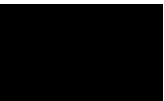


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/22061

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED: YES /NO
..... SIGNATURE	 ...21/02/2024..... DATE

In the matter between:

BLISS BRANDS (PTY) LTD

Applicant

and

ADVERTISING REGULATORY BOARD NPC

First Respondent

COLGATE-PALMOLIVE (PTY) LTD

Second Respondent

COLGATE-PALMOLIVE COMPANY

Third Respondent

JUDGMENT

MANOIM J:

[1] This case has its origins in an advertising dispute between two rival manufacturers of soap products. It is now before this court because the applicant (“Bliss”) seeks to review and set aside a decision made by a committee of the first respondent, the Advertising Regulatory Board NPC (“the ARB”), in favour of the second and third respondents (“Colgate”).¹ In proceedings before the ARB, Colgate had complained that Bliss had violated two provisions of the ARB’s advertising Code. One provision relates to exploiting the advertising goodwill of Colgate the other, imitation of its advertising packaging.²

[2] This case has already been before this court on three separate occasions, as well as going once on appeal to the Supreme Court of Appeal (“SCA”) and then to the Constitutional Court.³ As the litigation has unfolded so have new legal issues. To unpack these issues, it is necessary for me to start with the origin of the dispute.

Origin

[3] Colgate is a large international manufacturer of consumer goods. One of its brands is a soap called Protex. It is branded as a hygiene soap. Hygiene soap is seen by both firms as a separate category of soap. Protex is the leading brand with 32% of the market in the category. It is common cause that it is the pioneer of this category. Protex has been in the market since around 2000.⁴

¹ Nothing in this case turns on the distinction and both parties have conveniently referred to Colgate in these proceedings.

² Clauses 8 and 9, respectively. I deal with their contents later.

³ Reported as *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) and *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and others* [2023] ZACC 19.

⁴ I derive this from the complaint filed with the ARB. The complaint was filed in 2019 and refers to Protex having been in the market for “over 19 years”.

Protex brands are also divided into sub-brands each with a distinctive name that is included in the packaging along with the main brand name.

- [4] Bliss, which also manufactures other consumer goods, entered the market in 2011, with its own hygiene soap brand called Protex. It has registered a trademark for that name and this application was not challenged by Colgate. As with Protex, it has four variants with these names included on the packaging in smaller type. Although Colgate contended that the Bliss packaging at that time *“made use of a combination of certain elements identical (or substantially similar) to that of Colgate’s old Protex packaging (i.e. pre 2015)”* it did not lodge a complaint at that time.⁵
- [5] In 2015 Colgate changed the look of its Protex brand to what it is currently now, although minor changes were made in 2016. In 2018 Bliss changed the packaging of its Securex brand. Colgate contends that this made the look of Securex more closely resemble that of its Protex brand. This galvanised Colgate, which had thus far not objected to the presence of Protex in the market, to lodging a complaint with the first respondent, the Advertising Regulatory Board NPC (“ARB”) on 9 December 2019. What appears to have animated Colgate into action was that Bliss was gaining market share after the change and Colgate believed this was attributable to consumers confusing the two brands.
- [6] In the complaint Colgate alleged that what is referred to as the ‘Securex design concept,’ breached two provisions of the ARB’s Code of Advertising Practice

⁵ This is the claim Colgate made in its appeal to the AAC. See record Case Lines 026-118.

("the Code"). It is necessary to pause the narration here to discuss the nature of the ARB as this is central to certain of the issues in the litigation.

- [7] The ARB is a private company not an organ of state. It serves as a voluntary regulator of the industry. It counts amongst its members a significant number of manufacturers, retailers, and advertising agencies. Colgate is a member, but Bliss is not. Despite its private status it is able to wield sufficient influence in the marketplace because its members must respect its rulings or face expulsion. For this reason, it would not be inaccurate to observe that its private power is akin to that of a body vested with public power.
- [8] When a complaint is brought to the ARB, as in this case by Colgate, the matter is first dealt with by the Directorate. Since Bliss was a non-member, the ARB has no authority over it. The Directorate enquired if Bliss would consent to jurisdiction. Bliss agreed to, a fact that is significant for later litigation. The Directorate dismissed the complaint. Colgate then appealed the decision to the next structure in the ARB hierarchy, the Advertising Appeals Committee ("AAC").
- [9] Four members of the AAC decided the matter; three persons from industry and a senior counsel who served as chair. The panel wrote a single decision in which all the members concurred. The AAC concluded that the Bliss' Securex packaging breached clauses 8 and 9 of the Code. Bliss was ordered to withdraw the Securex packaging in accordance with the provisions of the ARB's Procedural Guide. This provision requires an advertiser to withdraw its packaging within 3 months of the order, save that products on the shelves may remain.

