

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Famous Brands Ltd
Advertiser	McCain Foods SA (Pty) Ltd
Consumer/Competitor	Competitor
File reference	78 - McCain - Steers - 23-01-19
Outcome	Upheld
Date	26 February 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a complaint lodged by Stefan Vos Marketing Regulation Advisers, on behalf of Famous Brands, against billboard and Facebook advertisements of McCain Foods.

Description of the advertising

The billboard advertisements contain pictures of one hot chip split in half, and a pack of McCain "Slap Chips", as well as the claim, "SA's NO.1* CHIP".

The McCain Facebook page's cover photo shows both the split chip and a pack of McCain "Fry Chips", as well as the claim, "SA's NO.1* CHIP".

The asterisk refers to the following disclaimer: "*Aztec market share data – sales volumes".

Complaint

The Complainant submitted that the advertising either communicates that McCain Fry Chips is South Africa's number one chip (i) based on sales; or (ii) because of the quality of its chips. The latter take-out is supported by the visuals of a chip broken in half, which visual communicates the quality of McCain Fry Chips.

While McCain Fry Chips may indeed be the frozen chip brand that has the most volume sales when compared to other frozen chip brands in South Africa, this is not what the Respondent claims. It claims to be "SA's NO.1* Chip", which claim is inclusive of all chips sold in South Africa, whether fresh or frozen. Moreover, the very small disclaimer underneath the claim, "Aztec market share data – sales volumes", does not qualify the claim in terms of frozen chips only. The Complainant therefore requested the Respondent to provide independent verification to validate the claim. It submitted that sales of fresh chips far exceed the sale of frozen chips in South Africa, and on this basis alone, the claim is unlikely to be substantiated.

The Complainant further submitted that Steers has won the Leisure Options Award for the Best Chips for 16 years running, and it challenged the Respondent to prove that its McCain Fry Chips is perceived to be "SA's Number 1 Chip" based on quality. Again, this claim is not qualified in terms of frozen chips, and is therefore inclusive of fresh chips.

Finally, the Complainant argued that the Respondent's claim is ambiguous and likely to mislead consumers, as it does not distinguish between frozen chips and, *inter alia*, fresh cut chips. Consumers are thus likely to erroneously interpret the claim to mean that McCain's frozen chips are superior to Steers' fresh cut chips, either in terms of quality, perception, or in terms of sales, a claim which is likely to mislead consumers.

Response

Attorney Gerald Ramsden submitted, on behalf of McCain Foods SA, that it is important to note at the outset that the respective products (namely, Steers' fresh cut chips and McCain frozen chips) fall into two very distinct market segments and accordingly also different competitive spheres, namely:

- fresh cut chips that are sold to consumers through Steers' fast-food outlets in a state ready for immediate consumption (that is, what is commonly known as 'fast foods' or 'take-outs'); vs.
- frozen chips that are sold to consumers through grocery stores, such as PnP and Checkers, in an uncooked state intended for later preparation and consumption (that is, what is commonly known as 'frozen foods').

In light of this, it is evident that the two products do not compete with each other and consumers are therefore unlikely to be misled regarding the respective claims being made by McCain and Steers that their chips are each superior within their own particular market segment, namely fast foods vs. frozen foods. Grocery shoppers (at whom the advertisements are targeted) are likely to be fully aware that McCain chips are, by their nature, clearly distinguishable from Steers' chips. Similarly, fast food consumers are also likely to be fully aware of that distinction. Since the two market segments are so different by their nature, it is unlikely that any confusion will arise in the minds of consumers. When one thinks of the Steers brand, one immediately thinks of fast foods, whilst, on the other hand, when one thinks of the McCain brand, one immediately thinks of frozen foods.

The Respondent argued that it is unreasonable for Steers to object to McCain claiming superiority in respect of its particular market segment on account of Steers' claiming to be superior in respect of its particular market segment. The two market segments in question are clearly different, and accordingly, even if Steers' is superior in the fast foods segment (as it alleges to be), that would not *per se* entitle it to object to McCain, on the other hand, claiming to be superior in its particular market segment.

The Respondent submitted that the photograph of an individual chip, broken in half, was used for creative purposes, as a straight chip would have had less visual effect on consumers viewing the advertisements. It denied that this feature, or any other feature of the advertisements, suggests that superiority is being claimed for its product in respect of quality. Similarly, nothing in the advertisements suggests superiority based on consumer preference. The only superiority being claimed is in respect of sales volumes as stated by the disclaimer.

The prominent display of the pack in the advertisements contextualises the claim in terms of the particular market segment in which superiority is being claimed, namely the frozen foods segment of the market. The disclaimer, in turn, provides further context for the claim in respect of the type of superiority that is being claimed within that particular segment of the market, namely superiority based on sales volumes.

