IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

5 May 2016 .....

CASE NO: 14/45774

In the matter between:

HERBEX (PROPRIETARY) LIMITED Applicant

and

THE ADVERTISING STANDARDS AUTHORITY Respondent
Company Registration No. 1995/00781/08

Neutral citation: Herbex (Pty) Ltd v The Advertising Standards Authority [2016] (14/45714) (25 April 2016) (ZAGPJHC)

Coram: D T v R DU PLESSIS AJ

Heard: 25 April 2016

Delivered: 5 May 2016

Summary: Application for declaratory orders relating to the status and powers of the respondent to determine complaints and issue rulings regarding advertisements of non-members. The legitimacy of respondent's adjudication over advertisements of non-members discussed. Respondent's adjudication in circumstances where its non-members are not bound to its rulings but has practical consequences, amounts to an imposition of jurisdiction over non-members. Respondent interdicted from adjudicating such complaints in the absence of a submission to jurisdiction.
Applicant's rights of association and freedom of expression infringed.
Respondent ordered to amend its standard letters to non-members to bring absence of jurisdiction to their attention.
Application for repayment of appeal fees paid by the applicant to the respondent. Respondent held not to have the power to unilaterally impose such fees on non-members in the absence of an agreement. Applicant's error in payment in the belief that the respondent had the necessary authority was excusable in the circumstances. Respondent ordered to repay the fees.
Declaratory orders – discretion in terms of Section 21(1)(c) of the Superior Courts Act 10 of 2013 exercised against the granting of where no *lis* between the parties and relate to factual issues only.

JUDGMENT

D T v R DU PLESSIS AJ:

[1] The applicant is Herbex (Pty) Ltd, a company which sells and markets complementary medicines.

[2] The respondent is the Advertising Standards Authority, a voluntary association incorporated in terms of section 21 of the Companies Act 61 of 1973.

[3] The respondent is an independent, industry-funded body that was established to promote and enforce standards in the advertising industry. From the preface to the code hereinafter referred to, it appears that it was founded on the principle that advertising is a service to the public and should accordingly be informative, honest, decent and legal.

[4] Membership of the respondent is voluntary. Members consist of agencies, marketers and media. Members are voluntarily bound by the respondent's guiding document, the Code of Advertising Practice ("the code"). The code applies to all commercial and non-commercial advertising. The respondent adjudicates complaints of breaches of the code on behalf of its members, who have an interest in maintaining the integrity of the advertising industry and in ensuring that only responsible advertising appears in their media.

[5] The respondent's directorate has the primary responsibility for receiving and adjudicating complaints regarding advertising in order to ensure compliance with the code. Any party who feels aggrieved by a ruling of the directorate may within ten days appeal the ruling to the Advertising Standards Committee (in respect of consumer complaints) or to the Advertising Industry Tribunal (in respect of competitor complaints).

[6] The North Gauteng High Court (per Bertelsmann J), has recently confirmed that the respondent's processes operate in the public interest. It held that:

[6.1] "*There can be no doubt whatever that the rendering of a service in the public interest lies at the heart of the [ASA's] genesis and existence. It is the official regulator of the advertising industry. It prides itself upon its close association with organs of state and consumer organisations.*"[1]

[6.2.] The respondent investigates complaints "*with the interests of the public at large and that of consumers and children in particular in mind.*"[2]

[7] In terms of section 55 of the Electronic Communications Act[3] ("the ECA") all broadcast service licensees have to comply with the code. Where a licensee is a member of the respondent, it is empowered to consider complaints concerning alleged breaches of the code due to its contractual relationship with the licensee. Where a licensee is not a member of the respondent, the Complaints and Compliance Committee of ICASA is empowered to consider complaints concerning alleged breaches of the code.[4]

[8] Though it is an important statutory recognition of the legitimacy and importance of the respondent, the ECA does not confer on the respondent the authority to regulate advertisements published by non-members.

---

1 Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others (2331/15) [2015] ZAGPPHC 243 at para 28

2 Brandhouse Beverages, supra at para 29

3 36 of 2005

4 Section 55(2) of the ECA.

[9] The respondent has applied for its code to be recognised as an industry ombud under the Consumer Protection Act, 68 of 2008. This application has not been granted, but is ongoing.

[10] The applicant is not a member of the respondent. Notwithstanding this fact and for a number of years, the respondent has communicated with the applicant regarding complaints received in respect of some of its advertisements in the media and the applicant has responded thereto, participated in and defended itself in internal hearings and procedures conducted by or under the auspices of the respondent. The respondent has also issued rulings in respect of some of the applicant's advertisements.

[11] The applicant alleges that it was misled and induced by misleading and false statements and non-disclosures in the respondent's standard letters to so participate in the respondent's procedures. After it obtained legal advice, it brought the present applicant in terms whereof the substantive relief sought can be categorised as follows:

[11.1] Declaratory relief regarding the status and powers of the respondent;

[11.2] Declaratory relief aimed at restricting the respondent's powers to regulate the applicant's advertising;

[11.3] Relief dealing with the way that the respondent represents its powers, which relief purports to flow from alleged misrepresentations of the respondent;

[11.4] Relief flowing from the respondent's allegedly unlawful appeal fees.

