

LEGAL ISSUES IN LEXICOGRAPHY: AN EXAMINATION OF THE HANDLING OF BRAND NAMES IN THE ISICHAZAMAZWI SESINDEBELE

Paper presented

By

Mandlenkosi Maphosa of the Department of African Languages and Culture, Midlands State University, P.B. 9055, Senga Gweru, Zimbabwe at the 16th International Conference of the African Association for Lexicography (Windhoek, Namibia, 5-7 July 2011)

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Abstract

This article is centred on a legally explosive issue of brand names. It investigates the handling of brand names in the Isichazamazwi SesiNdebele. In looking at this issue the article is driven by the realisation that most general purpose dictionaries normally do not include brand names as part of their macrostructural entries. This is a reality that is vividly expressed by the Chief editor of Webster's Third New International Dictionary of the English language as cited by Higgins (1997:381) where he proclaims that "this dictionary [Webster's] confines itself to generic words and their functions, forms, sounds and meanings... [presumably as distinguished from those that are non-generic of which brand names are part of]. In light of this realisation this article sought to investigate whether the Ndebele general purpose dictionary, Isichazamazwi SesiNdebele (henceforth, ISN) lived within this tradition or deviated. Taking note that some words that could be legally (as informed by the laws of the country) considered to be brand names were included in the ISN the article went further to probe on whether there was a rational scientific basis in the selection or lack thereof of certain brand names. In order to contextualise the study the article draws comparisons with International English dictionaries on this aspect of handling of brand names. The article then ponders on the ramifications of the path that was taken by the ISN lexicographers in handling brands names. Thus the article looks at whether there is some marking of brand names of some sort or the use of capitalisation to distinguish them from any other word. This part of the discussion mostly dwells on legal ramifications and also looks at implications for lexicographic practice and theory. In looking at the phenomenon of brand names the article takes into consideration that dictionaries are reference works that carry with them immense authority. When people have arguments over certain concepts the tendency is to use the dictionary as an arbiter. This practice has extended well into the judiciary systems of many literate societies where the dictionary definition in most cases carries the day in courts. Since dictionaries have so much influence on people's perceptions on interpreting the world (at least from the literary realm) it is the interest of this article to investigate how brand names are handled in the Isichazamazwi SesiNdebele. Methodologically, the article relies heavily on desk review of related literature which helps in the

understanding of the primary source, the ISN. However, the research does not lose sight of the importance of getting first hand information from the authors of the dictionary under spotlight which explains the use of interviews with senior editors (the chief editor and the deputy chief editor) to try and get their views on why they took the steps they took and to establish whether they were aware of the legal ramifications, i.e. Whether the inclusion or exclusion of certain brand names was an expression of their opinion on proprietary rights. In examining the dictionary vis a vis the treatment of brand names the article does not lose sight of the actual linguistic behaviour of the Ndebele linguistic community vis-a vis its treatment of brand names in everyday discourse. In view of this, the study also sort views from the speakers of the Ndebele language, who are also the target users of the ISN. This was done through a structured questionnaire where the respondents were given ten definitions of unidentified lexical items and they were asked to provide possible lexical items for those definitions. This was a strategy to test on the status of the so called brand names/trademarks, at least from the viewpoint of the ordinary speakers of the language. Thus the assumption was that if a significant number of the users identified a brand name as the missing lexical item for the definition provided then that could be used as a pointer to the generification of that particular brand name.

1.0. INTRODUCTION

This article is centred on a legally explosive issue of brand names. It is inspired by chapter 8 of Landau's (2001) landmark work in the book: "Dictionaries: the art and craft of lexicography". It investigates the handling of brand names in the Isichazamazwi SesiNdebele. In looking at this issue the article is driven by the realisation that most general purpose dictionaries normally do not include brand names as part of their macrostructural entries. This is a reality that is vividly expressed by the Chief editor of Webster's Third New International Dictionary of the English language as cited by Higgins (1997:381) where he proclaims that "this dictionary [Webster's] confines itself to generic words and their functions, forms, sounds and meanings... [presumably as distinguished from those that are non-generic of which brand names are part of]. In light of this realisation this article sought to investigate whether the Ndebele general purpose dictionary, Isichazamazwi SesiNdebele (henceforth, ISN) lived within this tradition or deviated. Taking note that some words that could be legally (as informed by the laws of the country) considered to be brand names were included in the ISN the article went further to probe on whether there was a rational scientific basis in the selection or lack thereof of certain brand names. In order to contextualise the study the article draws comparisons with International English dictionaries on this aspect of handling of brand names. The article then ponders on the ramifications of the path that was taken by the ISN lexicographers in

handling brand names. Thus the article looks at whether there is some marking of brand names of some sort or the use of capitalisation to distinguish them from any other word. This part of the discussion mostly dwells on legal ramifications and also looks at implications for lexicographic practice and theory.