Clause 3.2 of Section I of the Code of Advertising Practice states: *“In assessing an advertisement’s conformity to the terms of this Code, the primary test applied will be that of the probable impact of the advertisement as a whole upon those that are likely to see or hear it ...”*. Similarly, it has been a long-standing principle in the ASA (the ARB’s predecessor) that, *“... a claim should be considered within the context of the advertisement as a whole in order to determine what the hypothetical reasonable person’s take out of the claim would be”* (see, for example, Corobrik / CMA / 1137).

The Respondent submitted a report from Information Resources SA (Pty) Ltd, trading as IRI (and formerly known as Aztec), as substantiation for the claim that McCain is “SA’s No.1 Chip”, on the basis that McCain frozen chips are the best-selling frozen chips in South Africa.

Application of the Code of Advertising Practice

The following clauses were considered in this matter:

- Substantiation – Clause 4.1 of Section II
- Misleading claims – Clause 4.2.1 of Section II

Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

We are of the view that the Respondent’s advertisements can be interpreted in a number of different ways, because the context in which the claim *“SA’s No.1 Chip”* appears is not consistent throughout the advertising executions. For example, the disclaimer referring to market share data and sales volumes on the Facebook cover photo is legible, whereas it seems highly unlikely that a person driving past one of the billboard advertisements would

be able to read it, given the small size of the font in relation to the rest of the billboard. This means that the claim on the billboard could be interpreted to refer to consumer preference rather than market share.

Furthermore, if one only saw the billboard advertisements, one could think that McCain's "Slap Chips" variant is the "No.1" chip in South Africa, as opposed to the McCain chip brand in general. This is because the billboards contain a picture of the McCain "Slap Chips" product variant. On the other hand, the Facebook cover photo has a picture of McCain's "Fry Chips" variant, and so one could interpret this to mean that the "Fry Chips" variant is South Africa's number one chip. However, it is also possible that consumers would understand the claim to apply to McCain's frozen chips as a whole.

Finally, the claim itself is not qualified in terms of the market that it is referring to, i.e. frozen or "supermarket" chips. The Respondent essentially argued that because the advertising contains a picture of the product packaging, together with the fact that the Complainant and Respondent's brands operate in completely different markets, means that consumers will know that the claim refers to frozen chips only. The Directorate agrees that there certainly will be some consumers that interpret the claim in this way.

However, the fact that the claim itself is not qualified with, for example, the word "frozen", or with a legible disclaimer to that effect, and the fact that there is a large picture of a hot, cooked chip in the advertising, means that there is a real likelihood that consumers will interpret the claim to mean that McCain's "Slap Chips", or its "Fry Chips" (depending on which advertisement you are looking at), is the "No.1" chip in South Africa overall. In addition, the claim appears on a billboard and Facebook, and not at point of sale, which aggravates the fact that a consumer might not be sure exactly which type of chips are being referred to.

It is also worth noting that the chips that you buy from fast food restaurants are usually referred to as "fries"/"chips" by the restaurant, and "slap chips" in particular is a South African colloquialism (or slang term) for chips bought from a restaurant or café, that are somewhat soggy and usually drenched in vinegar. The Respondent's use of similar names for its products therefore increases the likelihood that consumers will interpret the claim to refer to all other chips, not just frozen or "supermarket" chips.

In addition, because the claim in the billboard advertisements could be interpreted to be a consumer preference claim (as mentioned above), it means that a consumer could reasonably interpret the billboard advertisement to say that McCain's "Slap Chips" is consumers' most preferred chip in South Africa, which is far from the claim that the Respondent is trying to make, i.e. South Africa's bestselling frozen chip brand. Indeed, it is a factor in the Directorate's decision that it is easy to encapsulate exactly what the Respondent is claiming in one statement.

The Directorate recognises that some consumers will reach the correct conclusion: that the claim is a sales based claim as against other frozen chips. However, this is not patently clear from the communications before the Directorate, and the hypothetical reasonable consumer could also reasonably conclude that the claim is a consumer preference claim and/or in relation to both frozen and fresh chips and/or in relation to only one product.

In light of the ambiguities discussed above, the Directorate finds that the claim "SA's No. 1 Chip", as it is currently used by the Respondent, is likely to mislead consumers. The claim therefore contravenes Clause 4.2.1 of Section II.

Sanction

In light of the above decision, the advertising in its current format must be amended.

The Respondent is required to:

- Withdraw the advertising in its current format;
- The process of withdrawing the advertising must be actioned with immediate effect;
- The process of withdrawing the advertising must be completed within the deadlines stipulated in Clause 15.3 of the Procedural Guide; and
- The advertising may not be used again in its current format in future.