The respondent's jurisdiction over non-members.

[12] The crux of the dispute is whether the respondent has any lawful basis to exercise jurisdiction over persons who are not its members.

[13] The respondent accepts that the sanctions available to the directorate, the Advertising Standards Committee, the Advertising Industry Tribunal and the Final Appeal Committee are effective only insofar as its members agree to enforce them, and they are effective only in the media owned by its members. The rulings of the respondent are not legally enforceable against non-members. The only consequence of a non-member's refusal to comply with a ruling of the respondent is that its members will decline to accept advertising from that non-member.

[14] The ultimate sanction available to the respondent is an Ad-Alert. If a non-member advertiser ignores reasonable requests for co-operation, the respondent may issue an Ad-Alert to its members. The effect of an Ad-Alert is that none of the respondent's members will publish any advertisement of the offending advertiser in any medium.

[15] The respondent therefore accepts that the strict outer limit of its jurisdiction is that none of its sanctions has any effect beyond the willingness of its

members to enforce them. None of the respondent's sanctions has the force of law. They are not enforceable except to the extent that its members agree to enforce them. An Ad-Alert, for example, has no impact whatsoever in media owned by non-members of the respondent. Its only effect is that members of the respondent may decline to publish advertisements of the offending advertiser.

[16] Despite the respondent's acknowledgement that it has no jurisdiction over non-members and that its rulings are not binding upon them, it insists upon its entitlement to make determinations pertaining to non-members' advertising even where such advertising appears in a medium owned by non-members of the respondent.

[17] The respondent relies on the following legal basis for its consideration of complaints:

[17.1] If the advertiser is a member of the respondent (or is a member of one of the industry bodies that are members of the respondent), then the respondent is entitled to consider the complaint because the advertiser has agreed to be bound by the code, either directly or indirectly through its membership of an industry representative body or association;

[17.2] If the publisher of the advertisement is a member of the respondent (or is a member of one of the industry bodies that are members of the respondent), then the respondent is entitled to consider the complaint

because the publisher has agreed to abide by the code. The code precludes those who are bound by it from accepting advertising that conflicts with the code. It provides that "*All entities bound by the Code shall neither prepare nor accept any advertising which conflicts with the Code and shall withdraw any advertising which has subsequently been deemed to be unacceptable by the ASA Directorate, Advertising Standards Committee, Advertising Industry Tribunal or Appeal Committee.*";

[17.3] If neither the publisher nor the advertiser are members of the respondent, the respondent is entitled to consider the complaint on behalf of its members, so that its members may make an election whether or not they wish to publish that advertisement, or any advertising by an advertiser who breaches the code or declines to participate in the respondent's system of self-regulation. The respondent's members established it in order to make this determination on their behalf. When the respondent issues an Ad-Alert, its members enforce it by exercising their right to decline to publish advertising.

[18] The respondent denies that its conduct in considering complaints regarding advertising constitutes an assertion of jurisdiction over non-members. The grounds relied upon for this denial, are the following:

[18.1] The fact that the respondent's rulings are not binding or enforceable as against any advertiser. They have an effect only insofar as its members

give effect to them, because the ASA's members have agreed to do so;

[18.2] The only consequence of a refusal to participate in the respondent's processes is that its members may decline to publish that particular advertisement, and, in severe cases, all of the advertisements of the relevant advertiser. This is made clear in the respondent's standard letter alerting advertisers to a complaint;

[18.3] Non-members of the respondent, such as the applicant, are legally entitled to ignore its rulings and procedures. However, in doing so they elect to place themselves outside the system of self-regulation established by the advertising industry. The consequences of this election may include the refusal of members of the respondent to publish their advertisements.

[18.4] The decision of a member of the respondent to decline to publish a particular advertisement or the advertising of a particular advertiser does not constitute an assertion of coercive jurisdiction over that advertiser. It is an election which the respondent's members are entitled to make in terms of the common law and the Constitution. No advertiser has the right to insist on or compel the publication of its advertisements in the medium of its choice. No advertiser has the right to compel the respondent's members to publish its advertisements in their media.

[19] The respondent further relies on the fact that no advertiser who is not one of its members is forced to comply with its procedures. They only have to do so if they wish the respondent's members to continue to publish their advertisements.

[20] The assertion that the consideration of complaints and issuing of rulings against non-members do not constitute an assertion of jurisdiction is untenable. As stated by Kentridge AJ in S v Mhlungu and others[5] at para 71:

"... The accepted meaning of 'jurisdiction' is
'a lawful power to decide something in a case, or to adjudicate upon a case'."

[21] The fact is that the respondent's determination of complaints relating to the applicant's advertisements imposes its code on the applicant and makes it subject thereto. It cannot do so as it has no jurisdiction over the applicant and the applicant is not subject to its code. The practical effect of the respondent's actions makes it irrelevant that the applicant is not one of its members, as it is treated exactly the same as a member. It effectively renders the applicant a *de facto* member of an association that it does not wish to belong to.

