

# Ambush Marketing

Ambush Marketing can generally be described as a practice whereby a person, often a competitor, intrudes upon public attention surrounding an event thereby deflecting attention towards itself and away from a sponsor. It occurs when a trader seeks to utilise the publicity value of a sponsored event, for instance a major sports tournament or concert, to gain a benefit from it despite not having any involvement or connection with that event and particularly having made no financial contribution to entitle it to derive benefit therefrom.

Ambush Marketing generally takes two forms, namely:

- [i] Ambush Marketing by way of "association" in which case the ambush marketer misleads the public into thinking that he is an authorised sponsor or contributor associated with the event. This can be done by using the insignia of the event or insignia which are confusingly similar thereto and furthermore by misrepresenting to the public in some manner that the marketer or its brand is associated with the event; and
- [ii] Ambush Marketing by way of "intrusion" whereby the ambush marketer does not seek to suggest a connection with the event but rather to give its own brand or other insignia exposure through the medium of the publicity attracted by the event without the authorisation of the event organiser.

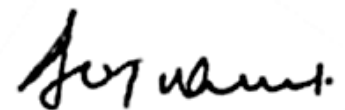
In both forms of Ambush Marketing the marketer has the objective of using the event as a platform to promote its brand or product without incurring the financial and other obligations of a sponsor.

One of the most obvious pre-requisites for Ambush Marketing is that the event in respect of which the offending conduct is aimed at is in fact a sponsored event. This includes not only sporting competitions and tournaments such as the FIFA World Cup event, but also stage performances and related entertainment which may have as an enabling platform the support of sponsors. Ambush Marketing is a source of frustration for organisers of sponsored events and the companies which give its support to such events by paying sponsorship fees alike.

The protection of sponsors against possible Ambush Marketing by their competitors is a particularly important obligation on an event organizer. The event organizer accepts financial contributions from its sponsors and in return is required to provide them exclusive marketing rights as far as the event is concerned. If the event organizer cannot guarantee such exclusivity then it faces the real risk that it may not be able to retain the sponsor and possibly also be in breach of its agreement with the sponsors.

There is no exhaustive list of what constitutes Ambush Marketing. Whether a trader is committing an act of Ambush Marketing will depend on the facts of each matter. By way of illustration, the following scenarios may be held to constitute Ambush Marketing:

- [i] Making unauthorised use of a sponsored event's trade marks or logos which may create the impression of an association or connection with the event;
- [ii] Placing advertisements for a product on the outskirts of a stadium at which a sponsored event is taking place through, for example, billboard advertising; and



[iii] Running a promotional competition making reference to a sponsored event, including the use of marketing techniques to mislead the consumer, e.g. offering event tickets as prizes.

### Anti-Ambush Marketing Laws

There are effectively two Acts in South Africa which contain prohibitions (or in terms of which prohibitions can be declared) against Ambush Marketing. The relevant provisions of these laws are set out below. However, in addition to these laws the South African Advertising Standards Authority [ASA] has incorporated as part of its code on advertising a sponsorship code which (in Article 11 thereof) list certain unacceptable sponsorship practices and for Ambush Marketing to be an objectionable marketing strategy.

- **Trade Practices Act, No. 76 Of 1976**

This Act prohibits certain types of advertisements, statements, communications, descriptions and indications and provides specifically that no person shall in connection with a sponsored event, make, publish or display any false or misleading statement, communication or advertisement which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event, or cause such statement, communication or advertisement to be made, published or displayed.

The above provisions are primarily aimed at combating Ambush Marketing by way of association.

- **Merchandise Marks Act, No. 17 Of 1941**

The Minister of Trade and Industry has designated the 2010 FIFA World Cup Tournament as a protected event in terms of the provisions of the Merchandise Marks Act. The protected status of the event was



conferred on it on 25 May 2006 and will end six (6) calendar months after the date of commencement of the tournament.

This prohibition entails that for the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event.

These provisions present a basis on which Ambush Marketing by way of intrusion may be objectionable.

The prohibitions in terms of both the Trade Practices and Merchandise Marks Acts state that a contravention thereof constitutes a criminal offence which is punishable by a fine and/or imprisonment. Civil liability can also arise from a breach of these provisions with unlawful competition as the cause of action. Remedies in this regard may include an interdict/injunction. This was recently confirmed by the High Court in the case of *Fifa v Metcash* a brief overview of which is set out below:

### **Fifa v Metcash Trading Africa (Pty) Limited [Case No. 53304/07 TPD]**

Metcash is a major South African distributor of fast-moving consumer goods, including foodstuffs. It introduced a confectionery product into the market as part of its ASTOR range of products under the trade mark 2010 POPS which it uses in conjunction with partial depictions of the South African



Flag and soccer balls (a representation of which is depicted below). FIFA subsequently instituted High Court proceedings against Metcash primarily on the basis of Ambush Marketing in that the combined elements constituting the packaging allude to or denote the 2010 FIFA World Cup Tournament. Metcash opposed the proceedings and at the hearing of the matter counsel on behalf of FIFA argued in support of their application, inter alia, for an interdict/injunction that the product will be associated with the protected event and more so that Metcash would through the use of its own trade mark on the packaging obtain a special promotional benefit.

The court held that use of the trade mark referred to in section 15A(2) (of the Merchandise Marks Act) includes use of the trade mark in promotional activities which in any way directly or indirectly is intended to be brought into association with or to allude to an event. It was held that the various elements combined on the packaging complained of alluded to Fifa's protected event and that, to quote the court, "[T]he Respondent's conduct clearly falls foul of the provisions of 15 A of the MMA". The court issued an order restraining the Respondent from competing unlawfully with Fifa by contravening the provisions of section 15 A of the Merchandise Marks Act.

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