

THE ADVERTISING REGULATORY BOARD

In the matter between:

COLGATE- PALMOLIVE (PTY) LTD

Complainant

and

BLISS BRANDS (PTY) LTD

Advertiser

DECISION BY THE ACTING CHAIRPERSON OF THE ADVERTISING APPEALS COMMITTEE IN RESPECT OF THE APPLICATION FOR SUSPENSION OF THE DIRECTORATE'S RULING DATED 30 AUGUST 2019

INTRODUCTION

On 30 August 2019 the Directorate handed down its decision in the complaint lodged by Colgate - Palmolive Company and Colgate - Palmolive (Pty) Ltd ("Colgate") concerning advertising by Bliss Brands (Pty) Ltd ("Bliss Brands" / "the Advertiser") of its fabric conditioner labelled as MAQ Soft. The Directorate ruled that although Colgate had failed to make out a successful case in respect of Clause 8 of Section II of the Code (Exploitation of Advertising Goodwill) the advertising in issue was in breach of Clause 9 of Section II of the Code (Imitation). In other words, it partially upheld the complaint. It imposed the following sanction on Bliss Brands:

"The Advertiser is ordered to withdraw the advertising, in accordance with the provisions of Clause 14 and Clause 15.3 of the Procedural Guide. Specifically, the Advertiser would usually be required to have amended the packaging in line with this ruling within 3 months of receipt of this ruling. However, the Advertiser requested and received an extension on their response time, and in terms of Clause 8.2.2.5 of the Procedural Guide, the period for amendment of the packaging is therefore reduced by six days."

Bliss Brands has not appealed the decision of the Directorate. In fact, it has indicated that although it does not necessarily agree with the ruling,¹ it intends to comply with the ruling for the most part. It has however sought to apply for the "suspension" of the Directorate's ruling in respect of one of the affected products, the 500ml fabric conditioner refill pack ("refill packs") by way of an application lodged with the ARB on 10 September 2019. In its application it seeks a "suspension" of the Directorate's ruling for a period of what it refers to as 6 (six) months (reduced by 6 days as referenced in the ruling) until 24 February 2020 in respect of the refill packs. This essentially because, so Bliss Brands claims (and as I understand the argument), that as a result of delays in the Directorate handing down its ruling, combined with various logistical complications arising out of the fact that its product packaging for the refill packs is imported from Europe, it was forced to order new stock of the refill pack (bearing the contravening advertising) prior to the ruling being handed down "in order to preserve its commercial interests." This stock will only be depleted by February 2020 and the newly packaged product will presumably not be available before then.² It relies on Clause 9.12 of the Advertising Regulatory Board's (ARB) Procedural Guide as the basis for claiming this relief.³

Although the application purports, so it seems, to have been made to the Directorate,⁴ the matter has been referred to the Chairperson of the Advertising Appeals Committee (AAC) for consideration and determination for two reasons. First because the Directorate correctly, so I

¹ Paragraph 22 of the Suspension Application.

² As is extensively dealt with by Colgate in its response to the application, Bliss Brand's explanation as to its grounds for seeking the "suspension" are vague, unsubstantiated and somewhat confusing and accordingly difficult to distil. On the one hand it appears the concern is the preservation of its commercial interest (see para 10 read with paras 16 -18) while at other times in the application the submission appears to be that it will be "practically impossible for [it] to abide by the ARB's Ruling within the [prescribed period for withdrawal]" (see para19). Given the decision I have reached on the procedural issue, it is not necessary for the purposes of this ruling for me to make any determination on the merits.

³ Paragraph 2 of the Suspension Application.

⁴ The headnote of the Suspension Application refers to the matter being "Before the Directorate".

find, considers itself *functus officio*,⁵ and second because in the application reliance is placed on Clause 9.12 of the Procedural Guide as the relevant "empowering" provision enabling the decision to suspend sought. Clause 9.12 makes provision for applications for suspension of a ruling of the Directorate to be made to the AAC, which is the body that is empowered to consider appeals against rulings of the Directorate in terms of Clause 8.9 of the Procedural Guide.

NOVEL PROCEDURAL ISSUE

The request to "suspend" the operation of a ruling in a context where the ruling sought to be "suspended" is not being appealed is a novel request and raises important questions as to the extent of the powers of the AAC to suspend a ruling, and whether, in terms of the Code of Advertising Practice ("Code") and in particular the Procedural Guide, it is competent for the AAC to grant the relief sought by Bliss Brands.