[22] The respondent's suggestion in relation to the publication of adverse rulings that non-members are "free to ignore" same, disregards the following undisputed facts contained in the applicant's founding affidavit:

---

5 1995 (3) SA 867 (CC). See also: Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation) 1987 (4) SA 883 (A) at 886D; Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) at 256G.

[22.1] *"Although the rulings against Herbex are unlawful and do not have the force of law, the public and retailers are unaware of this. Therefore rulings made by the Company against Herbex adversely affect Herbex's reputation and damage its business."*

[22.2] "*The Company's Rulings are all published on the Company website and are accessed inter alia by the media and others who are unaware of the Company's lack of jurisdiction and unlawful conduct ... and who utilise those rulings to further damage Herbex's reputation. ... This type of negative publicity self-evidently causes Herbex huge reputational harm.*"

[23] The effect of the sanction of an Ad Alert, which will inevitably follow if a non-member does not take part in the respondent's processes, is that none of its members will publish any advertisement of the offending advertiser in any medium. In other words, not only will the respondent's members not publish the non-member's advertisement that was the subject of the ruling against such non-member but, in addition, all future (and other) advertisements of such non-member (irrespective of whether they comply with the code) will not be published by the respondent's members.

[24] When regard is had to the fact that the said members of the respondent comprise effectively the whole of the print media in South Africa, the contention that non-members are "free to ignore" the respondent's rulings is also untenable. This is particularly so where the issuing of an Ad Alert, in addition to effectively banning the publication of all advertisements of such non-member advertiser in mainstream media in South Africa, also constitutes

a form of widespread publication through and to other media to the effect that (the non-member advertiser) is guilty of false, unreliable or misleading advertising, whether or not this is in fact the case and in circumstances where the respondent has no jurisdiction to pronounce upon such matters.

[25] As a voluntary association, the sole source of the respondent's power is its articles. Its articles create a contract only between it and its members. Only its members agree to be bound by the respondent's code, and are so bound. As stated above, this is accepted by the respondent.

[26] In analysing the lawfulness of the respondent's conduct vis-à-vis non-members, it is important to be mindful of the principle of privity of contract. As RH Christie puts it in *The Law of Contract in South Africa* 5th ed at 260:

"The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they are in no way connected. The doctrine which prevents this ridiculous situation arising is usually known as the doctrine of privity of contract: parties who are not privy to a contract cannot sue or be sued on it."

[27] While the respondent and its members are free to agree that they (i.e. the parties to the contract) will be bound by the respondent's articles, code and procedural guide, they are precluded by the doctrine of privity of contract from agreeing that a third party non-member will be so bound. The respondent and

its members cannot by agreement between themselves confer jurisdiction upon the respondent in respect of a non-member third party's advertising.

[28] This is a trite proposition, as appears from the judgment of Van den Heever JA in Rowles v Jockey Club of SA and Others[6] at 364C:

"The club's rules are the domestic statutes of a voluntary association. In order to achieve its objects its rules also refer to the conduct of non-members. But since the rules have no statutory authority they cannot, save insofar as a non-member has bound himself by agreement to observe them, be legally binding upon non-members. Similarly, the club cannot, apart from contract, impose its will upon non-members by legal process."

[29] The respondent concedes that the code does not have the effect of a statute. The code is a contract between the members of the advertising industry and the respondent's enforcement of the code therefore binds only its members, and only because those members have agreed to be bound. It also accepts that it exercises a purely contractual power, which binds no party other than its members.

[30] The consequence of these unavoidable concessions is the trite proposition articulated above, namely that the respondent and its members cannot by agreement between themselves impose the code that they have agreed to be bound by, upon non-members who have not so agreed and in doing so confer jurisdiction upon the respondent in respect of a non-member's advertising.

---

6 1954 (1) SA 363 (A). See also: De Freitas v Society of Advocates of Natal 2001 (3) SA 750 (SCA) at para 5

[31] There is in consequence no basis in law that the respondent, absent the consent of the non-member, can be permitted to assert jurisdiction over the advertising of such non-member, whether in media owned by non-members (such as the non-member's website) or in media owned by the respondent's members.

[32] The respondent accepts that it is not competent for contracting parties to impose the terms of their contracts on third parties who have not agreed to be bound by the contract. However, it denies that this is what its members do when they decline to publish the advertisements of non-members that breach the code. The basis for this denial is that either the common law gives the members the right to decline or that they are constitutionally entitled to so decline. The court is, in the alternative, invited to develop the common law in light of the Constitution to provide for such a right.

[33] Accordingly, so the respondent argued, in the event that the applicant exercises its legal entitlement not to comply with the code, the respondent's members are entitled to exercise their right to decline to publish the applicant's advertising. This does not constitute an imposition of their contract on the applicant, but the independent exercise of their common law and constitutional rights.

[34] The respondent's argument, in my view, cannot be sustained. The applicant's complaint is about the conduct of the respondent, not that of its members. The respondent's adjudication of complaints was never at the instance of one of its members, but always at the instance of members of the public (mostly activists) who are not members of the respondent. The right of the respondent's members to decline to publish the applicant's advertising was therefore not exercised independently, but always after an adverse determination by the respondent.