- [10] Bliss then appealed that decision to the ARB's Final Appeal Committee ("FAC"). That body also comprised four members. Three were industry participants, whilst the fourth, the chair, was retired Judge Ngoepe. The panel split 2-2 on the issue. Two of the members favoured dismissing the appeal while two favoured upholding it. In terms of the ARB constitution the Chairperson is given a casting vote. Since Ngoepe J was of the view that the appeal should be dismissed, his view, and that of his colleague Mr Mokoena, then became the majority view of the FAC. The FAC's order reiterated that Bliss Brands must stop using the Securex packaging although the date for compliance was extended.
- [11] Bliss then brought an urgent application to suspend the FAC decision pending the launch of a review. This was heard by Yacoob J. Bliss argued that it was not necessary for the court to decide whether the review had prospects of success as that was not the basis for the application. At that stage, the review had not yet been launched. Nevertheless, certain of the review grounds were indicated and they are the same as advanced before me now. Yaccob J did not consider that these grounds sufficed to establish a *prima facie* right and she dismissed the application.
- [12] Bliss then brought another application to the High Court in Gauteng for an urgent review of the FAC decision. The review was based on the provisions of Promotion of Administrative Justice Act, 3 of 2000. In alternative, Bliss sought an interdict pending the determination of the review. The matter served before Fisher J. Fisher J decided that there was not enough time to determine the review urgently. However, she *mero moto* raised a constitutional issue with the parties. Bliss pursuant to this and with the agreement of the other two

respondents (then both the ARB and Colgate) amended its notice of motion and founding papers to reflect the constitutional issues. In the meantime, Fisher J interdicted the ARB from implementing the FAC order. I return to the consequences of this later in this decision.

- [13] The parties then amended their papers to deal with the constitutional issues Fisher J had identified and the parties appeared before her again. In terms of its now amended Notice of Motion Bliss now sought in addition to its review relief, an order declaring the ARB's MOI unconstitutional, alternatively its exercise of jurisdiction over non-members unconstitutional. Fisher J upheld them. The ARB and Colgate then appealed to the SCA which overturned the order of Fisher J. The SCA decided the constitutional issues in favour of the ARB and Colgate. It also, at behest of the ARB which was concerned with its ongoing vulnerability of constitutional challenges, decided further constitutional issues than had been raised before the High Court. But this was not the end of the matter. Bliss then sought leave to appeal to the Constitutional Court. Whilst the Constitutional court decided the matter more narrowly than did the SCA it refused leave to appeal holding that:

*"To conclude because Bliss Brands consented to the jurisdiction of the ARB, it is not in the interests of justice to entertain any other issue in the matter"*⁶

- [14] The order of the SCA was left undisturbed. In its order the SCA replaced the order of Fisher J and remitted the matter back to this court which has been allocated to me to hear. This relief as per the SCA order, is now confined to

⁶ CCT 132/22 paragraph 22.

paragraphs 2, 3 and 7 of the amended Notice of Motion that served before FisherJ.⁷

[15] These are:

2. Declaring that the rulings of the Final Appeals Committee ('FAC') of the first respondent, dated 3 August 2020 ('the FAC Ruling') and 17 August 2020 (titled 'Clarification of the Cost Orders') ('the Costs Decision', respectively, (collectively 'the Rulings') are unlawful and are set aside.

3. (This deals with a costs issue that the parties have agreed to resolve among themselves and I need not decide.)

7. Substituting the FAC Ruling and the Costs Decision with the following:

7.1.1. Declaring that the SECUREX packaging does not breach clauses 8 or 9 of Section II of the Code of Advertising Practice of the first respondent;

7.1.2. Declaring that the applicant's appeal to the FAC succeeds;

7.1.3. Directing that the first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 12.6 of the Procedural Guide;

7.1.4. Declaring that the Ruling of the Advertising Appeal Committee ("AAC") of the first respondent, dated 27 April 2020, ("the AAC Ruling") is substituted with the following:

7.1.4.1. The appeal is dismissed;

⁷ What the SCA did was to excise those prayers that raised the constitutional issues.

7.1.4.2. The first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 9.2 of the Procedural Guide.

7.2. Alternatively, to prayer 7.1, referring the matter back to the FAC for a re- hearing, and suspending the AAC Ruling, pending the outcome of that hearing.

- [16] At my first case management meeting with the parties, I requested they set out concisely the issues that I needed to determine given the lengthy litigation that had ensued. In a joint practice note they have usefully done so. However, that effort became unstuck soon. Prior to the hearing of the matter Bliss gave notice that it would add a rationality point to its other review points. This was done a few days before the hearing to Colgate's' umbrage. Nevertheless, Colgate replied in the brief time it had to the new argument, so I do not consider that it has been prejudiced by this. This is because the reliance on rationality is based on the same facts as in the other review points.
- [17] Colgate also in the same note brought to the fore a point that was not included in the joint practice note. I accept that this point was raised in Colgate's answering affidavit but somehow it fell on to the cutting floor when the practice note was drawn up. Nevertheless, given its nature let me deal with this point first.
- [18] Bliss as can be seen from its Notice of Motion seeks to set aside the FAC ruling, but not the AAC ruling. Colgate argues that this is a fatal flaw. The finding of the

AAC ruling is consistent with that of the FAC. Therefore, argues Colgate even if the FAC ruling is set aside this ruling would still hold.

- [19] There are two cases on this point leading to opposite outcomes. In *Black Eagle Project Roodekrans v MEC of the Department of Agriculture, Conservation and Environment, Gauteng Provincial Government, and others*, the SCA had to deal with a review of a Minister's decision which decided an appeal from a decision of a head of that Minister's department (HOD). The applicant had reviewed the Minister's decision but not that of the HOD, whose decision the Minister had upheld. The court explained:

*"It is clear from the decision in Oudekraal that a successful review of the MEC's decision would not affect the validity of the HOD's decision, which would remain intact. What was required of Black Eagle and what it failed to do was to advance a proper challenge to the HOD's decision."*⁸

- [20] But in the same decision the court refers to another SCA decision in *Sewpersadh v The Minister of Finance and Another*.⁹ Here the issue was that the applicant, who was seeking a special type of pension, had been turned down by both the Treasury, and then on appeal by an Appeal Board. The applicant had then approached the courts but had only reviewed the decision of the Treasury, not the Appeal Board. This point was addressed by the SCA which observed of the applicant that:

⁸ [2021] ZASCA 84 (17 June 2021) at paras 12 — 13

⁹ [2019] ZASCA 117; [2019]4 All SA 668 (SCA).

