

South Africa

Merchandise Marks Act, 1941

Act 17 of 1941

Legislation as at 28 March 1946

FRBR URI: /akn/za/act/1941/17/eng@1946-03-28

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Contents

1. Definitions	1
2. What acts amount to applying a trade mark or trade description	2
3. Appointment of officers	2
4. Powers of inspectors and police officers	3
5. Obstruction of inspectors and police officers an offence	3
6. Forging or falsely applying trade mark and applying false trade description	3
7. Sale of goods bearing forged trade marks and false trade descriptions	4
8. Sale of imported goods bearing name or mark of a Union manufacturer or trader, unaccompanied by indication of origin	4
9. Sale of imported goods bearing marks in English or Afrikaans, unaccompanied by indication of origin	4
10. Power to require indication of origin and compliance with specified standards in the case of certain classes of goods	4
11. Minister may prescribe what indication of origin of goods to be made	5
12. Certain provisions not to apply to trade descriptions applied to certain goods at commencement of Act	5
13. Affording of opportunity to interested persons to submit representations	6
14. Unauthorized use of certain emblems	6
15. Use of certain marks may be prohibited	6
16. Implied warranty on sale of marked goods	6
17. Bottles marked with owner's name not to be sold	7
18. Evidence	7
19. Limitation of prosecution	7
20. Penalties	7
21. Repeal of laws	7
22. Short title and commencement of Act	8

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Act 17 of 1941

Published in Government Gazette 2893 on 17 April 1941

Assented to on 7 April 1941

Commenced on 18 October 1941 by [Merchandise Marks Act, 1941: Commencement](#)

[This is the version of this document as it was from 28 March 1946 to 3 May 1951.]

[Amended by [Merchandise Marks Amendment Act, 1946 \(Act 3 of 1946\)](#) on 28 March 1946]

(Signed by the Governor-General in English.)

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.

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa as follows:—

1. Definitions

In this Act, unless the context indicates otherwise—

"**apply to**" means emboss, impress, engrave, etch or print upon or weave or otherwise work into or otherwise annex or affix to;

"**bottle**" means a bottle made of glass or earthenware;

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

"**false trade description**" means any trade description, whether or not it consists of or includes a trade mark or part of a trade mark, 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;

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

"**inspector**" means an inspector appointed under section three;

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

"**mark**" includes a trade mark and, for the purposes of sub-section (1) of section eight and section nine, a mark used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, production, selection, dealing with or offering for sale;

"**Minister**" means the Minister of Commerce and Industries, or any other Minister of State to whom the Governor-General has assigned the administration of this Act, or any other Minister of State acting on behalf of any such Minister;

"**name**" includes an abbreviation or addition to a name;

"**police officer**" means any member of a police force;

"**sell**" includes expose for sale or have in possession for purposes of sale or any purpose of trade or manufacture;

"**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;

"**trade mark**" means a trade mark registered in the register of trade marks kept under the Patents, Designs, Trade Marks and Copyright Act, 1916 ([Act No. 9 of 1916](#)), or an amendment thereof.

2. What acts amount to applying a trade mark or trade description

- (1) A person shall be deemed to apply a trade mark or 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 mark or trade description has been applied; or
 - (d) uses in connection with the goods a trade mark or trade description in such manner as to be likely to lead to the belief that the goods are designated or described by that mark or 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 sub-section (1), be deemed to be goods in connection with which that trade description is used.
- (3) A person shall be deemed to forge a trade mark who—
 - (a) without the assent of the registered proprietor of that trade mark makes that trade mark or a mark so nearly resembling it as to be likely to deceive; or
 - (b) alters, adds to or effaces any genuine trade mark.
- (4) A person shall be deemed falsely to apply to goods a trade mark who, without the assent of the registered proprietor of that trade mark, applies to goods that trade mark or a mark, so nearly resembling it as to be likely to deceive.
- (5) Any person who sells goods which having been used have been reconditioned, rebuilt or remade, whether in the Union 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 have falsely applied the said trade mark.
- (6) Any person who applies to goods any such word, name, letter, figure or mark, or arrangement or combination thereof, whether consisting of or including a trade mark or part of a trade mark or not, 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 trade description to the goods.