[35] In any event, if the respondent's members do not have the right to adjudicate on a complaint regarding the applicant's advertisements, they cannot delegate such a right to the respondent. They still have the right to decline to publish the applicant's advertising but they cannot, absent a contractual or other right, impose their code on the applicant.

[36] The fact is that the respondent has no jurisdiction to determine complaints or issue rulings against non-members. The absence of jurisdiction prohibits the granting of such rulings or orders *ab initio*. In consequence, a decision taken absent proper jurisdiction is void. As stated by Grosskopff JA in Tödt v Ipser[7] (at 589C – D):

"According to our common-law authorities judgments are void in only three types of cases - where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction. See Minister of

---

7 1993 (3) SA 577 (A)

Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961 (4) SA 415 (T) at 422E-424H; S v Absalom 1989 (3) SA 154 (A) at 163C and 164E-G; and the earlier authorities cited in these cases...".[8]

[37] The respondent's own articles properly construed do not permit it to regulate the conduct of non-members in the absence of their agreement to be so regulated. It is clear from both the articles and the code that the respondent's mandate is one of consensus rather than coercion and that it is of application only to those who agree to be subject to its dictates.

[38] It is apparent also from the procedure for the adjudication of complaints that what is envisaged is a process in which the parties must participate in order for it to be effective (which can only happen pursuant to agreement). A reading of the code shows that the active participation of the advertiser is required in most instances in order for the respondent properly to determine whether a complaint in terms of the code is valid. This is because the respondent's code is premised upon the notion of substantiation, that is that an advertiser is required to prove that its advertising claims are substantiated.

[39] This being the case, absent the participation of the advertiser, any determination by the respondent regarding whether a claim is substantiated is effectively meaningless. Put differently, absent participation of the advertiser (who the respondent concedes is entitled to elect to not participate), there will inevitably be a finding that the advertising in question is not substantiated and

---

8 See also: The Master of the High Court (North Gauteng High Court, Pretoria v Motala NO 2012 (3) SA 325 (SCA)

is in breach of the code. This is irrespective of whether such finding is in fact correct.

[40] This is a further indication that the respondent's code requires it to exercise its jurisdiction over advertisers with their consent or submission to its jurisdiction (and their consequent participation) and not through determinations imposed "*in absentia*" upon persons who are not bound by the code, which lack of participation at best for the respondent renders such decisions wholly unreliable such that even advertisements that in fact comply with the code will be held not to do so.

[41] I therefore find that the respondent has no jurisdiction over any person or entity who is not a member of the respondent. I further find that the determination of complaints relating to advertisements of non-members and the issuing of instructions, orders or rulings constitute an unlawful imposition of its jurisdiction over such non-members. It follows that the respondent may accordingly not issue any instruction, order or ruling against non-members and may not sanction them without their consent or submission to jurisdiction.

[42] The fact that the respondent exercises a public power when it adjudicates on complaints about advertising, which fact was accepted by the respondent, cannot assist it in overcoming its lack of jurisdiction over non-members. It cannot confer upon itself the power to regulate advertising where that function, which is a public function, has expressly been entrusted by

parliament to other bodies. It cannot "pull itself up by its bootstraps and empower itself".[9]

[43] The North Gauteng High Court has held that the ASA exercises a public power for the purposes of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").[10] PAJA defines "empowering provision" to include "*a rule of common law, customary law, or an agreement, instrument, or other document in terms of which an administrative action was purportedly taken.*"[11]

[44] Although the code (which is an agreement) and the respondent's members' rights to decline to publish advertising (which is a common law and constitutional right) may constitute empowering provisions as defined in PAJA (I make no finding in this regard), it cannot confer jurisdiction to the respondent where it has none, i.e. over non-members and their advertising.

[45] The abovementioned finding of an absence of jurisdiction over non-members, does not leave complainants and/or the respondent's members without remedy against misleading or false advertising by non-members such as the applicant. The applicant's advertising is subject to the provisions of, *inter alia*, the Medicines and Related Substances Act, 101 of 1965 ("the Medicines Act") and the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972.

---

9 Clur v Keil and Others 2012 (3) SA 50 (ECG) at para 23, see also paras 13 & 15; Pedal Power Association v Cycling South Africa and the South African Sports Confederation and Olympic Committee 2014 JDR 0306 (WCC) at paras 20 & 21

10 Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others, supra at para 28

11 Section 1 of PAJA, emphasis added.

[46] In terms of the Medicines Act the power to regulate the advertisement and sale of medicines, is vested in the Minister of Health, assisted by the Medicines Control Council ("the MCC"), the Director-General and the Registrar of Medicines. Section 18C of the Medicines Act prescribes that the Minister of Health (not the respondent) shall make regulations relating to the marketing of medicines and an enforceable Code of Practice, subsequent to "consultation with the pharmaceutical industry and other stakeholders". Section 20(1) of the Medicines Act is headed "publication or distribution of false advertisements concerning medicines". It prohibits the publication or distribution to the public of "any false or misleading advertisement concerning any medicine".

[47] Consumers also have the protection provided to them by the Consumer Protection Act, 68 of 2008 ("the CPA"). Absent a regulatory scheme imposed in terms of a national statute and duly recognised by the Minister as qualifying for an industry specific exemption, it is the CPA that applies to the regulation of advertising "of any goods" and the regulators appointed (and recognised) by the CPA who are empowered to enforce its scheme of regulation.