While the issue of the AAC's competence to entertain this application or grant the suspension sought has not been raised by Colgate in its response to the application, I am bound to consider this issue. The ARB and its constituent bodies derive their power from the Code, are bound by the provisions of the Code and cannot lawfully exceed the bounds of their powers as provided for in the Code. If they were to assume powers not provided for in the Code they would be acting *ultra vires* and unlawfully.⁶

Accordingly, before considering the merits, the question I must answer is whether, absent an appeal (and assuming a case on the merits had been made out), it would be within the powers of the AAC to grant the "suspension" of the Directorate's ruling sought by Bliss Brands.

⁵ Even if not *functus*, Clause 8.14 of the Procedural Guide expressly states that the Directorate does not have the power to suspend rulings.

⁶ Like its predecessor the Advertising Standards Authority (ASA), although not a statutory body, the ARB does exercise an important public function - that being the self - regulation of the advertising industry in order to protect consumers and ensure fair play amongst advertisers. See: **The Advertising Standards Authority v Herbex (Pty) Ltd** 2017 (6) 354 (SCA) at para 17. In doing so it is seemingly bound by the constitutional principle of legality which, *inter- alia*, requires that functionaries do not exceed their powers. See **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) at para [20]. Even if not bound by the public law principle of legality, the ARB is manifestly bound to comply with the terms of the contractual mechanism by which it was set up. See **Nestlé (South Africa (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA)** at para 12.

THE POWERS AND FUNCTIONS OF THE AAC:

According to the Procedural Guide the AAC has two functions - to consider and rule on consumer complaints referred to it for consideration (in the first instance) by the Directorate and to consider appeals against rulings made by the Directorate. This appears from Clause 8.9 read with Clause 9.1 of the Procedural Guide. In carrying out these functions its Chairperson / the AAC itself is empowered in terms of Clause 9.10 to " ...perform all such acts and do all such things as are reasonably necessary to the performance of any of its functions, *including the suspension of rulings*" (my emphasis).

Like many other tribunals, quasi - judicial and administrative bodies, the ACC accordingly has ancillary powers to do all things necessary for the performance of its primary functions. These powers are however incidental powers which may of course only be exercised in order to assist the AAC to carry out its primary functions, namely considering a consumer complaint referred to it by the Directorate in the first instance or determining an appeal against a ruling of the Directorate. They do not extend the jurisdiction of or confer extra jurisdiction on the AAC. To the extent that Clause 9.10 refers to the power to suspend rulings this is an ancillary power which could only be exercised where appropriate by the Chairperson/ AAC when performing his/ her/ it's primary functions.

CLAUSE 9.12 OF THE PROCEDURAL GUIDE

Further reference to the power of the AAC / its Chairperson to "suspend rulings" is made in Clause 9.12 of Procedural Guide – the provision that Bliss Brands relies upon in seeking "suspension" of the Directorate's ruling in this matter. Clause 9.12 which provides important indicators as to the ambit and scope of the Chairperson/ AAC's power to suspend rulings provides as follows:

"9.12 Application for suspension of a ruling must be made as soon as possible but by no later than the date for the filing of the Appeal.

9.12.1 In the event that the suspension is granted, the time that has elapsed between the Directorate ruling and the filing of the request for suspension will, at the discretion of the Advertising Appeals Committee, be deducted from the deadline subsequently set for withdrawal of the material. In other words, and by way of example, if the request for suspension relates to packaging, which has a three-month withdrawal period, is received after 5 days from the

ruling, the Advertiser will have 2 months and 25 days to remove packaging after the appeal, if unsuccessful. However if the request for suspension is only received after one month, the Advertiser will only have 2 months to remove the packaging after the appeal, if unsuccessful.

9.12.2 The Advertising Appeals Committee may, on good cause shown, order a longer withdrawal period, but this clause sets out the default position."

