

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 22061/2020

(1)	REPORTABLE: NO YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
21/5/2021	
DATE	SIGNATURE

In the matter between:

BLISS BRANDS (PTY) LIMITED

Applicant

And

ADVERTISING REGULATORY BOARD NPC

First Respondent

COLGATE- PALMOLIVE (PTY) LIMITED

Second Respondent

COLGATE- PALMOLIVE COMPANY

Third Respondent

JUDGMENT

Summary: The Advertising Regulatory Board ('ARB'), the self-appointed watchdog of the advertising industry, is a non-profit company which has been set up and is funded by the advertising industry for the purpose of regulating that industry. The ARB seeks to enforce the maintenance of standards for the advertising industry as described in its code of conduct ('the Code') which incorporates a procedural guide relating to the adjudication of complaints made to it of contraventions of the Code by members of the public, including those that make use of advertising services to sell their products. The ARB's Memorandum of Incorporation ('the MOI') binds its members and such members, in turn, undertake thereby to bind their members to the MOI. This has the result that those who control the whole of the print, digital, and broadcast media in SA are subject to the MOI which, in turn, binds them to adhere to the Code.

The MOI and the Code allow for rulings and orders to be made by the ARB against non-members and dictate that if a non-member refuses to comply with an ARB ruling, the members of the ARB (including their members) are bound to decline to accept the impugned advertising from that non-member upon the issue of a notice to members – known as an *ad-alert* – from the ARB to that effect. This has the effect that the advertiser cannot gain access advertising services unless it complies with the ruling, in this instance being the withdrawal of the packaging of the applicant's packaging for its hygiene soap brand SECUREX. The complainant in the ARB process were the second to third respondents who are the purveyors of a competing soap brand – PROTEX.

Clauses 8 and 9 of the Code which deal with 'exploitation of advertising goodwill' and 'imitation' in advertising raise legal issues which entail the same inquiries to those which courts are called on to entertain in cases dealing with passing-off and contraventions of copyright law and trade mark law and rulings of the ARB generally entail the withdrawal of the impugned advertisement which is no different from the grant of an interdict.

The constitutionality of the ARB process considered with specific reference to the coercive effect of the ad-alert on non-members of the ARB.

Held: The exercise of this public power over non-members of the ARB is unconstitutional in that such power is not sourced in law as required by the principle of legality.

Held: A constraint on the right to trade freely on the scale precipitated by an ad-alert is inherently an infringement of the rights of the person and property and thus section 34 of the Constitution is implicated.

Held: The ARB process arising from complaints under clauses 8 and 9 of the Code fall foul of Section 34 of the Constitution in the following three respects: First, such disputes are of a nature that can and should be resolved by the application of law and in a court of law. Second, the procedures prescribed for the hearing in terms of the procedural guide are inherently unfair. Third, the ARB is not an independent tribunal.

Held: In determining complaints under clauses 8 and 9 of the Code the ARB seeks to exercise judicial authority in contravention of section 165(1) of the Constitution.

FISHER J:

Introduction

[1] The applicant (Bliss) and the first and second respondents (collectively Colgate) are competitors inter alia in the supply of detergents, fabric softeners and hygiene soap bars.

[2] The first respondent is the Advertising Regulatory Board (ARB).¹

¹ The predecessor of the ARB, the Advertising Standards Authority (ASA) previously held the same position and exercised the same powers as the ARB, but it was liquidated in October 2018 as a result of difficulties with funding and tax problems. The ASA was in its time generally acknowledged to be the

[3] The ARB has, in the context of its role as self-appointed industry watchdog, made disciplinary rulings against Bliss arising out of complaints filed by Colgate. This occurred previously in relation to their competing fabric softener brands and now in relation to their competing hygiene soap bars.

[4] The complaint in issue here was essentially that the Bliss packaging of its SECUREX soap bar contains similarities in its architecture and parts of its get-up to the packaging of Colgate's competing PROTEX soap bar which are likely to cause confusion amongst consumers of these products soap products. A similar complaint was made in relation to the fabric softener brands where Colgate obtained some success in the ARB.

[5] In the ARB processes which are three-tiered (i.e. a first determination followed by two appeal processes) Bliss had initial success in that it was first held that the respective packaging was not confusingly similar. Bliss, however, fell at the second and third appeal hurdles the latter and final determination being as a result of a Chairman's casting vote which broke a deadlocked panel. Thus it is clear that there was some contention in the process as to similarity or otherwise of the soap packaging. This notwithstanding and, because of the previous finding in relation to the fabric softener, one of the final appeal panel characterised Bliss as a 'serial imitator' in a concurring judgment.

[6] The effect of the final ruling is that Bliss may no longer sell its soap using its current packaging. This, obviously, has cost and brand image implications for Bliss and has led to this application.

[7] The ARB's functions are informed and underpinned by the Advertising Code of Conduct which incorporates a procedural guide (the Code). The ARB contends that

official regulator of the advertising industry. The ARB now holds that position and has been set up to replace the ASA.

the Code represents a codification of the mores of society in the field of advertising. The Code draws from advertising regulation in other jurisdictions, such as the United Kingdom, Canada, and Australia. Its present form is substantively similar to the Code which served under the ASA.

[8] Essentially, the Code is drawn and administered through the ARB collectively by the captains of the advertising industry who comprise its membership. It has, as I have said, been set up by its members as the industry watchdog and, as such, it claims to perform a protective and educative role which it says is necessary for the good governance of advertising in South Africa.

[9] The Code covers a space where the law does not necessarily reach but which, according to the ARB, requires regulation in the public interest. In this respect It argues that advertisers may seek to put out advertisements which, although not unlawful, may still exceed the bounds of good taste, fairness, and responsibility to the public as determined by the ARB.

[10] From an administrative law perspective, it is not disputed that the ARB performs a public function and exercises public powers which are coercive. This coercion arises out of a machinery employed by the ARB known as an 'ad-alert'. This entails a contractually enforced blanket refusal by the ARB's membership to publish any advertisement which has been found by the ARB to violate its Code.

[11] This case examines the constitutionality of the ARB process with specific reference to the coercive effect of the ad- alert on non-members of the ARB.

[12] Bliss contends that the ability to wield this power as it emerges from the ARB's Memorandum of Incorporation (MOI) and the Code which is administered pursuant thereto is unconstitutional. The respondents contend that, in the absence of such power, the ARB will become toothless and defunct and that this is against the public interest. It argues that the exercise of the public power of the ARB is constitutional.

[13] In the alternative to the constitutional challenge, Bliss seeks the setting aside of the impugned rulings under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and raises six grounds of review.

Procedural history

[14] The matter was initially brought as an application for review only. As an adjunct to the review application Bliss, represented by Ms Southwood SC, also sought before me, interim relief in the form of a suspension of the operation of the rulings pending the outcome of the review.

