Decision of the ADVERTISING REGULATORY BOARD

Complainant	Citrogold (Pty) Ltd
Advertisers	Eurosemillas SA Stargrow Fruit Marketing (Pty) Ltd
Consumer/Competitor	Competitor
File reference	Tango Fruit – Citrogold
Outcome	Upheld
Date	22 July 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a competitor complaint lodged by Citrogold against packaging and in-store promotional material for Eurosemillas SA's seedless citrus fruit varietal which is marketed and sold under the TANGO trade mark.

Description of the advertising

The Advertiser makes the claim, on both its packaging and in-store promotional material, that its TANGO product is "bee-friendly".

Complaint

In essence, the Complainant submits that the claim “bee-friendly” is misleading in that-

> “-It wrongly implies that no pesticides which are harmful to bees are used in the commercial production of the Tango fruit.
>
> -It seeks to make a false distinction between the normal protocols for pesticide spraying that are required for the commercial production of TANGO on the one hand, and…other varieties on the other hand, when the protocols being applied are the same…”.

The Complainant further submits that, because the claim is of an environmental nature, it should comply with Appendix G to the Code of Advertising Practice, and be based on recognised scientific standards and principles. The Complainant is of the view that the “bee friendly” claim falls foul of Appendix G, in that:

> “- There is no information on what scientific standards or principles this ‘bee-friendly’ claim is based.
>
> -There is no information of any scientific or independent organisation that verifies the ‘bee- friendly’ claim….
>
> -There is no information that Eurosemillas or the Marketers require any sort of compliance of the commercial farmers that grow the fruit that could support their ‘bee- friendly’ claim.
>
> -There is moreover no information that Eurosemillas or the Marketers conduct any sort of audit of compliance of the commercial farmers that grow the fruit that could support their ‘bee-friendly’ claim.
>
> -The general statement, ‘bee-friendly’ is unqualified, there is no description of the benefit conferred and there is no substantiation of the claim.”

Response

There is some background to this complaint and the responses received, including that the initial complaint was received in October 2018 by the Advertising Standards Authority of South Africa ("the ASASA"), when that body was in the liquidation process. A "fresh" complaint was submitted to the ARB by Citrogold in March 2019.

Werksmans responded on behalf Eurosemillas SA, on 11 April 2019, and made the following relevant submissions.

Jurisdiction

The Advertiser argues that it is not a member of the ARB and therefore do not submit to the jurisdiction thereof.

ASA Code

The Advertiser argues that that the ARB is not entitled to rely upon the ASA Code, in light of the fact that it was proprietary to the ASASA and, as a result of the ASASA's liquidation, the ASA Code is an asset under the control of the liquidator. In making this argument, the Advertiser referred to a number of previous matters before South African courts, in which the ASASA had asserted its rights to the Code and the Procedural Guide.

In essence, Werksmans submits that there is no legal basis on which the ARB can claim rights to the ASA Code and enforce such code against third parties.

Advertising older than 90 days old

The Advertiser then made additional arguments to the effect that, in terms of Clause 3.3 of the Procedural Guide, the advertising material was older than 90 days old and the ARB cannot therefore entertain the complaint.

Subsequent to the initial complaint, current advertising was again found in Shoprite-Checkers stores and this was pointed out the advertiser, who was again given the opportunity to respond.

Matter to be considered by the appropriate regulator

The Advertiser repeatedly emphasised the fact that the TANGO variety "has low-viability pollen and double gametic sterility which results in seedlessness". The advertiser holds the view that the complaint is of such a technical nature that it should not be dealt with by the ARB, but rather by the Department of Agriculture.

Response on merits

The Advertiser maintained its arguments that the ARB has no jurisdiction to hear the complaint, and no ownership of the Code, but nevertheless responded on the merits by repeatedly referring the Directorate to the characteristics of the TANGO fruit, namely that it has low-viability pollen and double gametic sterility, which results in its seedlessness. The Advertiser alleges that the importance of these two characteristics is that it is not necessary to prevent cross-pollination which is *inter alia* effected by bees.

The Advertiser referred to an internet article, "California Mandarins- A Seedy Tale" which explains that, the more pollen that is transferred by bees, the more seeds in a fruit and the larger and more uniform the size and shape of the fruit.