“For some reason he did not challenge the initial decision of the Treasury. It would probably have been better had he done so. It was pointed out in Wings Park that when an applicant has suffered an unfavourable decision at first instance which is confirmed on an internal appeal, both decisions must usually be taken on review in order to have the decision set aside. This is because if just the appeal decision is set aside, the first decision that was the subject of the internal appeal will continue to stand should it, too, not be set aside on review. The failure to target the original decision is, however, not necessarily fatal to a review in such circumstances, and much depends upon the nature of the decision at first instance and the remedy sought on review. Here the proceedings before Appeal Board do not amount to a simple rehearing as in the case of a true appeal but, rather, are akin to proceedings de novo in as much as the Appeal Board can receive further evidence and make further enquiries. In my view, this is a case where a failure to target the original decision does not preclude relief. Certainly, if the Appeal Board's decision is substituted on review with an order which overturns the Treasury's initial decision, no harm can be done.”¹⁰

- [21] In the present case the FAC did have the power to consider new evidence and in fact did so. This places the facts of this case closer on the spectrum to *Sewpersadh* than to *Black Eagle*. But even if I am wrong on this point I consider that it would not be in the interests of justice to dismiss this point on so narrow

¹⁰ Supra, paragraph 20.

a ground. Acting more cautiously Biss should have reviewed both decisions, but perhaps distracted by the many other considerations this case has raised, this was not considered at the time.

- [22] The reason I consider that it is in the interests of justice to decide this matter, is that I cannot ignore the fact that this litigation has already been before several courts, including the apex court, but at no stage have the merits of the review been considered. Both parties are exposed to considerable commercial risk depending on the outcome. The matter has been ongoing since the complaint was lodged in December 2019. It is time the merits of the review were considered, and I will proceed to do so.

Review points

(i) First ground of review: Casting vote exercised by the Chairperson

- [23] When the matter came before the FAC the panel comprised four members. Ngoepe J who was chairing the panel queried why there was an even number but was advised by the Directorate of the ARB that due to logistical problems they were not able to get a further member. At the end of the hearing the panel split evenly. Ngoepe J who along with another member Mr Mokoena held that the appeal should be dismissed, then exercised a casting vote which led to the result that the FAC had dismissed the appeal.
- [24] There is no challenge that this was not in terms of the ARB constitution or that the panel was in view of its even number inquorate. Rather, the first challenge is that in his decision Ngoepe J sourced this power in clause 14.3 of the Code where there is no such power. This was doubtless an error as the relevant

clause is 14.13 of the MOI, which provides for this power.¹¹ I do not consider this point has any substance and the error is obvious.

[25] The next criticism is hard to follow. The point now taken is that this source, for the casting vote, should have been located in the Code of Conduct not the MOI. No argument in principle is made for why this should be the case. If anything, the power is properly located in the MOI which is the constitution of the ARB. If this is an argument based on company law, it has no basis. Section 15(2) of the Companies Act, 71, of 2008, regulates the provisions of an MOI. It states that a provision that is inconsistent with the Act is void. But no argument is made that the inclusion of a casting vote power given to an organ of the company like the FAC is contrary to the Act. Moreover, in its MOI the ARB makes it clear that the standard form MOI prescribed by the Act does not apply to it.¹² There is no legal bar to the inclusion of this legal provision in the MOI and it is the logical place for it to be inserted, given that the MOI sets out the various organs of the ARB and included their voting procedures.

[26] Then the argument was that because in terms of section 15(6) of the Companies Act, the MOI is a contract, binding as between its members and the company, this could not bind a non-member. But Bliss participated in the proceedings of the ARB and chose to exercise its rights of appeal provided by the same MOI. It can hardly object to this now. Moreover section 15(6) applies to both the MOI and any rules of the company. The Code constitutes the Rules

¹¹ The provision states: "Where an equality of voting occurs the Chairman of the Final Appeal Committee will have a casting vote in addition to his/her deliberative vote."

¹² MOI section 1,1.

of the company thus the attempt to make a distinction between the two has no merit.

[27] I do not know if Bliss was aware of the provisions of the MOI when it appealed to the FAC. It seems from some correspondence in the record that it did not. But it was incumbent on Bliss having instituted an appeal, to familiarise itself with the voting procedures. If it did not, it has only itself to blame.

[28] Finally, the argument is made that a casting vote is an exercise of discretion. On this basis the Chairperson's choice to exercise a casting vote is attacked for being irrational and unfair. But as Colgate has argued, one needs to distinguish between functions that entail the exercise of a discretion and those that are mechanical. As Hoexter and Penfold explain, unlike discretionary powers, mechanical powers "*...involve little or no choice on the part of their holder.*"¹³ The Bliss critique presupposes that the Chairperson exercises a discretion when voting a casting vote. But that is not the case. The language of the MOI makes this clear – there is no discretion - this is a mechanical power.

[29] This review point must fail.

Approach to the remaining review points.

