

(1) REPORTABLE: YES/NO. IN THE HIGH COURT OF SOUTH AFRICA

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

GAUTENG PROVINCIAL DIVISION, PRETORIA

29/4/15

DATE

SIGNATURE

Case no 2331/15

In the matter between:

08/4/2015

BRANDHOUSE BEVERAGES (PTY) LTD

Applicant

and

THE ADVERTISING STANDARDS AUTHORITY

OF SOUTH AFRICA

First Respondent

MR JUSTICE BERNARD NGOEPE

Second Respondent

(In his capacity as Chairperson of the Final Appeal

Committee of the Advertising Standards Authority

of South Africa)

SOUTH AFRICCAN BREWERIES (PTY) LTD

Third Respondent

JUDGMENT

1. The applicant approached this Court on the basis that urgent relief in the form of an immediate review and correction of a decision made by the second

respondent in his official capacity was required to avoid potentially irreparable commercial harm being caused to the applicant should the order sought not be granted. The third respondent disputed that the matter was urgent, particularly on the ground that the applicant had only itself to blame for its failure to seek appropriate relief at an earlier stage. Third respondent further suggested that alternative remedies were available to the applicant that would obviate the necessity of approaching the urgent court.

2. For the reasons set out below the Court ruled that the matter was indeed urgent.
3. The applicant is Brandhouse Beverages (Pty) Ltd, a company incorporated in terms of the South African company law with registration number 2003/021753/07 and with registered address at 1st Floor, Block B, C and D, Black River Business Park, C/o Nelson and Fir Streets, Observatory, Western Cape.
4. The applicant, like the third respondent, does business as distributor of alcoholic beverages in South Africa.
5. The first respondent is the Advertising Standards Authority of South Africa ('ASA'); a voluntary association created by members of the advertising industry to '*.. ensure that its system of self-regulation works in the public interest...ASA has a president independent from the industry...*', as the preface to its Code of Advertising Practice reads. The ASA enjoys national and international recognition as regulator of the advertising industry. National legislation such as the Electronic Communications Act 36 of 2003 has made electronic advertising subject to the ASA Code. The ASA's principal place of business is at Willowview, Burnside Island Office Park, 410 Jan Smuts Avenue, Craighall Park, Johannesburg.

6. The second respondent is Mr Justice Bernard Ngoepe, who was cited herein in his capacity as chairperson of the ASA's Final Appeal Committee. No costs order was sought against the second respondent.
7. The first and second respondents abide the decision of the court.
8. The third respondent is South African Breweries (Pty) Ltd ('SAB'), a company duly incorporated and registered in terms of the South African company law with registered office or principal place of business at 65 Park Lane, Sandton, South Africa. In addition to marketing and distributing beers and other beverages the third respondent is also a brewer of beers, marketed under brands such as Castle and Castle Lite.
9. The applicant and third respondent are competitors.
10. The applicant launched a lite beer into the South African market under the name Amstel Lite. The launch commenced in August 2014. Three months later the third respondent lodged a complaint with ASA on the grounds that Amstel Lite cans and so-called six - packs were packaged in a way that copied the distinctive colours, green and silver, in a similar presentation as that of SAB's Castle Lite and thereby unlawfully benefitted from Castle Lite's advertising goodwill, apart from intentionally confusing consumers.
11. SAB claimed to have conducted a consumer survey that substantiated its claims that the purchasers of Castle Lite were indeed confused when confronted with the applicant's product packaging. The validity of this survey is vigorously disputed by the applicant, as are the assertions that SAB had acquired goodwill and a commercially significant reputation in the packaging of its product; or that applicant had taken any advantage of the alleged advertising goodwill.

12. The complaint was considered by the ASA Directorate. Complaints concerning advertising are categorized as either consumer complaints or competitor complaints depending upon the identity of the complainant. The complaint against the applicant clearly fell into the latter category.
13. The applicant disputed the third respondent's allegations in its response to the complaint, which response was filed with the Directorate of the ASA. In spite of the applicant's protestations the Directorate ruled on the 6th February 2015 that the complaint was well founded. The applicant was found to have transgressed clause 8 of General Principles of the ASA Code. This clause prohibits the taking of advantage by an advertiser 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...*'
14. The Directorate ruled that the applicant had to withdraw the Amstel Lite packaging within three months from date of the ruling, less one week deducted from this period because the applicant's response had been delivered one week out of time. This period will expire on the 29th April 2015.
15. The applicant was dissatisfied with the Directorate's ruling and lodged an appeal to the Advertising Industry Tribunal. The notice of appeal was delivered on the 20th February 2015. The third respondent filed a response to the appeal on the 5th March 2015. The tribunal has not yet ruled on the appeal, but its decision is expected in the near future.
16. The ASA's Procedural Guidelines provide i.a. the following in respect of an appeal against a ruling given by the Directorate:

