THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case nos: 1498/2024 and 79/2025

In the matter between:

BLISS BRANDS (PTY) LTD	**APPELLANT**
and	
COLGATE-PALMOLIVE (PTY) LTD	**FIRST RESPONDENT / CROSS-APPELLANT**
COLGATE-PALMOLIVE COMPANY	**SECOND RESPONDENT / CROSS-APPELLANT**
ADVERTISING REGULATORY BOARD NPC	**THIRD RESPONDENT**

Neutral citation: *Bliss Brands (Pty) Ltd v Colgate-Palmolive (Pty) Ltd and Others* (Case no: 1498/2024); *Colgate-Palmolive Company and Another v Bliss Brands (Pty) Ltd* (Case no: 79/2025) [2026] ZASCA 106 (12 August 2026)

Coram: MOLEMELA P and GOOSEN and BAARTMAN JJA and STEYN and KGANYAGO AJJA

Heard: 30 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 August 2026.

Summary: Contempt of Court – Code of Advertising Practice – Intellectual Property – court order prohibiting marketing of product in offending packaging – whether Bliss Brands breached the order by continuing to market its original offending packaging – whether Bliss Brands discharged evidential burden – introduction of another version of packaging – whether in further proceedings, the lawfulness of the packaging ought to be compared with the original offending packaging – Cross Appeal – whether further order of the high court should have limited the effect of the order to include only media over which the Advertising Regulatory Board has jurisdiction.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J, sitting as court of first instance: Order dated 11 October 2024 and Manoim J, sitting as court of first instance: Order dated 13 December 2024).

On cross-appeal: Gauteng Division of the High Court, Johannesburg (Manoim J, sitting as court of first instance: Order dated 13 December 2024):

1 The appeals are dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal is upheld with costs, such costs to include the costs of two counsel.

3 The order of Manoim J dated 13 December 2024, is hereby set aside and substituted as follows:

‘3. The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear.’

JUDGMENT

Steyn AJA (Molemela P and Goosen and Baartman JJA and Kganyago AJA concurring):

Introduction

[1] The appellant, Bliss Brands (Pty) Ltd (Bliss Brands), and the first and second respondents, Colgate-Palmolive (Pty) Ltd and Colgate-Palmolive Company

(Colgate),[1] have been engaged in extended litigation processes against each other. The third respondent is the Advertising Regulatory Board NPC (the ARB).[2] The third respondent did not participate in these appeals.[3]

[2] What serves before us are two combined appeals[4] and a cross-appeal by Colgate, all of which form part of a new chapter in the parties' extended litigation history. Their litigation commenced in 2019 when Colgate lodged a complaint with the ARB that the Securex packaging of Bliss Brands breached the Code of Advertising Practice (the Code). It claimed that Bliss Brands' packaging imitated the packaging architecture of its Protex packaging and, in doing so, improperly exploited the goodwill of Protex.

[3] On 10 December 2019, the ARB sent a letter to Bliss Brands, informing it of the complaint and stating that the ARB had limited jurisdiction over non-members, such as Bliss Brands. Bliss Brands was informed that it was not obliged to respond to the complaint. Bliss Brands, however, elected to subject itself to the ARB's jurisdiction by participating in the adjudicative process. The ARB Directorate dismissed Colgate's complaint, whereafter Colgate appealed to the Advertising Appeals Committee (the AAC). Bliss Brands was ordered to withdraw the original offending packaging from every medium in which it appeared. The original offending packaging appears in paragraph 14 below. Bliss Brands then appealed to the Final Appeal Committee of the Advertising Standards Authority of South Africa (the FAC), which confirmed the AAC's ruling and order. Hearings thereafter proceeded in different fora, and several rulings, orders, and judgments followed.

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[1] For the sake of convenience, I shall refer to the first and second respondents as 'Colgate'.