3. Appointment of officers

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

4. Powers of inspectors and police officers

- (1) Any inspector generally or specially authorized thereto by writing signed by an officer thereto designated by the Minister, and any police officer of or above the rank of sergeant, may at any reasonable time and place require any person who has the possession or custody or control of any goods to produce those goods then and there or at a time and place fixed by that inspector or police officer.
- (2) Any such inspector or police officer may at any reasonable time examine any goods, and for that purpose may open any packages, vessels or containers, if he has reasonable cause to suspect that they contain any goods, and may enter any place, whether it is a building or a vehicle or is in the open air, and whether it is open or enclosed, if he has reasonable cause to suspect that any goods are in or on that place, and if any such place is closed, may open that place.
- (3) Any such inspector or police officer may seize and detain any goods if he has reasonable cause to suspect that in respect thereof the provisions of this Act have not been complied with, and may remove them or such portion thereof as may reasonably be necessary for further examination or for analysis.

5. Obstruction of inspectors and police officers an offence

Any person who fails to comply with any demand made by any inspector or police officer under subsection (1) of section four, or who hinders any inspector or police officer in the exercise of his functions under that section, shall be guilty of an offence.

6. Forging or falsely applying trade mark and applying false trade description

Any person who—

- (a) forges any trade mark; or
- (b) falsely applies to goods any trade mark; or
- (c) makes, disposes of or has in his possession any die, block, machine or other instrument which is capable of being used for forging a trade mark; or
- (d) manufactures, imports or has in his possession any coverings, labels or reels for the purpose of applying them contrary to the provisions of this Act; or,
- (e) applies any false trade description to goods,

shall be guilty of an offence, unless, in the case of a charge under paragraph (b), (c) or (e) it be proved—

- (i) that in the ordinary course of business he is employed to make dies, blocks, machines or other instruments for other persons to be used in the making of trade marks, or, as the case may be, to apply marks or descriptions to goods for other persons, and that the act which is the subject of the charge was done by him in the ordinary course of his employment by a person resident in the Union, and that he was not interested in the profit or commission that might be gained upon the sale of such goods; and
- (ii) that he took all reasonable precautions against committing the offence charged; and
- (iii) that he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark or trade description; and
- (iv) that on demand made by any inspector, police officer or officer of customs, he gave to him all the information in his power with respect to the persons on whose behalf the die, block, machine or other instrument was made or the trade mark, mark or description was applied.

7. Sale of goods bearing forged trade marks and false trade descriptions

Any person who sells any goods to which any forged trade mark or false trade description is applied, or to which any trade mark is falsely applied, shall be guilty of an offence, unless it be proved—

- (i) that he took all reasonable precautions against committing the offence charged; and
- (ii) that he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark or trade description; and
- (iii) that if any demand was made by any inspector, police officer or officer of customs he gave to him all the information available to him with respect to the persons from whom he had obtained the goods.

8. Sale of imported goods bearing name or mark of a Union manufacturer or trader, unaccompanied by indication of origin

- (1) Any person who sells or, for the purpose of advertising goods, distributes in the Union any goods which were not made or produced in the Union, 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 Union or the name of any place or district in the Union, 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 trade 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 Union are or are to be sold, if the name or mark so applied is the name or trade mark of a manufacturer, producer or trader in those goods in the Union, and the name or trade mark was applied with his consent.

9. Sale of imported goods bearing marks in English or Afrikaans, unaccompanied by indication of origin

Any person who sells or, for the purpose of advertising goods, distributes in the Union any goods which were not made or produced in the Union, and to which there is applied any trade mark, mark or trade description in the English or Afrikaans language, 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.

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 Union of goods of any class or description Union 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 stating clearly the materials of which they are composed and the percentages of such materials calculated either by weight or by volume as prescribed in the notice.

