

## MERCHANDISE MARKS ACT 17 OF 1941

[ASSENTED TO 7 APRIL 1941]

[DATE OF COMMENCEMENT: 18 OCTOBER 1941]

*(Signed by the Governor-General in English)*

### as amended by

Merchandise Marks Amendment Act 3 of 1946

Merchandise Marks Amendment Act 26 of 1951

Merchandise Marks Amendment Act 39 of 1952

Merchandise Marks Amendment Act 47 of 1954

Merchandise Marks Amendment Act 55 of 1967

Merchandise Marks Amendment Act 54 of 1987

General Law Amendment Act 49 of 1996

Intellectual Property Laws Amendment Act 38 of 1997

Merchandise Marks Amendment Act 50 of 2001

Merchandise Marks Amendment Act 61 of 2002

**NOTE: Sections 8 and 9 of this Act were suspended until further notice by Government Notice 1682 of 9 August 1946.**

### Regulations under this Act

NOTICE IN TERMS OF SECTIONS 10 (1) AND 11 (1)

## ACT

**To make provision concerning the marking of merchandise and of coverings in or with which merchandise is sold and the use of certain words and emblems in connection with business.**

### 1 Definitions

In this Act, unless the context indicates otherwise-

**'apply to'** means emboss, impress, engrave, etch or print upon or weave into or otherwise-

- (a) work into or onto;
- (b) annex or affix to; or
- (c) incorporate in;

[Definition of 'apply to' substituted by s. 1 (a) of Act 38 of 1997.]

**'bottle'** .....

[Definition of 'bottle' deleted by s. 1 (b) of Act 38 of 1997.]

**'convention country'** means any country or group of countries declared a convention country or convention countries in terms of section 63 of the Trade Marks Act, 1993 (Act 194 of 1993);

[Definition of 'convention country' inserted by s. 1 (a) of Act 50 of 2001.]

**'covering'** includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, wrapper or container;

**'device'** means any visual representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise, but does not include a trade mark;

[Definition of 'device' inserted by s. 1 (c) of Act 38 of 1997 and substituted by s. 1 (b) of Act 50 of 2001.]

**'document'** means recorded information regardless of form or medium;

[Definition of 'document' inserted by s. 1 (c) of Act 38 of 1997.]

**'event'** means any exhibition, show or competition of a sporting, recreational or

entertainment nature which is-

- (a) held or to be held in public;
- (b) likely to attract the attention of the public or to be newsworthy; and
- (c) financed or subsidised by commercial sponsorship,

and includes any broadcast of such exhibition, show or competition;

[Definition of 'event' inserted by s. 1 (a) of Act 61 of 2002.]

**'false trade description'** means any trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, if that alteration makes the description false in a material respect;

[Definition of 'false trade description' substituted by s. 1 (d) of Act 38 of 1997.]

**'Gazette'** .....

[Definition of 'Gazette' inserted by s. 1 (a) of Act 39 of 1952 and deleted by s. 1 of Act 49 of 1996.]

**'goods'** means anything which is the subject of trade or manufacture;

**'inspector'** means-

- (a) any member as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995), of or above the rank of sergeant;
- (b) the Commissioner for Customs and Excise or any officer as defined in section 1 (1) of the Customs and Excise Act, 1964 (Act 91 of 1964);
- (c) any officer appointed under section 3;

[Definition of 'inspector' substituted by s. 1 (f) of Act 38 of 1997.]

**'label'** includes any band or ticket;

**'mark'** means any sign capable of being represented graphically, and includes a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned, but does not include a trade mark;

[Definition of 'mark' substituted by s. 1 (c) of Act 50 of 2001.]

**'Minister'** means the Minister of Trade and Industry;

[Definition of 'Minister' substituted by s. 1 of Act 54 of 1987 and by s. 1 (g) of Act 38 of 1997.]

**'name'** includes an abbreviation or addition to a name, but does not include a trade mark;

[Definition of 'name' substituted by s. 1 (d) of Act 50 of 2001.]

**'police officer'** .....

[Definition of 'police officer' deleted by s. 1 (h) of Act 38 of 1997.]