[2] The Constitutional Court in *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19; 2023 (10) BCLR 1153 (CC), described the ARB as follows in para 3:
'The ARB is an independent, voluntary entity that regulates advertising among its members. It is funded by some of its members and by certain entities that are not members. Its core function is to ensure that advertising by its members accords with its Code of Advertising Practice (Code). The Code states its main objects to be: to protect consumers; to ensure that advertisers maintain standards of professionalism; and to ensure that advertising, which is a service to the public, is informative, factual, honest and decent. The Code is based on the International Code of Advertising Practice. Internationally the latter code is the basis of domestic self-regulation in the advertising industry. Industry players in South Africa, some of whom are members of the ARB and some of whom are not, comprise the print, digital and broadcast media.'

[3] The third respondent filed a notice to abide by the decision of this Court in the cross-appeal, case no 79/2025.

[4] The two appeals have been consolidated with leave granted by the Acting President of this Court on 27 March 2025.

[4] This is the second time the parties have appeared before this Court. Previously, this Court had to decide whether the ARB could exercise jurisdiction over a non-member, such as Bliss Brands.[5] It was held that Bliss Brands had consented to the jurisdiction of the ARB and that it could exercise jurisdiction. The litigation between the parties have been ongoing for the past six years.

[5] Documentary evidence showed that Colgate is the market leader in the germ-protection soap category and commands a 32 percent market share in the industry. This was never seriously contested. Colgate acquired a considerable reputation and goodwill in the market with its Protex soap brand. In February 2011, Bliss Brands, however, entered the same market with its soap brand, Securex, and began competing with Protex. In 2018, Bliss Brands changed its Securex packaging. Colgate considered that it unfairly impinged on the reputation and advertising goodwill that its Protex packaging had acquired in the market. This gave rise to the litigation between the parties.

Factual background

[6] The facts of this appeal revolve around the packaging of the parties' hygiene soap. The orders issued by the various fora are relevant for the context of the combined appeal and the cross-appeal before us. What follows hereunder is a chronology of several judgments and orders that were issued:

(a) On 21 January 2020: The ARB Directorate dismissed Colgate's complaint against Bliss Brands;[6]

(b) On 27 April 2020: The AAC found that Bliss Brands' packaging breached clauses 8 and 9 of the Code;[7]

(c) On 3 August 2020: The FAC of the ARB, chaired by Ngoepe JP (retired), ruled on the appeal before them and dismissed the appeal and confirmed the AAC's order;

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[5] *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA); [2022] HIPR 201 (SCA) (*Advertising Regulatory Board*).

[6] The Directorate of the ARB concluded by finding that it would be 'contrary to the spirit of the Code to allow a complaint of this sort after a competitor has participated in the market for 9 years, establishing its own brand goodwill in the process'. The ARB embarked on a comparison not only of the packaging at the time but also compared the different lines of Securex and Protex over time, since entering the market. The packaging has always been somewhat similar. This was conceded by Colgate.

[7] Bliss Brands was instructed to withdraw its Securex packaging, Colgate was to be refunded with the amount of R30 000.

(d) On 28 September 2020: Yacoob J, in the Gauteng Division, Johannesburg, case 22061/2020 dismissed Bliss Brands' urgent application to suspend the operation of the FAC ruling, pending a review application;

(e) On 21 May 2021: Fisher J, in the Gauteng Division, case 22061/20 ordered: 'The ARB is interdicted from enforcing the impugned rulings of the ARB pending the final determination of [the question of whether the ARB process in question is constitutional and the further questions that arise in terms of the impugned rulings under judicial review by this Court]';

(f) On 12 April 2022: This Court overturned the order issued by Fisher J;[8]

(g) On 26 June 2023: The Constitutional Court[9] endorsed the factual findings of this Court as follows: 'I can conceive of no basis on which the ordinary rule should not apply to *the factual findings made against Bliss Brands by the Supreme Court of Appeal*.' (Emphasis added.)

