

Flags and the law in South Africa

Heather Brownell

ABSTRACT: Flags, like other kindred heraldic representations, comprise an interesting facet of intellectual property law, which relates to the subjective rights which people have to the creations of their intellect. In South Africa flags may be placed in various categories and there are a number of legislative measures which have, over the years, extended legal protection to flags. An overview of these categories and measures is given and it is concluded that it makes good sense for owners of flags to utilise the legislative provisions which are available to secure appropriate legal protection.

The illustrations for this paper appear on Plate 11.

1 Introduction

There is a popular perception that flags are simply interesting pieces of coloured cloth, but they, like other kindred heraldic representations, comprise an interesting facet of intellectual property law. Intellectual property law relates to the subjective rights which people have to the creations of their intellect. There are a multiplicity of Acts in terms of which flags are created and/or protected - naturally the category into which a flag falls determines which Act applies.

Southern African flags can be broadly divided into five categories, the discussion of which is the subject matter of this paper. The five categories of flags are:

1. National flags;
2. Flags registered either under the Protection of Names, Uniforms and Badges Act,¹ or under the Heraldry Act;²

¹Act No. 23 of 1935.

²Act No. 18 of 1962, as amended.

3. Flags of the Defence Force;
4. Heraldic banners; and
5. Other flags.

2 National flags

The term "national flag" refers to a flag which is used to denote nationality.

2.1 Ensigns

On 31 May 1910 four former British Colonies were unified into what became the Union of South Africa. However, this new dominion within the British Empire had no distinctive uniquely South African flag of its own, and made use of the Union Jack (**Fig. 1**). Seven months later, on 28 December 1910, Admiralty Warrants³ were issued for the Blue and Red South African ensigns; "ensign" being the term applied to a national flag at sea. The arms in the fly of these ensigns had been granted by Royal Warrant on 17 September 1910. South Africa was at this stage still a monarchy, so the authority for these ensigns was given in terms of a royal prerogative, and not in terms of legislation as such. The Blue Ensign was for use on government vessels and the Red Ensign for use on merchant vessels (**Fig. 2**). Since there were then no government vessels to wear the Blue ensign, it was virtually unknown, but was customarily flown over the Union of South Africa's offices abroad. Despite not being the official view, it was the popular view that the Red Ensign was the national flag, and served as such until 1928 when a new national flag was adopted. The Red Ensign remained in use until 1951, when the South African national flag, adopted in 1928, became the flag of the Merchant Navy.⁴

2.2 National flag: 1928–1994

In 1925 a Bill was tabled to define South African nationality and to provide for a national flag. The Balfour Declaration of 1926 stated that Great Britain and her dominions were "equal in status, in no way subordinate to one another," which confirmed that the Union of South Africa was entitled to its own distinctive national flag.

The Union Nationality and Flags Act, No. 40 of 1927, which came into operation on 31 May 1928, provided for a dual flag arrangement in terms of which the Union Jack and the new national flag were hoisted together.⁵ The design of the new national flag was set out in Section 8 (**Fig. 3**). This arrangement of

³Being the Admiralty's authority for a particular action.

⁴Section 65 of the Merchant Shipping Act, No. 57 of 1951.

⁵Section 7 of the Act.

flying both flags together lasted until 6 April 1957 when the Flags Amendment Act, No. 18 of 1957, decreed that only the South African national flag would be flown as the national flag of South Africa — the Union Jack ceased to have any legitimate right to being flown.

When South Africa became a republic on 31 May 1961 this national flag was retained unchanged, and its description was embodied in Section 5 of the Republic of South Africa Constitution Act, No. 32, of 1961.⁴ Similar provisions regarding the description of the national flag were incorporated into Section 4 of the Republic of South Africa Constitution Act, No. 110 of 1983.

2.3 National flag: 1994

As South Africa moved towards a fully democratic political dispensation there was widespread criticism that the national flag which had been in use since 1928 was not representative of the nation as a whole. A Commission on National Symbols was appointed by the Multi-Party Negotiating Council in 1993 to put forward proposals for a new national flag. After a process lasting some six months, a national flag was duly taken into use on 27 April 1994.

At the time that the "Interim" Constitution was adopted by Parliament at the end of 1993, as the Constitution of South Africa Act, No. 200 of 1993, the national flag question had not yet been resolved because no national flag had yet been decided upon. Section 2(1) merely stated that "the national flag of the Republic of South Africa shall be the flag, the design of which is determined by the President by proclamation in the Gazette." The national flag design was ultimately approved on 15 March 1994 and Proclamation No. 70, published in *Government Gazette* No. 15663 dated 20 April 1994, contained a description of the new national flag. This new national flag was naturally also registered under the *Héraldry Act* (Fig. 4).