[15] Bliss faced some difficulty in seeking this interim relief in that an application for urgent relief in the same terms had already been heard by Yacoob J in the ordinary urgent court some weeks previously and been dismissed. It was argued by Mr Michau SC who represents Colgate, that Ms Southwood was attempting to bring a fresh application before me seeking interim relief based on issues which were *res iudicata*.

[16] At the hearing, I *mero moto* raised the constitutional point which is determined in this judgment. I held also that, as a result of the introduction of the constitutional challenge, the inquiry was substantially different from that determined by Yacoob J.

[17] The complaint of Bliss was that the application of the order would result in significant loss to it in that it would be unable to market and sell its product in its existing style and get-up pending the final determination of this review. It argued that this would result in incalculable loss to it which would not be recoverable by way of damages.² Colgate on the other hand argued that its prejudice existed only in the deprivation of its rights. Thus on my assessment of the case for interim relief before me I found that Bliss had shown that, if it has to comply with the rulings in the interim to a determination of this right, this would cause irreparable harm to it if it is ultimately vindicated; the

² See: *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73; [2006] 1 All SA 6 (SCA).

ARB conceded this position and agreed to an interim order against it suspending its rulings.

[18] This interim order is thus currently in place pending the final determination of the case. Mr Michau submitted that my order should be reconsidered at this stage. I will deal with his submissions in this regard later.

[19] When this Court *mero motu* raised the question of whether the ARB process in issue is constitutional, particularly in light of section 34 of the Constitution, Bliss amended its papers to incorporate the constitutional challenge as it is now framed and all parties supplemented their papers accordingly.

[20] It is necessary in relation to both the constitutional challenge and the review that the regulatory scheme of the ARB be understood.

Regulatory context

[21] The ARB is a non-profit company incorporated in terms of the Companies Act 71 of 2008 ("the Companies Act"). In terms of section 15(6) of the Companies Act, its Mol is an agreement between the ARB and each of its members.

[22] In terms of the ARB's Mol, each of its members is bound by the Code; and each member undertakes to bind its members to the Code. Thus there are direct and indirect members of the ARB. The ARB has been set up and paid for by the advertising industry in order to self-regulate that industry.

[23] The Directorate and the Committees of the ARB administer the Code. They adjudicate complaints of breaches of the Code both by and against members and non-members of the ARB. The ARB's Directorate is responsible for receiving and adjudicating complaints concerning advertising in order to ensure compliance with the Code.

[24] Any party who feels aggrieved by a ruling of the Directorate may appeal the Directorate's ruling to the Appeals Complaints Committee ("the AAC"). A further appeal lies to the Final Appeal Committee('FAC').

[25] It is important that, unless an advertiser has applied for and been granted a suspension of a ruling, it must adhere to the ruling pending an appeal.

[26] The ARB concedes that its rulings are not legally enforceable against non-members. However, if a non- member refuses to comply with an ARB ruling, the members of the ARB are bound by the MOI and the Code to decline to accept advertising which has been found to be unacceptable by the ARB from that non-member.

[27] The Code provides that, should a non- member ignore a reasonable request for co-operation, the ARB may issue an ad-alert to its members, the effect of which is that none of its members will publish any advertisement (found to be unacceptable by the ARB) of the offending advertiser in any medium.

[28] Clause 3.3. of the Mol also provides that where a non-member who has been complained against does not participate in the ARB's processes, the ARB may nonetheless issue an ad-alert against it.

Factual background

The complaint

[29] On 9 December 2019, Colgate lodged a complaint against Bliss with the ARB, contending that the packaging of Bliss's SECUREX soap contravened the Code in the following two respects: it exploited the advertising goodwill of the packaging architecture of the Colgate's PROTEX soap in contravention of clause 8 of Section II of the Code; and it imitated the PROTEX Packaging Architecture in contravention of clause 9 of Section II of the Code.

[30] On 21 January 2020, the Directorate dismissed the complaints whereupon Colgate appealed against the Directorate's decision to the AAC.

AAC Ruling

[31] Colgate's appeal succeeded and, as a consequence, Bliss was directed to withdraw its SECUREX packaging within three months of the ruling and immediately to cease any advertising showing the product every medium other than packaging.

[32] Accordingly, Bliss withdrew its advertising of the SECUREX brand from all media other than packaging after the AAC Ruling. It did not immediately withdraw the packaging because the ruling allowed it three months in which to do so. The purpose of the granting of the three months is obviously a recognition that there are logistical challenges to changing packaging whereas other forms of advertising are capable of being stopped immediately.

FAC Ruling

[33] The Advertiser appealed against the AAC Ruling to the FAC on 26 May 2020. The FAC gave its decision on the appeal on 3 August 2020 upholding the ruling of the AAC. This is the main decision which is being challenged in these review proceedings.

The Constitutional Challenge

[34] The challenge is specifically directed at clause 3.3 of the Mol, which provides as follows:

'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 an advertisement regardless of by whom it is published [including non-members] to determine on behalf

of its members whether its members should accept any advertisement before it is published or should withdraw an advertisement if it has been published.' (Emphasis added).

[35] The underlined portion of clause 3.3 has the effect that the rights of non-members are implicated in the ARB's processes.

[36] The fundamental challenge is to the effect that the ARB's exercise of public power against non-members has no source in law. The applicant also contends that the ARB processes fall foul of section 34 of the constitution in a number of respects.

[37] The respondents contend that the ARBs processes are constitutional and that the legality of clause 3.3 of the MOI has, in any event already been determined by the SCA.

[38] The remedy proposed by Bliss is directed first at the striking down of the MOI in toto and, in the alternative, at declaring that clause 3.3 of the MOI is unconstitutional, void and unenforceable and providing for amendments thereto which will cure the lack of constitutionality.

[39] I move first to deal with the fundamental constitutional challenge.

Is the ARB's power sourced in law?

[40] It is trite that in terms of the principle of legality, public power can only be validly exercised if it is sourced in law.³

³ *AAA Investments Pty Ltd v Micro-Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at p 050-20, para 68 ("AAA"); *Minister for Justice and Constitutional Development v Chonco and Others* (CCT 42/09) [2009] ZACC 25; 2010 (1) SACR 325 (CC); 2010 (2) BCLR 140 (CC) ; 2010 (4) SA 82 (CC) (30 September 2009) at para 27.

[41] The respondents initially submitted that the power of the ARB had its source in statute and more specifically in section 55⁴ of the Electronic Communications Act⁵ ("ECA").

[42] However, a reading of section 55 shows that it does no more than identify the Code as a code to which broadcasting service licensees must adhere. It does not empower the ARB to determine breaches of the Code.

[43] Section 55 empowers the Complaints and Compliance Committee which is constituted under the ICASA Act (and which bears no relationship to the ARB) to adjudicate complaints alleging breaches of the Code (by broadcasting service licensees who are not members of the ASA) (section 55(2)). The section also provides that broadcasting service licensees (whether or not they are members of the ASA/ARB) found to have breached the Code must be dealt with in accordance with sections 17A to 17H of the ICASA Act (section 55(3)), which provide, inter alia, for the investigation and adjudication of complaints and allegations of non-compliance with the ECA by the Complaints and Compliance Committee.