In terms of the Court order, Bliss Brands' review of the FAC ruling had to be determined and was remitted back to the high court;

(h) On 21 February 2024: Manoim J, issued an order in the Gauteng Division, Johannesburg, case 22061/2020 (hereinafter referred to as Manoim J1), wherein it was ordered that Bliss Brands needed to comply as follows:

'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.' (Emphasis added.)

(i) On 23 August 2024, Colgate launched its contempt application to enforce the Manoim J1 order. Bliss Brands simultaneously launched an application for an interdict to prevent the enforcement of the ruling, issued by Ngoepe JP, pending a further application to have it reviewed and set aside. Both applications were then heard by Vally J.

(j) On 11 October 2024: Vally J delivered judgment in the Gauteng Division, case 095598/2024.[10] The court held that Bliss Brands must comply with the Manoim J1 order within 30 days;

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[8] *Advertising Regulatory Board* fn 5 above para 22. This Court upheld the appeal against the high court order issued by Fisher J, with costs, including the costs of two counsel.

[9] The Constitutional Court unanimously confirmed the factual findings in this Court and dismissed the application for leave to appeal. It concluded that Bliss Brands consented to the jurisdiction of the ARB, and it is not in the interests of justice to entertain any other issue.

[10] Vally J considered two applications, the first was by Colgate that Bliss Brands be held in contempt, alternatively breach of the Manoim J 1 order and the second was an application by Bliss Brands that

(k) On 12 December 2024: Manoim J heard in the urgent court a second contempt application whereby Colgate sought a declaration of contempt, alternatively a finding that there was a breach of the Manoim J1 order;

(l) On 13 December 2024: Manoim J delivered judgment and order in the Gauteng Division, case 095598/2024 (hereafter referred to as the Manoim J2 order) and key to the cross-appeal. The court found as follows: 'Bliss argued that even if I were to find that there had been contempt, the order proposed in the notice of motion is too wide as it prevents Bliss from distributing the offending product in non-member outlets. I agree. The jurisdiction of the ARB is limited to its members.';[11]

(m) On 27 January 2025: Judgment by Manoim J in the Gauteng Division, case 095598/2024 in response to the applications for leave to appeal brought by Bliss Brands. Colgate applied for an interim enforcement order under s 18(3) of the Superior Courts Act 10 of 2013 (the SC Act). Manoim J granted Bliss Brands leave to appeal to this Court and granted Colgate the interim enforcement order, pending the outcome of this appeal. This is the Manoim J3 order;[12]

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the execution of the order of the FAC be stayed until the finalisation of the review of that order. The matter to stay the proceedings was struck from the roll.

[11] *Colgate-Palmolive (Pty) Ltd and Another v Bliss Brands (Pty) Ltd and Another* (095598/2024) [2024] ZAGPJHC 1280; 2024 BIP 495 (GJ) (13 December 2024) para 38. This case concerned the urgent application for contempt, only. The application by Bliss Brands to stay the order of the FAC did not form part of this case again, as it did before Vally J.

[12] *Colgate-Palmolive (Pty) Ltd and Another v Bliss Brands (Pty) Ltd and Another* (095598/2024) [2025] ZAGPJHC 38 (27 January 2025). The order reads as follows:

'**A. Bliss application for leave to appeal:**

1. Leave to appeal to the Supreme Court of Appeal is granted against the whole of the order granted by Manoim J, dated 13 December 2024 (under case no. 2024/095598) ("the December order").
2. Costs of the application shall be costs in the appeal.

B. Colgate's application to cross appeal

1. Leave to appeal to the Supreme Court of Appeal is granted against the underlined portion in paragraph 3 of the December order, as it appears in paragraph 3 of that order, as set out below:

"The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear, over which the second respondent has jurisdiction, by virtue of them being member."