A further paper is referred to, entitled "A Spatial Look at Negative Externalities in Agricultural landscapes: Seedless Mandarins and Honey Bee Pollination in California". The Abstract is summarised by Werksmans as follows-

"*When honey bees transport pollen across citrus orchards they can increase the number of seeds in varieties that remain seedless otherwise. An increase in seed diminishes the market value of the fruit creating an externality including a range of regulated spatial*

segregations of beekeeping and seedless farming with or without financial compensations."

The paper also states "*Pollination can reduce the quality and the market value of the crops. This is the case with many seedless mandarin varieties. In absence of cross-pollination with other citrus, clementine and W.Murcott Afourer varieties are seedless and this more highly valued by customers. If both honey bees and other varieties of citrus…are present in the vicinity of seedless orchards these mandarins become seedy and lose their quality premium. The externality comes from the transport of pollen from other citrus orchards by bees into orchards intended to produce seedless fruits.*

In the case of seedless citrus, the magnitude of externality is determined both by the vicinity of the cross compatible varieties of citrus and by the distribution of honeybees in the crops."

The Advertiser argues that the characteristic of low pollen viability is extremely important to ensure that the cross-pollination by bees does not create seedy fruit. They aver that the TANGO variety is seedless wherever it is planted and need not be planted in isolated blocks far from other pollinators which will make the variety seedy. Also, unlike most other late mandarins, TANGO does not have seeds and this makes it possible to avoid the use of treatments to remove or kill pollinating insects during the flowering period.

The Advertiser also states that the use of phytoregulators, like insecticides, is reduced.

Application of the Code of Advertising Practice

The following clauses were considered in this matter:

Misleading claims – Clause 4.2.1 of Section II

Advertising containing environmental claims- Appendix G

Decision

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

Jurisdiction

The Advertiser has indicated that it is not a member of the ARB and is not bound by the decisions thereof.

The Memorandum of Incorporation of the ARB states:

"3.3 The Company has no jurisdiction over any person or entity who is not a member and may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. However, the Company may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published."

In other words, if you are not a member and do not submit to the jurisdiction of the ARB, the ARB will consider and rule on your advertising for the guidance of our members.

The ARB will, however, rule on whatever is before it when making a decision for the guidance of its members. This ruling will be binding only on ARB members, and on broadcasters in terms of the Electronic Communications Act.

The ARB will therefore proceed to consider this matter for the guidance of its members.

Code Ownership

The Advertiser contends that the ARB has no basis on which to administer the Code of Advertising Practice, which it contends is the property of the Advertising Standards Authority, which is currently in liquidation.

The ARB has considered this contention but considers it to be without merit. It is beyond the scope of this decision to canvas each and every aspect of this issue, but the ARB has concluded that it is not precluded from applying the Code of Advertising Practice in these proceedings for the following main reasons. It must be noted that these reasons are independent and self-standing and that each of them separately lead to the conclusion that the Advertiser's contention is without merit:

- First, the MOI of the ARB makes clear that the ARB is to enforce the Code of Advertising Practice. It provides inter alia
  ". . . 3.1.3 address and fill the lacuna left by the liquidation of the Advertising Standards Authority of South Africa (1995/000784/08), which lacuna creates a risk that consumers will be exploited, and the advertising and marketing industry will be brought into disrepute;
  3.1.4 adopt and enforce, as far as reasonably possible, the existing and established Code of Advertising practice in the Republic (as administered until now by the Advertising Standards Authority of South Africa (1995/000784/08)). . ."
  On this basis, the ARB has the jurisdiction to apply the Code in this complaint.

- Second, the core of the Advertiser's complaint is that the ARB is violating the property rights of the ASA. But if there were any merit in that complaint, that is not an issue that the Advertiser has standing to raise in these proceedings.

- Third, the contention that the Code forms part of the property of the ASA such that the ARB is precluded from applying it is without merit in view of the fact the Code of Advertising Practice is based on the international ICC Code that all Self Regulatory Organisations use as their starting point. A line by line comparison with this document will reveal that the core of the Code of Advertising Practice is a

direct reflection of this document. The ICC have confirmed, in writing, that, "The ARB is recognised by the International Council for Advertising Self-Regulation (ICAS) as the official body responsible for implementation of advertising standards in South Africa. Accordingly, the ARB has justifiable remit to apply and enforce a national code of advertising practice".