[44] Mr Ferreira, who appeared for the ARB, thus contented himself with the submission that it was not, in any event, necessary for the public power of the ARB to be sourced in statute. Mr Michau aligned himself with this argument. The respondents relied on the definitions of 'administrative action' in section 1 of PAJA shows this by envisaging that a natural or a juristic person, other than an organ of state, may exercise a public power or perform a public function in terms of an 'empowering

⁴ Section 55 of the ECA reads as follows:

"55 Control over advertisements

(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa [as defined] and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act [Independent Communications Authority of South Africa Act 13 of 2000], as well as complaints concerning alleged breaches of the advertising regulations.

(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority of South Africa, is found to have breached the Code or advertising regulations, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act.

⁵ 36 of 2005.

provision' which in turn is defined as 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.'(underlining added)

[45] The respondents rely also on *Ndoro and Another v South African Football Association and Others*⁶ for the proposition that wide-scale public commercial regulation by private treaty is unobjectionable.

[46] In *Ndoro*, Unterhalter J deftly sought to reconcile apparently differing positions taken by our courts in relation to the exercise of public power by a private regulator as follows:

'The following principles emerge from this body of cases. First private entities may discharge public functions by recourse to powers that do not have a statutory source. Powers of this kind may be characterised as public powers. So characterised actions that issue from their exercise may constitute administrative action. Second, a private entity may exercise public powers, but this does not entail that all its conduct issues from the exercise of a public power or the performing of a public function — all depends on the relevant power or function. Finally, while there are broad criteria for making an evaluation as to whether a competence enjoyed by a private entity is a public power or public function, there is no warrant to conclude that, simply because a private entity is powerful and may do things that are of great interest to the public, it discharges a public power or function. Rather, it is the assumption of exclusive, compulsory, coercive regulatory competence to secure public good that reaches beyond mere private advancement that attracts the supervisory disciplines of public law.'⁷(Underlining added)

[47] It is undoubtedly correct that private bodies are capable of exercising public power in the absence of statutory empowerment. It is correct also that such public power can be sourced purely in an instrument of agreement such as the MOI and the Code. The question to be answered in this case is, however, not whether public power

⁶ (16/16836) [2018] ZAGPJHC 74; [2018] 3 All SA 277 (GJ); 2018 (5) SA 630 (GJ) (24 April 2018)

⁷ *Ndoro* paras 19 to 23.

is being exercised (it is common cause that it is) but whether such exercise of public power is lawful. Unterhalter J made it clear in the passage quoted above that an enquiry of this nature was fact specific.

[48] Further in relation to this question, the definitions of 'administrative action' and 'empowering provision' in PAJA do not assist the respondents because such definitions explicitly beg the question whether the exercise of the administrative power is lawful. The realm of administrative action as defined in PAJA is not restricted to lawful administrative action; otherwise it would be impossible to challenge unlawful action under PAJA. It is because of this that the definition of 'empowering provision' expressly refers to the law or document in terms of which an administrative action was 'purportedly' taken.

[49] Mr Ferreira appears to suggest that there is an implication in *Ndoro* to the effect that the administrative action which was the subject of that case – i.e. the decisions under the instruments governed by FIFA and the related South African instruments was lawful. He points out that if one wishes to partake in professional football one has to submit to the rules of FIFA and he seeks to draw a parallel between the position of Mr Ndoro and non-members of the ARB.

[50] However, this is of no assistance to the respondents in that Unterhalter J was not called upon to and did not decide the legality or otherwise of the restraints of trade which exist in the international scheme under which professional football is run.

[51] There are for that matter also a number of authorities which deal directly with of the ARB's predecessor, the ASA⁸. These cases also cannot be taken to move from the perspective that the ASA processes are accepted as lawful. As in *Ndoro*, the issue of lawfulness was not raised or canvassed in any of these matters.

⁸ See for example *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) ('Herbex'), *Telematrix n 2* above; *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others* (2331/15) [2015] ZAGPPHC 243 (28 April 2015) ('Brandhouse') and *Nestle (SA) (Pty) Ltd v Mars Incorporated* 2001 (4) SA 542 (SCA) ('Nestle').

[52] In any event, the situations in *Ndoro* and this case are, to my mind not commensurate. In *Ndoro* the source of the power is clearly consensus. In order to reap the considerable benefits of the international scheme headed by FIFA, Mr Ndoro made the election to become a member of such scheme. In contrast, a non-member of the ARB, such as Bliss does not agree to be bound by the rules of the ARB or subject to its jurisdiction, but it is made subject to these rules nonetheless.

[53] There can be no doubt that the public power wielded by the ARB is resides in the coercive effect of the ad-alert. I move to examine the legality of this source.

The legality of the ad- alert

[54] In the MOI, the members of the ARB declare that they regard themselves as bound by, and they undertake to bind their members, to the jurisdiction of the ARB. The members of the ARB and their members represent a wide cross- section of advertising media, agencies and marketers.⁹ Essentially, they comprise the whole of the print, digital and broadcast media in South Africa. Furthermore, the Code provides that it binds the advertiser, the advertising practitioner and the medium involved in the publication of the advertiser's message to the public.

[55] This means that a non-member who is sanctioned cannot advertise its product unless it complies with the ruling. This predicament is more serious still where, as in this case, the complaint relates to the packaging of the product, in that the product cannot be offered for sale at all. The respondents do not dispute that the purpose and effect of an ad-alert is to prevent the non-member from marketing its products and thus from participating in commerce.

[56] Mr Ferriera concedes that publishers are not entitled to refuse to publish advertising for no legitimate reason and that there are statutory, common law and

⁹ Most of the country's blue-chip companies are members of the ARB's members (namely the Association for Communication and Advertising ("ACA"), the Marketing Association of South Africa ("MASA"), the Interactive Advertising Bureau ("IAB"), the National Association of Broadcasters ("NAB") and the Pet Food Industry Association of Southern Africa ("PFI")), and the Association for Alcohol Responsibility and Education (aware.org).

constitutional limits on the right of publishers to refuse to publish advertising.¹⁰ But, he argues, provided such right is lawfully exercised, it must be given effect to. He seeks to find this lawfulness in the rights to freedom of association (which includes the right not to associate) and expression.

[57] In expanding on these right Mr Ferriera made reference the case of *Remuszek v. Poland* in European Court of Human Rights¹¹ where the applicant complained about a refusal by a newspaper to publish paid advertisements for his book which cast aspersions on *Gazeta Wyborcza*, a popular Polish daily newspaper. The applicant relied on Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹² ('the Convention') which deals with the right to freedom of expression.

