



Decision

ZA2011-0102

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

ADJUDICATOR DECISION

CASE NUMBER:	ZA2011-0102
DECISION DATE:	01 March 2012
DOMAIN NAME	nutri-ag.co.za
THE DOMAIN NAME REGISTRANT:	Nutri-Ag
REGISTRANT' S LEGAL COUNSEL:	None
THE COMPLAINANT:	NutriAg Limited
COMPLAINANT' S LEGAL COUNSEL:	Mr Louis Van Wyk of Spoor & Fisher
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 “SAIPL”) on **14th December 2011**. On the **15th December 2011** the SAIPL transmitted by email to UniForum SA a request for the registry to suspend the domain name at issue, and UniForum SA confirmed that the domain name had indeed been suspended on **22 December 2011**. 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 the **22nd December 2011**. In accordance with the Regulations the due date for the Registrant’ s Response was the **24th January 2012**. The Registrant did not submit any response, and accordingly, the SAIPL notified the Registrant of its default on the **25th January 2012**.
- c) The SAIPL appointed **Gavin Edwin Morley SC** as the Adjudicator in this matter on the **7th February 2012**, although the Adjudicator was only able to access the relevant papers on the **16th February 2012**. 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.
- d) The Adjudicator requested further particulars of the Complainant’ s trade mark registrations in the United States and Canada and this information was furnished to the Adjudicator on the **29th February 2012**

2 Factual Background

- 2.1 The domain name was registered on the **14th August 2009**.

2.2 The Complainant is NutriAg Limited, a company at 39 Gail Grove, Toronto, Canada.

2.3 The Complainant is the proprietor of the following trade mark registrations consisting of the word NUTRIAG in South Africa, United States of America and Canada:

a) United States of America - Registration No. 4000937 dated the 1st June 2010, registered in respect of the following goods:

“Water conditioners and spray adjuvants for spraying crops; non-pesticidal chemical additives for use with pesticides in agriculture, horticulture and forestry; preparations and chemical additives for killing weeds and destroying vermin for agricultural use; plant and crop nutrition agents, plant and crop protection agents, namely, fertilisers; fungicides, plant nutrients, plant fertilisers, plant stimulators; plant activators, agricultural spray adjuvant, namely, a wetter spreader.”

b) Canada - Registration No. TMA778, 481 dated 30th November 2009, claiming first use on the 29th September 2010 in respect of:

“Water conditioners and spray adjuvants for spraying crops; non-pesticidal chemical additives for use with pesticides in agriculture, horticulture and forestry; preparations and chemicals additives for killing weeds and destroying vermin for agricultural use; plant and crop nutrition agents, plant and crop protection agents, namely, fertilisers; fungicides, plant nutrients, plant fertilisers, plant stimulators; plant activators, agricultural spray adjuvant, namely, a wetter spreader.”

c) South Africa - Registration No. 2009/22444 dated the 17th November 2009 in class 1 in respect of:

“Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuff; tanning substances; adhesives used in industry.”

d) South Africa - Registration No. 2009/22445 in class 5 dated the 17th November 2009 in respect of:

“Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies, plasters, materials for dressings; material for stopping teeth,

dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.”

- 2.4 It is to be noted that the registered trade mark rights were all applied for after the registration of the domain name in issue.
- 2.5 In the early 1960’ s the Complainant was founded by Doctor Jonah Fisher, an agronomist. Since that time the Complainant has been involved in the development, registration, manufacture, marketing and selling of a range of agricultural chemicals, including adjuvants, plant nutrients (micros) and crop protection products. The Complainant’ s activities extended to Toronto, Canada in 1993 and a multi-functional manufacturing facility was set up in January 1999 in Toronto, to manufacture various plant nutrients (micros) (liquid & crystalline products), as well as various spray adjuvants.
- 2.6 The Complainant’ s business was extended to countries outside of Canada and the United States from 2001 onwards. The Complainant’ s products have been distributed by means of distributors and dealers.
- 2.7 In South Africa the Complainant’ s NUTRIAG products have, since 2001, been made available to the South African public through its agent Plaaskem (Pty) Limited. Plaaskem itself is stated, on its website, to be responsible for its own in-house development, manufacturing, formulation and distribution of specialised agricultural chemical products. The Adjudicator accepts that Plaaskem (Pty) Limited is a large concern in the agrochemical sector. It appears that the Complainant’ s products such as CalciMax, Cu-Max, MagMax, Cambor, ManMax, SoMo and K-Max are sold directly to the South African public by Plaaskem.
- 2.8 Although the adjudicator has not been provided with turnover figures for sales in South Africa, he has been provided with a series of invoices, which indicate the importation of the Complainant’ s products into South Africa

