

CHAPTER 14:13
MERCHANDISE MARKS ACT

Act 9/1974, 22/2001 (s. 4).

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AN ACT to prohibit the application to goods of false trade descriptions and to prohibit the sale of goods to which a false trade description is applied; to prohibit the importation, sale or distribution of certain goods unless they bear an indication of the origin thereof; to provide for the imposition of controls or restrictions on the marking of goods; and to provide for matters incidental to or connected with the foregoing.

[Date of commencement: 1st January, 1975.]

PART I
PRELIMINARY

1 Short title

This Act may be cited as the Merchandise Marks Act [*Chapter 14:13*].

2 Interpretation

(1) In this Act—

“apply to”, in relation to goods, means—

- (a) to emboss, impress, engrave, etch or print upon; or

(b) to weave or otherwise work into; or

(c) to annex or affix to; such goods;

“bottle” means a bottle made of glass, earthenware or plastic material;

“covering” means any bottle, box, capsule, case, cask, frame, vessel, wrapper or other container or cover and includes a band, label, ticket or reel;

“goods” means any thing which is the subject of trade, manufacture or merchandise;

“goods processed externally” means goods—

(a) assembled in a country other than Zimbabwe; or

(b) manufactured or produced in a country other than Zimbabwe; or

(c) the ingredients of which have been mixed in a country other than Zimbabwe and were manufactured or produced in—

(i) a country other than that in which they were mixed; or

(ii) more than one country;

“inspector” means a person who has been appointed as an inspector in terms of section *eighteen*;

“Minister” means the Minister of Industry and Commerce or any other Minister to whom the President may from time to time assign the administration of this Act;

“mix” includes blend;

“name” includes any abbreviation of, or addition to, a name;

“offending mark”, in relation to—

(a) goods processed externally, means—

(i) a mark applied to those goods containing any name which is or purports to be the name of an assembler, a manufacturer, a producer, a trader, or a mixer in Zimbabwe or the name of any town, place or district in Zimbabwe; or

(ii) a trade mark or trade description applied to those goods which contains—

A. a direct or indirect reference to any town, place or district outside Zimbabwe; or

B. otherwise than for the purpose of indicating the country in which the goods were assembled, manufactured, produced or mixed, a direct or indirect reference to any country;

(b) goods assembled, manufactured, produced or mixed in Zimbabwe, means a trade mark or trade description applied to those goods which contains a direct or indirect reference to any town, place or district outside Zimbabwe or to any country other than Zimbabwe;

“sell” includes to offer, advertise, expose, keep, have in possession or prepare for sale or for any purpose of trade or commerce;

“trade mark” means a mark which is used upon or in connection with goods for the purpose of indicating that they are, by virtue of manufacture, production, selection, certification or dealing with or offering for sale, the goods of the proprietor or of a person who is registered in terms of the Trade Marks Act [*Chapter 26:04*] as the registered user thereof.

(2) Any reference in this Act to a trade description shall be construed as a reference to any description, statement or other indication, direct or indirect, as to— (a) the number or measurement of any goods; or

(b) the standard of quality of any goods according to a classification commonly used or recognized in the trade; or

(c) the name of the assembler, manufacturer, producer or mixer of any goods; or

(d) the place or country in which any goods were assembled, manufactured, produced or mixed; or

(e) the fitness for purpose, strength, performance or behaviour of any goods; or

(f) the mode of assembling, manufacturing, producing or mixing of any goods; or

(g) the material of which any goods are composed; or

(h) the fact of any goods being the subject of an existing patent, privilege or copyright; and the use of any figure, word or mark which, according to the customs of the trade, is commonly taken to be an indication of any of the matters referred to in paragraphs (a) to (h) shall be deemed to be a trade description for the purposes of this Act.

(3) Any reference in this Act to a false trade description shall be construed as a reference to a trade description which is false in a material respect as regards the goods to which it is applied and includes any alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description false or misleading in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description from being regarded as a false trade description for the purposes of this Act.