A proper reading of Clause 9.12 makes it clear that the Clause provides for the Chairperson / AAC to consider applications for the suspension of rulings lodged pursuant to an appeal / an anticipated appeal and confirms my view expressed above that the AAC's power to suspend a ruling is effectively an ancillary power which it may exercise while performing its appeal function, and is not a wide power granted to the AAC to suspend rulings in a vacuum absent an appeal of the ruling sought to be suspended. This is plain from the several references to an appeal in the Clause. The opening sentence of the Clause requires that the application for suspension be made by no later than the date "for the filing of the Appeal" and clearly indicates that what is envisaged is an application for suspension of a ruling pending the determination of an appeal. This is confirmed by Clause 9.12.1 which ties the date of expiry of any suspension granted to a date "after the appeal, if unsuccessful." Clause 9.12. does not in my view envisage or make provision for the "suspension" of a ruling of the Directorate in circumstances where there is no appeal / anticipated appeal of the ruling sought to be suspended and does not in my view empower the Chairperson /AAC to suspend a ruling of the Directorate in instances where there is no pending appeal before it/ anticipated appeal.

Empowering the AAC to suspend a ruling pending the determination of an appeal is in line with the general principle of the common law which provided that the execution of the judgment of a court is automatically suspended upon the noting of an appeal, with the result that pending the determination of the appeal, the judgment cannot be carried out, except with the leave of the court that granted the judgment. The purpose of this principle was to avoid irreparable harm being done to the intending appellant while exercising his/ her/ it's right of appeal.⁷

⁷ See **University of the Free State v Afriforum and Another [2017] 1 All SA 79 (SCA) at para 5; South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 545:**

"Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland ...it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make a special application...

The whole purpose of empowering a quasi - judicial or judicial body to suspend its own decision or that of a body of lower status than itself pending an appeal is to ensure that irreparable harm is not suffered by a person or entity who seeks to appeal a decision affecting its interests to a higher body while the appeal is being determined.⁸ It is an interim measure put in place to preserve the status quo pending the further determination of the merits of the matter on appeal.

Absent an appeal there is no reason or justification for suspending an order / ruling. In choosing not to appeal an order the losing party implicitly accepts the ruling of the court / quasi - judicial body and agrees to be bound by that ruling and to give effect to it. If the losing party does not agree with the ruling or takes issue with the ruling, then the appropriate procedure is to appeal the ruling on whatever grounds that the said party disagrees / takes issue with the ruling.

By deciding not to appeal the Directorate's ruling Bliss Brands has chosen to accept the ruling of the Directorate and be bound by it. It cannot on the one hand choose to abide the ruling of the Directorate while at the same time seek to escape the effect of the ruling by having it in part suspended. To the extent that it took issue with the sanction imposed by the Directorate it was open to Bliss Brands to appeal the Directorate's decision regarding sanction and apply for a suspension of the ruling and seek a longer withdrawal period / extension of the withdrawal period (in accordance with Clause 9.12.2). Obviously in seeking such an extension good cause would have had to have been shown.

Moreover, it was open to Bliss Brands to have made representations to the Directorate requesting an extension of the time period (as stipulated by Clause 15.3.7 of the Procedural Guide) for the withdrawal of packaging in respect of the refill packs when making its submissions to the Directorate in response to the complaint. On its own version as set out in the suspension application, by the time it finalised its submissions on 11 July 2019, it must have been aware that it was going to face the dilemma of having to imminently order more product.⁹ It could have requested then that in the event the Directorate was to uphold the

The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant..." (my emphasis).

⁹ This appears from paragraphs 10, 16 and 17 of its application. At para 10 it states that " it is customary for the Advertiser to order additional product packaging around July of each year to maintain stock levels. This is because during the European summer breaks (typically August), the Advertiser's product packaging supplier and other factories and businesses, are virtually on holiday for 3-4 week" (my emphasis). It was almost already mid - July by the time it submitted its submissions. In para 16 it goes on to state that: " due to the logistical hurdles emanating from overseas purchases, the replenishment

complaint and order the withdrawal of the advertising, it exercise its discretion under Clause 8.14 to depart from the usual procedure and extend the 3 month period for the withdrawal of the product packaging in respect of the refill packs. The Directorate would then have been able to consider whether good and valid reasons existed for it to exercise the necessary discretion to agree to such a request.

Given my finding that the AAC is in the circumstances not competent to order the suspension requested, it is not necessary for me to consider whether there is good cause on the merits for the relief sought.

RULING

The application for suspension is dismissed.



Acting Chairperson

Advertising Appeals Committee

2 October 2019

lead times on existing material is approximately 2-3 months. This reality necessitated the finalisation of orders for shipment well in advance, to ensure the continuity of the refill packs supply" (my emphasis).