



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 902/2016

In the matter between:

THE ADVERTISING STANDARDS AUTHORITY

APPELLANT

and

HERBEX (PTY) LTD

RESPONDENT

Neutral Citation: *The Advertising Standards Authority v Herbex (Pty) Ltd*
(902/16) [2017] ZASCA 132 (29 September 2017)

Coram: Navsa ADP and Mathopo JA, Plasket, Rogers and
Schippers AJJA

Heard: 22 August 2017

Delivered: 29 September 2017

Summary: Jurisdiction – voluntary association – self-regulation of
advertising industry – no jurisdiction over non-members – costs on appeal –
discretion – agreement on substituted order.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Du Plessis AJ) sitting as court of first instance):

The following order is made:

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, 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.’

3 Each party shall bear its own costs of appeal.

JUDGMENT

Mathopo JA (Navsa ADP and Plasket, Rogers and Schippers AJJA) concurring):

[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. The appeal is with the leave of the high court.

[2] During the hearing of the appeal the parties reached agreement in relation to the merits and the order that should issue. They could not agree on who should bear the costs of the appeal and the costs in the court a quo. They asked this court, having regard to the agreed order and the record of proceedings, to determine liability for costs in the court a quo and this Court. In order to engage in that exercise, it is necessary to briefly set out the background to this matter.

[3] The ASA is a voluntary association incorporated in terms of the Companies Act 61 of 1973. It is an independent, industry-funded body that serves the purpose of self-regulation on behalf of the advertising industry. Its purpose, as a watchdog in the industry, is to ensure that advertising is informative, factual, honest, decent, legal and that advertisements are prepared with a sense of responsibility to the consumer.

[4] The ASA serves this purpose, on behalf of its members, through two primary methods. First, the ASA has developed standards for the industry, contained in the Advertising Code (the Code). The Code is a contract entered into between the participants in the advertising industry, for the purpose of self-regulation. Second, the ASA has created a mechanism to enforce these industry standards, including the adjudication of consumer complaints and disputes between competitors.

[5] The ASA adjudicates complaints on behalf of its members, who agree to adhere to the Code and abide by the ASA's rulings. The Code applies to all commercial and non-commercial advertising. This includes advertising by advertisers who are not members of the ASA, such as Herbex, but who seek to have their advertisements published by members of the ASA. The ASA's Directorate is responsible for receiving and adjudicating complaints concerning advertising in order to ensure compliance with the Code. Any party who feels aggrieved by a ruling of the Directorate may appeal the ruling to the Advertising Standards Committee (in respect of consumer complaints) or to the Advertising Industry Tribunal (in respect of competitor complaints). The appellant is required to pay a fee to cover the costs of the appeal. A further appeal lies to a Final Appeal Committee, also on payment of a fee.

[6] The rulings of the ASA are published on its website which is accessible to members and the media. Rulings are not legally enforceable against non-members. The only consequence of a non-member's refusal to comply with an ASA ruling is that the members of the ASA will decline to accept advertising from that non-member. If a respondent ignores reasonable requests for co-operation, the ASA may issue an Ad-Alert to its members. The effect of an Ad-Alert is that none of the ASA's members will publish any advertisement of the offending advertiser in any medium.

[7] Herbex challenged the ASA's jurisdiction in the court a quo essentially on the following grounds. The ASA is a private company which has no jurisdiction over non-members. Herbex was induced by misleading statements and non-disclosures in the ASA's standard letter sent to advertisers, pursuant

to receipt of a complaint by a member of the public, to respond to complaints and to participate and defend itself in hearings conducted by or under the auspices of the ASA. Consequently, the ASA issued rulings against Herbex, published them on its website and extracted appeal fees from Herbex. The ASA was acting unconstitutionally, in violation of the rights of Herbex to freedom of expression and trade, and the ASA's rulings against Herbex adversely affected its reputation and damaged its business.

[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). The ASA denied that Herbex was misled into believing that the ASA is a governmental body, that it exercises statutory powers and that its letters were in any way misleading. The ASA also denied any infringement of Herbex's fundamental rights in the enforcement of the Code.

[9] Herbex succeeded in the court a quo which made the following order:

[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;

[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;

[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 his jurisdiction, it has no jurisdiction to adjudicate the complaint and that such a 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 amount 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.'