[30] The next two review points deal with the merits of the FAC decision. Each involves a consideration of whether the FAC took the correct approach to the application of the Code. Colgate argues that the approach taken by Bliss is to elevate its review points impermissibly into what are appeal points. Whilst both parties agree that the distinction between the two has elided, Colgate argues

¹³ Hoexter and Penfold, "*Administrative Law in South Africa*," Third edition page 65.

that nevertheless the distinction must still be retained.¹⁴ It says much of Bliss argument falls on the wrong side of the divide. Even with an expanded notion of what constitutes a review, Bliss' review points, it argues, remain appeal points. Bliss relying on the SCA in *Tellumat* contends that once the reviewing court is satisfied that:

*"...the decision could only properly be taken if certain facts, overlooked by the decision maker, were taken into account, it is entitled to interfere. Similarly, once it is satisfied that in taking the decision certain facts that were taken into account should not have been, it may interfere. Even when all relevant facts were considered, the court will have to consider the weight attached to the facts. The precise point at which a court is entitled to interfere may not be entirely clear, but as Henning J said many years ago, "where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant is given weight far in excess of its true value" interference is warranted. I would suggest that it is essential."*¹⁵

[31] Since most of the argument advanced by Bliss falls into this category referred in *Tellumat*, this will be the approach I will follow. But there is also another principle to be observed. Colgate argues that administrative decision makers are entitled to deference. This is particularly so when the issues involve '...

¹⁴ See Hoexter and Penfold op cit. who cite Cameron JA in *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) who states in a review the focus is on the way in which the decision maker came to the challenged conclusion. (Paragraph 310. But the authors also state that in practice the distinction between a review and appeal "... is not nearly as clear as it is made to seem." (Pages 137 to 139)

¹⁵ *Tellumat v Appeal Board, Financial Services Board* [2016] 1 All SA 704 (SCA) at paragraph 42.

*polycentric or policy issues.*¹⁶ I now go on with these principles in mind to consider the remaining review points.

(ii) Second ground of review.

a. Clause 8 of the Code.

[32] Clause 8 of the Code states:

“Exploitation of advertising goodwill

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. Such permission shall not be considered to be a waiver of

the provisions of other clauses of the Code.

8.2 Parodies, the intention of which is primarily to amuse and which are not likely to affect adversely the advertising goodwill of another advertiser to a material extent, will not be regarded as falling within the prohibition of paragraph 8.1 above.

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.

¹⁶ See *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at paragraph 46.

- [33] To bring its case into the realm of review, Bliss argues that it is necessary as a jurisdictional fact for there to be a finding that Colgate had established it acquired goodwill in the Protex packaging architecture and that Bliss had taken advantage of that in its Securex packaging. In the FAC decision Ngoepe J found that Colgate had established this goodwill because it enjoyed 32% of the market and established itself over many years.
- [34] Bliss argues this does not suffice to a finding that advertising goodwill subsists in the Protex packaging. Bliss argues that proof of market share and longevity should not constitute proxies for advertising goodwill. This is proof of the value of the goodwill of the trademark, but it does not necessarily follow that it constitutes proof of the goodwill in the advertising architecture. But this is not a fair reading of the reasons. Ngoepe J goes on to state: *“The appellant has exploited respondent’s goodwill relating to Protex. Given the overall similarity between the two, we are of the view that there is a likelihood of confusion.”* In prior paragraphs this exploitation is detailed.
- [35] The fact that it is set out in an earlier portion of the reasons and not under the heading dealing with clause 8 of the Code does not detract from the fact that this reasoning was advanced and considered. It is not necessary for review purposes for me to regurgitate what was said. But in brief the approach of the AAC was to detail the history of the respective brands packaging and to reach a conclusion that Colgate’s’ brand packaging architecture was unique and that historically Bliss, which was the latecomer, had adopted similar packaging and

then in 2018 (the event that led to the present complaint) had in the words of the ACC “*moved the packaging even closer to Protex packaging than before.*”

[36] Ngoepe J quoted this reasoning in his decision with approval. He repeats the statement that the 2018 Securex packaging had moved closer to that of Protex as being correct. Mr Mokoena who wrote the other decision dismissing the appeal concurred with the reasons given by Ngoepe J and added some more remarks of his own. He notes that even the Directorate which had decided in favour of Bliss had nevertheless come to the conclusion that that the combination effect can become protectable advertising concepts, noting that if this was not the case “... *then distinctive packaging, which is almost always made up of separate non-distinctive elements, would never be protectable as advertising.*”¹⁷

[37] Mokoena being a marketing practitioner uses the evocative language of those in the industry. Thus, while he acknowledges that an entrant into a new market competing with an incumbent “*might subscribe to the category norms provided*” this does not justify exploiting their advertising goodwill. As he put it, it is one thing to take a “*spoonful of inspiration but not a spade full.*” There was he concluded a “... *significant reduction of the perceptual distance between the two brands.*”

[38] Put simply Bliss had entered the market in 2011 copying significant aspects of Colgate’s brand architecture, and when the latter changed some aspect in 2016, Bliss had followed it in 2018, bringing the products visually even closer.

¹⁷ He notes as well as does Ngoepe J, that the reason the Directorate did not find an infringement of the Code was that Colgate had not pursued its case in 2011 when Bliss commenced with Securex. Since nine years had elapsed since the Bliss brand had entered the market the Directorate reasoned the Code should not be used to protect Colgate.

