

Decision of the ADVERTISING REGULATORY BOARD

Complainants	Mpho Lephala Bongani Mdletshe
Advertiser	Distell Limited
Consumer/Competitor	Consumer
File references	Savanna – Mpho Lephala and Bongani Mdletshe
Outcome	Partially upheld
Date	26 July 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider complaints lodged by Mpho Lephala and Bongani Mdletshe against a television commercial for Savanna Non-Alcoholic Lemon.

Description of the advertising

The opening scene in the commercial shows two men sitting at a busy bar and drinking out of bottles. The two patrons show surprised expressions on their faces as a traffic officer in uniform rides into the bar on his official motorcycle. The traffic officer orders and drinks what

appears to be an alcoholic drink, briefly looks at the two patrons and then rides away. One patron comments, "That's a bit unconventional", and the other responds, "Mm-hmm. Savanna with no alcohol. Breaks all the rules". They then glance over at a pilot dressed in his full uniform, sitting at a table in the bar behind them, also drinking from a bottle similar to theirs.

The words "Not For Persons Under The Age Of 18" appear at the bottom of the screen right throughout the commercial. The following wording also appears on the screen in the final shot, where a bottle with the label "Savanna Non-Alcoholic Lemon" is depicted:

- "New Non Alcoholic";
- "The Rules Don't Apply";
- "Savanna, the unapologetic cider".

Complaint

The First Complainant submitted that the commercial:

- Portrays the cider as non-alcoholic cider whereas in reality it contains alcohol;
- Wrongly sends a message to the public that even someone who is on duty can consume such a product; and
- The complainant also added that the fact that the advertiser used the disclaimer "Not For Persons Under The Age Of 18" makes the claim that the cider is non-alcoholic questionable.

The Second Complainant submitted that:

- The claim that the product is non-alcoholic is misleading as the drink contains 0.3% alcohol; and
- The commercial paints a confusing image depicting a traffic officer drinking an alcoholic drink and thereafter riding a motorbike.

Response

The Respondent submitted that:

- The cider contains no more than 0.3% alcohol by volume. In terms of the Liquor Products Act, an alcoholic beverage is defined as a product of which the alcohol is above 0.5% alcohol by volume. Products which contain less than 0.5% alcohol are not considered alcoholic or liquor products in terms of legislation.
- The legal driving limit is not more than 0.24mg per 1000ml for breath-alcohol content, or 0.05g per 100ml for blood alcohol content. Based on the above, the average person should consume less than two 240ml drinks of 5% alcohol/volume to remain safely below the legal alcohol limit. At not more than 0.3% alcohol /volume for Savanna Non-Alcoholic, one could deduce that a consumer would need to drink approximately twenty 330ml Savanna Non-Alcoholic products within an hour to reach the legal alcohol limit.
- The commercial does not in any way suggest overconsumption or irresponsible consumption.
- The respondent also submitted that due to the product's association with the alcoholic Savanna brand, it has, in order to ensure responsible communication, made an effort to retain its social responsible compliance guidelines on all commercial communication of Savanna Non-Alcoholic. It has therefore included the responsible message on its commercial communication, only promoting the product to adults, in order to avoid underage appeal to the brand.

Application of the Code of Advertising Practice

The following clauses were considered in this matter:

Honesty - Clause 2 of Section II

Misleading claims - Clause 4.2.1 of Section II

Alcohol Advertising - Basic Rule 11 of Appendix A

Decision

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

The complaints essentially break down into two questions around the commercial:

- Is it misleading in that the product in fact contains 0,03% alcohol;
- Does the commercial create the idea that police and pilots and similar professions should be drinking.

Clause 4.2.1 of Section II states that advertisements should not contain any statement or visual presentation, which directly or by omission, ambiguity or exaggerated claim, is likely to mislead the consumer about the advertised product.

The Advertiser submitted that the cider contains no more than 0.3% alcohol by volume. In terms of the Liquor Products Act, an alcoholic beverage is defined as a product of which the alcohol is above 1% alcohol by volume. Products which contain less than 1% alcohol are not considered alcoholic or liquor products in terms of legislation. In addition, the Foodstuffs, Cosmetics and Disinfectant Act allows for the term “non alcoholic” and “alcohol free” for products below 1,2% and 0,05% respectively.

The Directorate accepts this and accepts that the ARB cannot make a ruling that contradicts legislation, although it can find that something that conforms to legislation is nonetheless misleading in certain situations.

In Becks Non Alcoholic Beer / BG Flemming / 10837 (10 July 2008), heard before the old Advertising Standards Authority, pertaining to a beer that contained 0,03% alcohol, the Advertising Standards Committee (the ASC), in dismissing the complaint that Becks Non Alcoholic Beer cannot be termed as such because it contained a certain amount of alcohol, stated:

“It is our view that a hypothetical reasonable person will understand that many beverages and other consumables that are considered to be non-alcoholic or alcohol-free contain small amounts of alcohol, in amounts which are so insignificant as to regard them as alcohol-free. This is so because it stands to logic that for any

substance to be considered alcoholic, it has to induce intoxication by the consumption or use thereof. The Appellant made a point that one would have to consume at least 50 bottles of Beck's non-alcoholic beer for the 0.03% alcohol content in each 340 ml bottle to induce the slightest sensation of intoxication".