[58] The Court found that the State's obligation to ensure the individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media and that effective exercise of the freedom of the press presupposes the right of the newspapers to establish and apply their own policies in respect of the content of advertisements and also necessitates that the press enjoys freedom to determine its commercial policy in this respect and to choose those with whom it deals.¹³

¹⁰ For example it would be unlawful for publishers to act in concert to give effect to the FAC Ruling where the effect of such action would constitute an infringement of section 34 of the Constitution, an unlawful restraint of trade, an unlawful boycott, or an infringement of section 4(1)(a) of the Competition Act 89 of 1998 which provides, in its relevant part, that an agreement by firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if it has the effect of substantially preventing or lessening competition in a market.

¹¹ *Remuszek v. Poland* (case no: 1562/10): 16/10/2013

¹² Article 10 of the Convention, reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

¹³ At para 79.

[59] The ARB's reliance on these principles ignores a fundamental distinction between the facts of this case and *Remuszko*. It was found in *Remuszko* that it was not argued, let alone shown, that 'the applicant had any difficulties in publishing his book or that the authorities tried in any way to prevent or dissuade him from publishing it, or that, more generally, the media market in Poland was not pluralistic'.¹⁴ Thus this was not a case where the right to commercial activity was completely cut off, as is the case when an ad-alert is issued.

[60] Mr Loxton SC who dealt with the constitutional challenge on behalf of Bliss, argued that the operation of the ad -alert has all the features of an indirect boycott. I agree. Neethling describes this type of boycott as 'a weapon which is directed at the partial or total exclusion of a specific entrepreneur from commerce' and as 'an act whereby an entrepreneur successfully instigates third parties – by influencing their free will - to break off economic or non-legal relations with a rival (or rivals), or to refrain from entering into economic legal relationships with him'.¹⁵

[61] Whilst the argument of the respondents that these principles are germane to the area of the delict of unfair competition and not the examination of constitutional rights is obviously correct, the element of unfairness has relevance in the consideration of the constitutionality of the ARB process as against non-members.

[62] The respondents have sought to emphasise the consensual nature of the collective withholding of advertising services, but it appears clear that, to the extent that this practice serves to circumvent the normal commercial relationships, it is necessary that there is an element of enforcement even against members of the ARB. In this matter, Colgate's attorneys demanded of the ARB that it enforce its ruling, on pain of application when it appeared that there may have been some reticence to do so. In fact, the membership have by means of their subscription to the provisions of the MOI and the Code relinquished their independent right to determine what they

¹⁴ At para 80.

¹⁵ Van Heerden & Neethling -*Unlawful Competition* p 308.

believe to be appropriate advertising material. Regardless of their personal considerations in any given situation, they are obliged to follow the ARB's prescripts.

[63] Recall, that this stranglehold which the ARB exerts over the industry has nothing to do with seeing to it that the law is not broken. It is common cause that the ARB has no truck with the law. Its purpose is to enforce 'standards' which are determined and set by the membership. Whether it is in the public interest that these standards are policed without consent is central to the enquiry in this matter. In *Clur v Keil and Others*¹⁶ ("Clur"), Plasket J (as he then was) held as follows:

'In *R v Somerset County Council, ex parte Fewings and others*, Laws J made the point that while private persons are free to do anything that the law does not forbid, the opposite is true of public bodies: any action taken by a public body 'must be justified by positive law'. In my view, the same principle applies to a private body that exercise public powers: it is not permitted to be, as Goldstone J put it in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and others*, 'a law unto itself'.¹⁷ (Emphasis added; footnotes omitted.)

[64] Mr Ferriera's argument that the removal from the MOI of the power to consider the advertisements of non-members and enforce its ruling against them through its membership would result in the deregulation of the advertising industry to the detriment of the public interest contains a concession that, if the members were not obligated to refuse to flight impugned advertising, they probably would opt to maximise profit and provide the required advertising services. Thus the public power of the ARB derives from some coercion in respect of members too.

[65] Mr Ferriera argued that, in any event, this issue has already been determined by the SCA in *Herbex* and that I am bound thereby.

I move to deal with this submission.

¹⁶ (448/2010) [2010] ZAECHC 137; 2012 (3) SA 50 (ECG) (17 December 2010).

¹⁷ *Ibid* at 15.

The decision in Herbex

[66] The respondents contend that the relief sought by Bliss -i.e. to strike down clause 3.3 of the Mol or to sever the unconstitutional portions of that clause - is in direct conflict with the order of the SCA in *Herbex* to the effect that by agreement between the parties in that case it was declared:

‘the ASA may consider and issue a ruling to its members (which is not binding on non-members) on 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.’

[67] The point made on behalf of the ARB is that this declaration, although made by agreement is, on the face of it, *in rem* and thus authority for the proposition that clause 3.3 of the MOI is lawful and constitutional. As the respondents rightly point out, clause 3.3 of the MOI was drawn by design on the basis that its formulation was ‘taken straight out of the order made by agreement in *Herbex*.’

[68] Mr Loxton however makes the point that, in *Herbex*, the SCA made the said order by agreement between the parties and did not give a reasoned judgment. Thus, he argues, that whilst the judgment is *res iudicata* between the parties in that matter, it is not precedent for the proposition that the issuing of an ad- alert by the ASA against a non-member is lawful.

[69] In terms of *Airports Company South Africa v Big Five Duty Free Pty Ltd and Others*¹⁸ a court must give reasons for its decisions when it gives its approval to a settlement agreement on appeal that sets aside a trial court's judgment *in rem*. In the event that an appeal court does make a settlement agreement an order of court without determining the merits, it does not have the effect of overturning a judgment *in rem* given by the court a quo.¹⁹

¹⁸ 2019 (5) SA 1 (CC) at para 3.

¹⁹ para 64 (order 4) read with para 9.

[70] To my mind, it stands to reason that the SCA would not have decided a point of this magnitude and wide general application without fully considering the matter on the facts and giving reasons.

[71] In order to understand the Court's approach to the settlement order in *Herbex*, it is helpful to start with the order in the court *a quo* with reference to the scope and effect of the order of the SCA on that order.

[72] The first paragraph of the order of the Court *a quo* reads as follows in relation to the part which the settlement agreement replaced:

'[90.1] It is declared that the respondent [the ASA] has no jurisdiction over any person or entity who is not a member of the respondent and that the respondent may, in the absence of a submission to its jurisdiction, not require the applicant [Herbex] to participate in its processes, issue any instruction, order or ruling against the applicant or sanction it: ...' (my underlining)

This part of the order is *in rem* at least to the extent of the portion underlined but it seems clear that the rest of the paragraph serves to explain what the effect of such lack of jurisdiction over non members is - being that the ASA [and now the ARB] may not require a non-member *'...to participate in its processes, issue any instruction, order or ruling against [a non-member] or sanction it.'*

[73] The following paragraphs of the order read as follows:

'[90.2] It is declared that all rulings issued by the respondent against the applicant are void;

[90.3] The respondent is directed to remove from its website and other official publications all rulings issued in respect of the applicant;

[90.4] The respondent is interdicted, in the absence of a submission to its jurisdiction, from issuing any further rulings or adjudicating any further complaint against the applicant;’ .