2.0. DEFINING BRAND NAMES

According to the American marketing association (1960) a brand name is ...a name which is intended to identify goods of one seller or a group of sellers and to differentiate them from those of competitors. Thus a brand name is that part of the brand that can be spoken. McDonald's use both its name and the "Golden Arches" as part of its brand. McDonald's would be the brand name. A brand name carries legal force if it is registered with a judicial institution entrusted with the mandate of registering and protecting patents and trademarks. When a brand name is registered with such an entity it then becomes a registered trademark. Thus in essence a brand name and a trade mark are essentially one and the same thing. Registration of a brand name as a trademark affords the owner of that trademark legal recourse if someone else uses that name. Thus a trade mark is a word, symbol, name or signifier to distinguish goods of firm from those of other firms. This definition shows that a brand name is a form of trademark.

2.1. FORMS AND ROLE OF BRAND NAMES

Brand names manifest themselves in different forms mostly determined by their nature and 'strength' chief of which are:

1) Fanciful: These are coined words invented to serve as Trade marks (TM) or to identify a product. These have no common place or dictionary meanings. They are completely fabricated by their owners. Ex: Kodak, Jeep, Xerox

2) Arbitrary: These are common linguistic words with dictionary meanings, but neither suggest nor describe qualities when used as product TM. They do not in any respect describe the goods or services to which they are attached to. They are only distinctive within the product market and entitled to little or no protection outside of that area. The distinctiveness of an arbitrary mark arises from the fact that it is mismatched to a particular product or service. Ex: MS Windows, Apple Computer, Crest Toothpaste, Camel Cigarettes

3) Suggestive: They do not directly describe good, but suggests purpose of trademarked good. Considered inherently distinctive, eligible for TM protection without a showing of secondary meaning. It only indirectly conveys an impression of the goods or services to which it is attached. Requires the observer or listener to use imagination and perception to determine the nature of the goods. Ex: Wall Street Journal, Business Week, Head and Shoulders Shampoo, Coppertone, People Magazine, Mr. Clean

4) Descriptive: They describe purpose, function, quality, attribute, etc (ADDITIONAL INFO) of

trademarked good. It takes no imagination to understand what characteristic or ingredient of a product or service is being conveyed. Ex: Car freshener brand auto deodorizer, vision center eyewear, All-Bran cereal, Paperback books, TV Guide

5) Generic: Primarily reference to category instead of a brand name. Commonly used as the name for description of a kind of goods. A generic term that describes the genus of which a particular product's is a species. Ex: golf balls (instead of Nike golf balls)

Note: (1-4) can become generic (and thus lose TM protection) if they gain sufficient dominance
Some who have: Trampoline, Brazier, Escalator, Thermos, Yo-Yo, Aspirin

2.2. THE ASYMETRICAL ROLES OF BRAND NAMES: A LINGUIST'S AND ECONOMIST'S PERSPECTIVE

The role of the brand names is a contested terrain because on one hand linguists see them as language resources to be made use of whilst the economists see them as economic resources to be protected from 'unfair use'. Linguists as well as lexicographers mention the word trademarks as a possible source of expanding the lexicon. For instance Akmajian et al. (2001) note that:

The words kleenex and xerox illustrate another technique for creating new words ... Kleenex, a brand name for facial tissue, has come to denote facial tissue in general. Xerox is the name of the corporation that produces a well-known photocopying machine, and much to the dismay of the company, the term xerox has lost its specific brand-name connotation and has come to be used to describe the process of photocopying in general."

In a similar vein Crystal (2006) succinctly puts it that:

A surprising number of words have developed contentious generic meanings: they include aspirin, band-aid, escalator, filofax, frisbee, thermos, tippex, and xerox. And the problem facing the lexicographer [dictionary-maker] is how to handle them. If it is everyday usage to say such things as I have a new Hoover: it's an Electrolux, then the dictionary, which records everyday usage, should include the generic sense. The principle has been tested several times in the courts and the right of the dictionary-makers to include such usages is repeatedly upheld. But the decision still has to be made: when does a proprietary name develop a sufficient general usage to be safely called generic?"

Metcalf (2002) puts it in a rather comic way when he says: "Some brand names have slipped the leash, run wild, and joined the pack of the general vocabulary".