Thus, both members who made up the majority decision on the FAC, came to the conclusion that the case for a breach of clause 8 of the Code rested on what is termed 'visual proximity'. This conclusion of visual proximity was also the conclusion of the four members of the AAC and on this aspect even the view of the Directorate. That each added other issues as well takes the matter no further. The core finding does not amount to an error of fact, nor is it irrational and constitutes a determination of a matter of policy which the FAC was entitled to exercise.

- [39] The minority decision was written by a Mr Neethling. Mr Gendel, the fourth member, concurred with Neethling's decision but did not write his own. I accept that Mr Neethling does make some valid points about irrelevant features that the AAC had relied on. He gave two examples. For instance, there was some reliance on evidence of consumer confusion about the two brands. But the evidence for this was hardly conclusive. It amounted to two posts that had been made on Colgate's' social media platform. Then allegations had been made about a past campaign in which the two firm were involved. Colgate had accused Bliss of violating both clauses 8 and 9 of the Code when the latter marketed a fabric conditioner called Maq Soft which competes with the former's brand Sta Soft, leading to accusations that Bliss was a serial imitator. Neethling was correct in rejecting the weight and relevance of these facts. But these facts are not central to the core conclusion of the FAC majority which is premised on the degree of 'sameness'. Nor indeed does Neethling dispute the sameness description. As he puts it: *"There is a high degree of sameness in the packaging designs within the category."*

[40] Neethling is thus not disputing the core factual conclusion of the majority. He just does not consider sameness an issue of significance. It seems for him that originality is overrated. Advertisers will tend to come up with similar offerings. This means that the difference between the minority and majority on this point (and previously the AAC) is a policy one. How much sameness is tolerable before the ARB invokes clause 8 against an advertiser.

[41] It is not for a court to second guess either approach; that of Neethling or the majority. What is clear is that on the core issue there is no factual error that would justify a review court interfering with it. This issue is one of policy which is for the ARB, as the guardian of the industry norms and standards, to take its own view. Nor does the fact that some other evidence on which the majority sort to bolster its conclusion is irrelevant (the prior dispute between the parties for another product) or is based on slim pickings (the Facebook confusion posts). The core issue on which the FAC majority based its decision was based on the “sameness” between the respective brands brand architecture. As an issue of fact this was consistent with the view taken by the four members of the AAC. Even those who took a contrary view as to whether there had been a contravention of Clause 8 (the Directorate and the FAC minority (Neethling and Gendel) did not disagree on the factual conclusion of sameness.

[42] The FAC majority in concluding on the issue of sameness complied with the interpretive guidance the Code lays down. Thus, the Code states:

3.2 In assessing an advertisement's conformity to the terms of this Code, the primary test applied will be that of the probable impact of the advertisement as a whole upon those who are likely to see or hear it. Due

regard will be paid to each part of its contents, visual and aural, and to the nature of the medium through which it is conveyed. (Emphasis provided)

- [43] The FAC majority applied the primary test when they concluded that Bliss had contravened Clause 8 of the Code. This ruling does not amount to a reviewable irregularity. Nor for that matter was it irrational.

b. Clause 9 of the Code

- [44] The FAC also found that the Bliss advert for Securex contravened clause 9 of the Code.

- [45] This clause states:

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.

- [46] A reading of both clauses 8 and 9 suggests that they deal with the same transgression. However, the SCA has held this is not so. In *South African Airways (Pty) Ltd [Appellant] and Comair Ltd t/a Kulula.com* Lewis JA considered the issue of the similarity:

“Although at times this Committee has considered that Clauses 8 and 9 provide related protections, it is clear from the language of the two provisions ... that their purpose and reach is different. Clause 9 emphasises that it is protecting "advertisements" that

have an "existing concept", not "the goodwill" arising from trade names, symbols or advertising which Clause 8 explicitly protects."

[47] Lewis JA went on to consider that Clause 9 was meant to do:

"The primary purpose of Clause 9 thus appears to be the protection of the intellectual and creative idea that is given form in a particular advertisement. As the Committee has held on previous occasions, what is protected is the element of original or intellectual thought behind the advertisement itself. Even though Clause 9 protects not only the whole advertisement, but also parts of it, in each case it will be necessary to establish that what has been imitated or copied is an existing advertising concept which is the product of intellectual and creative thought. Clause 9 can thus best be construed as providing protection to the intellectual creativity that informs the development of advertisements. Although it is true that the Code defines "advertisement" broadly to include any "visual or aural communication. intended to promote" the sale or lease of goods or services, this broad definition should not detract from recognising that the purpose of Clause 9 is to prevent the copying or imitating of advertising concepts.

[48] Bliss argues that the FAC has not met this test. It has not explained why Bliss has imitated or copied an existing advertising concept. This same argument had found traction in the minority decision of Neethling whose view was that there was nothing particularly original about the Colgate add. It was what one

might expect in the category for this type of product. In his response, Mokoena, who was part of the majority, wrote that Bliss had not taken a “spoonful of *inspiration but a spadeful.*” Albeit phrased as a metaphor what Mokoena is saying is that Bliss had gone beyond what might be considered a permissible boundary of emulation and had copied or imitated Colgate’s product

[49] In his decision Ngoepe J writes that he accepts the analysis of the AAC in this respect without elaborating on it much further. The AAC described Bliss as a serial imitator because of the Sta-Soft /Maq Soft dispute between the same two firms that I referred to earlier.¹⁸ Bliss correctly argues that the whatever the merits of the Sta-Soft/ Maq Soft dispute it was irrelevant to any finding in respect of Protex and Securex.