(4) Any person who applies to goods any word, name, letter, figure or mark or any arrangement or combination thereof, whether or not consisting of or including a trade mark or part of a trade mark, which 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 trade description to the goods. PART II

3 Prohibition of application of false trade description

- (1) Subject to subsection (2), no person shall apply any false trade description to goods.
- (2) It shall be a sufficient defence to any charge under subsection (1) if the accused proves— (a) that he acted without intent to defraud; or (b) that—
 - (i) in the ordinary course of his business he was employed on behalf of other persons to apply trade descriptions to goods and that, in the case which is the subject of the charge, he was so employed by some other person and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and
 - (ii) he took reasonable precautions against committing the offence charged; and
 - (iii) he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade description; and
 - (iv) on request made by an inspector or police officer, he gave to that inspector or police officer all the information in his power with respect to the persons on whose behalf the trade description was applied.

4 Prohibition of sale of goods bearing false trade description

- (1) Subject to subsection (2), no person shall sell any goods to which a false trade description is applied.
- (2) It shall be a defence to any charge under subsection (1) if the accused proves that—
 - (a) having taken all reasonable precautions against committing an offence under subsection (1)—
 - (i) he had, at the time of the sale, no reason to suspect the genuineness of the trade description; and
 - (ii) on request made by an inspector or police officer, he gave to that inspector or police officer all the information in his power with respect to the person from whom he obtained such goods;
 - or
 - (b) otherwise he had acted innocently.

5 Prohibition of sale of imported goods unless accompanied by indication of origin

- (1) Subject to subsection (2), no person shall sell or, for the purpose of advertising goods, distribute in Zimbabwe any goods processed externally or samples of such goods to which there is applied an offending mark unless there is also applied to those goods, in the manner specified in section *eight*, the name of the country in which those goods were assembled, manufactured, produced or mixed so as to indicate that those goods were assembled, manufactured, produced or mixed, as the case may be, in that country.
- (2) Subsection (1) shall not have effect in respect of the application of a name or trade mark to—
 - (a) parts or materials of a type suitable only for consumption in a process of manufacture; or
 - (b) articles to be used as coverings; or
 - (c) articles in or with which goods assembled, manufactured, produced or mixed in Zimbabwe are to be sold; if the name or trade mark so applied is the name or trade mark of an assembler, manufacturer, producer or mixer of, or trader in, those goods in Zimbabwe and the name or trade mark is applied with his consent.
- (3) The Minister may, by statutory instrument, suspend, in relation to any goods or class of goods, the operation of subsection (1).

6 Prohibition of sale of certain local goods unless accompanied by indication of origin

- (1) No person shall sell or, for the purpose of advertising goods, distribute in Zimbabwe any goods assembled, manufactured, produced or mixed in Zimbabwe or samples of such goods to which there is applied an offending mark unless there is also applied to those goods, in the manner specified in section *eight*, the name of Zimbabwe so as to indicate that those goods were assembled, manufactured, produced or mixed, as the case may be, in Zimbabwe.
- (2) The Minister may, by statutory instrument, suspend, in relation to any goods or class of goods, the operation of subsection (1).

7 Prohibition of import of certain goods

No person shall import into Zimbabwe any goods which it would be an offence in terms of section *five* to sell or distribute.

8 Manner of application of mark

- (1) Whenever the name of the country in which goods were assembled, manufactured, produced or mixed is applied to goods for the purposes of section *five* or *six*, that name shall be applied in a conspicuous manner—
 - (a) in the case where an offending mark—
 - (i) is applied to the goods themselves, to the goods themselves; or
 - (ii) is applied to any covering or other attachment, either by means of such covering or other attachment or to the goods themselves;
 - and
 - (b) so as to render unlikely the obliteration, erasure or detachment of such name in the ordinary course of handling prior to sale to the consumer; and
 - (c) in a prominent position and so placed that it can be easily read without detaching or unwrapping any part of the covering in which the goods may be offered for sale, or wherever an offending mark is applied.

(2) Notwithstanding subsection (1), the Minister may, by statutory instrument, and for the purposes of sections *five* and *six*, prescribe in respect of goods specified in such notice the manner in which the name of the country shall be applied, and in that event subsection (1) shall not apply in relation to those goods.