In SAB / Castle Free / E van Antwerpen (27 February 2018), the Advertising Standards Committee of the ASA again took this view – finding no issue with the rounding down of 0,03% to 0% and of the words “alcohol free”.

The Directorate nonetheless has a discomfort with the advertising of products which contain a small amount of alcohol as “no alcohol” or “0%” alcohol. It accepts that legislation allows for these products to be labelled as “non-alcoholic” and to declare the actual alcohol levels. It also accepts that educated consumers who are concerned about consuming alcohol will read the label carefully. However, not everyone is an educated consumer. The Directorate is also aware that some consumers will not wish to drink even trace amounts of alcohol – including alcoholics and people who do not drink for religious reasons. The fact that the drink will not intoxicate them will not be of relevance to their decision.

The ARB is not the ASA. While it accepts the decisions of the ASA as precedent, it is also free to forge new paths and approaches. But it cannot ignore that a Committee of industry representatives has twice accepted the practice of calling products with legally acceptable alcohol limits as “alcohol free”, “non-alcoholic” and even “0%” alcohol, on the basis that the actual product contains a clear alcohol declaration, and on the basis that consumers are familiar with this type of product. It notes that both cases dealt with labelling.

Similarly, the legislation is aimed at product labelling – where the exact alcohol content is declared on the packaging. The Directorate notes that it would feel far more comfortable if the commercial itself contained some sort of disclaimer as packaging would – along the lines that the product contains 0,3% alcohol or “trace amounts” of alcohol. If this were the case, there could be no argument that any consumer is misled.

It becomes crucial in this regard that the material in question is a television commercial. The

viewer does not have the luxury of consulting the packaging for clarity until they have in fact responded to the advertisement and gone to the retailer. By this time – even if they now elect not to buy the product – they have arguably been misled. In this ground, the material at hand can be differentiated from both the previous cases and the intention of the legislation.

That said, there is no doubt that the product label of “non-alcoholic” falls within the boundaries of legislation, and that the Directorate cannot expect the Advertiser to offer its non-alcoholic product without using those words.

The use of the words “non-alcoholic” therefore cannot present a problem despite the Directorate’s noted discomfort.

However, the commercial also has one character say, “Savanna with no alcohol. Breaks all the rules.” The question before the Directorate is whether this:

- Goes further than legislation allows;
- Is misleading.

The words “no alcohol” are not governed by legislation – although arguably they are similar in meaning to the words “alcohol free”, which are. The Directorate wrestled with this. However, the Directorate eventually gave weight to these factors:

- This is television and not packaging;
- This is a new type of product – alcohol “free” cider as opposed to beer;
- This goes beyond the specific mandates of legislation;
- The repercussions of a misunderstanding could be deeply upsetting for a consumer;
- The wording could easily be avoided, or a disclaimer could easily clarify the position.

Given this, the Directorate finds that the phrase “no alcohol” is misleading and in breach of Clause 4.2.1 of Section II.

The Directorate also notes the first complainant’s concern regarding the respondent’s usage of the disclaimer “Not for Sale to persons under the age of 18.”

The Directorate concurs with the respondent that the inclusion of the responsible message in this particular commercial promoting a non-alcoholic cider cannot be viewed as an admission that the product is actually an alcoholic product in terms of the law or could lead to intoxication. It is rather an indication that the respondent is promoting the product to adults in line with the requirements of the Code, and also an indication of an intent to avoid underage appeal to the Savanna brand as a whole

The “under 18” disclaimer is therefore not misleading and can also not be regarded as dishonest. This is therefore not in contravention of Clauses 2 and 4.2.1 of Section II of the Code.

The Directorate also understands the complainants’ concern regarding portrayal of a traffic officer and a pilot in a compromising situation, especially with the spotlight currently on drunken driving and its contribution to the carnage caused by car accidents on South African roads.

The Directorate, however, wishes to point out that in deciding whether there has been a breach of the Code, the commercial has to be judged in its context as a whole. Consideration should also be given to the surrounding circumstances as well as the underlying message. The Basic Rule 11 of Appendix states that “Commercial communication may not suggest the consumption of alcohol beverages under circumstances that are generally regarded as irresponsible, inadvisable, improper or illegal, e.g. preceding or during any operation requiring sobriety, skill or precision.”

The Directorate is of the opinion that in this instance, the over-the-top portrayal of a police officer and a pilot in a bar, ordering and drinking a cider that appears to contain alcohol, is part of a twist in the plot. The aim is to reveal that although they are consuming what appears to be a branded alcoholic drink – an act that might be against the requirements of the Code, as both the pilot and the traffic officer are in uniform, and the traffic officer is seen riding his official motorbike – the drink that is being consumed is non-alcoholic. They are therefore not being irresponsible. The intended message is to encourage consumers to be responsible, by opting for a non-alcoholic drink.

A reasonable adult viewer would, on seeing the whole commercial, understand that it is promoting a drink that is non-alcoholic, and therefore allows drivers to consume it without the danger of becoming intoxicated.

In the circumstances, the Directorate finds that it cannot be said that the commercial is in any way suggesting overconsumption or irresponsible consumption of an alcoholic beverage. The commercial is therefore not in contravention of Basic Rule 11 of Appendix A of the Code of Advertising Practice.