These paragraphs relate to directly to Herbex and are *in personam*.

[74] Moving on to the judgment of the SCA, it is made clear from the outset that the Court understands the central issue in the appeal to be jurisdiction over non - members. It commences as follows:

‘[1] The central issue in this appeal is whether the appellant, the Advertising Authority of South Africa (the ASA), has jurisdiction over persons who are not its members and who have not consented to its jurisdiction. The respondent (Herbex), which carries on business marketing complementary medicines, is not a member of the ASA. Herbex launched an application in the Gauteng Local Division of the High Court and obtained, inter alia, a declaratory order that the ASA has no jurisdiction over non-members and that all its rulings against Herbex are void.’

[75] It goes on to say:

‘[8]In the court a quo and before us the ASA conceded that the Code binds only its members; that non-members such as Herbex are legally entitled to ignore the rulings and procedures of the ASA; and that Herbex would be affected by a ruling of the ASA only if it wished to place an advertisement with a member of the ASA which has bound itself to comply with the ASA’s rulings (something which on the evidence Herbex has never sought to do). (Emphasis added)

[76] Thus, on the facts, there was no evidence of an ad-alert to members against Herbex and thus the legality or otherwise of the ad-alert process was not directly in issue.

[77] In relation to the settlement agreement, the Court said the following:

‘[13] Before us the parties also agreed that paragraph 90.4 of the court a quo’s order was superfluous since it was covered by paragraph 90.1 of the order. Given that the issues between the parties were confined and there was a real prospect that the case

could be settled, the Court adjourned to give the parties an opportunity to consider settlement and prepare a draft order acceptable to both sides.

[14] When the hearing resumed the parties presented a draft order which counsel explained and which was finally agreed upon in the form set out in paragraphs 1.1 and 1.2 of the order below. The orders relating to previous rulings and appeal fees (paragraphs 90.2, 90.3, 90.6 and 90.7) of the order of the court a quo fell away, by virtue of the order by agreement. Thus the only outstanding issue was costs, on which the parties could not agree. (Emphasis added)

[78] The SCA made an order as follows on the basis of the agreement:

1. 'The parties having agreed thereto, the appeal is upheld to the extent reflected in the substituted order set out below.

2 Save for paragraph 90.8 [which dealt with the Costs a quo], the order of the court a quo is set aside and substituted as follows:

'1 It is declared that:

1.1 the Advertising Standards Authority of South Africa (the ASA) has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA 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;

1.2 the ASA may consider and issue a ruling to its members (which is not binding on non-members) on 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.

2 The ASA is directed to include in its standard letter of complaint the contents of paragraph 1 and that a non-member is not obliged to participate in any ASA process, but that should it not participate, the ASA may still consider the complaint, for the purposes set out in paragraph 1.2.²⁰

3 Each party shall bear its own costs of appeal.'

[79] From the above it is clear that the SCA, when making the order:

²⁰ This part of the agreed order was as a result of the contention of Herbex that it had been led by correspondence from the ASA to believe that the ASA had jurisdiction over it.

- Understood that the central *in rem* issue on appeal – i.e. jurisdiction and the scope thereof was decided in favour of Herbex.
- Accepted that the order [in 90.4] which interdicted the ASA from issuing any further rulings or adjudicating any further complaint against the applicant or sanctioning it was covered by the *in rem* order of the Court *a quo* in [90.1] which was upheld.
- Understood that the orders which were confined to the parties (i.e. paragraphs 90.2, 90.3, 90.6 and 90.7) fell away as part of a settlement between the parties.
- Understood that the only issue that it was being called on to decide was costs.

[80] Thus, the part of the order which was by agreement – i.e. paragraphs 1.2 and 2- was *in personam*.

[81] The fact that, as part of this settlement, an order which purports to read as if it were of general application is sought to be introduced into the *inter partes* settlement does not change the fact that the order was intended to be and understood by the SCA to be confined to the parties themselves and not of general application. Indeed, the introduction of such a general order in this context seems opportunistic. On my reading of the case, the lawfulness or otherwise of the imposition of the coercive device of the ad-alert had no foundation from the perspective of the appeal and was not considered by the Court.

[82] Thus, the order in [90.1] stands. And it is this order that makes it clear as a matter of general application that the ASA has no jurisdiction over non-members. Indeed, the order goes further in relation to the parties and states that Herbex 'may not be sanctioned' by the ASA. To my mind this implies that the lack of jurisdiction has the result that there can be no ad- alert issued against a non-member.

[83] Thus, it appears to me that *Herbex* is, contrary to Mr Ferriera's submission, in fact, authority for the proposition that the issuing of an ad- alert against non-members

is unlawful as a general rule in that the only sanction of consequence would be the ad-alert and sanction is prohibited by the order. But, even if the case does not go that far, it is certainly not authority for the contrary position.

[84] Thus, in sum, on this fundamental challenge I find that although public power can be sourced in an instrument of agreement, the exercise of such power on these facts against those who are not party to such agreement and who do not consent thereto is unconstitutional in that it is not sourced in law.

I move now to deal with the constitutional challenge based on breach of section 34.

Does the ARB's consideration of complaints under clauses 8 and 9 of the Code violate Section 34 rights?

[85] Section 34 of the Constitution entitled 'Access to courts'. reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[86] This challenge relates to the ARB's adjudication of complaints under clauses 8 and 9 of the Code.

[87] Bliss argues that the ARB process specifically with respect to the adjudication of complaints brought under clauses 8 and 9 of the Code falls foul of Section 34 in the following three respects:

First, the disputes under these clauses are of a nature that can and should be resolved by the application of law and in a court of law. Second, the procedures prescribed for the hearing in terms of the procedural guide are not fair. Third, the ARB is not an independent tribunal.

I will deal with each of these arguments in turn.

The disputes should be resolved by a court

[88] Bliss argues that the issues raised by clauses 8 and 9 of the Code are squarely legal issues which entail the same inquiries to those which courts are called on to entertain in cases dealing with passing-off and contraventions of copyright law and trade mark law.²¹

[89] I agree with this submission. Clause 8 requires the complainant to establish an advertising goodwill in relation to a trade name, symbol, advertising campaign or advertising property and that the respondent's advertisement has taken advantage of such advertising goodwill. In other words, it provides protection against deception as to trade source or trade connection.

[90] Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business.²² Determinations as to whether clause 8 has been breached are virtually identical to determinations of passing-off. Similarly, both the Trade Marks Act²³ (TMA) and clause 8 are directed at the unauthorised use of a trade mark (a trade name or symbol of a product or service in which an advertising goodwill resides) which causes deception or confusion (thus taking advantage of the

²¹ Clause 8 (exploitation of advertising goodwill) of Section II of the Code provides in its relevant part as follows:

"8.1. Advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or advertising goodwill relating to another party's advertising campaign or advertising property, unless the prior written permission of the proprietor of the advertising goodwill has been obtained. In considering matters raised under this clause consideration will be given to, inter alia, the likelihood of confusion, deception and the diminution of advertising goodwill. Furthermore, whether the device or concept constitutes the 'signature' of the product or service, is consistently used, expended throughout media and is prominent in the mind of the consumer'.