[paragraph (c) substituted by section 1 of [Act 3 of 1946](#)]

- (d) there shall be applied to them in a conspicuous manner, if, after they have been used, they have been reconditioned, rebuilt or remade, whether in the Union or elsewhere, words specified in the notice, stating clearly that they have been reconditioned, rebuilt or remade, as the case may be.
- (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 sub-section (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 Union 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 Union 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 Union 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.
- (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 sub-section (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 sub-section (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 sub-section (1) applies, and thereafter, unless the notice has been withdrawn in terms of sub-section (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 sub-section (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) Any person who uses in connection with his trade business, profession or occupation, or in connection with a trade mark, mark or trade description applied by him to goods made, produced or sold by him—
 - (a) without authority in writing signed by or on behalf of His Majesty or by or on behalf of the Governor-General in person, the Royal Arms, or arms so nearly resembling the Royal Arms as to be likely to deceive; or
 - (b) without authority in writing signed on behalf of the Governor-General-in-Council, the Arms of the Union, or arms so nearly resembling the Arms of the Union as to be likely to deceive; or
 - (c) without authority in writing signed by or on behalf of the Minister—
 - (i) the style, title, name, portrait or effigy of the King, of a member of the Royal Family, of the Governor-General or of a Minister of State of the Union; or
 - (ii) the name, portrait or effigy of any President of the South African Republic or of the Orange Free State; or
 - (iii) a reproduction of the National Flag of the Union,

shall be guilty of an offence: Provided that this sub-section shall not apply to a trade mark registered before and in existence on the first day of February, 1941.
- (2) Any person who uses in connection with his 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 his trade, business, profession or occupation is carried on under the patronage of, or that he is employed by or supplies goods to, His Majesty, any member of the Royal Family, the Governor-General, any Government department or a provincial administration, without authority in writing signed by or on behalf of His Majesty, that member of the Royal Family, the Governor-General, the Minister administering that department or the Administrator concerned, as the case may be, shall be guilty of an offence.

15. Use of certain marks may be prohibited

- (1) The Minister may, after such investigation as he may think fit, by notice in the *Gazette*, prohibit either absolutely or conditionally the use of any mark, word, letter or figure or any arrangement or combination thereof, in connection with any trade, business, profession or occupation or in connection with a trade mark, mark or trade description applied to goods.
- (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 sub-section (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.

16. Implied warranty on sale of marked goods

Every person who sells any goods to which a trade mark or trade description has been applied shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the

trade description is not a false trade description, as the case may be, 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. Bottles marked with owner's name not to be sold

- (1) Any person—
 - (a) who buys or sells any bottle or screw stopper to which have been indelibly applied words in the English or Afrikaans language stating plainly that the bottle or screw stopper is the property of a named person; or
 - (b) who sells any goods contained in any such bottle, 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) Sub-section (1) shall not apply to any transaction whereby any such bottle or screw stopper 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.

18. Evidence

- (1) In any prosecution for forging or falsely applying a trade mark the burden of proving the assent of the registered proprietor shall lie on the accused.
- (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.

19. Limitation of prosecution

No prosecution for any offence under the provisions of this Act shall be commenced after the expiration of a period of three years reckoned from the date upon which the offence was alleged to have been committed.

20. Penalties

- (1) Any person who is convicted of any offence under the provisions of this Act shall be liable to a fine not exceeding fifty pounds, or, if he has been previously convicted of any offence under the provisions of this Act or any law repealed by section twenty-one to a fine not exceeding two hundred pounds.
- (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 No. 12 of 1888](#)), and the Merchandise Marks Amendment Act, 1889 ([Act No. 11 of 1889](#)), of the Cape of Good Hope, the Merchandise Marks Law, 1888 ([Law No. 22 of 1888](#)), and [Law No. 11 of 1889](#) of Natal, and the Merchandise Marks Ordinance, 1903 ([Ordinance No. 47 of 1903](#)), of the Transvaal are hereby repealed.

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.