[48] The respondent relied on the fact that its code and processes are parallel to statutory processes and that no statute has declared that its determination of complaints is unlawful. That is correct, but it can only exercise its parallel processes and impose its code on its own members.

[49] The respondent's members may impose its code contractually on non-members, as has already been done by at least one member. They may also

refuse to publish the advertisements of non-members of the respondent in total. Non-members may, off course, voluntarily submit themselves to the jurisdiction of the respondent in which case compliance with its code can be enforced on such non-members. If and when the respondent obtains statutory recognition as an industry regulator or ombud, its status and powers over non-members will obviously also change.

Infringement of the applicant's rights.

[50] By adjudicating upon complaints against non-members and issuing rulings against them, in circumstances in which they do not consider themselves (or wish to be) bound by the respondent's articles, code or Procedural Guide, the respondent in fact imposes upon them (against their will) the terms of the respondent's association with its members.

[51] This constitutes an infringement of section 18 of the Constitution which provides that everyone has the right to freedom of association. This right includes the right not to associate.[12]

[52] The imposition by the respondent of its contract with its members over the applicant, in circumstances in which the applicant has expressly said that it does not want to be bound by such contract, effectively renders the applicant

---

12 The Law Society of the Transvaal v Tloubatla 1999 JDR 0309 (T)

a *de facto* member of an association that it does not wish to belong to. This constitutes a limitation of the right of freedom of association.

[53] This is particularly so where the exercise by the applicant of its right to not associate with the respondent and participate in its processes will inevitably result in a ruling against the applicant that will damage its reputation, substantially prejudice its business interests and even result in it being banned from advertising in mainstream media in South Africa. The pressure that the respondent imposes upon non-members to submit to its association and the terms of such association (i.e. absent submission, sanction with dire prejudicial consequences will inevitably follow), is a further manifestation of the infringement of the applicant's right to not associate.

[54] The applicant also relies on the infringement of its right of freedom of expression. The importance of the right has been recognised by the Constitutional Court in Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International [13], where the following was said (at para 47):

"We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. Section 16 is in two parts: the first subsection sets out expression protected under the Constitution. It indeed has an expansive reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. The second part contains three categories of expression which are expressly excluded from constitutional

---

13 2006 (1) SA 144 (CC)

protection. It follows clearly that unless an expressive act is excluded by s 16(2) it is protected expression..."

(and at para 66):

"... all categories of expression, save those excluded by the Constitution itself, enjoy constitutional shield and may be restricted only in a way constitutionally authorised. "

[55] In British American Tobacco South Africa (Pty) Ltd v Minister of Health[14] the Supreme Court of Appeal expressly recognised that advertising, as commercial speech, falls within the sphere of protected speech in section 16 of the Constitution.

[56] By asserting jurisdiction over non-members and imposing its code and procedural guide upon such non-members, the respondent purports to regulate the free exercise by such members of their right of freedom of expression entrenched in section 16 of the Constitution. That this constitutes a limitation of the right of freedom of expression appears from the judgment of Sweyiya J in Print Media SA v Minister of Home Affairs[15], which case concerned the constitutionality of certain provisions of the Film and Publications Act, 65 of 1996. The learned Judge said: (at paragraph 51):

"The Act creates a complex system requiring the submission of material that is sought to be published for evaluation and classification. Whether a publication is banned, restricted in its scope of dissemination or permitted to

---

14 [2012] 3 All SA 593

15 2012 (6) SA 443 (CC)

be distributed freely, the Act regulates expression and does so in varying degrees. To the extent that protected expression falls subject to the Act's prior-classification scheme, the right to freedom of expression itself is regulated by the statute. Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless...".

[57] The respondent contends that its conduct in considering complaints does not limit the applicant's right of freedom of expression or association. The basis for this contention is that it is not an organ of state. The respondent is accordingly not bound by the duty imposed on the state in section 7(2) of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights.*"

[58] It is correct that the positive obligation to enforce constitutional rights horizontally between private entities is not analogous to the positive duty owed by organs of state. As such, the full extent of the positive obligation imposed upon the state (including, of course, legislation passed by the executive) to 'respect, protect, promote or fulfil' constitutional rights cannot always be extended to private entities such as the respondent.

[59] The Constitutional Court has held in relation to the infringement of

constitutional rights by a person other than the state as follows:[16]

"This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of Court of the Republic of South Africa, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures to diminish that protection. . . .'

[60] The court went on to say that in applying constitutional rights, private entities 'are not to interfere with or diminish the enjoyment of that right'. The court also indicated that the negative duty imposed on a private entity not to impair existing constitutional rights depends on the 'intensity' of the right. Thus, even though a private entity does not have the positive duty or obligation to 'promote, protect and fulfil' the constitutional rights of another private entity in the same way as the state, the respondent has the negative duty not to interfere with the applicant's right to elect not to associate with it.