Clause 9 (imitation) of Section II of the Code provides in its relevant parts as follows:

9.1. An advertiser should not copy an existing advertisement, local or international, or any part thereof in a manner that is recognisable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value. This will apply notwithstanding the fact that there is no likelihood of confusion or deception or that the existing concept has not been generally exposed. In considering whether or not an infringement has taken place consideration will be given to, inter alia, the extent of exposure, period of usage and advertising spend, whether the concept is central to the theme, distinctive or crafted as opposed to in common use. Furthermore the competitive sphere will also be taken into account.

²² See *Caterham Car Sales & Coachworks Ltd v Birkin Cars Pty Ltd* 1998 (3) SA 938 (SCA) at para 15 ("Caterham").

²³ Act 194 of 193

advertising goodwill) or which takes advantage of the distinctive character or repute of the trade mark (taking advantage of the advertising goodwill in the trade name or symbol) or is detrimental to the distinctive character or the repute of the trade mark (causing a diminution of the advertising goodwill attached to the trade name or symbol). Unlike the Code, the TMA makes provision for statutory defences.²⁴

[91] Clause 9, in essence, deals with protection from imitation. Its purpose is to protect intellectual and creative ideas that are given form in a particular advertisement from conscious copying. Similarly, copyright law seeks to protect owners of the copyright in original works from the unauthorised copying of that work. Unlike the Code, as with the TMA, the Copyright Act²⁵ also contains statutory defences to claims of copyright infringement by allowing for exceptions²⁶. There is thus an overlap between the determination of whether advertising constitutes a breach of clause 9 and whether such advertising constitutes copyright infringement. The requirements of clause 9 are, in essence, a watered-down version of the requirements for establishing copyright infringement by reproduction but without the exceptions provided by the Copyright Act.

²⁴ Section 34(2) of the TMA provides:

"(2) A registered trade mark is not infringed by—

(a) any bona fide use by a person of his own name, the name of his place of business, the name of any of his predecessors in business, or the name of any such predecessor's place of business;

(b) the use by any person of any bona fide description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of his goods or services, or the mode or time of production of the goods or the rendering of the services;

(c) the bona fide use of the trade mark in relation to goods or services where it is reasonable to indicate the intended purpose of such goods, including spare parts and accessories, and such services;

(d) the importation into or the distribution, sale or offering for sale in the Republic of goods to which the trade mark has been applied by or with the consent of the proprietor thereof; (e) the bona fide use by any person of any utilitarian features embodied in a container, shape, configuration, colour or pattern which is registered (g) the use of an identical or confusing or deceptive similar trade mark which is registered: Provided that paragraph (a) shall not apply to the name of any juristic person whose name was registered after the date of registration of the trade mark: Provided further that the use contemplated in paragraph (a), (b) or (c) is consistent with fair practice." (our emphasis)- as a trade mark; (f) the use of a trade marking any manner in respect of or in relation to goods to be sold or otherwise traded in, or services to be performed, in any place, or in relation to goods to be exported to any market, or in any other manner in relation to which, having regard to any conditions or limitations entered in the register, the registration does not extend;

²⁵ Act 98 of 1978

²⁶ sections 12 to 19B of the Copyright Act contain statutory defences to claims of copyright

[92] Rulings of the ARB generally entail the withdrawal of the impugned advertisement including, as in this instance, packaging. The effect of such a ruling is no different from the grant of an interdict to restrain passing off, trade mark infringement or copyright infringement. The Code also provides for the awarding of costs in favour of a successful party.

[93] These clauses of the Code are directed at the same mischief as the trade mark infringement, passing-off or copyright infringement causes of action but without the demanding legal frameworks necessary to sustain these causes of action and without affording a respondent the common-law and statutory defences which are available in such proceedings.

[94] A constraint on the right to trade freely on the scale precipitated by an ad-alert is inherently an infringement of the rights of the person and property and thus entails the protections under section 34.

[95] The Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*²⁷ 2000 (1) SA 409 (CC) ('Lesapo') (per Mogoro J) held as follows in analysing section 34:

'On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.

Dicey's first principle of the rule of law is that:

". . . no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."²⁸ (footnotes omitted)

²⁷ 2000 (1) SA 409 (CC).

²⁸ *Ibid* at para 16

[96] Bliss argues also that the committees of the ARB when adjudication clause 8 and 9 complaints seek to exercise judicial authority in contravention of section 165(1) of the Constitution which provides that judicial authority is only vested in the courts. This means that judicial power or power akin thereto can only be exercised by judicial officers.²⁹

[97] Writers in Australia and Canada have stated inter alia the following as criteria for determining whether a power is judicial in nature³⁰:

- there is a dispute between parties, that must be adjudicated through the application of a recognised body of rules, in a manner consistent with fairness and impartiality.
- a judicial decision has the element of finality (at least in relation to the merits).
- the power has historically been exercised by the courts.

[98] The respondents argue that section 165 does not provide for judicial monopoly of legal disputes. This is correct, but it is not the question. Bliss' argument is that section 165 provides for a judicial monopoly over the exercise of power which is peculiarly judicial in nature. To my mind, matters which courts deal with should not be dealt with by other bodies unless the law expressly permits it.

[99] I did not understand the respondents to dispute these overlaps between clauses 8 and 9 and the law. Colgate argued however that the ARB procedure is 'akin' to an arbitration and thus governed by the Arbitration Act.³¹ This submission ignores the fact that arbitration is consent based whereas the ARB process is coercive.

²⁹ See *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC); *MEC for Health Gauteng v Lushaba* 2017 (1) SA 106 (CC) at paras 13 and 14.

³⁰ Lumb & Moens: *The Constitution of the Commonwealth of Australia* Annotated 7 ed (2007) by Monens & Trone at 258 — 268 ; Hogg *Constitutional Law of Canada* 5th ed Supplemented (2016) vol 1 pp 7-44.1 to 7-52.

³¹ Act 42 of 1965.

Lack of fairness

[100] The Procedural Guide makes no provision for the rules of evidence which are applicable to court proceedings. No appeal to a court lies against a decision of the ARB and, in any review, the merits of the ARB's finding cannot be challenged.

[101] The non-member is, accordingly, denied the right to defend itself in a court of law on the merits of a complaint. To my mind, there can be no doubt that a determination by the ARB as to whether clauses 8 and 9 have been breached, impliedly ousts the jurisdiction of the ordinary courts by establishing a parallel dispute-resolution process which has not been agreed to by the non-member and which serves the interests of a complainant above those of a respondent.