- Fourth, the contention that the Code forms part of the property of the ASA such that the ARB is precluded from applying it is without merit in view of the fact the creation of the Code of Advertising Practice occurred on an ongoing basis through consultation with the industry. The industry makes submissions to the SRO which the SRO then either accepts or rejects. Sometimes the SRO may fine-tune the drafting of the submission, but any property rights such as existed in the Code (if there were any) lay with the advertising and marketing industry, rather than the ASA. The advertising and marketing industry has now mandated the ARB to enforce the Code, as appears from the MoI of the ARB.

- Fifth, the contention that the Code forms part of the property of the ASA such that the ARB is precluded from applying it is without merit in view of the fact that section 55 of the Electronic Communications Act must be read with the definition in section 1 which defines Advertising Standards Authority as "*the entity which regulates the content of advertising, or any entity that replaces it but has the same functions*''. The ARB has replaced the ASA and has the same functions as it had. It is thus entitled to enforce the Code.

Merits

The complaint in this matter is simple – the Complainant submits that the "bee-friendly" claim made in the advertising is misleading.

Clause 4.2.1 of Section II of the Code states as follows:

"Advertisements should not contain any statement or visual presentation which directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer."

The essence of the matter before the Directorate is what a hypothetical reasonable consumer would understand the claim "bee-friendly" to mean. The Directorate is of the view that such consumer would consider "bee-friendly" to mean that the products, during their planting and growing process, attract bees, or certainly, and at the very least, that bees would not be harmed by any pesticides or insecticides that may be used and with which the bees could come into contact during the growing process.

The Advertiser's asserts that the seedlessness of the variety makes it bee-friendly. The Directorate understands that the Advertiser's argument comes down to the following chain of logic: Because the fruit is seedless, it is unnecessary to prevent cross-pollination, meaning, it assumes, that less "anti-bee" steps are taken.

However, the Directorate finds that the seedlessness of the product is not what the hypothetical reasonable consumer would understand from the claim "bee-friendly". The Directorate is of the view that the lack of an explanation about what bee-friendly means renders the claim ambiguous. The average consumer would not understand seedlessness alone to equate to bee-friendliness, and would expect at the very least that "bee-friendly" fruits are not sprayed with any products that could be harmful to bees. This impression is strengthened by the illustration of a happy animated bee next to the words "Let's play" on the point-of-sale material.

While the Complainant made several references to the fact that the TANGO product is, to the best of its knowledge, sprayed with insecticides harmful to bees, the Advertiser in its response does nothing to refute this assertion. A passing reference is made to the fact that the use of phytoregulators, like insecticides, is *reduced*, but that is all. The Advertiser

does not address whether the phytoregulators used, reduced or not, are harmful to bees that may come into contact with the TANGO fruit.

Reference is again made to the following statement by the Advertiser. "TANGO does not have seeds and this makes it possible to avoid the use of treatments to remove or kill ***pollinating*** insects ***during the flowering period***…The use of phytoregulators, like insecticides, is ***reduced***…[our emphasis]"

This averment covers certain important points, highlighting that the product is not "bee friendly."

1. It would not be necessary to apply insecticides or pesticides to deter pollinating insects during the flowering season. This does not automatically mean that other insecticides or pesticides, during other periods in the life cycle of the plant, are not applied, and the Advertiser has not provided this information.
2. It is expressly stated that the use of insecticides is reduced, not eliminated.

The Advertiser does not directly address the issue of insecticides and pesticides, and the Directorate draws the conclusion, for the reasons set out above, that these products are still applied, albeit in smaller measure and less frequently. The product may therefore cause less harm to bees than seeded fruit varieties, but this does not equate to being "bee friendly" as the consumer would understand it.

To call the product "bee-friendly" is, therefore, misleading in that the claim is ambiguous at best, or inaccurate at worst.

Consideration was also given to Appendix G of the Code. Clause 2.4 of Appendix G requires that general statements, such as "environmentally friendly" will not be permitted unless qualified by a description of the benefit conferred.

The Directorate again concludes that the Advertising does not sufficiently qualify or explain the way in which the product can be considered "bee-friendly" and therefore also falls foul of Appendix G.

In the circumstances, the Directorate has no choice but to find that the claim is misleading and in breach of Clause 4.2.1 of Section II, as well as Appendix G.

Sanction

Members of the ARB are advised not to accept advertising for TANGO citrus fruits that include the claim "bee- friendly".