[10] Before agreement was reached in this court on the form of the order, the dispute between the parties related mainly to the question whether paragraph 90.1 of the order of the court a quo was overbroad, and the content of the ASA's standard letter sent to advertisers on receipt of a complaint. It was submitted on behalf of the ASA that paragraph 90.1 of the order of the court a quo was extraordinarily wide and curtailed the ASA's ability to perform its function of self-regulation of the advertising industry in the public interest. More specifically, paragraph 90.1 precluded the ASA from considering any complaint whatsoever in respect of a non-member, without a submission to its jurisdiction, in three categories: (a) advertisements of a non-member published in media owned by a member of the ASA; (b) advertisements published by non-members of the ASA, and which are not published by a member of the ASA; and (c) advertisements of a non-member broadcast by a broadcast service licensee under the Electronic Communications Act 36 of 2005 (the ECA).

[11] The ASA contended that it is entitled to consider complaints under category (a) because the publisher, a member of the ASA or one of the industry bodies that is a member of the ASA, has agreed to abide by the Code, which prevents members from accepting advertising that conflicts with the Code. The ASA was also entitled to consider complaints under category

(b) on behalf of its members, so that they could make an election, if approached in the future by the advertiser, whether or not they wish to publish an advertisement by an advertiser who breaches the Code. The ASA could also consider complaints under category (c) because s 55(1) of the ECA requires all broadcasting service licensees to adhere to the Code and s 55(2) envisages that the ASA will, in respect of its members, adjudicate complaints concerning alleged breaches of the Code.¹

[12] Although the ASA contended that there was nothing misleading about its standard letter of complaint, it accepted that the content could be improved to make it clear to a non-member that it is not obliged to participate in the proceedings of the ASA, but that if it does not participate in those proceedings, the ASA may still consider the complaint, so as to determine whether its members should accept an advertisement by that non-member for publication.

[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

¹ Section 55 of the ECA, in relevant part, reads:

'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 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, as well as complaints concerning alleged breaches of the advertising regulations.'

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.

[15] Mr Marcus who with Mr Ferreira appeared for the ASA (the appellant), submitted that Herbex was successful in the court a quo, and that the ASA was substantially successful on appeal. For practical purposes therefore, the two orders should be set off against each other, and there should be no order as to costs in either court. Mr Subel with Ms Stein for Herbex, submitted that the ASA persisted with its stance that it had jurisdiction over non-members, both in the court a quo and this Court. Accordingly, so it was submitted, Herbex was within its rights to defend the orders of the court a quo, the ASA was not substantially successful and Herbex was thus entitled to costs on appeal.

[16] The power to interfere with costs on appeal is limited to cases where the court vested with the discretion did not exercise it judicially, ie the court of first instance exercised the power conferred on it capriciously, or upon a wrong principle, or did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons (*Manong and Associates (Pty) Ltd v City of Cape Town & another* 2011 (2) SA 90 (SCA) para 92). In the court a quo a substantial part of the case was spent on what the ASA could or could not do. The focus of the argument was on the outer limit of its jurisdiction. The court a quo was undoubtedly correct in holding that in the absence of a submission to its jurisdiction, the ASA has no jurisdiction over non-members and could not require them to participate in its processes. The respondent was substantially successful and consequently, there is no basis to interfere with the court a quo's order directing the ASA to pay the costs of that application, which include the costs of two counsel.

[17] The ASA is a body set up to ensure that the system of self-regulation of the advertising industry works, and the main purpose of the Code is to protect consumers and ensure fair play among advertisers (*Telematrix (Pty Ltd) t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA

461 (SCA) para 4). For these reasons, in my view, the ASA had to approach this Court to reverse the wide-ranging effect of paragraph 90.1 of the court a quo's order, particularly as regards the prohibition on the ASA from determining whether any advertisement breaches the Code, so as to enable the ASA to determine, on behalf of its members, whether they should accept an advertisement for publication or withdraw the advertisement if it has been published. Accordingly, the parties agreed to the orders in paragraphs 1.1 and 1.2 below. The substituted order reflects a measure of success achieved by each of the parties. In my view therefore, in the exercise of a discretion, it would be just and equitable for each party to bear its own costs in the appeal.

[18] The following order is made:

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

2 Save for paragraph 90.8, 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.'

3 Each party shall bear its own costs of appeal.

R S Mathopo
Judge of Appeal

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