[102] Despite the significant inroads which may be made into the rights to a respondent's person and property, the disciplinary processes of the ARB are relatively informal and do not adhere to universally accepted evidential rules and procedural fairness. Also, although the chairpersons of the AAC and FAC are lawyers, the other members of the panels need not be lawyers. Thus decisions on legal causes of action akin to passing-off, copyright, and trade mark infringement are made, in large part, by non-lawyers.

[103] A further fundamental principle of fairness is that the right to an appeal process must have efficacy. This raises questions of relief pending the appeal.

[104] In a court this entails a delicate and informed weighing up by the judge of the balance of convenience – which is in fact a judicial determination as to what will best promote justice.

[105] This is seldom a simple exercise. The ability and authority to make such a determination lies at the heart of judicial function. Reference to section 18 of the Superior Courts Act³² and the vast body of cases and jurisprudence relating to interdictory relief, is ample testimony to this fact. This is because of the intricate

³² Act 10 of 2013.

controversies and basic legal protections which arise as a matter of course when the right to appeal processes is invoked. The suspension of orders pending appeal is central to the right of appeal and to section 34 rights and is central also to judicial function.

[106] The ARB process does not allow for the suspension of the order pending appeal without special application. Thus the rulings of the ARB take effect immediately. The onus is then placed on the respondent to satisfy the ARB that there should be a suspension of the ruling. Thus the tables as they would generally be afforded a losing litigant in court are turned. The respondent is compelled to enter into the ARB process with all its informality and lack of proper process in order to protect the status quo.

[107] Although the respondents argue that their parallel jurisdiction with the courts is lawful, the Code acknowledges that its processes can serve to create conflict with the court's jurisdiction. It provides that where a complainant has instituted an action or application with a court and the subject matter of that action is substantially the same as the subject matter of a complaint lodged by that complainant with the ARB, the ARB will 'decline to deal with it'.

[108] Clearly, this provision does not remove the ARB's power to decide issues that fall within the purview of the courts and therefore the fact of the usurpation of the courts' functions by the ARB remains. Indeed, the provision does not even recognise that the fact of an action or application in court would have the effect that the ARB's jurisdiction is excluded. It simply provides that the ARB will 'decline' to deal with the matter which suggests that it contends that it would, in the absence of the provision, have an election. And the rub is this: once the complainant has made its election to go the ARB route, the court's jurisdiction is effectively ousted and the respondent is made subject to the tyranny of the ARB's processes in the absence of any consent.

[109] It is argued by the respondents that this assumption of jurisdiction to the exclusion of the courts is unobjectionable. They rely for this argument on the decision in *Nestle (South Africa) Pty Ltd v Mars Inc.*³³ This case considered whether the ARB's

³³ [2001] ZASCA 76; [2001] 4 All SA 315 (A) (31 May 2001)

predecessor, ASA was entitled to refuse to entertain a complaint by a member under paragraph 9 of the then Code³⁴ because a dispute which entailed an inquiry that traversed the same considerations was already before the Registrar of Trade Marks.

[110] The Court accepted that members of the ASA were entitled to enforce their contractual rights against the ASA and held that the ASA was bound by its obligation to its members and could not abdicate its position to the Registrar of Trade Marks

[111] It was not disputed that by subscribing to the terms of the Code the ASA and its members became contractually bound *inter se* to adhere to the respective obligations imposed upon them. The issue raised by Nestlé's was that the circumstances that arose were analogous to those that would give rise to a defence of *lis alibi pendens* in a court of law.

[112] It was submitted that the ASA was not obliged to consider the complaint because the matter that formed the subject of the complaint was awaiting adjudication in another forum. The Court found that the analogy with *lis pendens* was misplaced and that there is room for the application of that principle only where the same dispute, between the same parties is sought to be placed before the same tribunal (or tribunals with equal competence to end the dispute authoritatively). The Court held that none of those elements was present. Nugent AJA (as he was) concluded that 'it is difficult to see how such elements could exist where the matters in issue had been placed before two quite different tribunals – the one operating consensually and the other by force of statute.'³⁵

[113] Thus, *Nestle* dealt with the contractual obligations of the ASA to its members and the application of the *lis pendens* principle in the context of that relationship. It did not deal with the jurisdiction of the ASA over non-members and has no bearing in this matter.

Lack of independence

³⁴ The Smarties and M&M characters – each used a cartoonish character which embodied the button shape of each product- which were similar in appearance were the subject of the dispute.

³⁵ Ibid at para 16 and 17.

[114] Provisions in an administrative scheme which do not meet the constitutional obligation to create an adequately independent entity, must be declared constitutionally invalid and set aside.³⁶

[115] The test for determining whether the Constitution's criteria for independence are met is whether, from the objective standpoint of the reasonable and informed person, the forum or tribunal will be perceived as enjoying the essential conditions for independence. This test is objective and stresses the importance of the public perception of independence, which is as relevant to the enquiry as factual independence. Independence is to be distinguished from impartiality, which refers to the state of mind or attitude of the tribunal in relation to the issues and the parties in the particular case and connotes absence of bias.³⁷

[116] The ARB is established and funded by its members which comprise the major participants in the advertising industry. That this membership includes Colgate is not insignificant. This funding model creates room for the perception of a lack of independence where the complainant is a funder and member and the respondent is a non-member.

[117] A further concern as to lack of independence is that the members of the ARB are entitled to nominate the members of the AAC and FAC, subject to ratification by the Board. Thus, to my mind, where a complainant is a member of the ARB and the respondent to a complaint is not a member of the ARB, there is a reasonable perception of lack of independence on the part of the AAC and the FAC.

[118] The respondents argue that it is in the public interest that the advertising standards contained in the Code be applied and regulated by the ARB. They argue further that the success of Bliss' case would cause harm to consumers in that the ARB is able to resolve disputes expeditiously and inexpensively which protects the public.

³⁶ *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at para 10.

³⁷ *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 32.

They argue further that adequate protections are afforded the applicant by the right to judicial review.

[119] These submissions translate into an inquiry as to whether it is reasonable and justifiable to limit Bliss' rights in terms of section 36 of the Constitution. I move to consider this question.

The application of section 36 (lawful limiting of rights)

[120] In terms Section 36(1) of the Constitution 'rights in the Bill of Rights may be limited only in terms of law of general application and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

[121] A proportionality exercise has to take place in determining this question and this involves the weighing up of the various factors listed in section 36(1)(a) to (e) in a balancing exercise to determine whether or not the limitation is justifiable³⁸.

[122] Neither the MOI nor the Code pass the first hurdle set out in section 36 in that they are not law. However, even if they were, powerful considerations are required for the limitation to be reasonable and justifiable.

[123] To my mind, the purpose of the Code, being a self-imposed authority to regulate the standards of advertising in the public interest, does not justify the infringement of

³⁸ Section 36(1) reads as follows:

'Limitation of rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.'

this foundational right. This is especially so when the specific objectives of clauses 8 and 9 are already achieved by existing law.

