



agriculture, land reform & rural development

Department:
Agriculture, Land Reform and Rural Development
REPUBLIC OF SOUTH AFRICA

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FOR ATTENTION:

ALL PROCESSORS, PACKERS, IMPORTERS, EXPORTERS AND RETAILERS OF ANIMAL PRODUCTS AND PROCESSED PLANT PRODUCTS REGULATED IN TERMS OF THE AGRICULTURAL PRODUCT STANDARDS ACT, 1990 (ACT NO 119 OF 1990)

NOTICE REGARDING THE APPLICATION OF THE PROHIBITION IN SECTION 6 OF THE AGRICULTURAL PRODUCT STANDARDS ACT, 1990 (ACT NO 119 OF 1990) ON MISLEADING TRADE MARKS (A) EITHER IN THE PROCESS OF BEING REGISTERED, OR (B) ALREADY REGISTERED UNDER THE TRADE MARKS ACT, 1993 (ACT NO. 194 OF 1993)

1. Background:

- 1.1 Since the Agricultural Product Standards Act, 1990 (Act No. 119 of 1990) ('APS Act') came into effect on 1 September 1991, the Department of Agriculture, Land Reform and Rural Development's (DALRRD) own inspectors as well as inspectors of the recently designated assignees (i.e. Nejahmogul Technologies and Agric Services, Impumelelo Agribusiness Solutions Holdings, and the Food Safety Agency), have been responsible for the enforcement of the various a processed plant or animal products regulations published under the said Act.

In terms of Section 6 of the APS Act, these inspectors have always acted against any trade mark (either registered or in the process of being registered with the Companies and Intellectual Property Commission (CIPC)), which may either directly or by implication, be regarded as misleading, or create a false impression about the contents of the container or outer container containing a regulated processed plant or animal product.

- 1.2 In March 2020, a meeting was held between the Directorate Food Safety and Quality Assurance (D: FSQA), and Head of Trade Marks Division at the CIPC at the Department of Trade, Industry and Competition (DTIC) regarding trade marks. The meeting concluded that the mandate of –

- (a) the DTIC in terms of the Trade Marks Act, 1993 (Act No.194 of 1993) ('Trade Marks Act') is to register and administer trade marks; and

- (b) the Department of Agriculture, Land Reform and Rural Development (DALRRD) in terms of the APS Act, is to regulate the quality or composition of the agricultural product presented for sale, which is communicated to the consumer via the prescribed marking requirements (e.g. class designation, grade indication, etc.) appearing on the label.
- 1.3 Following the outcome of the meeting, inspectors of the designated assignees mentioned in paragraph 1.1 above, were advised to ignore any trade marks (either registered or in the process of being registered) that were regarded as misleading. This was subject to the provision that the inspectors were able to obtain the necessary proof that the trade mark concerned is in the process of being registered, or is already registered with the CIPC, and that it is used on a product for which it is registered.
- 1.4 However, since the advice provided to the designated assignees referred to in paragraph 1.3 above, the D: FSQA has been frequently receiving complaints about the use of misleading trade marks on various regulated processed plant and animal products. Subsequently, the D: FSQA decided to obtain a legal opinion on whether the prohibition in Section 6 of the APS Act also applies to trade marks used on agricultural products regulated under the APS Act that are either in the process of being registered, or are already registered under the Trade Marks Act administered by the CIPC at the DTIC.

Section 6 (*'Prohibition of false or misleading descriptions for products'*) of the APS Act reads as follows:

"No person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality or other properties, or the class or grade, origin, identity, or manner or place of production, of that product."

2. Brief summary of the legal opinion provided by the Directorate: Corporate Legal Support within DALRRD:

- 2.1 The most important principle in the interpretation of statutes is to establish and apply the purpose of legislation considering the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996.
- 2.2 From the long title of the APS Act, read with the definition for "product" in the same Act, it is clear that the main purpose of the APS Act is to provide for control over the sale of certain agricultural products. Section 6 of the APS Act more specifically prohibits the sale of agricultural products under false or misleading names.

The purpose of Section 6 of the APS Act is clearly to protect the public against unscrupulous vendors that, through the use of names or descriptions, create the impression that their products are something which it is not, or have qualities that it in fact does not have, which is clearly in conflict with the Bill of Rights.

- 2.3 A trade mark can undoubtedly create a false or misleading impression on agricultural products, which is the very mischief that Section 6 of the APS Act seeks to prohibit. The Trade Marks Act itself recognizes in Section 10(12) that a trade mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be *contra bonos mores*, or be likely to give offence to any class of person, is unregistrable as a trade mark.

It is clear that both the APS Act and the Trade Marks Act aim to, among other things, prohibit the use of deceptive, false or misleading marks, names, words, etc. under the circumstances set out in the two Acts. There is thus no inconsistency between the two Acts regarding this objective.

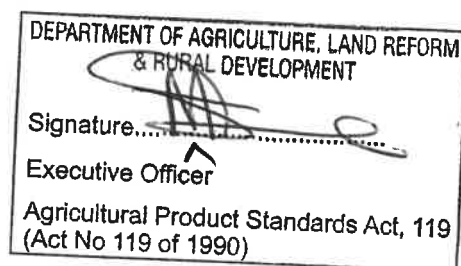
- 2.4 The wording of Section 6 of the APS Act is wide enough to include the registered or to be registered trade marks. This is apparent from the use of similar or identical words in Section 6 of the APS Act and definition of "mark" in the Trade Marks Act (e.g. "word"). Excluding trade marks from Section 6 of the APS Act would defeat one of the purposes of the APS Act, namely to protect the public from purchasing agricultural products under the false impression that such products purport to be something which they are not.
- 2.5 It shall also be kept in mind that the Trade Marks Act is an Act of general application that applies to all trade marks or marks that can be potentially registered as trade mark. The APS Act, on the other hand, applies specifically to agricultural products, and inspectors enforcing the regulations published under the APS Act are trained to identify names, words, expressions, etc. on agricultural products that may be directly or by implication be regarded as false or misleading. However, these misleading names, words, expressions, etc. may not necessarily be identifiable by the Registrar of Trade Marks or his/her officials, who are not experts on agricultural products.
- 2.6 The DALRRD has a responsibility to enforce Section 6 of the APS Act and any prohibitions set out in the subordinate regulations made under the said Act in relation to trade marks appearing on agricultural products. This responsibility cannot be abdicated to the Registrar of Trade Marks at the CIPC.

3. Way forward:

In view of the legal opinion obtained, this notice serves to inform all affected stakeholders in the animal products and processed plant products industries that –

- 3.1 the advice provided by the D: FSQA to inspectors of the designated assignees referred to in paragraph 1.3 above, is hereby withdrawn with immediate effect; and
- 3.2 inspectors of the assignees designated under the APS Act will prospectively act against any trade mark (either in the process of being registered, or already registered under the Trade Marks Act) which may, either directly or by implication, be regarded as misleading in terms of Section 6 of the APS Act when used on any animal product and processed plant product regulated under the APS Act.

Kind regards,



**EXECUTIVE OFFICER:
AGRICULTURAL PRODUCT STANDARDS**