What is coming out of these views is that there is indeed a privileged lexical stock of the language that should not be used willy-nilly. However, with time sometimes elements of the privileged few join the general stock of the language. This phenomenon manifests genericness.

For languages such as Ndebele the issue becomes even more complex because of language policy

issues. As a result of the fact that since the mid 19th century when the Ndebele people first made real and sustained contact with the West, the Ndebele language has been playing second fiddle to English. This has incapacitated the language in terms of its expressive capacity in certain fields. Moreso, because of the diglossic nature in which the language has found itself in for a long time there is a tendency to borrow words from English. This means that even words that would be ordinarily taken as uncontested brand names in English in Ndebele they are adopted as part of the stock of general vocabulary of the language. An example would be the word 'ikhokhu' (variably called ikhokho, ikhokhakhola, ikhokhokhola) referring to any soft drink yet the lexical item is derived from the word 'coke' which is a trade name for an American cola. With this linguistic reality it means lexicographers working on this language have to be extra cautious in handling such lexical items.

On the other side of the divide economists see brand names as words which are associated with all good and bad that could be in our minds about the firm, its products/services and employees. Klein and Keith (1981) note that:

The basic economic theory of brand names is that they are a goodwill asset on which the firm earns a profit. This profit shows up as a price premium for brand named products compared to their generic counterparts

Thus a Brand allows a firm to differentiate itself from the competition meaning to say a brand is a marker of corporate visibility. If you are highly visible, you have chances to prosper or decay. What this means is that for linguists and economists brand names play asymmetrical roles as the process of genericness is counter to the economic-legal essence of trademarks. The linguistic success of a mark becomes its economic suicide.

LEXICOGRAPHIC TREATMENT OF BRAND NAMES

The style manual of the ISN did not make any explicit pronouncement on how brand names were to be handled. Nevertheless under the subheading “Headwords” it says: “To be entered in lower case bold type and be will generic terms only (no proper names)”. (The ISN style manual in Hadebe 2002:222) We can also make any inference from the style manual under the sub heading “proper names” where it says “not to be entered” (ibid, 223). Looking at these two stipulations in the style manual it is clear that all brand names were not supposed to make their way into the dictionary. Thus going by the stipulations of the style manual one would not expect to find brand names in the ISN. This is implied where the manual makes stipulations on orthographic conventions to be used in entering headwords. The manual says the headwords were to be entered in lower case. Thus if some of the headwords to be entered in the dictionary were brand names it would be expected that

they would be presented in upper case at least for their initial letters. This practice is evident in the presentation of some proper nouns such as:

1. uNtulikazi bz 1a. uNtulikazi yinyanga yesikhombisa eyomnyaka ephakathi kukaNhlangu la loNcwabakazi. (ISN, 2001:498) [July n. Cl 1a July is the 7th month of the year which is in between June and August.]
2. uNkulunkulu bz 1a. uNkulunkulu kukholelwa ukuthi ngumdali wezinto zonke emhlabeni. (ISN, 2001:496) [God is believed to be the creator of all the things in the universe.]

However, this is not the case the truth is that there is a sizeable number of 'brand names' that are lemmatized in the dictionary. Examples include “ikhokhu, (coke) ijibhi, (jeep) ivaselina, (vaseline petroleum jelly) among others. These are however entered according to the orthographic stipulations of the style manual as illustrated below:

3. ikhokho bz 5. Ikhokho yisiphuzo esinathwa siqanda esilombala ongathi umnyama esigcinwa embodleneni. (ISN, 2001:127) [A coke is a bottled, darkish soft drink that is best taken cold.]
4. ifanta bz 5. Ifanta ngokunathwayo okulombala olithanga okusembodleneni. (ISN, 2001: 106) [A fanta is a bottled orangish soft drink.]

It is therefore not a subject of debate whether or not brand names are part of the ISN macrostructural entries. What becomes a puzzle is the criteria for inclusion or exclusion since their inclusion is ultra vires if one were to consider the stipulations of the style manual. By including the brand names in the dictionary the editors went beyond what they were allowed to do by their style manual. A possible explanation is that the entered lemmas are generified forms of brand names. This kind of argument would not suffice, at least if one were to consider the definitions of the above entries. The two definitions are not generified to include all kinds of soft drinks but are specific to coke and fanta respectively. This is unlike what is done with respect to the following entries:

5. ivaselina bz 5. Ivaselina ngamafutha ajiyileyo awokugcoba ubuso lomzimba. (ISN, 2001:273) [vaseline is a jellyish oilish cosmetic used on the face and body]
6. ikhango bz 5. ikhango yinkomitsho enkulu. (ISN, 2001:124) [a kango is a big cup.]

