of trade mark applications filed in 2013, which is after the date on which the offending domain name was registered by the Registrant. These unregistered trade mark applications in and of themselves cannot be evidence of the rights of the Complainant. The Complainant asserts that it has statutory rights in the ROSTRUCT trade mark but has not provided any proof of such rights.
- 4.3 The Complainant has made broad sweeping statements regarding business conducted by the Complainant and its holding company but has not indicated where this business was conducted or whether it was under the

ROSTRUCT trade mark. No evidence is provided of use of the trade mark before 2010, when the offending domain name was registered. In the circumstances, it cannot be found that the Complainant has common law rights in the trade mark ROSTRUCT either.

5 Abusive Registration

5.1 There is no need to decide on this aspect as the Adjudicator finds that the Complainant has not established rights in the ROSTRUCT trade mark. Nevertheless, it can be stated that the allegations made on the papers do not support a conclusion that the registration of the domain name is abusive. No evidence is provided of the nature of the dispute referred to in the complaint and no evidence is given as to why the domain name would be abusive.

6. Decision

6.1 For all the foregoing reasons, the dispute is refused.

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MEGAN REIMERS
SAIIPL SENIOR ADJUDICATOR
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