**'premises'** includes land, any building or structure, or any vehicle, ship, boat or aircraft or other conveyance;

[Definition of 'premises' inserted by s. 1 (i) of Act 38 of 1997.]

**'protected event'** means an event designated as such under section 15A;

[Definition of 'protected event' inserted by s. 1 (b) of Act 61 of 2002.]

**'sell'** includes expose for sale or have in possession for purposes of sale or any purpose of trade or manufacture, and the word **'sale'** has a corresponding meaning;

[Definition of 'sell' amended by s. 1 (1) of Act 47 of 1954.]

**'Territory'** .....

[Definition of 'Territory' inserted by s. 1 (b) of Act 39 of 1952 and deleted by s. 1 of Act

49 of 1996.]

**'trade description'** means any description, statement or other indication, direct or indirect, as to the number, quantity, measure, gauge or weight of any goods, or as to the name of the manufacturer or producer or as to the place or country in which any goods were made or produced, or as to the mode of manufacturing or producing any goods, or as to the material of which any goods consist, or as to any goods being the subject of an existing patent, privilege, or copyright, and includes any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the aforementioned matters, but does not include a trade mark;

[Definition of 'trade description' substituted by s. 1 (e) of Act 50 of 2001.]

**'trade mark'** means a trade mark as defined in section 2 (1) of the Trade Marks Act, 1993 (Act 194 of 1993), and includes a well-known trade mark contemplated in section 35 of that Act.

[Definition of 'trade mark' amended by s. 1 (c) of Act 39 of 1952 and by s. 1 of Act 49 of 1996 and substituted by s. 1 (k) of Act 38 of 1997 and by s. 1 (f) of Act 50 of 2001.]

**'Union'** .....

[Definition of 'Union' inserted by s. 1 (d) of Act 39 of 1952 and deleted by s. 1 of Act 49 of 1996.]

## 2 What acts amount to applying trade description

(1) A person shall be deemed to apply a trade description to goods who-

- (a) applies it to the goods themselves; or
- (b) applies it to any covering, label or reel in or with which the goods are sold; or
- (c) places, encloses or annexes the goods in, with or to any covering, label, reel or other thing to which that trade description has been applied; or
- (d) uses in connection with the goods a trade description in such manner as to be likely to lead to the belief that the goods are designated or described by that description.

(2) Goods delivered in pursuance of an offer or request in which reference is made to a trade description contained in any sign, advertisement, invoice, wine list, business letter, business paper or other commercial communication, shall, for the purposes of paragraph (d) of subsection (1), be deemed to be goods in connection with which that trade description is used.

(3) and (4) .....

(5) Any person who sells goods which having been used have been reconditioned, rebuilt or remade, whether in the Republic or elsewhere, and which bear the trade mark of the original maker or seller of the goods, shall, unless there is applied to them in a conspicuous manner words stating clearly that the goods have been reconditioned, rebuilt or remade, as the case may be, be deemed to apply a false trade description to the goods.

(6) Any person who applies to goods any word, name, letter, figure or mark, or arrangement or combination thereof, other than a trade mark, as is likely to lead to the belief that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, shall be deemed to apply a false description to the goods.

[S. 2 substituted by s. 2 of Act 38 of 1997.]

## 3 Appointment of officers

Subject to the laws governing the public service, the Minister may appoint such officers as he or she may deem necessary for carrying out the provisions of this Act.

[S. 3 substituted by s. 3 of Act 38 of 1997.]

#### **4 Powers of inspectors to enter and search premises and seize certain articles**

(1) If an inspector suspects that an offence in terms of this Act has been committed, is being or is likely to be committed or that preparations or arrangements for the commission of an offence in terms of this Act are being or are likely to be made on or in any premises (in this section referred to as the 'alleged offence'), he or she may, on the authority of a warrant issued under subsection (3)-

- (a) enter the premises and search the premises or the person referred to in the warrant or the owner or person in control of the premises, and there make, subject to subsection (2), the enquiries he or she considers necessary;
- (b) examine any document or thing found on or in the premises, and make copies of or make extracts from that document;
- (c) subject to subsection (2), request the owner or person in control of the premises or any person in whose possession or control that document or thing is, or who may reasonably be expected to have the necessary information, to furnish information regarding that document or thing;
- (d) seize for further examination or safe custody any document or thing on or in the premises which has a bearing on the alleged offence;
- (e) seal or otherwise safeguard any premises on or in which any document or thing which has a bearing on an alleged offence is found;
- (f) take the steps that he or she considers necessary to terminate or prevent the commission of an offence in terms of this Act.