Between 1994 and 1996 a new constitution was negotiated and in Schedule 1 of the Constitution of the Republic of South Africa, Act No. 108 of 1996, adopted by the Constitutional Assembly on 8 May 1996, this national flag as set out in Proclamation No. 70 of 1994, was retained. However, the description of the national flag in Schedule 1 is simplified into layman's terms, and no longer conforms to the vexillological terminology used to describe the flag as done in the Interim Constitution. The whole of the Constitution, which has been translated into all eleven national languages, is written in layman's terms, the intention being to eliminate as much technical legalism and specialised terminology as possible, so as to enable the broad public to read and understand its contents.

The relevant Acts of Parliament referred to above do not, however, prescribe the practical use of the national flag. Instructions regarding the flying of the new national flag are laid down by Government Notice No. 865 of 26 April 1994.⁶ The instructions lay down *inter alia* the hours when the flag should be

⁶In *Government Gazette*, Vol. 345, No. 15694.

flown, the sizes of flags, listed flag stations, *etc.* Official rules of respect are also laid down in the Government Notice, the most important of which is that the national flag must be treated with dignity and respect at all times. Furthermore traditional rules of respect must be adhered to.

In March 1994, at the request of the Office of the State President, the South African Bureau of Standards compiled and issued specifications with which flag manufacturers are required to comply in order to ensure uniformity of colour, form and standard. No tender for the supply of the national flag to the State may be accepted unless the supplier complies with these specifications.

In terms of Section 14 of the Merchandise Marks Act, No. 17 of 1941 (as amended), which deals with the unauthorised use of certain emblems, it is deemed an offence to use a reproduction of the national flag in connection with one's trade, business, profession or occupation, or in connection with a trade mark, mark or trade description applied to goods made, produced or sold without the written consent of the Minister of Trade and Industry. The Minister may claim and interdict without proof of special damages. The criminal penalties laid down are minimal, being a maximum fine of R100.00 for a first offence, or a maximum fine of R400.00 for a subsequent offence. The goods in respect of which the offence was committed may however be confiscated, which should be the main deterrent.

Since the national flag has been registered as an "heraldic representation" in terms of the Heraldry Act, it is an offence⁷ to:

- wear, use, sell, or trade in the flag; or
- a material part of it; or
- any replica or reproduction of it; or
- any imitation which might reasonably be confused with it;

without the written authority of the Office of the President.

Anyone who contravenes this provision is liable to be sued in a civil court for a maximum of R1000.00, without proof of any damages, or damages and/or an interdict, in addition to the cost of the action. Furthermore a criminal conviction is also made provision for, the maximum fine being presently R1000.00.

The Trade Marks Act, No. 193 of 1994, prohibits the registration of the national flag as trade mark, which means that it can not be used as trade mark to denote the origin of goods or services.⁸

⁷Section 21(1)(b).

⁸Section 14.

3 Registered flags

3.1 Protection of Names, Uniforms and Badges Act, No. 23 of 1935

3.1.1 GENERAL ASPECTS

One of the primary objects of the Protection of Names, Uniforms and Badges Act, Act No. 23 of 1935, was to provide legal protection for the "badges" of an association or institution. The definition of a "badge" under this Act was wide,⁹ and did not make specific provisions for the registration of a "flag" as such, but in terms of its provisions the design of 5 yacht club flags (burgees) were registered as blazer badges, which *de facto* provided for the legal protection of the full size burgee. One of these was the burgee of the Royal Cape Yacht Club (Fig. 5).

Registration under this Act was entirely voluntary. In terms of this Act an association or institution could apply to the Minister¹⁰ for the registration of their name, special name, uniform or any badge (with or without a uniform).¹¹ Descriptions of the items to be registered were published in the *Government Gazette*,¹² and an objector was given three months to lodge an objection to the proposed registration. If no objection was lodged, then a notice of registration was published in the *Government Gazette*¹³ and a certificate of registration issued.¹⁴ A copy of the certificate was kept on file and the details entered into a register.¹⁵

Over and above the cost of registration an annual refresher fee was payable,¹⁶ which if not paid, would result in the registration lapsing and meant that the Minister could cancel the registration.¹⁷ This provision bears a measure of similarity to the Trade Marks Act¹⁸ which determines that a registration of a trade mark endures initially for a period of ten years from the date of registration, after which renewal fees must be paid every ten years if these provisions are not complied with then the registrar may remove the trade mark from the register.

⁹A "badge" was defined as being for "any design, applicable to any article whether for the pattern, for the shape or configuration, or for ornament thereof, and by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for sculpture."

¹⁰First the Minister of the Interior, and then from 1 September 1959 the Minister of Education, Arts and Science.

¹¹Section 2.

¹²Section 4.

¹³Section 5(1).

