



SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

The Advertising Standards Authority v Herbex (Pty) Ltd (902/16) [2017] ZASCA

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) partially upheld a judgment of the Gauteng Division of the High Court, Johannesburg which held that the appellant, the Advertising Authority of South Africa (the ASA) has no jurisdiction over non-members and that all its rulings against the respondent (Herbex) are void.

The ASA is an independent, industry-funded body that serves the purpose of self-regulation on behalf of the advertising industry. It 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 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.

On appeal, the parties reached an agreement in relation to the merits and the order that should issue. The remaining dispute between the parties were (i) whether paragraph 90.1 of the order of the court a quo which held that the ASA has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA may, in the absence of a submission to its jurisdiction, not require Herbex to

participate in its processes, issue any instruction, order or ruling against Herbex or sanction it' was overbroad? And (ii) who should bear the costs of the appeal and the costs in the court quo?

With regards to paragraph 90.1 of the order of the court a quo, the parties presented a draft order which was agreed upon in the form set out in paragraphs 1.1 and 1.2 of the order of the SCA. The order of the court a quo was set aside and substituted as follows: '(1.1.) 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 and '(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.'

As to the issue of costs in the court a quo, the SCA stated that power to interfere with costs on appeal is limited to cases where the court vested with the discretion did not exercise it judicially, i.e. 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 reason. 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 SCA found that 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. Herbex 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.

Regarding the issue of costs on appeal, the SCA held that 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. For these reasons the ASA had to approach the SCA 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 of the SCA. The substituted order reflects a measure of success achieved by each of the parties, Accordingly, the SCA held that in the exercise of a discretion, it would be just and equitable for each party to bear its own costs in the appeal.

As a result, the appeal was upheld to the extent reflected in the substituted orders in paragraphs 1.1 and 1.2.