from at least 2004. These invoices indicate that the Complainant's NUTRIAG products have been available in South Africa from a date prior to the incorporation of the Respondent and the registration of the domain name.

2.9 The Complainant has been listed as a supplier of agrochemical products in the Farm Chemicals Handbook since 2001.

2.10 The Adjudicator has not had regard to assertions by the Complainant, which are in the nature of legal conclusions, where the Complainant has not provided underlying facts. For example the withholding of any particulars of turnover has inhibited a finding as to the extent of the Complainant's common-law rights to the mark NUTRI-AG in South Africa. The Adjudicator would have expected to be furnished with at least a turnover figure for the relevant period even if this was not particularised by year. The assertion has been made that the NUTRIAG trade marks have been promoted widely in South Africa and are available to the public on a daily basis. There are no facts to support this assertion. It is further asserted that the renown of the NUTRIAG brand internationally and in South Africa is as a direct result of the time, effort and money committed by the Complainant and its agent to promote and advertise the NUTRIAG brand. The Complainant has not provided any details of the way in which the NUTRIAG trade marks have been promoted widely. The Adjudicator cannot find from these bald assertions that the NUTRIAG brand in fact enjoys a renown internationally and there is no particulars of the amount of time, effort or money committed in the promotion and advertising of the NUTRIAG brand. Without the underlying facts in support of the assertions, they were unhelpful to the Adjudicator and do not take the Complainant's case any further.

2.11 The Complainant released a product reference application in 2011 and it also appears that the Complainant uses Facebook to promote its products. A perusal of the extract from the Facebook page seems to date the entry on

Facebook to 2011. In the context of the present case, where the relevant time for determining the Complainant's rights is at the 14th August 2009, the product reference application, and the Facebook entry do not take the matter much further.

2.12 The Complainant became aware of the Registrant's use of the offending domain name in October 2009 when customers complained that they were being confused and/or deceived between the Complainant and the Registrant's businesses. A letter of demand was sent to the Registrant by the Complainant's attorneys on the 24th May 2010. The pertinent paragraphs of the letter state as follows:

"Our client is the proprietor of the trade mark NUTRIAG in relation to 'agricultural chemicals, plant nutrients and crop protection products' which it has extensively used since 1993. Our client supplies state of the art environmentally responsible agricultural chemicals and plant nutrients to several countries worldwide under the trade mark NUTRIAG.

As a result of the extensive use which our client has made of its trade mark NUTRIAG over a considerable period of time it has acquired a substantial reputation and goodwill therein. Such has been our client's use and acquired repute of the name NUTRIAG that it has become a well-known mark internationally and in South Africa. In light of the foregoing, our client is entitled to the exclusive use of the name NUTRIAG and is entitled to object to any unauthorised use thereof, or any name confusingly similar thereto, in relation to the activities of interest to our client.

It has come to our client's attention that you have obtained a registration of and/or are using the name Nutri-Ag Nutrition CC in respect of services which are the same as or similar to those of interest to our client. This name is confusingly (sic) to our client's trade mark NUTRIAG. Our client has not authorised your use and/or registration of the mark NUTRIAG in this manner and your use thus constitutes passing-off as of common-law (sic) and trade mark infringement in terms of section 35(3) of the Trade Marks Act 1993. Your use of the name Nutri-Ag Nutrition CC in this manner is thus unlawful.

As a result of your unlawful conduct our client is entitled to institute proceedings against you in the High Court for an interdict, damages, delivery up of all materials in your possession featuring the offending mark, costs of suit as well as various other forms ancillary relief (sic).