(2) An inspector requesting information from a person in terms of subsection (1) (a) or (c) or (4) (a) shall, before so requesting information, inform the person in a language that the person understands of-

- (a) the right to remain silent; and
- (b) the consequences of not remaining silent.

(3) (a) A warrant referred to in subsection (1) shall be issued by a magistrate or a judge of a High Court, if it appears to the magistrate or judge from information on oath or affirmation that there are reasonable grounds for believing that a document or thing that has a bearing on the alleged offence-

- (i) is or will be in the possession or under the control of any person or on or in any premises within the area of jurisdiction of that magistrate or judge; and
- (ii) cannot reasonably be obtained otherwise.

(b) The warrant shall specify which of the acts contemplated in subsection (1) (a) to (f) may be performed thereunder by the inspector to whom it is issued.

(c) The warrant may be issued on any day and shall be of force until-

- (i) it is executed;
- (ii) it is cancelled by the person who issued it or, if such person is not available, by any person with similar authority;
- (iii) the expiry of three months from the day of its issue; or
- (iv) the purpose for which the warrant was issued no longer exists, whichever may occur first.

(d) An inspector shall, immediately before commencing the execution of the warrant-

- (i) identify himself or herself to the person referred to in the warrant or the owner or person in control of the premises, if such person is present;
- (ii) hand to such person a copy of the warrant or, if the person is not present, affix that copy to a prominent place on the premises;
- (iii) supply such person at his or her request with particulars regarding his or her authority to execute the warrant.

(4) (a) Subject to paragraph (b) of this subsection and subsections (2) and (5) to (10), any inspector may, without a warrant-

- (i) enter any premises, if the person who is competent to do so consents to that entry, and perform such of the acts contemplated in subsection (1) (a) to (f) which the person who is competent to do so consents to; or
- (ii) enter any premises other than a private dwelling and perform any of the acts contemplated in subsection (1) (a) to (f), except the search of any person, if there are reasonable grounds for believing that-
  - (aa) a warrant would be issued to the inspector under subsection (3) if the inspector were to apply for that warrant; and
  - (bb) the delay in obtaining that warrant would defeat the purpose of the entry.

(b) An inspector shall, immediately before entering premises in accordance with paragraph (a), identify himself or herself.

(c) Any acts performed by an inspector by virtue of paragraph (a) (ii) will cease to have any legal effect unless a magistrate or a judge of a High Court having jurisdiction in the area where the acts were performed, confirms those acts on the application of an inspector brought within 10 days of the day on which those acts had been performed.

(5) An entry, search and seizure under this section shall be-

- (a) conducted with strict regard to decency and order, including the protection of a person's right to dignity, to freedom and security and to privacy; and
- (b) executed by day unless the execution thereof by night is justifiable and necessary.

(6) The seizure of a document or thing under this section shall be effected by removing it from the premises concerned or, if that removal is not reasonably practicable, by sealing or otherwise safeguarding it on or in the premises.

(7) An inspector who may under this section enter and search any premises-

- (a) shall, immediately before the entry, audibly demand admission to the premises and make known the purpose of the entry and search, unless there are reasonable grounds for believing that a document or thing in respect of which the search occurs, may be destroyed, disposed of or tampered with if that admission is first demanded and that purpose is made known;
- (b) may use the force that is reasonably necessary to overcome resistance to the entry or search or the seizure of a document or thing under this section;
- (c) may utilize or request the assistance of any person to identify any document or thing which has a bearing on the alleged offence or to

otherwise conduct the entry or search or the seizure of any document or thing under this section.