[50] However, despite this, the AAC had embarked on a detailed comparison of the advertising architecture of the products and noted their similarity and that most significantly for it, that Bliss’ design change to Securex in 2018 had let to Bliss to make a design change that despite some differences, in the panel’s view moved the two products closer to one another.

[51] Unlike the Directorate, the AAC went back into the history of the similarities because it regarded this as relevant to an assessment of a breach of the Code. It noted that since Securex’s launch in 2011, these similarities were not only visual but also aural, and conceptual, because the name chosen was similar “both in aural pronunciation and conceptual meaning”. Securex also had four variants (the same as Protex) three of which had the same colour as the Protex.

¹⁸ The Directorate had found according to the AAC decision that Colgate’s packaging was protectable and had been imitated by Bliss although it dismissed the complaint on the grounds that the likely confusion and actual confusion had not been shown.

It also accepted Colgate's submission that none of the other soaps in the same germ protection were packaged in a manner that resembled that of Protex. The AAC's conclusion was that *"... we find that Bliss has copied the Protex packaging in a manner that is recognisable and that clearly evokes the existing Protex concept."*

[52] This a self-standing conclusion separate from the reliance on the Sta-Soft case, which is supported by the analysis of the two products. This reasoning of the AAC was approved by Ngopepe J in his consideration of whether Bliss had contravened Clause 9.

[53] Bliss also argued that the FAC had ignored the design brief which Bliss had furnished which *"contained no instruction to copy the PROTEX packaging; and the advertisers' [Bliss] disavowal that the PROTEC packaging had been copied."*

[54] Then Bliss seeks to rely on two letters from its advertising agency Fountainhead which had refreshed the Bliss packaging in 2018, and in which the agency claimed that it was not instructed to, nor did it imitate the Protex packaging.

[55] The FAC majority does not refer to either of these assertions. The question is whether this amounts to ignoring material relevant evidence. I will accept that evidence that the designers of the Securex packaging were not instructed to imitate the Protex brand is relevant.

[56] But the real question is of its probative weight. The mere assertion about the instruction in their brief is hardly decisive. Given that the Bliss brand was always the follower, and not the leader, in this instance this assertion could rightly be treated with some scepticism, particularly in an industry like advertising where

practitioners are unlikely to concede that they are not innovators. I consider this evidence carried little weight against the weight of the other inferences that were drawn, and the failure to mention it, in either of the FAC majority decisions, does not constitute a review point. As the full bench in the Western Cape in *Hamata* pointed out:

*“Even a court of law is not required to show that it took every relevant consideration into account or that it went through every relevant process.”*¹⁹

[57] Finally, in relation to the contravention of either clause of the Code, I consider whether the FAC judgment was irrational. Bliss, as I mentioned earlier, belatedly raised this further ground of review. In brief it argues, based on the same facts, that FAC could not rationally have made the decision it did in respect of Clauses 8 and 9 of the Code.

[58] But at best for this argument is the possibility that the Panel could have on the same facts come to a different conclusion. I accept this as a possibility. I do not for instance consider Mr Neethling’s reasoning for the minority to be irrational – only a different approach to the issues. But as the Constitutional Court has pointed out in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and others* where it cited the view of the same court in *Electronic Media Network*:

“It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely

¹⁹ *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000(4) SA 621 (C) at paragraph 39.

designed master key that opens up any and every door, any time, anyhow.”²⁰

[59] But it does not matter for a rationality review that the panel could have equally come to another decision. Rather, as the court held in *Nu Africa*:

“Rationality is also not about justification. Nor is it about the cogency of reasons furnished for a particular decision. It concerns the question whether there exists a rational connection between the exercise of power, and the purpose sought to be achieved through the exercise of that power.”²¹

[60] The FAC majority decision links the power they exercised with the purpose for the power – to protect the interests sought to be protected by the Code. The decision is therefore a rational one.

[61] In *Nu Africa*, the same court also referred to the issue of deference:

“a high degree of deference is accorded to the decision-maker”²²

[62] When I heard the matter counsel for Bliss argued that deference to the decision maker is not appropriate in this case as the FAC is not an expert body. Those chosen to hear the case, it was argued, are not chosen for their expertise in this area. First, I do not know if this proposition is correct. Although Ngoepe J is a retired judge, not an industry practitioner, the other three members were. But the fact that the ARB may not set out some threshold for who may be appointed to panels does not detract from the need for deference. This is deference to

²⁰ 2024 (1) SA 567 (CC) at para 113, citing *Electronic Media Network Ltd v e.tv (Pty) Ltd* 2017 (9) BCLR 1108 (CC) at para 6.

²¹ *Nu Africa*, supra, paragraph 114.

²² Supra, paragraph 18.

respect a body that has been established by players in the industry to regulate their own conduct. They have chosen a Code of Conduct for their members to adhere to and trust their members to adjudicate on its terms.

[63] Where, as in a case such as this, issues are ones of policy, courts of law should be wary to step in to review decisions simply because the body might, on the same facts, have come to a different conclusion. It must be borne in mind the industry has chosen to self-regulate. It has drawn up the Code. It has chosen who should sit on the panels that determine disputes. The decisions made in terms of both clauses in the Code have involved an interpretation of not only the clauses in question but in doing so an application of the “... *spirit as well as the letter of the Code*.” That is what Clause 3.1 of the Code requires them to do.

[64] Furthermore, case law has long recognised the principle of deference being shown to administrative bodies.²³ Whilst admittedly these cases have dealt with the question of deference owed to decisions of organs of state, not non-governmental organisations like the ARB, there is no reason why this principle should not be extended to the latter.