¹⁴Section 5(2).

¹⁵Section 1.

¹⁶Section 9(1).

¹⁷Section 9(2).

¹⁸Act No. 193 of 1994.

3.1.2 LEGAL PROTECTION

The legal protection afforded by the Protection of Names, Uniforms and Badges Act was set out in Section 6. A valid certificate of registration entitled the holder thereof to the sole and exclusive right to use the registered name, uniform or badge,¹⁹ while the use by someone not entitled thereto was expressly prohibited.²⁰ The term "use" was defined as "the use, wearing, sale, trading, bartering, or otherwise dealing in or with any name, uniform, or badge," and any misuse entitled the association or institution to sue such person in a magistrate's court for an amount not exceeding ten pounds, without the proof of any damages, in addition to costs of the action. The claimant was furthermore entitled to damages and/or an interdict. During the first reading of the Protection of Names, Uniforms and Badges Bill, one Colonel Stallard stated that "this is a matter where you should rely upon the activities of the clubs themselves, which desire to protect themselves . . . the principle of the Bill is to create a proprietary right." The registration legally confirms the proprietor's ownership and right to the item registered. It is up to the proprietor to institute an action against any infringement.

In Section 7 a number of provisos to Section 6 are set out. A name, uniform or "badge" (which would include the registered burgees) could be used in a play or film, provided it was not used in such a manner or under such circumstances as to bring it into ridicule or contempt.²¹ A design already registered under the Patents, Designs, Trade Marks and Copyright Act, 1916, could not be registered unless the owner gave permission for the use thereof,²² and a mark or device not protected under the Patents, Designs, Trade Marks and Copyright Act, but in *bona fide* use before the commencement of the Protection of Names, Uniforms and Badges Act, could be used provided that the onus of proving such *bona fide* use would be upon the person claiming it.²³

Furthermore, no one was deprived of the right to use any name, uniform or badge, which at the commencement of this Act was in regular use by such person²⁴ or, to which he had *bona fide* become entitled by reason of his present or past membership of the association or institution, beyond the boundaries of the Union, provided that the onus of proving such regular use or *bona fide* use would be upon the person claiming such right.²⁵ The Minister was empowered to make regulations not inconsistent with this Act:²⁶

¹⁹Section 6(1).

²⁰Section 6(2).

²¹Section 7(1).

²²Section 7(2).

²³Section 7(3).

²⁴Section 7(4).

²⁵Section 7(5).

²⁶Section 10.

3.2 The Heraldry Act, No. 18 of 1962

3.2.1 GENERAL ASPECTS

After the commencement of the Heraldry Act on 1st June 1963, the badges registered under the Protection of Names, Uniforms and Badges Act were deemed to be registered under the Heraldry Act. The Act provides for the registration *inter alia* of heraldic representations in the form of coats of arms, badges or other emblems. The definition and concept of a "badge" under the Heraldry Act differs markedly from that found in the previous Act.²⁷ This requires that the object of the right must have an element of distinctiveness. This requirement of the element of distinctiveness is found in most intellectual property legislation.²⁸ Furthermore provision was now specifically made for the registration of flags under the definition of "other emblem."²⁹

If the application for registration is in a form acceptable to the State Herald, he may approve or reject the application, or he may refer it to the Heraldry Committee for consideration. The Committee may, in turn, submit the application to the Heraldry Council for a decision.³⁰ If rejected, the applicant may lodge an appeal to the Heraldry Council. If this appeal is rejected, the applicant may in accordance with the rules of Administrative Law, appeal to the High Court against the Council's decision.

If the item submitted appears to be acceptable for registration then notice of the application is given in the *Government Gazette*, indicating the manner and period within which any objection should be lodged with the Bureau of Heraldry.³¹ When the objection period has expired and provided no objections have been noted, a notice of registration is published in the *Government Gazette* and a registration certificate issued. No renewal fee is payable, as was the case under the preceding Act. In contrast to the typed certificate issued under the previous legislation, those issued under the Heraldry Act contain a colour illustration and a full description, which in heraldic terminology is called a blazon.

3.2.2 LEGAL PROTECTION

In the event of misuse of a flag registered under the Heraldry Act, the offender may be sued in a court of law for a fine (without proof of any damages), costs of

²⁷The definition of "badge" is "any object or figure, being a symbolic representation in conformity with the principles and rules of heraldry, but less formal than a coat of arms, used for official purposes or municipal purposes or by any association, institution or person as a mark of recognition or as a distinguishing token."

²⁸Under the Trade Marks Act, No. 62 of 1963 (as amended), in order to gain admission to part "A" of the register, a trade mark must either be inherently distinctive or must be proved, on the strength of past user and promotion, to have acquired distinctiveness.

²⁹The definition of "other emblem" includes any flag, pennant and gonfalon.