(8) A person from whose possession or control a document has been removed under this section may, at his or her own expense and under the supervision of an inspector, make copies thereof or excerpts therefrom.

(9) (a) An inspector who removes a document or thing from any premises under this section shall issue a receipt to the person who is the owner or in possession or in control thereof or, if that person is not present, affix it to a prominent place on the premises.

(b) If an inspector who is not a member of the South African Police Service removes a document or thing under this section, he or she shall forthwith hand it over to any member of that Police Service.

(10) (a) If, during the conduct of a search under this section, a person claims that a document or thing found on or in the premises contains privileged information and refuses the examination or removal of the document or thing, the inspector conducting the search shall, if he or she is of the opinion that the document or thing contains information which has a bearing on the alleged offence, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize the document or thing for safe custody until a court of law has made a ruling on the question whether the information is privileged or not.

(b) If that information is held not to be privileged, the document or thing concerned shall be available for inspection and testing or analysis under subsection (12).

(11) Subject to subsections (12) to (15), any document or thing seized under this section shall be disposed of in accordance with the applicable provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), as if it has been seized in terms of that Act.

(12) Subject to subsection (10), a document or thing seized under this section shall-

- (a) be open for inspection by any interested person during normal office hours;
- (b) on request of any interested person, be made available for testing or analysis, if the person in whose custody the document or thing is kept or any inspector is satisfied, after taking into account the nature of the document or thing and of the testing or analysis, the purpose of the testing or analysis and the suitability of the person by whom the testing or analysis is to be conducted, that the request is reasonable.

(13) (a) If criminal proceedings are not instituted in connection with a document or thing seized under this section within a reasonable time after the seizure or, if it appears that the document or thing is not required in criminal proceedings for the purposes of evidence or an order of court, it shall-

- (i) subject to paragraph (b), be returned to the person from whom it was seized or, if that person may not lawfully possess it, to the person who may lawfully possess it; or
- (ii) be released from the safeguarding on or in the relevant premises,

as the case may be.

(b) The person in whose custody the document or thing is kept, shall 72 hours before the return notify every complainant (if any) in respect of the alleged offence to

which the document or thing relates of the intended return of the document or thing.

(14) In criminal proceedings in connection with a document or thing seized under this section, the court concerned may, without limiting any other powers of the court, order that-

- (a) if the document or thing is the subject of an offence in terms of this Act, it be destroyed;
- (b) the document or thing be released to a specified person.

(15) When a court holds that imported goods which are destined for exportation and were seized under this section are the subject of an offence in terms of this Act, the court shall not allow the exportation of those goods in an unaltered state, except if it, after due regard to the circumstances regarding the offence, thinks it fit to allow that exportation.

[S. 4 amended by s. 2 of Act 47 of 1954 and substituted by s. 4 of Act 38 of 1997.]

## **5 Obstruction of inspectors**

Any person who-

- (a) hinders or obstructs an inspector in the performance of any of his or her functions in terms of section 4;
- (b) refuses or fails without valid reason to-
  - (i) answer to the best of his or her ability, a question put to him or her by an inspector; or
  - (ii) furnish information to an inspector, after having been required to do so in terms of section 4; or
- (c) wilfully furnishes false or misleading information to an inspector,

shall be guilty of an offence.

[S. 5 substituted by s. 5 of Act 38 of 1997.]

## **6 Applying false trade description and alteration of trade mark**

[Heading substituted by s. 2 of Act 50 of 2001.]

(1) Any person who applies any false trade description to goods shall be guilty of an offence, if-

- (a) at the time of the commission of the alleged offence, the person knew or had reason to suspect that the trade description was not genuine; or
- (b) the person did not take all reasonable steps in order to avoid the commission of the alleged offence.

(2) Any person who alters any trade mark, whether by addition of effacement or in any other manner, shall be guilty of an offence, if the person did not take all reasonable steps in order to avoid the commission of the alleged offence.

[S. 6 amended by s. 1 of Act 26 of 1951, substituted by s. 6 of Act 38 of 1997 and amended by s. 2 of Act 50 of 2001.]