Unless you comply with the following demands forthwith, our client will have recourse to the High Court in order to protect and enforce its rights:

- 1. Immediately cease all use of the name Nutri-Ag and furnish our client with a written undertaking that you have done so and will refrain from doing so in the future;*
- 2. Amend the name of your close corporation incorporated under Registration No. 2007/079849/23 so as to exclude the name Nutri-Ag therefrom.....”*

2.13 Despite numerous reminders no formal response was forthcoming from the Registrant and on the 29th July 2011 a further letter was addressed. It was in similar terms to the previous letter of the 24th May 2010, except that it included the following paragraphs:

- 5. In addition, our client has discovered that you have registered the domain name nutri-ag.co.za (hereinafter referred to as “the Domain Name”). It is our client’ s contention that the Domain Name is for all intents and purposes identical and/or confusingly similar to our client’ s NUTRIAG trade marks. Our client also contends that you do not have any rights or legitimate interest in respect of this Domain Name and that you are using it in bad faith.*
- 6. Our client has not authorised you to use the NUTRIAG trade mark and there is no connection in the course of trade between our client and you. It is contended that your use of the offending name and Domain Name is calculated to confuse the public into believe (sic) that you are connected in the course of trade with our client. These perceptions are obviously incorrect.*
- 7. In the circumstances, your use of the offending name and Domain Name as mentioned above constitutes passing-off under the common-law and is unlawful. In addition, your conduct amounts to unlawful competition and we submit that you are aware of our client’ s well-known trade mark and are aware that your use will cause damage to our client.....”*

2.14 A further reminder was sent on the 26th August 2011.

2.15 No response to the correspondence addressed by the Complainant’ s attorneys has been forthcoming from the Registrant. In the opinion of the Adjudicator an adverse inference may be drawn against the Registrant because of its failure to respond to correspondence. It is a factor, which an adjudicator may take into account in arriving at a determination.

2.16 The Registrant is using the domain name in connection with the distribution of plant fertilisers and nutritional products and the Registrants and Complainant' s products are marketed and sold in direct competition with each other.

2.17 The Complainant has never assigned, licensed sold or transferred any rights in its NUTRIAG trade marks to the Registrant. The Complainant has certainly not granted the Registrant permission or consent to use or register its marks or similar marks as a domain name.

3 Parties' Contentions

3.1 The Complainant submits that its trade mark NUTRIAG is an immensely valuable item of intellectual property, which as a result of its continued use on an extensive scale in South Africa enjoyed a substantial repute and goodwill at the time the domain name was applied for.

3.2 The Complainant submits that the offending domain name incorporates the Complainant' s NUTRIAG trade mark in its entirety and is, for all intents and purposes, visually, phonetically and conceptually identical to the Complainant' s NUTRIAG trade mark. It is submitted that the only difference between the domain name and the Complainant' s trade marks is the inclusion of a hyphen between Nutri and Ag, which, in the event does not serve to distinguish the domain name from the Complainant' s NUTRIAG trade marks.

3.3 The Complainant submits that the offending domain name in dispute is identical to the Complainant' s NUTRIAG trade mark or, at the very least, similar to the trade mark NUTRIAG (as required by Regulation 3(1)(a)).

- 3.4 The Complainant submits that it has established that it has substantial rights in and to the NUTRIAG trade mark in that it has both statutory rights and substantial common-law rights. Accordingly the domain name is identical or at the very least similar to a trade mark in which the Complainant has statutory and common-law rights as required by Regulation 3(1)(a).
- 3.5 The Complainant submits that the Registrant has registered the offending domain name in a manner which, at the time that it was registered, took unfair advantage of and was unfairly detrimental to the Complainant's rights. In this regard the offending domain name was registered on the 14th August 2009. The Complainant was incorporated in the 1960's and commenced selling its product into the South African market in 2001, approximately 8 years prior to the registration of the offending domain name (although invoices dating back to only 2004 were produced). It is submitted that the Complainant has since 2001 made extensive use of the NUTRIAG trade mark in South Africa and its South African registrations date back to 2009. It is alleged that the Complainant's rights and in particular its common-law right predate the Registrant's registration of the offending domain name. It must be pointed out in this regard that the domain name registration preceded the Complainant's application for its registered trade marks.
- 3.6 The Complainant relies on the proviso contained in Regulation 5(c) which states 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.”*
- 3.7 In the light of this, the Complainant submits that the registration by the Registrant of a domain name identical or, at the very least, confusingly similar to its NUTRIAG trade marks shifts the burden of proof to the