8.9 *Any party who feels aggrieved by a ruling of the Directorate may, within ten days of the date on which such party is informed of the ruling, appeal*

to the Advertising Standards Committee, in respect of consumer complaints, or to the Advertising Industry Tribunal, in respect of competitor complaints, against such ruling. ..

8.13 Where an aggrieved party has lodged an appeal to the Advertising Standards Committee or the Advertising Industry Tribunal, the ruling of the Directorate must be adhered to, until such time as that ruling is reversed.

8.14 The Directorate may perform all such acts and do all such things as are reasonably necessary for or ancillary, incidental, or supplementary to the performance of any of its functions but will not extend to the suspension of rulings. Should circumstances arise where good and valid reasons justify a departure from usual procedure, these will be taken into account, but always at the discretion of the Directorate. ...

10.8 Any party who feels aggrieved by a ruling of the Advertising Industry Tribunal shall have the right to appeal to the Final Appeal Committee against such ruling, in accordance with the appeal procedure set out in this Code. An appeal must be lodged by the appellant within twenty days from receipt of the ruling.

10.9 Where an appeal is lodged, the ruling of the Tribunal must be adhered to, until reversed by the Final Appeal Committee.

10.10 The Chairman or Committee may perform all such acts and do all such things as are reasonably necessary for or ancillary, incidental, or supplementary to the performance of any of its functions but will not extend to the suspension of rulings. Should circumstances arise where good and valid reasons justify a departure from usual procedure, these will be taken into account, but always at the discretion of the Chairman or Committee.

.....

12. Final appeals against rulings of the Advertising Standards Committee or Advertising Industry Tribunal

- 12.1 *An appeal lodged against a ruling of the Advertising Standards Committee or Advertising Industry Tribunal shall be considered by the Final Appeal Committee. ..*
- 12.19 *The Chairman or Committee may perform all such acts and do all such things as are reasonably necessary for or ancillary, incidental or supplementary to the performance of any of its functions. Should circumstances arise where good and valid reasons justify a departure from usual procedure, these will be taken into account, but always at the discretion of the Chairman or Committee. ..*
17. *All parties shall exhaust the internal remedies provided by the Code before resorting to any relief or order from any court.*

17. It is apparent from these provisions that, although an aggrieved party such as the applicant has the right to appeal to the Advertising Industry Tribunal and from the Tribunal to the Final Appeal Committee, the Procedural Guidelines expressly decree that the lodging of an appeal will not suspend the ruling of the Directorate or the Tribunal pending the finalisation of the appeal. It stands to reason that the absence of an automatic suspension of the Directorate's ruling may have a devastating commercial effect upon the aggrieved party if the latter is forced to comply with a sanction as severe as that imposed in this case; only to find some weeks later that the ruling is overturned on appeal, when the harm may have been done. *Telematrix (Pty) Ltd v Advertising Standards Authority of South Africa* [2006] All SA 6 (SCA) provides a practical

example of the damage that can be caused to an advertiser by this process. (The applicant estimates the cost of the withdrawal of the allegedly offending packaging at R 100 million. This figure is in dispute, but it is clear that considerable financial loss will be caused if the packaging has to be changed, not least by the loss of advertising undertaken to promote the present get-up of applicant's product.)

18. The applicant therefore approached the second respondent with the request to exercise the powers conferred upon him by section 12.19 of the Procedural Guide and in the exercise of his discretion suspend the Directorate's ruling and order to withdraw the packaging pending the finalisation of the appeal. The second respondent, on the 19th March 2015, declined the application to suspend the ruling and its effect on the grounds that he did not have the authority to do so, unless and until the appeal process had reached the Final Appeal Committee. Apart from a lack of the power to do so the second respondent cited the fact that he was unable to consider the appeal's prospects of success. The second respondent further referred to an earlier decision he gave in the same vein in November 2014.