## **7 Sale and hiring out of goods bearing false trade descriptions**

Any person who sells or lets or offers for sale or hire any goods to which any false trade description is applied, or in relation to which a trade mark has been altered in any manner, shall be guilty of an offence, if-

- (a) at the time of the commission of the alleged offence, the person knew or had reason to suspect that the trade description was not genuine or that the trade mark had been altered; or

- (b) the person did not take all reasonable steps in order to avoid the commission of the alleged offence.

[S. 7 substituted by s. 7 of Act 38 of 1997 and by s. 3 of Act 50 of 2001.]

## **8 Sale of imported goods bearing name or make of South African manufacturer or trader, unaccompanied by indication of origin**

(1) Any person who sells or, for the purpose of advertising goods, distributes in the Republic any goods which were not made or produced in the Republic, and to which there is applied any name or mark being or purporting to be the name or mark of any manufacturer, producer or trader in the Republic or the name of any place or district in the Republic, shall be guilty of an offence, unless there is added to that name or mark, in a conspicuous manner, the name of the country in which the goods were made or produced, with a statement that they were made or produced there.

(2) This section shall not have effect in respect of the application of a name or mark to articles used or to be used for any of the following purposes, that is to say, as coverings, labels, reels, or otherwise as articles in or with which goods manufactured or produced in the Republic are or are to be sold, if the name or mark so applied is the name or mark of a manufacturer, producer or trader in those goods in the Republic, and the name or mark was applied with the consent of the manufacturer, producer or trader.

[Sub-s. (2) substituted by s. 4 of Act 50 of 2001.]

[S. 8 amended by ss. 8 and 18 of Act 38 of 1997.]

## **9 Sale of imported goods bearing marks in official language, unaccompanied by indication of origin**

Any person who sells or, for the purpose of advertising goods, distributes in the Republic any goods which were not made or produced in the Republic, and to which there is applied any mark or trade description in any official language of the Republic, shall be guilty of an offence, unless there is added to that mark or description, in a conspicuous manner, the name of the country in which the goods were made or produced, with a statement that they were made or produced there.

[S. 9 substituted by s. 9 of Act 38 of 1997 and by s. 5 of Act 50 of 2001.]

## **10 Power to require indication of origin and compliance with specified standards in the case of certain classes of goods**

(1) The Minister may, after such investigation as he may think fit, by notice in the *Gazette* prohibit the importation into or the sale in the Republic of goods of any class or description specified in the notice, whether made or produced in the Republic or elsewhere, unless one or more of the following requirements, specified in the notice, have been complied with in respect of those goods-

- (a) there shall be applied to them in a manner specified in the notice words stating clearly the country in which they were made or produced, or, if the manner in which the words shall be applied is not so specified, the words shall be applied to the goods in a conspicuous manner;
- (b) they shall, if they bear any mark specified in the notice, conform to such standard as may be prescribed in the notice;
- (c) there shall be applied to them in a conspicuous manner and as specified in the notice, words or letters stating clearly the materials of which they are composed and if so required the percentages of such materials calculated either by weight or by volume as prescribed in the notice;

[Para. (c) substituted by s. 1 of Act 3 of 1946 and by s. 2 of Act 26 of 1951.]

- (d) there shall, if after they have been used, they have been reconditioned, rebuilt or remade, whether in the Republic or elsewhere, be applied to them in the manner specified in the notice, words so specified stating clearly that they have been reconditioned, rebuilt or remade, as the case may be.

[Para. (d) substituted by s. 2 of Act 26 of 1951 and amended by s. 18 of Act 38 of 1997.]

[Sub-s. (1) amended by s. 18 of Act 38 of 1997.]

(2) The Minister may, if he is satisfied that the circumstances require it, by notice in the *Gazette* withdraw, amend or qualify any notice issued in terms of subsection (1).

(3) Any person who contravenes any such prohibition shall be guilty of an offence.