Registrant to show that the registration is not abusive. In support of this submission the Complainant refers to SAIIPL Decision ZA2007-0007 at para 4.7 where the Adjudicator held that *“the name forming the subject of the domain name in question is the mark FIFA. This is identical to the mark in which the Complainant had alleged registered in common-law rights and which the adjudicator finds established for the purposes of this complaint. The shifting of the burden disposes of the matter, in that the Registrant has not responded to the complaint”* .

3.8 The Complainant further submits that even if the onus remains with it, the finding of the expert in *Nominet DRS 00658 Chivas Brothers Ltd v David William Plenderleith* is relevant, namely:

1. *Where a Registrant registered a domain name;*
2. *Which is identical to a name in respect of that which the Complainant has rights;*
3. *Where that name is exclusively referable to the Complainant;*
4. *Where there is no obvious justification for the Registrant having adopted that name for the domain name;*
5. *Where the Registrant has come forward with no explanation for having selected the domain name;*
6. *It will ordinarily be reasonable for an expert to infer first that the Registrant registered the domain name for a purpose and secondly that that purpose was abusive.”*

3.9 The Complainant submits that it is difficult to imagine any reason for the Registrant’ s choice of domain name other than bad faith intent to use the name to exploit the goodwill associated with the NUTRIAG mark. The Complainant submits that the only reasonable conclusion to be drawn is that the domain name was registered with an abusive intent, and that its current use is abusive.

3.10 The Complainant submits that there is no plausible reason for the Registrant to select the offending domain name unless it was and is a deliberate attempt to profit from confusion with the Complainant’ s marks. It is submitted that the offending domain name suggests a connection with the

Complainant and thus the Registrant is in effect exploiting the goodwill and reputation of the Complainant's NUTRIAG trade mark, whilst blocking the Complainant's registration of the domain name in South Africa, disrupting the Complainant's business, and preventing the Complainant from exercising its rights in and to the NUTRIAG trade marks.

3.11 It is further submitted by the Complainant that the fact that the Registrant is active in the agriculture, horticulture and forestry industries and supplies identical products to those of interest to the Complainant and its NUTRIAG trade marks, such as plant fertilisers and nutritional products, the goodwill and reputation subsisting in the Complainant's NUTRIAG brand would indeed be affected. According to the Complainant the Registrant intended creating an association with the Complainant's NUTRIAG products.

3.12 The Complainant submits that it is highly unlikely that the Registrant's adoption of the domain name was without knowledge of the Complainant, or of the fact that in using the name NUTRIAG in relation to exactly the same goods, the Registrant would affect the goodwill and reputation subsisting in the Complainant's brand.

3.13 The Complainant submits that the use of the domain name in relation to the same products sold by the Complainant in South Africa will lead to deception or confusion and that actual confusion has taken place.

3.14 In the light of the facts and submissions, the domain name registration is an abusive registration within the meaning of Regulation 4(1), namely:

- 1. The Registrant has registered the domain name to block intentionally the registration of a name or mark in which the Complainant has rights;*
- 2. The Registrant has registered the domain name to disrupt unfairly the business of the Complainant;*
- 3. The Registrant has registered the domain name to prevent the Complainant from exercising its rights;*

4. *The Registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the Complainant; and/or*
5. *The Registrant has used the domain name to attract web users to a website other than the Complainant's website, by creating confusion with the Complainant's trade mark as to the source, sponsorship, affiliation or endorsement of the website."*

3.15 The Complainant further contends that the offending domain name constitutes trade mark infringement in terms of Section 34(1)(a) and/or (b) of the South African Trade Marks Act and that the Complainant is entitled further to protection of the NUTRIAG trade mark under the Paris Convention as a well known trade mark in South Africa. The Complainant submits that the Registrant's domain name nutri-ag.co.za constitutes reproduction or imitation of the Complainant's NUTRIAG trade mark and is likely to cause deception or confusion. In the light of the Adjudicator's findings, it has not been necessary to consider these grounds, which are more apt for consideration by a Court determining infringement proceedings.