³⁰Section 8(1).

³¹Section 7A Heraldry Amendment Act, 1969.

the action, damages and/or an interdict.³² A number of provisos are contained in Section 20 of the Heraldry Act, which in essence are similar as those set out in Section 7 of the Protection of Names, Uniforms and Badges Act. Once again the Minister is empowered to make regulations pertaining to the Act.³³

4 Flags of the Defence Force

Particulars of the flags and other insignia of the Defence Force are not published in the *Government Gazette*, but are nonetheless protected under Section 5(a) of the Heraldry Act, which requires that a register shall be kept of *inter alia* "...the national flag of the Republic... and any other heraldic representation instituted, constituted or created by any law, and any amendment thereof effected by any law."

Defence Forces throughout the world operate on various levels of confidentiality and secrecy and their insignia are traditionally protected in terms of Defence Force legislation.³⁴ For this reason the procedures set for publication in the *Government Gazette* in Section 7 of the Heraldry Act are not followed. In South Africa the State Herald is, however, part of the approval channel through which all Defence Force insignia pass, and he therefore ensures that such insignia do not clash with existing registrations and are in compliance with technical requirements prior to being taken into use. Copies of all approved art-cards of military insignia are recorded in the Bureau of Heraldry. The art card of the South African Navy's new Colour is an example (Fig. 6).

5 Heraldic banners

The registration of a coat of arms under the Heraldry Act entitles the owner thereof to expand the contents of the shield of arms to create a heraldic banner. These flags, although usually not separately registered, in accordance with established heraldic practise enjoy legal protection by virtue of the formal registration of the coat of arms upon which they are based.

6 Other flags

This category comprises those flags which have either been designed by their owners, commercial artists or other amateurs, which are not registered under any of the Acts already mentioned, and in respect of which no formal certificate of registration or entry into a register has been effected. These flags, as a creation of the intellect, will nevertheless enjoy protection under The Copyright

³²Section 21(b)(i) and (ii).

³³Section 25.

³⁴Sections 115 and 116 of the Defence Act, No. 44 of 1957.

Act, No. 98 of 1978, provided the persons relying on the copyright are able to prove that they are entitled thereto. A person whose copyright to a flag has been infringed is entitled to approach the courts for an interdict and damages, and they may also demand that the infringing copies be delivered to themselves.³⁵

7 Conclusion

From the foregoing it is evident that legal protection of flags in South Africa is available under the Heraldry Act, as it was under the Protection of Names, Uniforms and Badges Act. However, the onus rests on the owner thereof to make application for formal registration in order to be entitled to the legal protection offered in terms of this Act. The burden of proof required under the Heraldry Act to prove entitlement is so much lighter than under the Copyright Act that it makes sense to register a flag in terms of this legislation.

Acknowledgements

I wish to thank my father, the State Herald, for placing at my disposal information and illustrations relevant to this paper and Commodore A.P. Burgers, SAN (Retired), for allowing me to consult the relevant section of his draft manuscript on Southern African Flags. Part of Burgers' material was drawn from an article by Lesley Fitton of the law firm Webber, Wentzel and Bowens, published in *WSF Review*.

Heather Brownell

Heather Brownell studied law at the University of Pretoria. Her LLB dissertation, dealing with the origins and development of heraldic legislation in South Africa, is a pioneer academic study of this facet of intellectual property law. She practises as an attorney, notary and conveyancer.

ADDRESS: 155 Beckett Street, Arcadia, PRETORIA 0083, South Africa

³⁵Section 24(1).

Plate 11

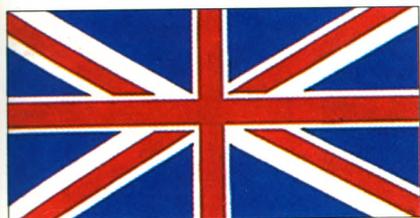


Figure 1



Figure 2

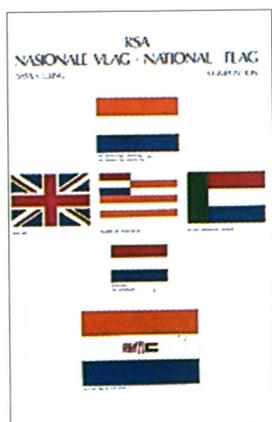


Figure 3

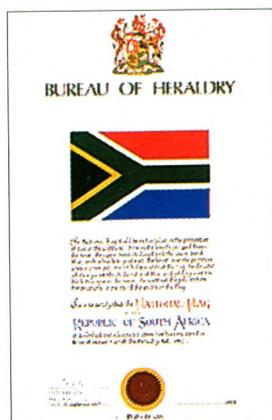


Figure 4



Figure 5



Figure 6