19. The applicant seeks an order having this decision reviewed and set aside in terms of section 6 read with section 8 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), and a substitution of the decision with an order by this court preventing the first respondent from enforcing the terms of the ruling until the finalisation of all appeal proceedings under the ASA Procedural Guide, and until the finalisation

20. The application is opposed. The following issues arise for determination, apart from urgency, which the court held was dictated by the facts of the matter:

Does the second respondent have the power in terms of clause 12.19 of the ASA Procedural Guide to order a suspension of the Directorate's ruling?

21. The second respondent's decision appears to, with respect, run counter to an earlier decision penned by a predecessor, Justice O'Reagan, dealing with a similar request in *Herbex Appetite Control Tablets v Dr Harris Steinman* on 12 July 2013. She noted that the Chairman of the Final Appeals Committee's powers did not exclude the power to suspend rulings, as do the provisions of the Procedural Guide relating to appeals against decisions of the Directorate or of the Advertising Industry Tribunal. She then continued:

'It might be argued that Rule 12.19 should be interpreted as having a narrow purview permitting the suspension of rulings only in cases of appeals pending before the FAC and not those pending before the ASC or the Advertising Industry Tribunal....there are three reasons why a narrow approach to the wording of the rule would not be appropriate. First, the wording of the Rule does not expressly suggest that it should be interpreted in this narrow fashion. Secondly, a narrow interpretation would have the irrational effect that a ruling by the Directorate could not be suspended at all for the period when the appeal is pending before the ASC or the AIT. Yet once a decision has been made by the ASC or the

AIT, that ruling could be suspended pending an appeal to the FAC. There can be no principled reason why a ruling that is being appealed may be suspended for some time during the appellate process, but not at other times. Thirdly, in our legal system the ordinary rule is that an appeal suspends the operation of a decision so that an appellant is not compelled to comply with an order before the legal issues are finally determined upon appeal.'

22. The learned Justice O'Regan refers to previous instances in which the Chairperson of the Final Appeal Committee exercised the power to suspend rulings of the Directorate pending appeals; suggesting that a practice of this nature had been followed by the second respondent's predecessors. I respectfully adopt and follow the interpretation given to the Rule by Justice O'Regan. Any other interpretation could, with respect, lead to absurd and indisputably unfair results by demanding compliance with a ruling to the significant detriment of an aggrieved party, who would be doubly aggrieved by finding that the ruling appealed against, but enforced pending an appeal, was eventually overturned by the Final Appeal Committee at a stage when compliance therewith has rendered the success thus achieved nugatory because the harm caused by the ruling cannot be undone. (See *Telematrix, supra.*) As was said by Harms, JA (as he then was), writing for a unanimous court, in a somewhat different context:

'[30] Although the Constitution does not guarantee a right of appeal in civil proceedings explicitly, a general right to a 'fair' hearing is entrenched in s 34. Applied to the provisions of the Supreme Court Act, this means

that the proceedings there described must, procedurally, be 'fair'. In *Boodhoo & Ors v. Attorney General of Trinidad and Tobago* (Trinidad and Tobago) **[2004] UKPC 17** (PC) the Privy Council had to consider the effect of a basic right to 'the protection of the law' contained in the constitution of Trinidad and Tobago on a delay in appeal proceedings, and it quoted with approval the following statement of de la Bastide CJ in the Court of Appeal of Trinidad and Tobago (at para 9): 'It seems to me that this is the right that can most appropriately be invoked by persons who complain of delay by a court in delivering judgment or for that matter failure to deliver judgment. Surely, if the protection of the law means anything, it must mean that persons are entitled to have recourse to the appropriate court or tribunal prescribed by law for the purpose of enforcing or defending their rights against others or resolving disputes of one kind or another. It is axiomatic that such a right is meaningless without a decision by the court or tribunal to which the claim or dispute is referred for adjudication.'

The Privy Council concluded by holding that 'delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law, as provided for in section 4(b) of the Constitution of Trinidad and Tobago, **but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should.**' (Para 12, emphasis added.) The same must apply to the right to a 'fair hearing' in respect of an application for leave to appeal.'

(Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO and Another (542/2004, 543/2004) [2004] ZASCA 122 (20 December 2004)).