[61] This Court held, in the recent matter of BDS South Africa and another v Continental Outdoor Media (Pty) Ltd and others[17] (per Mayat J) as follows:

"[81] As to the 'intensity' of the right to freedom of expression compared to the right to basic education referred to in the Juma Musjid case, the Constitutional

---

16 Governing Body of the Juma Musjid Primary School and Another v Essay NO and Others (Centre for Child Law and Another as Amici Curiae) 2011 (8) BCLR 761 (CC) ([2011] ZACC 13) in para 58.

17 2015 (1) SA 462 (GJ)

Court has repeatedly acknowledged the importance of freedom of expression in a democratic society. Thus, Kriegler J in C S v Mamabolo stated as follows:

'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. . . . Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed. . . .'[18]

More recently Davis J in the case of City of Cape Town v Ad Outpost (Pty) Ltd and Others held that:

'Whatever the role of such speech within a deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution.' [19]

[82] The Constitutional Court has further pronounced in the Print Media South Africa case that the right to freedom of expression embraces:

'(L)iberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one's own opinion about expression received . . . .' [20]

[83] ...

---

18 S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC) (2001 (1) SACR 686; 2001 (5) BCLR 449; [2001] ZACC 17) in para 37.

19 2000 (2) SA 733 (C) (2000 (2) BCLR 130) at 749E.

20 Supra in para 53.

[84] Taking all the above dicta into account, Continental clearly has a negative duty to respect the fundamental right of free speech of the applicants, ..."

[62] I agree with the sentiments expressed in this case. The respondent has a negative duty to respect the fundamental rights of the applicant not to associate and of free speech. This is even more so as the respondent also performs a public function.

[63] The respondent contended that the applicant did not make out a case that its rights of freedom of expression and association impose a constitutional obligation on the respondent's members to publish the applicant's advertisements. According to the respondent the existence of such an obligation is crucial to the applicant's case, since if there is no such obligation, the decision by members of the respondent to refuse to publish the applicant's advertisements does not affect the applicant's constitutional rights.

[64] Whilst the respondent is correct that there is no constitutional obligation on its members to publish the applicant's advertisements, it is not what the applicant complained about. The applicant's complaint is about the respondent's adjudication of complaints regarding its advertisements and the imposition of its jurisdiction and its code on the applicant in circumstances where it is unlawful to do so. The respondent's members will always have the right to elect whether to publish the applicant's advertisements and there is, in my view, no limitation on their rights of freedom of expression and association.

[65] Freedom of expression has long been entrenched in our common law.[21] The common law right of freedom of expression, like the constitutional right, includes the right not to be compelled to publish. It also includes the right not to associate. The media give effect to this common law right in their contracts with advertisers, which often contain standard terms reserving the right to refuse to publish advertisements.

[66] It is therefore not necessary to develop the common law to recognise such a right, as I was invited to do by the respondent. It is also not necessary to determine whether the limitation of the applicant's rights is reasonable and justifiable in terms of section 36 of the Constitution.

Alleged misrepresentation by the respondent.

[67] The applicant contends that the respondent's conduct has been culpably misleading. Its case is that:

[67.1] The respondent describes itself as an "Authority" that via the implementation of its code of practice furthers its main objective of promoting and maintaining the highest standards in advertising in all media in South Africa, "*without any reference to any limitation linked to membership of the Company*". The respondent's use of the word "Authority" in its name is misleading, in contravention of the CPA;

---

21 R v Bunting 1916 TPD 578; S v Turrell and others 1973 (1) SA 248 (C) at 256G-H; S v Evans 1982 (4) SA 346 (C) at 351C-D; Publications Control Board v William Heinemann, Ltd and others 1965 (4) SA 137 (A) at 160E-G (dissenting judgment subsequently approved and applied in Hix Networking Technologies v System Publishers (Pty) Ltd and another 1997 (1) SA 391 (A) at 400F); Du Plessis v Minister of Justice 1950 (3) SA 579 (W) at 580A-F and 581H-582A; R v Roux 1936 AD 271 at 281-284.

[67.2] The respondent's code misleadingly informed the public that its appendices were enforced pursuant to a delegation of authority from the MCC and the Department of Health in terms of section 18C of the Medicines Act;

[67.3] The respondent's use of case numbers and representation of its decisions as "rulings" misleadingly seek to clothe its decisions with judicial or quasi-judicial force;

[67.4] The respondent's standard letters are misleading and "*evidence its assertion of jurisdiction over non-members*". The applicant complains that:

[67.4.1] The fact that the respondent in its standard letters writes to non-members affording them a limited time period within which to respond to a complaint against them with the caution that "*...the Directorate will consider the matter after the deadline stipulated*";

[67.4.2] The fact that the recipient of the standard letter is told that after the stipulated deadline "*the ASA may consider the alleged breaches of the Code by investigating and ruling on the matter*" and that "*Rulings of the Directorate and the Advertising Standards Authority must be adhered to until reversed*";

[67.4.3] The applicant alleges that the respondent's registration number does not appear on its letterhead in legible characters and that other features of the letters, such as the use of references akin to Court citations, give the impression of official or judicial power.