It is clear from the above examples that the meanings deciphered are generic and they are not specific to a particular brand. For instance the vaseline defined is not specific to a lever brothers, Bp or shell petroleum jelly but it is all inclusive. The same applies with kango which refers to any metal cup regardless of its manufacturer. In this case it would seem justified to enter the headwords in lower case since they can no longer be seen as proper nouns but more of common nouns. In other

words the hitherto brand names are now exact synonyms for the words petroleum jelly and metal cup respectively.

Looking at examples 3-7, it becomes clear that the inclusion and treatment of brand names is so haphazard and inconsistent that even if we do know that the dictionary theoretically omits all brand names, our experience has shown that it does not, then the decision whether or not to look up a brand name is reduced to guesswork, and by the time we have flipped through the dictionary we discover the brand name we have been looking for has been omitted in utter shock and annoyance. For instance its mind boggling why the dictionary lists DAF (Deutsch-Amerikanische Freundschaft) and JEEP and not Scania when it is common knowledge that all these are common brands of vehicles. The same question can also be asked concerning the inclusion of the lemma Vaseline and not Camphor yet both are popular products used for skin care. It is also not clear to us why Sprite, Stoney Ginger Beer, Spa Letta are not listed as lemmas in the dictionary yet similar words such as Coke and Fanta are listed. In terms of definitions it remains a mystery as to why lemmas in examples 3 and 4 are defined as brand names yet 5 and 6 as generic terms.

One would be persuaded to conclude that the editors' choices are a reflection of their opinions on whether or not a certain lemma is subject to proprietary rights. However, in telephone interviews both senior editors aired sentiments to the effect that this is not the case. They attributed the inclusion of trademarked brand names to popular usage though they were quick to point out the 'popular usage' was not scientifically determined for instance through a corpus but was informed by intuition as experienced mother tongue speakers and language educationists. Thus the argument of the editors is that they did not intend to enter brand names that have not lost their brand identity or that have not become generic. These were to be considered as non-lexical. Those included in the dictionary could then be seen as being generic. Be that as it may the challenge is that they defined some of them as if they were not generic. Therefore the ISN chose brand names on the basis of sound lexicographic principles albeit in a de facto way yet it presented some of them in such a way as to lead trademark owners and dictionary users to believe they had been chosen sometimes because of their trademark uses only.

What do others do?

The ISN's treatment of generically used trademarks is in stark contrast to the way other leading dictionaries have presented them as exemplified below:

7. **Band-aid** ...a trademark used for an adhesive bandage with a gauze pad in the centre, employed to protect minor wounds. It is also used figuratively as "True welfare reform is being by passed for Band-Aid solution" (Los Angeles Times) "Many critics contend that these measures are mere Band-Aids" (US News and World Report) [The American Heritage dictionary of the English Language; 3rd edition 1992]

8. **Band-Aid** 1. Trademark. A brand of adhesive bandage with a gauze pad in the centre used to cover minor abrasion and cuts. Informal. A make-shift limited, or temporary aid or solution that does not satisfy the basic or long range need: The proposed reform isn't thorough enough to be more than just a band-aid. 3. ...informal serving as a make-shift, limited or temporary aid or solution: band aid measures to solve a complex problem...[The Random House Dictionary of the English Language 1987]

9. **Band-Aid**...trademark for a small prepared bandage of gauze and adhesive tape for minor wounds. 1 (a) a bandage of this type. 2. a temporary superficial remedy for a serious or

complex problem- adj. Providing only temporary, superficial relief... [Webster's New World Dictionary 1988]

10. **Band-aid**.. trademark used for a small adhesive strip with a gauze pad for covering minor wounds. [Merriam-Webster}

Examples 7-10 point to a problem of inconsistencies in the lexicographic treatment of brand names that needs some intervention of meta-lexicography. Clearly, all dictionaries do not basically treat trademarked brand names the same way. However, what is important of which future Ndebele dictionaries can get a leaf from is the idea of recording actual usage. All the examples above, with the exception of Merriam-Webster's, point to the genericness of the words through even using the informal and figurative sense. They strengthen their cases by even reflecting on non- nominal usages of the trade marks which in itself is evidence enough of genericness. What this means is as a principle lexicographers can lay claim to genericness of a certain brand name through among other things establishing its expanding semasiological field, especially by showing its idiomatic, metaphoric and non-formal usage. A more systematic way to do this would be to rely on the corpus to establish the linguistic behaviour of the brand name in the language.

