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## HAVE SA LAWS BEEN AMBUSHED BY FIFA?

There is a lot of excitement at the moment regarding the World Cup tournament: *coming soon to a stadium near you*. There is also a lot of hype too about the numerous laws that regulate the promotion of products and brands around this event, and in particular, the prohibitions against so-called ambush marketing. Ambush marketing is the attempt by a non-sponsor to associate his brand with an event and to thereby derive special promotional benefit from the significant publicity that the event attracts.

The source of these rules is to be found in a number of Acts of Parliament, especially the Trade Practices, and the Merchandise Marks Act; in the Sponsorship Code of the self-regulating Advertising Standard Authority; in the by-laws of the host cities. These rules are worded differently, but all prohibit non-sponsors from creating the impression that they are sponsors, when they have not, in fact, paid the requisite millions to be official event sponsor or partners. Of these sources, the Merchandise Marks Act is arguably the most broadly worded, and could be interpreted much wider than the traditional prohibition. It may effectively prevent the use of your own brand even if it indirectly allude to the event, if such reference attracts "special promotional benefit" for your mark. This goes well beyond the traditional sense of what should be, and usually is, prohibited. Numerous big brand companies are finding it extremely difficult to plan their usual marketing activities around this big sporting event, and the local businesses that should be reaping the benefits of this spotlight on South Africa are unsure where they stand.

There is little guidance as to how broadly the local laws should be interpreted, and only 2 cases have come before the courts so far on this issue. In the first, Eastwood Tavern, a bar in Pretoria consented to the judgment that FIFA had applied for, and it accordingly provides no real guidance. In the second case, the court ordered Metcash to stop selling its ASTOR 2010 lollipops that included South African flags, "2010" and soccer balls on its packaging. Much seems to have been made of the fact that profits had markedly increased when the packaging had been changed, and constitutional arguments, such as the right to freedom of commercial expression were given little more than a two sentence consideration in the judgment that took some 9 months to be handed down. Even more unfortunate, Metcash did not appeal the decision which has since been the subject of much heated debate and criticism.

The Merchandise Marks Act was amended long before South Africa's bid for the tournament, but the declaration of the event as protected and the resultant prohibition on the terms listed above were done at FIFA's instigation. It was also a requirement for the hosting of the games that the host cities

provide certain functions, resulting in various by-laws that prohibit business activities in the immediate vicinity of the stadiums with special consent. The by-laws also do not allow advertising in a number of zones, many of which have yet to be declared or finalised.

A more recent clash that hit our headlines concerned Kulula's UNOFFICIAL CARRIER OF THE YOU KNOW WHAT advert, which displayed images of vuvuzelas, a hanging South African flag, the new Cape Town soccer stadium, "2010", soccer balls and a football player. Heeding FIFA's usual threats to sue, Kulula (suspiciously?) quickly amended its advertisement with the new heading "NOT NEXT YEAR, NOT LAST YEAR, BUT SOMEWHERE IN BETWEEN", and replaced the allegedly "offending" images with golf tees, a hanging beach towel, the Storms River Bridge, mirror and snooker balls, and a "hoki poki" dancer respectively. In avoiding an expensive legal battle, and effectively sticking its tongue out at FIFA, Kulula ensured that its campaign rides the anti-FIFA wave and generated much more special promotional benefit than its original advert would ever have done. Very clever!

By FIFA's own guidelines, it seems that one can refer to soccer in general terms, and one can show support for South Africa. One cannot use FIFA's registered trade marks (which dubious list includes such non-distinctive terms such as "WORLD CUP" and "WORLD CUP 2010"), or any of the following specially prohibited marks as declared by the Minister of Trade & Industry:

- FIFA logos for current World Cup plus the previous ones
- Representations of the current and previous mascots
- Representations of the trophy cups
- 2010 FIFA WORLD CUP SOUTH AFRICA
- FOOTBALL WORLD CUP
- FIFA WORLD CUP
- 2010 FIFA WORLD CUP
- SOCCER WORLD CUP
- CONFEDERATIONS CUP

It would seem from the cases and the Kulula example that it is the combination of soccer images/terms with "South Africa" support or references to the year that FIFA takes particular offence to - although of course, FIFA is not a law maker, nor should it be seen as the law enforcer!