[124] The respondents argue that the ARB, in its capacity as self-appointed watchdog of commercial advertising, is best placed to regulate the commercial rights of all those that seek to market and sell their products. This argument does not, however, take sufficient account of the fact that members of the ARB, because of the competitive environment in which they operate with non-members have the ability, through their membership of the ARB to affect the ability of competitors to trade. This presents as a conflict of interest.

[125] it seems to me that contrary to the respondent's submissions, the ARB's absence of jurisdiction over non-members would not leave the public without remedy. Such advertising is covered by the law on copyright infringement, passing-off and trade mark infringement. Advertising is further subject to the provisions of, inter alia:

- Medicines and Related Substances Act ³⁹
- Foodstuffs, Cosmetics and Disinfectants Act⁴⁰
- Tobacco Products Control Act ⁴¹
- Consumer Protection Act⁴²

[126] The arguments of the ARB ignore the fact that competitors may abuse the processes of the ARB to engage in competition that is unfair and which is against the public interest.

[127] The fact is that the ASA was liquidated previously without any sense that there would be a material deficiency in the rights of consumers.

³⁹ Act 101 of 1965;

⁴⁰ Act 54 of 1972.

⁴¹ Act 83 of 1993; and

⁴² Act 68 of 2008.

Reconsideration of the interim order

[128] There is obviously the anticipation that this matter may take some time to reach finality. Colgate is thus in the position where it wishes to have the benefit of Bliss being bound to the order pending appeal. It was favoured by this position in the context of the ARB processes and subsequently by the order of Yacoob J. This was before the constitutional challenge was raised by this Court. Ultimately this Court determined that, in light of the addition of the constitutional challenge to the fray, the balance of convenience favoured Bliss.

[129] Mr Michau argues that this interim order should be reconsidered because Colgate, as at the date of the hearing for interim relief, did not know that it had to meet an argument in relation to Bliss being deprived by the ARB processes of the interim relief consideration which it is entitled to under section 18 of the Superior Courts Act.

[130] This is not correct. The deprivation of the legal machinery under section 18 is and has been from the outset of it being raised an important component of the constitutional challenge under section 34 and Mr Michau had every opportunity to deal with it.

[131] In any event, Mr Loxton is correct in his argument that in order for a reconsideration to take place this must be applied for substantively by way of application. There is no such application before me.

Conclusion

[132] Thus in sum, from a general perspective the public powers which are assumed by the ARB in relation to the regulation of the advertising of non-members is unconstitutional in that it is not sourced in law.

[133] Furthermore the determination of complaints under clauses 8 and 9 of the Code, implicates the protections under section 34 of the Constitution and falls foul thereof.

[134] In all these circumstances I find that the ARB's MOI and the Code are unconstitutional and that the partaking of Bliss in the proceedings cannot be said to constitute actual consent to the jurisdiction of the ARB.

[135] In light of these findings it is not necessary for me to determine the review. It suffices to say in relation to review grounds generally that the fundamental lack of fairness which attaches to the process of the ARB informs these review grounds.

Remedy

[136] Bliss has sought in the first instance that the MOI be declared unconstitutional in its entirety on the basis that this is the correct remedy if the Court finds that the power of the ARB is not sourced in law. It asks, in the alternative, for a declaration of invalidity in relation to clause 3.3 of the MOI on the basis that it has the effect of granting the ARB jurisdiction over non-members and severance of portion of that clause so as to render it compliant with the Constitution. In relation to the relief of severance, the indicated parts can be severed from clause 3.3 of the MOI without affecting the intention or enforceability of the MOI to regulate the conduct of the ARB's members.

[137] To my mind the second option suffices in that the coercive features of the clause 3.3 are essentially the reason why there is no lawful source of the power and thus the excising of those parts serve to remedy the fact that such powers are not sourced in law. So remedied the MOI will accommodate regulation of the contractual obligations of members in relation to the regulation of advertising.

[138] Although, to my mind the prayers relating to the declaration that the ARB has no jurisdiction over a non-member and that it may not issue rulings against or in relation to a non-member, are strictly speaking unnecessary because the SCA has already made such a ruling in *Herbex*, it is prudent to clarify the position to avoid confusion. This is so because the ARB seeks to interpret the order in *Herbex* to allow for the position that a non-member who participates in its processes is subject to the

ARB's jurisdiction, and that a non-member who does not participate in its processes may be subjected to a ruling and sanction in relation to its advertising.

[139] Bliss is also entitled to an order directing the ARB to pay to it the sums of money lodged by it with the ARB to cover the costs of its appeals to the AAC and the FAC in terms of clauses 9.2 and 12.6, respectively, of the Procedural Guide

Costs

[140] There is no reason why the costs should not follow the result save that the ARB should not be called upon to bear any costs occasioned by the application for review in that it was prepared to abide any decision in this regard.

[141] Both Colgate and Bliss employed more than two counsel. The scope and nature of the arguments were such that there was an element of specialisation required all round. However, in the case of the ARB, only the constitutional challenge was opposed and only two counsel employed.

[142] In the circumstances, an appropriate award of costs should include the costs of three counsel in relation to Colgate's liability but the costs of only two in relation to that of the ARB. Furthermore, the costs payable by the ARB should be confined to costs of the constitutional challenge only.

Order

I thus make an order which reads as follows.

1. Clause 3.3 of the MOI, which has the effect of granting the ARB jurisdiction over non-members, is declared unconstitutional, void and unenforceable.
2. The clause "*in the absence of a submission to its jurisdiction*" in the first sentence as well as the second sentence in its entirety are severed from clause 3.3 of the MOI.

3. It is declared that the ARB has no jurisdiction over a non-member of the ARB, meaning a person or entity who is not a member of the ARB or is not a person or entity who is bound by the Code as a result of its/her/his membership of a member of the ARB.
4. The ARB may not issue rulings against or in relation to a non-member or that non-member's advertising.
5. The FAC rulings in this matter are unlawful and are set aside.
6. The ARB is directed to pay to Bliss the sums of money lodged by it with the ARB to cover the costs of its appeals to the AAC and the FAC in terms of clauses 9.2 and 12.6, respectively, of the Procedural Guide.
7. The costs of the applicant are to be paid by the respondents jointly and severally, the one paying the others to be absolved, save that the ARB's liability for costs is confined to the constitutional challenge only and shall include the costs of two counsel only, whereas the liability of the second and third respondents shall include the costs of three counsel.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 18 -19 March 2021.

Judgment Delivered: 21 May 2021.

APPEARANCES:

For the Applicant : Adv CDA Loxton SC.
Adv F Southwood SC.
Adv A Pantazis
Adv CAA Louw

Instructed by : Eversheds Sutherland (SA) Inc.

For the 1st Respondent : Adv N Ferreira.
Adv K Harding.

Instructed by : Fairbridges Wertheim Becker Attorneys.

For the 2nd & 3rd Respondents :Adv R Michau SC.
Adv I Currie.
Adv L Harrilal.

Instructed by : D M Kisch Incorporated.