23. By the same token it must be said, however, that an appeal tribunal or court of appeal must on occasion be given sufficient time to consider the issues arising from an appeal and should not be subjected to undue pressure to finalise its deliberations merely because the aggrieved party is anxiously awaiting the result. This consideration adds further weight to the conclusion that Justice O'Reagan's ruling is, with respect, clearly correct.

24. It must be concluded that the second respondent does have the power to suspend a ruling by the Directorate and that he, with respect, committed an error of law in coming to the conclusion that is challenged in these proceedings.

25. This finding leads to the next question.

Does the court have the power to review and set aside the second respondent's ruling? Or, put differently, does the second respondent's decision amount to administrative action as defined by the Promotion of Administrative Justice Act 3 of 2000?

26. The starting point of this enquiry must be the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'). The relevant part of the definition in section 1 of PAJA reads:

'..any decision taken, or any failure to take a decision, by

....

(b) a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering

provision, which adversely affects the rights of any person and which has a direct, external legal effect, ..

This text was examined in *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) by Skweyiya J in the following passage:

'[72] Only acts of an administrative nature are subject to the administrative justice right in section 33(1) of the Constitution. The focus of the enquiry as to whether conduct constitutes administrative action is not on the position which the functionary occupies but rather on the nature of the power being exercised. This Court has held in a number of cases that in this enquiry what matters is not so much the functionary as the function; that the question is whether the task itself is administrative or not and that the focus of the enquiry is not on the arm of government to which the relevant functionary belongs but on the nature of the power such functionary is exercising.' (footnotes omitted).

27. In the same decision Langa CJ added these observations:

[188] Secondly, the applicant's dismissal will have a very small impact, if any on the public. While Transnet conducts work that has a constant and significant public impact, it is important to recognise the applicant's role in that venture. Her job was to ensure the smooth running of the Transnet Pension Fund. While that is important to Transnet employees, its impact on the public at large is further removed. She affects the proper functioning of the body that ensures the future of Transnet employees after retirement. She does not take decisions regarding transport policy or practice, and while her work may in some way affect the morale of the people who do take those decisions, the ultimate effect of her dismissal on the public service provided by Transnet is negligible.

[189] The next relevant factor is the source of the power. As noted above, in this case, the power is contractual. I must again stress that this factor is not always decisive, but is one that can have relevance. In this instance, it seems to me simply to point strongly in the direction that the power is not a public one.

[190] Finally, certain powers must be exercised for public, rather than private benefit. In Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (POPCRU) the question arose whether the dismissal of a number of correctional officers for refusing to work amounted to the exercise of a public power. The Court held that where there was limited or no impact on the public at large,

“what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her whim”.

(footnotes omitted)

28. It must thus be determined whether the function performed by the second respondent in taking the impugned decision was a public function or an act in the performance of a private or contractual nature. To get to the correct conclusion the function of the first respondent must be considered. There can be no doubt whatever that the rendering of a service in the public interest lies at the heart of the Authority'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. The introductory paragraph of the preface to the ASA Code has been referred to above. The Code is replete with other statements that underline the public function of the ASA. Two further extracts from the preface will have to suffice in the light of the urgency with which this judgment has to be prepared:

‘9. The ASA maintains close contact with government departments, consumer organisations, relevant NGO's and trade associations’

'11. Advertising is a service to the public and, as such, should be informative, factual, honest, decent and its content should not violate any of the laws of the country. 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.'

29. The public nature of the ASA's functions is further evident from the fact that members of the public, ordinary consumers, are invited to interact with the Authority and to file complaints relating to unethical, unlawful or misleading advertising against errant advertisers. Any complaint is investigated with the interests of the public at large and that of consumers and children in particular in mind. The results of investigations of hearings and appeals following upon complaints are published and are readily accessible to the man in the street.

30. The manner in which complaints are dealt with is therefore part and parcel of the ASA's service to and interaction with the public. It follows that it cannot be argued that the appeal procedures are not part of the public service the ASA renders, and this must of necessity include the role and function, and therefore also the decisions of the second respondent.

31. To this argument must be added the fact that the ASA has officially confirmed that PAJA applies to its functions in the Appeal Committee's rulings of 10 November 2005 in *Glaxosmithkline v Pfizer* and *International Society of Krishna Consciousness v Nando's* of the 1st April 2004.

32. Reference was made in argument to the Full Bench decision in *National Horse Racing Authority of Southern Africa v Naidoo and Another* 2010 (3) SA 182 (N).