[68] With regard to the use of the word "Authority" in the respondent's name:

[68.1] The respondent changed its name from the Advertising Standards Association to the Advertising Standards Authority. The applicant alleges that implicit in the word "Authority" (and absent from the word "Association") is a representation of a legitimate source in law for the exercise of public power. Section 81 of the CPA provides that:

"A business name - ... must not falsely imply or suggest, or be such as would reasonably mislead, a person to believe incorrectly that the business - ...is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court".

[68.2] The applicant has not referred to any legal prohibition against a private company including the word "Authority" in its name. The mere inclusion of the word "Authority" in the name of a private association or company does not tend to mislead, or to create the impression that the respondent is an organ of state or a statutory body.

[68.3] The respondent attached a printout of a search from the Companies and Intellectual Properties Commission ("CIPC") database of company names to its answering affidavit. That showed that there are presently 156 companies registered in South Africa that include the word "Authority" in their names, including many which are manifestly private associations and bodies, such as the "Apostolic Kingdom Leadership Authority", the "Autobody Certification Authority", and "The Design Authority". These companies and associations are not breaking the law or misleading the public merely by including the word "Authority" in their names.

[68.4] The legitimacy of the respondent referring to itself as an "authority" has furthermore been recognised by Parliament, which has enacted national legislation entrusting the respondent with important responsibilities and functions.[22]

[68.5] The applicant is in any event perfectly aware of the status of the respondent and the extent of its powers. There can therefore be no suggestion that it will be misled in future in that regard. For these reasons I am of the view that the applicant is not entitled to an interdict against the respondent using the word "Authority" in its name.

[69] With regard to the appendices to the code:

---

[22] Section 55 of the ECA.

[69.1] The applicant alleged that the respondent's code misleadingly informed the public that its appendices were enforced pursuant to a delegation of authority from the MCC and the Department of Health in terms of section 18C of the Medicines Act. I agree that there was such a misrepresentation.

[69.2] However, the issue is moot because the respondent's code no longer makes the said representations. Appendices "a" and "f" no longer form part of the code. Appendix "d" no longer refers to the MCC. The alleged misrepresentations are irrelevant to the forward-looking interdictory relief which the applicant seeks and it is accordingly not entitled to such relief.

[70] With regard to the respondent's use of case numbers and referring to its decisions as rulings, the applicant does not point to any prohibition in any law which prohibits a self-regulatory body from using this language. Indeed, it is difficult to see how a system of dispute resolution and adjudication could be established without using such language. Other self-regulatory bodies similarly adjudicate complaints on behalf of its members, and similarly use the language of adjudication in doing so. It can hardly be contended that it acts unlawfully or misrepresents the status of its powers in doing so.

[71] In any event, the respondent's members are aware of its powers and functions and cannot be misled by the use of the language complained about. Even if there was anything misleading about the language, it would only have

been relevant in respect of non-members. Because of the order that I intend making regarding the respondent's standard letters to non-members, the language used will no longer be misleading (if it was in the first place). The applicant is therefore also not entitled to interdictory relief in this regard.

[72] With regard to the respondent's standard letter of complaint, the respondent has tendered to effect reasonable amendments to its letters to the extent that the Court finds that any aspect of the letters may tend to genuinely mislead *bona fide* recipients. There is no indication in the said letters to non-members that they have an election to participate in the process or to submit themselves to the respondent's jurisdiction. To the contrary, all indications are that there is a duty to react to the letters and to participate in the process.

[73] The respondent relied on the wording of its code and procedural guide, which sets out the outer limit of its jurisdiction and the consequences of rulings on non-members. However, it cannot be expected of non-members to find and scrutinise these documents to determine whether they are bound to the respondent's processes. I am of the view that letters addressed to non-members should contain a reference to the fact that the respondent has no jurisdiction to determine the relevant dispute unless the non-member consents thereto or submits itself to the respondent's jurisdiction. I will not prescribe the wording to be used, but will make an order to that effect in terms of the respondent's tender.

Charging of appeal fees by the respondent.

[74] The respondent procured payment by the applicant of appeal fees in amounts of R79 800.00 and R89 718.00 respectively. The applicant claims repayment of these fees on the basis of unjust enrichment, alternatively that the imposition of the fees constituted an unlawful limitation of the applicant's right of access to court.

[75] The second ground can be disposed of easily: The applicant does not contend that it was unable to afford the respondent's appeal fees. It is plainly not an indigent organisation. The applicant does not contend that the respondent's appeal fees have prevented it from approaching a court to challenge any decision of the respondent, nor does it contend that it has asked the respondent to waive its appeal fees on the ground that it cannot afford to pay the fees. It has therefore not made out any case that the respondent's appeal fees have infringed its right of access to court and it cannot succeed on this ground.

[76] The ground based on unjust enrichment is premised on the fact that the applicant was misled into believing that it was bound by the respondent's processes as the respondent possessed the requisite power to issue rulings and make determinations binding upon it.