4 Discussion and Findings

4.1 Complainant's rights

4.1.1 By way of introduction Regulation 29(1) requires an Adjudicator to decide a dispute *"in accordance with the principles of law, on the basis of the dispute, response and reply, if any, and further statements or documents submitted in accordance with these regulations"*. As no response was delivered to the complaint, the Adjudicator can only proceed on the basis of the facts alleged in the Complainant's complaint, which have been attested to on oath. These facts have been summarised above and the Adjudicator has no reason to disregard them, subject to the qualifications mentioned.

4.1.2 Regulation 13(1) requires that an adjudicator must consider and be guided by previous decisions made in terms of these regulations, hereinafter referred to as “*national decisions*” and decisions by foreign dispute resolution providers, hereinafter referred to as “*foreign decisions*” . Regulation 13(2) further requires that an adjudicator must be guided by “*national, foreign and international law*” .

4.1.3 Regulation 3(1)(a) provides that a Registrant must submit to proceedings under the rules if a Complainant asserts, in accordance with the procedure, that - “*the Complainant has rights in respect of 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 abuse of registration.....*” .

4.1.4 The definition of “*rights*” and “*registered rights*” includes “*intellectual property rights, commercial, cultural, linguistic, religious, and personal rights protected under South African Law, but is not limited thereto*” .

4.1.5 The Adjudicator considers himself bound by the decision of the appeal panel [Xnets.co.za](#) ZA2011/0077, in which the panel stated as follows:

“5(c) *It is not necessary for present purposes to quantify, or qualify, where the line is to be drawn as to when ‘rights’ can be said to exist on the part of a Complainant or when they do not. As was stated by the majority panel in [www.seido.co.za](#) ZA2009-0030 (Appeal decision AD) at paragraph 5.7:*

‘The extent or strength of the “right” , as defined in the Regulations, require to be shown by a Complainant to have locus standi conferred on it on a balance of probabilities under Regulation 3(1)(a) is not clear but we have been guided by earlier decisions on this point.

(See WIPO Decisions Surfcult.com [2002 - 0381] and Dinkybomb.com [D 2004 - 320] and SAIPL Decisions Suncityvacations.co.za [ZA2008-0023] and Bikeandleisuretrader.co.za [ZA2008-0018].) Our view is that the threshold in this regard should be fairly low and we find that the Complainant has, through the License Agreement, established sufficient right to cross this hurdle.

[Emphasis added]

(d) *As has been recorded by Nominet Advisory the main point of the test is to make sure that the person who complains is someone with a proper interest in the complaint. The notion of “rights” for the purposes of Regulation 3(1)(a) is not trammelled by trade mark jurisprudence. By definition, rights include “intellectual property rights, commercial, cultural, linguistic, religious and personal rights protected under South African Law, but is not limited thereto” . An indication of the quality (or quantification) of rights is indicated by the WIPO Decisions to the effect that the location of a registered trade mark is irrelevant when finding “rights” in a mark for the purposes of a complaint.*

(e) *For example, the following was stated in {Thaigen.net} UDRP Case No. D2002-0358:-*

‘These rights acquired in the United States are relevant for this administrative proceeding, although the Complainant is from the Cayman Islands and the Respondent from Thailand. As indicated by the panel in Bennet Coleman & Co. Ltd v Steven Lallwani WIPO Case No. D2000-0014 and Bennet Coleman & Co. Ltd v Long Distance Telephone Company, WIPO Case No. D2000-0015, ‘the essence of the internet is its worldwide access’ . The propriety of the domain name registration may be questioned by comparing it to a trade mark registered in any country.’ ”

4.1.6 Regulation 3(2) requires that a Complainant prove, on a balance of probabilities that -

- (a) the Complainant has rights in respect of a name or mark;
- (b) the name or mark is identical or similar to the domain name;
- (c) the domain name, in the hands of the Registrant is an abusive registration.