9 Marking of goods on import

(1) If the import of any goods into Zimbabwe is prohibited by section *seven*, the Director of Customs and Excise, after—

- (a) being furnished by the importer thereof with proof of the country in which the goods were assembled, manufactured, produced or mixed; and
- (b) being satisfied that the goods are capable of being marked so as to comply with the requirements of section *five*;

may, within such time as he may specify, permit the importer of the goods to mark them so as to comply with such requirements.

(2) If any goods referred to in subsection (1) are marked within the time specified in terms of that subsection to the satisfaction of the Director of Customs and Excise, such goods may, notwithstanding section 47 of the Customs and Excise Act [*Chapter 23:02*], be imported into Zimbabwe.

10 Prohibition of removal of indication of origin from goods

(1) Subject to subsection (2), no person shall remove, alter or obliterate the indication of origin applied to goods in accordance with section *five*, *six* or *nine*.

(2) It shall be a sufficient defence to any charge under subsection (1) if the accused proves that the removal, alteration or obliteration was not made for the purpose of concealing the origin of the goods at the time of sale.

11 Minister may require indication of origin and compliance with specified standards in the case of certain classes of goods

The Minister may, after such investigation as he thinks fit, by statutory instrument, prohibit the importation for sale or the sale of goods of any class or description unless all or any of the following requirements, as specified in such notice, have been complied with—

- (a) there are applied to the goods words stating clearly the country in which they were assembled, manufactured, produced or mixed and such words are applied in such manner as may be specified in the notice or, if no manner is specified, in a conspicuous manner;
- (b) the goods bear such mark as may be specified in the notice and conform to such standard as may be prescribed in the notice;
- (c) there are applied to the goods 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 specified in the notice, the percentages of such materials calculated either by mass or by volume;
- (d) there are applied to second-hand goods which have been reconditioned, rebuilt or remade, whether in Zimbabwe or elsewhere, in the manner specified in the notice words stating clearly that they have been reconditioned, rebuilt or remade, as the case may be;
- (e) in the case of goods to which there is applied any number which, in the opinion of the Minister, is likely to lead to the belief that such number refers to a unit of measurement, there are added words stating clearly to what such number refers.

12 Minister may require indication of origin of certain goods

If the Minister, after such investigation as he thinks fit, is satisfied, in the case of goods of any class or description which are manufactured or produced in one country, that— (a) such goods—

- (i) have undergone in another country any treatment or process resulting in a substantial change in the goods; or
- (ii) have had a considerable part of the labour expended in the manufacture or production of such goods expended in another country; or
- (iii) are largely composed of materials made or produced in another country; and

(b) it is desirable that disclosure be made with respect to such goods of the facts referred to in subparagraph (i), (ii) or (iii), as the case may be, of paragraph (a); he may, by statutory instrument, prohibit the importation for sale or the sale of such goods unless there are applied to them in a conspicuous manner words specified in the notice making disclosure of the facts referred to concerning such goods.

13 Minister may prohibit use of certain marks

The Minister may, after such investigation as he thinks fit, by statutory instrument, prohibit, either absolutely or conditionally, the application to goods of any mark, word, letter or figure or of any arrangement or combination thereof.

14 Submission of representations by interested persons

Before the Minister issues any notice under section *eleven*, *twelve* or *thirteen*, he shall, by notice in the *Gazette*, invite representations on the matter within a period stated and take into consideration all representations so submitted.

PART III

GENERAL

15 Application of trade description

- (1) A trade description shall be deemed to be applied to goods if— (a) it is applied to the goods themselves; or (b) it is applied to a covering on, in or attached to which the goods are sold; or (c) the goods are placed in or around, enclosed by or annexed to any covering to which the trade description has been applied; or (d) it is used in any manner likely to lead to the belief that the goods in connection with which it is used are designated by that trade description.

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

16 Implied warranty on sale of marked goods

Any 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 behalf and delivered at the time of the sale to, and accepted by, the purchaser.

