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NO ONE ENTITY CAN LAY CLAIM TO OWNING THE VUVUZELA

There have been a number of press reports recently on the issue of who owns the rights to the vuvuzela. In reviewing the fuss and bother around this quasi-musical instrument, it is not clear whether these parties are claiming rights to the trade mark vuvuzela, or the rights to the product itself.

Be that as it may, it is instructive to look at the history of the vuvuzela.

One Freddie Maake, a fanatical Kaizer Chiefs supporter of Tembisa, claims he was the first person to create a vuvuzela, albeit an aluminium version in the 1970s. Maake claims that in 1999, with the assistance of Peter Rice, he produced a plastic version of the vuvuzela. He claims that until the late 1990s he was the only owner of a vuvuzela and the only user of one at soccer matches. In 1999 he launched an album called "Vuvuzela Cellular" which features this instrument.

Neil van Schalkwyk, a director of Masincedane Sports, a company that has been manufacturing plastic vuvuzelas since 2001, is also claiming rights to the name vuvuzela.

The Nazareth Baptist Church has now also stated that the trade mark "vuvuzela" belongs to it. It claims that it has been using the vuvuzela since 1910.

However, no one has done the groundwork required to give effect to ownership of the vuvuzela. There are no valid patents or designs registered in respect of the "musical instrument" that is now called the vuvuzela. Even if this instrument could have formed the subject matter of a design or patent registration, the opportunity of doing so has long come and gone. The only question now is who, if any, is the owner of the vuvuzela trade mark.

According to the records of the South African Registrar of Trade Marks, 40 trade mark applications, by numerous persons and entities, have been filed over the past eight years for the registration of trade marks incorporating vuvuzela. These trade mark applications are in relation to a wide variety of goods and services.

One of the applicants for these trade marks is Rory Peter Rice (presumably the same person who assisted Maake with the manufacture of a plastic vuvuzela), who in 2004 applied for registration of the trade mark vuvuzela in respect of a "plastic trumpet". Three days before Rice's application, Masincedane Sports also filed an application for the trade mark vuvuzela in relation to "musical instruments", a Mr Mafokate applied for the registration of the trade mark vuvuzela in 2003 and in 2009 so also did Messrs Urbas, Kehrberg and Bartels, all German citizens.

All of the vuvuzela trade marks are still pending, which means that at this point in time no single party can claim to be the registered proprietor of the vuvuzela trade mark in South Africa.

Masincedane Sports' application has been accepted by the Registrar but it would appear that this trade mark is currently under opposition, presumably by one of the other people who claim to own the vuvuzela. Despite the fact that at this point in time no-one can claim to be the registered proprietor of the vuvuzela trade mark in South Africa, the question still remains whether any party can claim to be the common law proprietor of the trade mark. A search of the Internet revealed that there are many entities or persons making use of the vuvuzela as a musical instrument. It would appear that most, if not all consumers regard the trade mark vuvuzela as not belonging to any single person.

For example, one can buy vuvuzelas on vuvuzela.co.za, which would appear not to be linked to either Rice or Masincedane Sports. The website that can be found at boogieblast.co.za also advertises vuvuzelas. There are other websites, such as southafrica.info, which openly state that the vuvuzela belongs to the people. Even if one looks at the website of Masincedane Sports, which can be found at vuvuzelas.com, there is no claim on the website that the company regards itself as the owner of the vuvuzela trade mark.

In fact quite the contrary: on its website Masincedane Sports appears to use vuvuzela in a sense to indicate that no single party can claim a monopoly on the name.

Section 10(2)(c) of the South African Trade Marks Act provides that a mark that consists exclusively of a sign or indication which has become customary in the current language is not registrable as a trade mark. In short, a word that is used by all and sundry to describe a particular thing cannot be protected as a trade mark as the word has become generic.

It would appear that the trade mark vuvuzela is used by the people of South Africa to describe a type of “musical instrument”. It can therefore be argued that the trade mark vuvuzela has become generic and that no single party will be able to claim ownership of the name vuvuzela when referring to the “musical instrument”.

It follows therefore that the people of South Africa are free to use the name vuvuzela to describe the instrument that has also been described by the then journalist now ambassador to Uganda, Jon Qwelane, as “an instrument of hell”.

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