### **11 Minister may prescribe what indication of origin of goods to be made**

(1) If the Minister, after such investigation as he may think fit, is satisfied-

- (a) that, by reason of the fact that a considerable part of the labour expended in the manufacture of any goods of any class or description which are sold or which it is proposed to sell in the Republic has been expended in any particular country or elsewhere than in any particular country; or
- (b) that, by reason of the fact that a considerable part of the material of which any goods of any class or description which are sold or which it is proposed to sell in the Republic are composed has been produced in any particular country or elsewhere than in any particular country,

it is desirable that in order that the purpose of the provisions of this Act which relate to the disclosure of the place or country in which goods have been manufactured or produced may be attained, disclosure be made concerning such goods of the facts referred to in paragraph (a) or (b), he may by notice in the *Gazette* prohibit the importation into or the sale in the Republic of such goods, unless there is applied to them in a conspicuous manner words specified in the notice making disclosure of the facts referred to concerning such goods.

[Sub-s. (1) amended by s. 18 of Act 38 of 1997.]

(2) The Minister may if he is satisfied that the circumstances require it, by notice in the *Gazette* withdraw, amend or qualify any notice issued in terms of subsection (1).

(3) Any person who contravenes any such prohibition shall be guilty of an offence.

### **12 Certain provisions not to apply to trade descriptions applied to certain goods at commencement of Act**

(1) If at the commencement of this Act a trade description is lawfully and generally applied to goods of a particular class or manufactured by a particular method, to indicate that class or method, the provisions of this Act as to false trade descriptions shall not, subject to the provisions of this section, apply to that trade description when so applied.

(2) If a trade description includes the name of a place or country and is likely to lead to the belief that the goods to which it is applied were made or produced in that place or country the qualification set forth in subsection (1) shall not apply to that trade description.

(3) The Minister may, after such investigation as he may think fit, by notice in the

*Gazette* declare that a trade description mentioned in the notice is or is not a trade description to which the qualification set forth by subsection (1) applies, and thereafter, unless the notice has been withdrawn in terms of subsection (5), that trade description shall be deemed to be or not to be (as the case may be) a trade description to which the said qualification applies.

(4) The Minister may, by notice in the *Gazette*, if he is satisfied at any time that the circumstances require it, suspend the operation of either section *eight* or *nine* or of both or exempt for such period as he may deem necessary any goods or class of goods from the operation of either or both of these sections.

(5) The Minister may, if he is satisfied that the circumstances require it, by notice in the *Gazette* withdraw any notice issued in terms of subsection (3) or (4).

### **13 Affording of opportunity to interested persons to submit representations**

Before the Minister issues any notice under section *ten*, *eleven*, *twelve* or *fifteen* he shall, by direct communication with the persons who he has reason to believe are interested in the matter, or by notice in the *Gazette*, invite persons interested in the matter to submit representations on the matter within a period stated, and shall take into consideration all representations so submitted.

### **14 Unauthorized use of certain emblems**

(1) For purposes of this section a person uses a mark or trade mark if he or she uses it-

- (a) in connection with his or her trade, business, profession or occupation; or
- (b) in connection with a mark, trade mark or trade description applied by him or her to goods made, produced or sold by him or her.

[Sub-s. (1) substituted by s. 6 of Act 50 of 2001.]

(1A) (a) No person may use a mark or trade mark which consists of or contains the national flag of a convention country, or an imitation from a heraldic point of view, without authorization of the competent authority of the convention country or without being in possession of an authorization in writing signed by or on behalf of the Minister.

(b) Paragraph (a) does not apply if no authorization for the use of a mark or trade mark contemplated in that paragraph is required by the convention country.

[Sub-s. (1A) inserted by s. 6 of Act 50 of 2001.]

(1B) No person may use a mark or trade mark which consists of or contains the armorial bearings or any other state emblem, of the Republic or a convention country, or an imitation from a heraldic point of view, without authorization of the competent authority of the Republic or convention country, as the case may be.

[Sub-s. (1B) inserted by s. 6 of Act 50 of 2001.]

(1C) No person may use a mark or trade mark which consists of or contains an official sign or hallmark adopted by the Republic or a convention country, or an imitation from a heraldic point of view, and which indicates control and warranty in relation to goods or services of the same or similar kind as those in relation to which such official sign or hallmark indicates control and warranty, without authorization of the competent authority of the Republic or convention country, as the case may be.