17 Sale of goods in bottles marked with owner's name

No person shall sell, in any bottle to which or to the stopper of which has been indelibly applied words indicating that the bottle is the property of a named person, goods resembling or so nearly resembling goods manufactured or produced for sale in any such bottle by such named person as to be likely to deceive. **18 Appointment of inspectors**

- (1) The Minister may appoint any person to be an inspector for the purposes of this Act.
- (2) An inspector shall be furnished with a certificate signed by or on behalf of the Minister stating that he has been appointed as an inspector in terms of subsection (1).

19 Powers of police officers and inspectors

- (1) A police officer or inspector may, at any time during the hours when the premises are open for business—
 - (a) enter any premises on which he has reason to believe there are kept for sale any goods, whether imported into or manufactured or produced in Zimbabwe; and
 - (b) on giving a receipt therefor, without payment, take and remove samples of any such goods for examination or inspection or for any other purpose relating to this Act.
- (2) A police officer or inspector taking a sample in terms of subsection (1) shall—
 - (a) forthwith notify the person on whose premises the sample is taken or his agent that the sample is taken in pursuance of this Act; and
 - (b) if required so to do at the time of giving such notification, select a second like sample or, if practicable, divide the sample into two parts and mark and seal and leave with that person or agent either the second sample or one part of the divided sample.

(3) Any sample taken by a police officer or inspector under the powers conferred upon him by this section shall, whenever possible, be returned by him to the person from whose premises it was removed or to his agent.

(4) Any person who hinders or obstructs a police officer or inspector in the exercise of the functions conferred on the police officer or inspector by this section shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

[Subsection substituted by section 4 of Act 22 of 2001]

(5) An inspector shall, on demand by any person affected by the exercise or the performance by him of any power or function under this Act, exhibit the certificate issued to him in terms of subsection (2) of section *eighteen*.

20 Aiding and abetting offence under this Act

No person shall within Zimbabwe procure, counsel, aid, abet or be accessory to the commission outside Zimbabwe of any act which, if committed within Zimbabwe, would be an offence under this Act.

21 Limitation of period of prosecution

- No prosecution for an offence under this Act shall be commenced after the expiration of a period of—
- (a) three years from the date on which the offence is alleged to have been committed; or
 - (b) one year after the first discovery thereof by a police officer or customs officer; whichever is the earlier.

22 Evidence

(1) Any invoice or other document submitted or used by an importer or any other person in connection with the importation of goods in respect of which a prosecution is brought under this Act may be produced as evidence in any criminal proceedings without calling the person who prepared or signed it.

(2) In any prosecution for an offence under this Act, evidence that any imported goods were shipped at any port of call shall be *prima facie* evidence that those goods were assembled, manufactured, produced or mixed, as the case may be, in the country within which that port is situated.

(3) Where, in any prosecution for an offence under this Act, the consent of the proprietor of a trade mark is a relevant issue, the onus of proving the consent of such proprietor shall lie on the accused.

23 General offence and penalty

Any person who contravenes any provision of this Act with which it is his duty to comply shall be guilty of an offence and, if no other penalty is provided therefor, shall be liable to a fine not exceeding level eight or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Section substituted by section 4 of Act 22 of 2001]

24 Forfeiture of goods

(1) On conviction of any person under this Act, the court may, in addition to any sentence passed, declare any goods in respect of or by means of which the offence was committed to be forfeited to the State, unless the owner of the goods or any person acting on his behalf or other person interested in the goods shows cause to the contrary.

(2) After any goods in respect of or by means of which it is suspected that an offence under this Act has been committed are seized by a police officer and no prosecution is instituted following that seizure—

- (a) the magistrate shall, on application by a police officer, cause a notice to be published in the *Gazette* and in a newspaper circulating in the area stating that, unless cause is shown to the contrary at the time and place specified in the notice, such goods shall be declared forfeited; and
- (b) at the time and place referred to in paragraph (a) the magistrate may, unless the owner of the goods or any person acting on his behalf or other person interested in the goods shows cause to the contrary, declare such goods to be forfeited to the State.