[65] The questions the AAC and FAC had to deal with involved their interpretation of the spirit of the Code. The SCA, who earlier on had to decide the constitutional issues in this matter quoted from the English case of *Datafin* where Sir John Donaldson MR had considered the desirability of self-regulation:

²³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para 46; *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and others* [2016] 1 All SA 704 (SCA) at para 42

“Self-regulation . . . can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not necessarily morally wrong or contrary to the public interest, unlawful or even undesirable.”²⁴

[66] This sentiment is entirely apposite to this matter.

Conclusion on the review

[67] There is no basis to set aside the ruling in terms of Clause 8 or 9, as being irrational, moreover even if another body of decision makers may have decided the questions differently, the decision of the FAC majority, was one based on applying the ‘spirit’ of the Code to the facts. Those facts are solidly based on the record before them. They drew inferences from those facts about transgressions of the Code based on solid reasoning. That other inferences could also be drawn is unimportant, given this is a review not an appeal. Moreover, in coming to their decision on how to interpret the spirit of the Code, the decision makers are entitled to deference from the Courts.

[68] I conclude that none of the grounds for review of the findings either under Clauses 8 or 9 succeed.

(iii) Final ground of review: the sanction

[69] The final ground of review was whether the sanction was materially influenced by errors of law and/or failure to take relevant circumstances into account. The

²⁴ *R v Panel on Takeovers and Mergers, Ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564 at 567 quoted by the SCA in *Advertising Regulatory Board NPC and others v Bliss Brands (Pty) Ltd* [2022] JOL 52815 (SCA) paragraph 43. The SCA held that: “The right to self-regulation includes the right of associations to adopt rules and standards to regulate their conduct in their dealings with the outside world.”

FAC order required Bliss to “remove the offending packaging.” This was a repeat of the order granted by the AAC. Where the orders differed was in relation to the period for compliance. The AAC gave Bliss three months to comply. This was consistent with the terms of Clause 15.3. of the ARB’s Procedural Guide which has a clause that deals specifically with packaging:

15.3 Where an advertisement is to be withdrawn in terms of a ruling, the advertisement shall be withdrawn as soon as possible, but no later than as set out below:

....

15.3.7Packaging — three months or as determined otherwise by the ARB. This applies to dissemination of new packaging, and does not require on-shelf removal”

[70] The AAC’s order would have expired on 27 July 2020. The FAC gave its order on 3 August 2020 and ordered that the period for compliance would be extended to 27 August 2020 in effect a one-month extension of the period given in the AAC order. Later this period was extended by the FAC to 30 September 2020.

[71] Bliss’ complaint is that it was only afforded one month to comply in terms of the FAC order. But this is only if the time period runs from the date of the FAC order. It was effectively given 5 months if one includes the period afforded to it by the AAC (three months) and then thereafter two months by the FAC.

[72] Whilst I accept as set out at great length in Bliss’ papers that changing packaging involves a major commercial outlay it has only itself to blame if it has incurred further expenditure in anticipation that it might succeed on appeal.

After all, why should the complainant be prejudiced by a further period of extension when there is an appeal. In any event much of this debate has become academic It is now February 2024. There is no basis for the decision to have been reviewed on this ground either.

Discharge application

- [73] The parties' dispute does not end with my dismissal of the review. During the case management meeting counsel for Colgate asked whether Bliss accepted that part of the order made by Fisher J when she heard the earlier application was still applicable if the review was unsuccessful before me, which it has proved to be. Counsel for Bliss indicated that Bliss view was that even in those circumstances the order was still in force. I directed then that Colgate must bring a separate discharge application and that it would be heard at the same time as the review. Both parties then filed further affidavits and heads of argument to address this point.
- [74] First some history is necessary to see how this order came about. Bliss first brought this review as an urgent application which was heard by Yacoob J. on 28 September 2020. She dismissed the application on the basis that Bliss had failed to demonstrate a *prima facie* right.
- [75] Bliss then brought a second urgent application which was heard by Fisher J. I will refer to this as Fisher 1. This was when *mero motu* Fisher J raised the constitutional issue. That is the same issue that then went to the SCA and ultimately to the Constitutional Court. It failed before both.

[76] However, what had happened was that in Fisher 1, on 30 November 2020, Fisher J had granted an order when she heard the urgent application in the following terms:

“2. The question of whether the ARB process in issue is constitutional and the further questions which arise in terms of the impugned rulings under judicial review by this Court are postponed to a date to be arranged between all parties.
(Emphasis provided)

3. The ARB is interdicted from enforcing the impugned rulings of the ARB pending the final determination of these questions.”

[77] After Fisher 1 had been delivered both parties filed fresh papers to deal with the constitutional issue, she had *mero motu* raised. She heard the matter again the following year and decided the matter on 21 May 2021. This was when Fisher J decided the constitutional issue in favour of Bliss, and she therefore did not consider the review points I have had to consider in this case. I will refer to this second decision as Fisher2.

[78] In Fisher 2, Fisher J did however opine on the interim order she had granted as Fisher 1. She considered inter alia, that since Colgate had not brought a reconsideration application the interim order stood.

[79] This means I must now consider what the terms of the order meant in Fisher1, since the decision of Fisher 2 has been overturned.

[80] I turn again to paragraph 3 of that order which I repeat for convenience.

“The ARB is interdicted from enforcing the impugned rulings of the ARB pending the final determination of these questions.”