[Sub-s. (1C) inserted by s. 6 of Act 50 of 2001.]

(1D) (a) No person may use a mark or trade mark which consists of or contains the flag, armorial bearings or any other emblem, or an imitation from a heraldic point of view, or the name, or abbreviation of the name, of any international organization of

which any convention country is a member, without authorization by such organization.

(b) Paragraph (a) does not apply if the use of the mark or trade mark contemplated in that paragraph does not suggest to the public that a connection exists between the organization and the mark or its proprietor, or is not likely to mislead the public as to the existence of a connection between the organization and the mark or its proprietor.

[Sub-s. (1D) inserted by s. 6 of Act 50 of 2001.]

(1E) Any person who contravenes or fails to comply with any provision of subsection (1A), (1B), (1C) or (1D) shall be guilty of an offence.

[Sub-s. (1E) inserted by s. 6 of Act 50 of 2001.]

(1F) This section does not apply to a trade mark registered before 1 February 1941.

[Sub-s. (1F) inserted by s. 6 of Act 50 of 2001.]

(1G) Subsections (1B), (1C) and (1D) apply to a state emblem, official sign or hallmark of a convention country, and the emblem or name, or abbreviation of the name, of an international organization only and to the extent that-

- (a) the convention country or international organization has notified the Republic in accordance with Article 6*ter* of the Paris Convention that it desires to protect that emblem, sign, hallmark, name or abbreviation, as the case may be;
- (b) the notification contemplated in paragraph (a) is in force; and
- (c) the Republic has not objected to the notification contemplated in paragraph (a) in accordance with Article 6*ter* of the Paris Convention.

[Sub-s. (1G) inserted by s. 6 of Act 50 of 2001.]

(1H) Subsection (1B) or (1C) shall not prevent the use of a trade mark by any citizen of a country who is authorized to make use of a state emblem, official sign or hallmark of that country, notwithstanding the fact that it is similar to that of another country.

[Sub-s. (1H) inserted by s. 6 of Act 50 of 2001.]

(2) Any person who uses in connection with his or her trade, business, profession or occupation any device, emblem, title or words in such a manner as to be likely to lead other persons to believe that-

- (a) his or her trade, business, profession or occupation is carried on under the patronage of; or
- (b) he or she is employed by or supplies goods to,

the President, any State department or a provincial government, without authority in writing signed by or on behalf of the President, the Minister administering that department or the Premier of the province concerned, as the case may be, shall be guilty of an offence.

[S. 14 amended by s. 2 of Act 39 of 1952 and by s. 1 of Act 55 of 1967, substituted by s. 2 of Act 54 of 1987, amended by s. 1 of Act 49 of 1996 and substituted by s. 10 of Act 38 of 1997.]

## **15 Use of certain marks may be prohibited**

(1) The Minister may, after such investigation as he or she may think fit, by notice in the *Gazette*, prohibit either absolutely or conditionally the use of-

- (a) the National Flag, or any former National Flag, of the Republic; or

- (b) any mark, word, letter or figure or any arrangement or combination thereof,

in connection with any trade, business, profession, occupation or event, or in connection with a trade mark, mark or trade description applied to goods.

[Sub-s. (1) substituted by s. 11 of Act 38 of 1997.]

(2) The Minister may, if he is satisfied that the circumstances require it, by notice in the *Gazette*, withdraw, amend or qualify any notice issued in terms of subsection (1).

(3) Any person who contravenes any such absolute prohibition or fails to comply with any condition prescribed in any such notice shall be guilty of an offence.

### **15A Abuse of trade mark in relation to event**

(1) (a) The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the *Gazette* designate an event as a protected event and in that notice stipulate the date-

- (i) with effect from which the protection commences; and
- (ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.

(b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.

(2) For the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.

(3) For the purposes of subsection (2), the use of a trade mark includes-

- (a) any visual representation of the trade mark upon or in relation to goods or in relation to the rendering of services;
- (b) any audible reproduction of the trade mark in relation to goods or the rendering of services; or
- (c) the use of the trade mark in promotional activities,

which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.