The majority judgment held that the proceedings of a domestic disciplinary tribunal did not constitute administrative action for the purposes of PAJA. Wallis J, as he then was, argued in a minority judgment that they performed a public function that was by no means necessarily excluded from the purview of PAJA:

I also find unpersuasive the contention that monopolistic sporting bodies holding a position of major public importance and exercising "near monopolistic powers in an area in which the public generally have an interest and many persons earn their livelihoods" are not performing public functions or exercising public powers, merely because they derive their standing from a constitution and rules adopted by their members. (footnotes omitted)

The description of the sporting bodies the learned judge referred to could be applied in equal measure to the first respondent.

33. Counsel referred the court to two judgments of the Western Cape High Court, *Tirfu Raiders Rugby Club v South African Rugby Union* [2006] 2 All SA 549 (C) and *Dominique Daniels and Others v WP Rugby and Another* Case No 15468/11 (WCHC), 4 November 2011, which held that the public interest in the administration of rugby clubs and rugby unions dictated that the proceedings of their disciplinary committees constituted administrative action reviewable in terms of PAJA. I respectfully adopt the reasoning of the minority judgment in *National Horse Racing Authority* and the two judgments in the Western Cape High Court.

34. It follows that the court is entitled to review and set aside the second respondent's decision because it was informed by a material error of law, as intended in section 6(2)(d) of PAJA. The applicant is therefore entitled to such an order.

35. This finding leads to the question

Are the circumstances of this matter sufficiently exceptional or extraordinary to justify an order substituting the court's finding for that of the second respondent?

36. It is trite that courts are reluctant to substitute their own decisions for those of the decision makers whose rulings have been set aside on review. Usually the matter is referred back to the administrative tribunal or decision maker to enable the latter to reconsider and correct the error that led to the review of the original incorrect ruling or finding. PAJA authorises a judicial intervention of such an invasive nature only in exceptional circumstances as decreed in section 8(1)(c)(ii)(aa). Exceptional circumstances are generally held to exist in matters of this nature if the tribunal or decision maker was biased, incompetent or conflicted to such an extent that the purpose of the review would be negated by referring the matter back to such person or body.

37. There is nothing on record to suggest that the second respondent would not, in the normal course of events, be fully competent and able to reconsider his decision if the matter were to be referred back to him, as the court would do were it not for the peculiar facts of this case. This judgment will be delivered literally the day before the deadline to comply with the Directorate's ruling expires by which the applicant must comply with the order to change the packaging. It would be impossible for the second respondent to deal with the matter before the applicant will find itself in default of the Directorate's order, which would negate the purpose of this application. Justice would literally be denied by being delayed, even if for one day only. It is for this reason, and this reason only, that the court is prepared to substitute its own order for that of the second respondent.

38. The relief sought by the applicant, as recorded earlier in this judgment, is clearly overbroad, as Mr Ginsburg SC for the third respondent has correctly pointed out. The court can only substitute an order that could have been given by the second respondent upon reconsideration of the matter.

39. Time does not permit to deal with the other grounds advanced by the third respondent in opposition to the application in any detail. Suffice to say that any undertaking the applicant may have given regarding compliance with the Directorate's ruling certainly did not include an undertaking not to appeal an unfavourable finding. The applicant can therefore not be said to have approached the court with unclean hands.

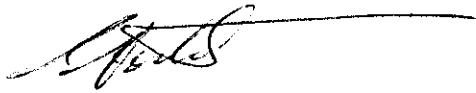
40. Having been substantially successful the applicant is entitled to its costs, including those consequent upon the employment of two counsel.

41. The following order is made:

1. The second respondent's decision delivered on the 19th March 2015, dismissing the applicant's application for the suspension of the ruling of the Directorate of the first respondent handed down on the 6th February 2015, is hereby reviewed and set aside;
2. The second respondent's decision is substituted with the following decision:

‘The Directorate's ruling in the matter of Amstel Lite / Castle Lite /2014-1685F, dated 6th February 2015, is suspended until the Advertising Industry Tribunal has determined the applicant's appeal.’
3. The third respondent is ordered to pay the applicant's costs, such costs to include the costs of two counsel

Signed at Pretoria on this 27th day of April 2015.

A handwritten signature in black ink, appearing to be 'E. Berelmann', with a long horizontal stroke extending to the right.

E BERTELSMANN

Judge of the High Court