(Emphasis provided)

- [81] The ‘*final determination*’ means that the losing party is entitled to exhaust all avenues of appeal. That interpretation is common cause. The controversy turns on the phrase “... *these questions*” Does it mean, expressed as it is in the plural, both the constitutional issues (now finally determined) as well as the review points (not finally determined.) Bliss finds the answer is clear from the way clause 2 of the order is framed. It is disjunctive. It refers to the constitutional issue “...*and the further questions which arise in terms of the impugned rulings under judicial review.*”
- [82] But Colgate argues that one must have regard to what Fisher J stated in her judgment in Fisher 1. Here she says two things. That the application before her did not raise any new issues not before Yacoob J other than the constitutional issues. (which in any event Fisher J had, *mero motu*, raised). Fisher J had also stated that if the constitutional challenge was unsuccessful Colgate’s’ rights would be restored “*ex tunc.*” Why would she have made this remark if the administrative review was being given further life. Thus, it appears that the reasoning is at variance with language of the order. Nevertheless, because the order is stated in such clear terms, I cannot find that it has been discharged by attempting to reinterpret its terms through the lens of certain paragraphs in the judgement.
- [83] But Colgate makes a more persuasive argument that even if the interim interdict still survived until the present matter was heard, it cannot survive the decision

of a court to dismiss the review. Given that this is my finding it would be anomalous to keep on life support an interdict whose rationale for continuing no longer exists. Nor would it be in the interests of justice to do so. Fisher J who granted it, does not explain in her reasons why it was necessary to survive the challenge and if anything seemed to suggest from certain passages that it would not. Yacoob J who heard the matter first as an urgent application dismissed it on the basis that no *prima facie* right had been established.

[84] What then is the status of an interim order once another court has considered the very issue it had pended. In *Cipla Agrimed* the SCA held:

*“As soon as the court makes a final determination, the interim interdict is discharged. This is also why a fresh application for an interim interdict pending an appeal can ordinarily be brought.”*²⁵

[85] Half the rationale for the interim order fell away when the Constitutional Court finally ended the basis of the constitutional challenge. I have now decided the remaining review points against Bliss. That takes care of the ‘remaining further questions’ contemplated in the Fisher 1 order. This cannot mean that the review relief must survive independently of how this case has now been decided.

[86] As the SCA explained in *MV Snow Delta*, “(a)n interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings”.²⁶

[87] Bliss has also argued that Colgate lacks *locus standi* to bring the discharge application because the suspension relates to the enforcement of the ARB

²⁵ *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA), at paragraph 45.

²⁶ *MV Snow Delta Serve Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA), at paragraph 6.

order by the ARB and only the latter has standing in respect of its suspension. However, this is highly formalistic approach to standing. The jurisdiction of the ARB was invoked by Colgate as the complainant concerning what it considered to be infringements of the Code as they effected its rights as a member of the ARB. Bliss a non-member nevertheless consented to the ARB's jurisdiction.

[88] Bliss participated in all three proceedings of the ARB with Colgate as the counterparty – it is cited throughout as the complainant. When litigation in the courts ensued, Colgate was respondent throughout proceedings before Yacoob J and Fisher J, the SCA and the Constitutional Court. If the interim order remains suspended, it delays the relief that Colgate has sought since day one when it brought the complaint to the ARB in December 2019. The purpose of the relief that the FAC majority provided was to secure rights that Colgate as an advertiser enjoyed under the Code to protect its rights. It was Colgate not the ARB that initiated the complaint. That complaint was the genesis of the current review. Denying it *locus standi* and saying it vests only in the ARB, seems to me the highpoint of formalism and to perpetuate an injustice to Colgate.

[89] I find that the interim order by Fisher J in paragraph 3 of Fisher1, has been discharged.

Conclusion

[89] I am mindful that my decision on both the main application and the discharge application, will mean, absent any other order, that Bliss will be required forthwith to withdraw its Securex packaging from distribution with ARB members to comply with the FAC order. Given that this litigation has taken some

years to get to this point it would be unfair to grant such a remedy with immediate effect. I am satisfied that complying with the three-month period set out in Clause 15 of the Code will be more than fair to Bliss.

Costs

- [90] Both sides employed the services of two counsel and so a costs award of two counsel is appropriate given the complexity of the case, the number of issues it raised and the lengthy factual record. Although Colgate is cited in two capacities, as the second and third respondents in the review, and second and third applicants in the discharge application, they should be treated as one party for the purpose of the costs award.

ORDER:-

- [91] In the result the following order is made:

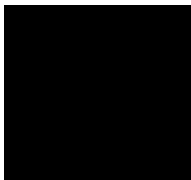
Review application

- [1] The applicant (Bliss') application for review of the decision of the Final Appeals Committee (FAC decision) of the first respondent is dismissed.
- [2] Bliss is liable for the second and third respondents (Colgate's) costs of the review application, including the costs of two counsel.
- [3] Bliss must comply with the FAC decision within three months of date of this order. This applies to dissemination of new packaging, and does not require on-shelf removal.

Discharge application

- [4] The interim interdict granted on 30 November 2022, under case number 2020/22061, is reconsidered and discharged.

[5] Bliss, as the first respondent in the discharge application, is liable for the costs of the applicants (Colgate) in the discharge application, including the costs of two counsel.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 18 October 2023

Date of Judgment: 21 February 2024

Appearances:

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NS Ruhinda

Instructed by.

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