The other morphological principle that the lexicographers can use is to establish how morphological adaptable the brand name has been to the other categories of speech. A brand name by nature is a noun and thus it is expected that these lexical items would be found in a language in the form of this grammatical category. In the light of this it means any brand name that becomes morphological productive and assumes the status of other grammatical categories such as verbs, adjectives, adverbs, copulatives etc gives a lexicographer a good legal shield in listing it as part of his/her dictionary macrostructural entries. It is also necessary to use corpus evidence in analysing the morphological behaviour of a brand name.

Another meta-lexicographic issue that needs to be taken into consideration in future Ndebele lexicographic projects is to mark/label the trademarked brand names as such. It is instructive that in all the 4 dictionaries cited above the development of the entry starts with the identification of the lemma as a trademark. Thus it would have been a good lexicographic practice for ISN editors to have marked brand names as such especially those defined as such. At least they can be excused for those defined in generic terms.

THE USER PERSPECTIVE

Since the editors did not rely on any principles to determine which trademarked brand names had lost their distinctiveness we sought to test the genericity of some of the lemmas through a questionnaire targeted at ISN dictionary users. This questionnaire was reliant on the good defining practice identified by Landau (2001:164). Landau says “for many words, the definition should be substitutable for the word in context”. Thus going by this principle one would expect a user to be in a position to give an educated guess of the missing lemma from a given statement given as a

definition in the ISN. Fifty questionnaires with ten definitions were distributed to lexicography students at the Midlands State University and these are some of the observations made:

Table 1: Substitutability test findings

Definition in the ISN	Lemma and no. of respondents who guessed the correct lemma	Other lemmas identified by respondents and no. in brackets	Observations
<p>..ngamafutha agcotshwa ngabesifazane ikakhulu ukuze bakhanye behlambulukile ebusweni njalo bemhlophe. (cosmetics worn by women for them to look like they are glowing and have a fair complexion.</p>	<p>Iphonzi (ponds cream)-35</p>	<p>Iambi (ambi cream)(13) Isibhuda (reddish soil)(2)</p>	<p>A great number of users attest to the generification of pond's cream to signify a range of beauty products meant for cleansing the facials and to get a fairer complexion. However, it should be noted that there is a sizeable no of respondents who also root for a similar brand name from a product that is no longer as popular because of the disastrous effects it had on some users' faces. Thirdly, they are those who have chosen to extend the signification of the meaning of the traditional form of doing facials through the use of the lemma 'isibhuda' which is however soil!</p>
<p>...yimota encane elamavili amane eyenelisa ukuhamba emigwaqweni emibi kakhulu (a small four wheeled car that can go through very bad</p>	<p>Ijibhi (jeep)- 11</p>	<p>Ilendirova (10) ipajero (6) idifenda (8) isantana (4) others (11)</p>	<p>From these results it is contentious whether the jeep brand can be said to typify the off the road small range cars amongst the ISN users. The reason</p>

roads)		could be the word was adopted long back when the vehicle concerned was widely used by the security forces, game rangers, safari operators, farmers etc. Now there are so many small range off the road cars and this could explain the wide array of responses.
...yingxenyé yesigqoko enziwe ngensimbi kumbe ipulasitiki elamazinyo asetshenziswa ukukupela (A device consisting of two flexible strips of metal or plastic with interlocking projections closed or opened by pulling a slide along them, used to fasten garments)	Izipha (zipper)-50	None Not surprising considering the name was invented in the early 20th century . According to the Wikipedia online dictionary “the popular “zipper” name came from the B. F. Goodrich Company ; they opted to use Sundbäck’s fastener on a new type of rubber boots (or galoshes) and referred to it as the zipper, and the name stuck. The two chief uses of the zipper in its early years were for closing boots and tobacco pouches. ▪ Perhaps because of this long tradition of use it explains the obvious genericification of the brand name.

From the above snippets of the findings from the quiz what comes out strongly is that it is a very elusive exercise to determine the genericness of a brand name but one that is necessary to

undertake. Lexicographers can take advantage of a well built corpus to 'scientifically' determine the status of a lemma as being a genericised brand name or otherwise. In this way they would keep away from any libels resulting from their work having unfairly advantaged or disadvantaged a business entity or individual. It is the lexicographer's task to strike a workable balance between promoting and protecting the users' interests and needs whilst at the same time doing the same for the business community. This balancing act can only be made through a judicious mixture of intuition, the corpus and sound judgement based on clear meta-lexicographic principles.

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