(4) Any person who contravenes subsection (2) shall be guilty of an offence.

(5) For the purposes of this section 'trade mark' includes a mark.

[S. 15A inserted by s. 2 of Act 61 of 2002.]

### **16 Implied warranty on sale of marked goods**

Every person who sells any goods to which a trade description has been applied shall be deemed to warrant that the trade description is not a false trade description unless the contrary is expressed in writing signed by the seller or on his or her behalf and delivered at the time of the sale to and accepted by the purchaser.

[S. 16 substituted by s. 12 of Act 38 of 1997.]

### **17 Containers marked with owner's name not to be sold**

(1) Any person-

- (a) who buys or sells any container or closure therefor to which have been indelibly applied words in any official language of the Republic stating plainly that the container or closure is the property of a named person; or

- (b) who sells any goods contained in any such container without the consent in writing of the person so named, unless those goods are the property of or have been produced or manufactured by the person so named,

shall be guilty of an offence.

(2) Subsection (1) shall not apply to any transaction whereby any such container or closure is sold-

- (a) by the manufacturer thereof to the person named thereon; or
- (b) with the whole of the business in connection with which it is used.

[S. 17 amended by s. 2 of Act 55 of 1967 and substituted by s. 13 of Act 38 of 1997.]

## 18 Evidence

(1) .....

[Sub-s. (1) amended by s. 3 of Act 26 of 1951 and deleted by s. 14 (a) of Act 38 of 1997.]

(2) In any prosecution for an offence under the provisions of this Act evidence that any imported goods were shipped at any port shall be *prima facie* evidence that those goods were made or produced in the country within which that port is situated.

(3) If in the prosecution of any person for an offence referred to in section 7 it is proved that-

- (a) the accused conducts business in goods of the same or similar type as the goods to which any false trade description was applied; and
- (b) the goods-
  - (i) were found in possession of the accused; or
  - (ii) the existence of which the accused was aware of or could reasonably be expected to have been aware of, were found on or in premises of which the accused was on the particular day the owner, occupier, manager or person in charge,

it shall be presumed, until the contrary is proved, that the accused offered for sale or hire the goods.

[Sub-s. (3) added by s. 14 (b) of Act 38 of 1997.]

## 19 .....

[S. 19 repealed by s. 15 of Act 38 of 1997.]

## 20 Penalties

(1) (a) Any person convicted of an offence in terms of this Act, except section 5, shall be liable-

- (i) in the case of a first conviction, to a fine not exceeding R5 000 for each article to which the offence relates or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment;
- (ii) in any other case, to a fine not exceeding R10 000 for each article to which the offence relates or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(b) Any person convicted of an offence referred to in section 5 shall be liable to a fine or to imprisonment for a period not exceeding six months.

[Sub-s. (1) substituted by s. 16 of Act 38 of 1997.]

(2) Whenever any person is convicted of an offence under the provisions of this Act, the court by which he is convicted may, in addition to any other penalty which may be imposed, order the confiscation of all or any part of the goods in respect of which the offence was committed, and goods so ordered to be confiscated shall be disposed of as

the Minister may direct.

## **21 Repeal of laws**

The Merchandise Marks Act, 1888 (Act 12 of 1888), and the Merchandise Marks Amendment Act, 1889 (Act 14 of 1889), of the Cape of Good Hope, the Merchandise Marks Law, 1888 (Law 22 of 1888), and Law 11 of 1889 of Natal, and the Merchandise Marks Ordinance, 1903 (Ordinance 47 of 1903), of the Transvaal are hereby repealed.

### **21bis .....**

[S. 21bis inserted by s. 3 of Act 39 of 1952, substituted by s. 3 of Act 55 of 1967 and repealed by s. 1 of Act 49 of 1996.]

## **22 Short title and commencement of Act**

This Act shall be called the Merchandise Marks Act, 1941, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*, which date shall not be earlier than six months after the date on which this Act is first published in the *Gazette* as a law.