THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 12 April 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal.

***Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51**

Today the Supreme Court of Appeal (SCA) upheld with costs an appeal by the appellant, the Advertising Regulatory Board NPC (ARB), against a series of orders issued by the Gauteng Division of the High Court, Johannesburg (the high court), which effectively dismantled the system of self-regulation of advertising in South Africa. The ARB is an independent, self-regulatory body in the advertising industry. Its members are required to comply with the Code of Advertising Practice (the Code), based on international best practice for advertising self-regulation. The main objects of the Code are the protection of consumers and professionalism amongst advertisers. In terms of section 55 of the Electronic Communications Act 36 of 2005 (ECA), all broadcast service licensees are required to adhere to the Code as administered by the ARB.

In 2019 the second appellant, Colgate-Palmolive (Pty) Ltd (Colgate) lodged a complaint with the ARB that the respondent, Bliss Brands (Pty) Ltd (Bliss Brands), in packaging its Securex soap, had breached the Code by exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. Although Bliss Brands is not a member of the ARB, it raised no objection to the ARB's jurisdiction and participated fully in its hearings. The Directorate of the ARB dismissed the complaint. Colgate appealed to the Advertising Appeals Committee which overturned the Directorate's decision. Bliss Brands unsuccessfully appealed to the Final Appeals Committee (FAC) of the ARB, which made a ruling that Bliss Brands

cease distribution of the offending Securex packaging. Bliss Brands then launched an application in the high court for an interdict suspending the FAC's ruling, pending its application for an order to review and set aside that ruling.

The high court, of its own accord, questioned the constitutionality of the ARB's powers, resulting in a fundamental change to the relief sought by Bliss Brands. It then sought orders declaring that clause 3.3. of the Memorandum of Incorporation of the ARB (MOI), which allows the ARB to consider any advertisement and advise its members whether they should accept or withdraw it, is unconstitutional and void; that the ARB has no jurisdiction over persons who are not its members and cannot issue any rulings in relation to non-members' advertising; and that the rulings of the FAC are unlawful. The high court granted these orders. It found that the ARB's powers are not sourced in law; that it may not consider complaints concerning advertising by non-members under section 55 of the ECA; that an ad alert (in terms of which members of the ARB may not approve or carry advertisements that breach the Code), is a violation of the section 34 constitutional right of access to courts; that the ARB may be perceived as lacking independence; that its processes are unfair; and that it deals with legal issues that ousts the jurisdiction of the courts.

The SCA set aside the high court's orders. It held that a court should of its own accord raise a constitutional issue only in exceptional circumstances. This is not such a case. Bliss Brands had submitted to the ARB's jurisdiction. That should have put paid to any constitutional challenge. The SCA held that the ARB's powers are sourced in law. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) expressly contemplates that a juristic entity other than an organ of state may take decisions that constitute administrative action, in terms of an 'empowering provision' which includes an agreement, instrument or other document. The ARB's MOI and Code constitute empowering provisions. The ARB is authorised under section 55 of the ECA to determine breaches of the Code by its members.

The high court erred in holding that clause 3.3 of the MOI is unconstitutional. This finding is at odds with the decision in *Advertising Standards Authority v Herbex (Pty) Ltd* [2017] ZASCA 132; 2017 (6) SA 354 (SCA), in which it was held that the Advertising Standards Authority (now the ARB) was empowered to consider and issue a ruling to its members on any advertisement, in order to advise them whether they should accept or withdraw such advertisement. The latter power, the SCA held, advances the rights to freedom of expression in section 16, and association in section 18 of the Constitution. For corporations as for

individuals, the right to speak includes within it the choice of what not to say. In a pluralistic media marketplace, publishers should not be obliged to carry advertisements proposed by private parties. It is open to Bliss Brands to publish its advertisements on any platform unconnected to the ARB. In exercising their right to association, the members of the ARB have given effect to two components of this right: self-regulation and the right to choose not to associate. Members of the ARB have organised around a shared goal of promoting ethical standards in advertising, as reflected in the Code. The rights of association and dissociation entitled members of the advertising industry to choose what advertisers they wish to associate with and what advertisements they approve or carry, subject to certain legal limits. In turn, Bliss Brands and other non-members have exercised their right to dissociate by choosing not to join the ARB, as they are entitled to do.

The SCA concluded that the ARB is a 'tribunal or forum' envisaged in section 34 of the Constitution. Consequently, its decisions are subject to control at two levels: a dissatisfied respondent is entitled to apply to court for an interdict suspending the operation of a decision pending a challenge; and the ARB's decisions are subject to judicial review. That is precisely what Bliss Brands did in this case. There is accordingly no violation of the section 34 right. The SCA held that the high court's finding that the ARB may be perceived to lack independence, had no basis in the evidence; and that in finding that the procedures of the ARB lack fairness, the court overlooked the flexible requirements of procedural fairness under PAJA. The SCA said that the mere fact that elements of a complaint before the ARB might overlap with elements of a cause of action that can be pursued in a court, does not mean that the ARB ousts the court's jurisdiction. The ARB and the courts are different fora with distinct powers. For these reasons, the high court's orders were set aside and the review application brought by Bliss Brands was remitted to that court for determination.