[77] The distinction between payments made in error of law and payments made in error of fact has been abolished.[23] An *indebitum* paid as a result of a mistake of law or fact can be recovered, provided that the mistake is found to be excusable in the circumstances of the particular case. The *onus* lies on the applicant to prove every element constituting its cause of action. This includes sufficient facts to justify a finding that its error was excusable.[24]

[78] I have no doubt that the error on the part of the applicant was excusable. There was nothing in the respondent's standard letters to indicate to the applicant that it had an election whether to participate in the respondent's procedures or that it could ignore the rulings. It was the applicant's case from the outset that it would not have participated in the process if it had been aware of the respondent's true status as a voluntary association with powers only in respect of its members. The respondent has placed no facts before me to countenance this.

[79] The applicant's belief that the respondent had the power to determine disputes regarding its advertisements and that it was bound to its processes, cannot be dismissed as patently wrong. In fact, the respondent persisted with the argument that it had the power to determine disputes in regard to the advertisements of non-members even before me.

[80] Because of my finding that, in the absence of consent, the respondent does not have jurisdiction to determine any complaints relating to the

---

23 Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another 1992 (4) SA 202 (A)

24 Willis Faber supra at 224H - J

advertisements of non-members, it follows that the respondent could also not impose the payment of appeal fees on non-members such as the applicant. The applicant's consent to pay the fees was based on the mistaken belief that it was bound by the respondent's processes and that the respondent possessed the requisite power to issue rulings and make determinations binding upon it.

[81] It follows that the applicant is entitled to recover the amounts unduly paid to the respondents.

Costs

[82] The applicant seeks a punitive costs order against the respondent, on the attorney and client scale. It does so on the basis that the respondent continues to adjudicate complaints despite the fact that two other parties have instituted applications similar to the present application against the respondent.

[83] In my view the respondent's conduct is not deserving of a punitive costs order. The applicant bases its claim for a punitive costs order solely on the fact that there are two similar applications pending against the respondent, neither of which have been finalised or resulted in a court pronouncing on the lawfulness of the respondent's operations. The parallel applications (also brought by the applicant's present attorneys) are opposed by the respondent and have not resulted in any orders against the respondent.

[84] Unless and until a Court orders the respondent to desist from functioning as it does, there is no reason why the respondent should do so and accordingly no reason for a punitive costs order to be granted against it.

[85] During argument it was accepted that the respondent conducted itself in the *bona fide* belief that it fulfils a lawful and legitimate role as the self-regulator of the advertising industry in the public interest. Even in light of my finding that the respondent has been mistaken about the extent and nature of its powers, this does not justify a punitive costs order. The parties were *ad idem* that the employment of two counsel was justified in respect of each party.

Orders sought by applicant.

[86] The applicant applied for certain declaratory orders regarding the respondent's status, for example that it is not an authority established by or having authority and jurisdiction conferred upon it by Parliament to regulate advertising in all media persons in South Africa and that it has never received delegation of authority from the MCC or the National Consumer Commission. The respondent does not contend, and never has contended, for the opposite position, and therefore these issues are not the subject of a live dispute between the parties. They are purely hypothetical, abstract and academic. In these circumstances I have a discretion whether to grant such orders.[25]

---

[25] Section 21(1)(c) of the Superior Courts Act 10 of 2013. See also: Reinecke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A) at 95C; Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) at 213E–G; Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) at 14C.

[87] The declaratory orders also relate to a factual state and not to any rights of the applicant.[26] Because thereof and in light of the orders that I intend granting, which will adequately protect the interests of the applicant, I will exercise my discretion not to grant these declaratory orders.

[88] Some of the remaining prayers in the amended Notice of Motion overlap and are not necessary to protect the applicant's rights. It is, in my view, for example not necessary to declare that the respondent has no authority to regulate advertising of medicines of persons who are not members of the respondent if an order is granted that it has no jurisdiction over non-members. I therefore decline to grant such superfluous orders.

[89] As far as the interdict is concerned, the applicant has shown all the requirements for a final interdict. It has a clear right (as discussed above), a reasonable apprehension of an invasion of that right and the absence of any other suitable remedy. In the result it is entitled to an interdict.

Order.

[90] In the premises I make the following order:

[90.1] It is declared that the respondent 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

---

26 Electrical Contractors' Association (Soth Africa) and another v Building Industries Federation (South Africa) 1980 (2) SA 516 (T) at 520D

applicant to participate in its processes, issue any instruction, order or ruling against the applicant or sanction it;

[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 complaints against the applicant;

[90.5] The respondent is directed to include in its standard letters of complaint to non-members a reference to the fact that, in the absence of a submission to its jurisdiction, it has no jurisdiction to adjudicate the complaint and that such non-member is not bound to participate in its processes;

[90.6] It is declared that there is no lawful basis for the respondent to unilaterally impose appeal fees on the applicant as a non-member of the respondent in the absence of a contractual service agreement between the applicant and the respondent;

[90.7] The respondent is directed to repay the appeal fees in the amounts of R79 800.00 and R89 718.00 to the applicant, together with interest at the prescribed rate *a tempore morae*;

[90.8] The respondent is to pay the costs of the application, including the costs consequent upon the employment of two counsel.

D T V R DU PLESSIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	25 April 2016
Date of judgment	:	5 May 2016
For applicant	:	Adv A Subel SC
		Adv S Stein SC
		Fluxmans Inc.
For respondent	:	Adv G Marcus SC
		Adv N Ferreira
		Judin Combrinck Inc.