- 4.1.7 The Adjudicator finds that although the trade mark registrations are irrelevant having been applied for after the domain name registration the Complainant has proved the requisite common law rights for the reason that the Complainant has proved use of the mark NUTRIAG in South Africa for a period of five years or more prior to the registration of the domain name. The Adjudicator makes this finding in spite of the shortcomings in the Complainant's case to which reference has been made. The use over an extended period of time coupled with a failure on the part of the Respondent to respond to correspondence and explain its conduct, leads the Adjudicator to draw the inference that the Complainant has demonstrated its right.
- 4.2 In the determination of the Adjudicator, the insertion of a hyphen between "Nutri" and "Ag" does not alter the substantial identity of the registered trade marks and the domain name complained of.
- 4.3 An abusive registration is defined in Regulation 1 as meaning 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 to the Complainant's rights."*
- 4.4 In terms of Regulation 4(1) factors, which may in the present case indicate that a domain name is an abusive registration include:
- (a) Circumstances indicating that the Registrant has registered or otherwise acquired the domain name primarily to -*
 - (i) Block intentionally the registration of a name or mark in which the Complainant has rights;*

- (ii) *Disrupt unfairly the business of the Complainant; or*
 - (iii) *Prevent the Complainant from exercising his, her or its rights;*
- (b) *Circumstances indicating that the Registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the Complainant;”*

4.5 Regulation 5 deals with circumstances that might indicate that the domain name is not an abusive registration. Regulation 5(c) appears to be relevant in this regard and provides that a factor which might indicate that the domain name is not an abusive registration, includes:

“(c) That the Registrant has demonstrated fair use, which use may include websites 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.....”

[Emphasis added]

This provision was considered in decision ZA2007-0007 fifa.co.za where in paragraph 4.6 the Adjudicator held:

“As indicated, the proviso to Section 5 provides 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 its rights, without any addition.

This proviso does not seem to have appropriate placing in this subsection, given that its apparent meaning is to operate as a shifting of the overall burden.)

4.6 The Adjudicator went on to say:

“The section is clear in its reference to the ‘burden of proof’ , ie. the onus. Whether a shifting of the onus as opposed to the evidentiary burden, is intended is open to question. CFDRS02201 Viking Office Products Inc v Wenda Sparey para 7.5, 7.6 : whereas the fact that the Complainant has rights in the trade mark that is identical to the domain name does not of itself give rise to an assumption of an abusive registration, ‘the registration of an identical domain name, particularly if unadorned, may raise a presumption that the registration is abusive, because it is impossible to infer that it was chosen for any reason other than to impersonate the Complainant.’ See also British Telecommunications PLC & Others v The One in a Million Limited & Others [1998] FSR265.”

- 4.7 It is not necessary for the Adjudicator to decide whether the reference in the regulation is to a shifting of the overall “burden of proof” or whether the regulation requires the Complainant to meet an evidentiary burden. In the present case the Registrant has adopted a domain name, which to all intents and purposes is identical to the mark in which the Complainant has established rights. Without any explanation for its conduct, it is reasonable for the Adjudicator to infer that the Registrant, operating in the same field as the Complainant, registered the domain name primarily to disrupt unfairly the business of the Complainant or to block intentionally the registration of a domain name in which the Complainant has rights or that the Registrant has registered the domain name in a way which leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the Complainant. Regulation 4 is not meant to be exhaustive in its scope and the Adjudicator is satisfied that the domain name was registered in a manner which, at the time when the registration took place, took advantage of or was unfairly detrimental to the Complainant’ s rights.
- 4.8 The Adjudicator accordingly finds that the registration of the domain name was an abusive registration.

5 Decision

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

.....

G E Morley SC
SAIIPL SENIOR ADJUDICATOR
www.DomainDisputes.co.za