2. Costs of the application shall be costs in the appeal.

C. Section 18(3) application:

1. The operation and execution of the order of Manoim J dated 13 December 2024 is not suspended by any application for leave to appeal or any appeal and will continue to operate and be executed in full, until the final determination of all present and future leave to appeal applications and appeals.
2. The First Respondent is to pay the costs of this application such costs to include the costs consequent upon the employment of one senior and one junior counsel on scale C.'

(n) On 28 February 2025: The full court,[13] of the Gauteng Division, in case 095598/2024, dismissed the appeal against the order of Manoim J, and concluded that the requirements of s 18(3) of the SC Act had been met.

[7] This appeal turns mainly on whether Bliss Brands complied with the Manoim J1 order, which has remained in force because Bliss Brands never appealed against it. In terms of that order, Bliss Brands was required to make material changes to its offending Securex packaging.

[8] Bliss Brands has argued that both Vally J and Manoim J erred in making the comparisons between the packaging of Securex and Protex. It was argued that Bliss Brands complied with the Manoim J1 order by adopting changes to its Securex packaging. Had Vally J and Manoim J compared the latest Securex packaging to the 2019 Protex packaging, so the argument goes, they would have found that Bliss Brands was neither in contempt nor in breach of the Manoim J1 order. In relation to the cross appeal, Bliss Brands submitted that Manoim J was correct in limiting the effect of the order to those media outlets over which the ARB has jurisdiction and submitted that it applied only to the members of the ARB. I shall return to these contentions later in this judgment.

[9] Colgate contended that Bliss Brands was in wilful and mala fide breach of the Manoim J1 order and that the court, per Vally J, was correct to find that Bliss Brands was in contempt of the court order. According to Colgate, Bliss Brands is impermissibly seeking to relitigate the original dispute by inviting this Court to compare the new iterations of the Securex packaging, but what ought to be considered is whether the May 2024 packaging was in breach of the Manoim J1 order and whether the October 2024 version of the packaging was a continuation of a breach of the same order.

Issues for determination

[10] The following issues arise for determination:

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[13] *Bliss Brands (Pty) Ltd v Colgate Palmolive (Pty) Ltd and Others* (2024/095598) [2025] ZAGPJHC 654 (28 February 2025). This was an appeal against the Vally J judgment. The appeal was dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one being senior counsel, on scale C.

(a) Was Bliss Brands in contempt of the Manoim J1 order (the Vally J appeal)?

(b) Should the lawfulness of Bliss Brands' new packaging be determined by comparing it with the Securex 2019 packaging, ie the original offending packaging?

(c) Did Bliss Brands breach the Manoim J1 order with the introduction of its October 2024 packaging (the Manoim J appeal)?

(d) Did the court err in limiting the effect of its enforcement order (Manoim J2) to media outlets subject to the jurisdiction of the ARB (the cross-appeal)?

Contempt of court

[11] The main argument offered by Bliss Brands is that they were not in wilful or mala fide non-compliance with the Manoim J1 order. It was further submitted that Vally J used the wrong packaging in conducting the comparison exercise and should have compared the May 2024 Securex packaging to the 2018 Securex packaging.

[12] The Constitutional Court in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and others* (*Zuma*)[14] re-affirmed the importance of court orders and the obedience thereof when it stated:

'The thrust of s 165 of the Constitution was expounded by Nkabinde J in *Pheko II*, in which it was stated that —

"(*t)he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld*. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. *It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial*

[14] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (*Zuma*) para 26. Also see *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*) para 6, where this Court stated that civil contempt is committed not by a mere disregard of a court's order, but by the deliberate and intentional violation of the court's dignity, repute or authority and that it evinces:
'It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies *in violating the dignity, repute or authority of the court.* The offence has in general terms received a constitutional "stamp of approval", since the rule of law – a founding value of the Constitution – "requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'

authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also, and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest."

Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary… .' (Emphasis added and footnotes omitted.)

[13] The requirements for establishing civil contempt are trite.[15] Equally trite is that once a breach of an order is established, the elements of wilfulness and mala fides are presumed. Bliss Brands therefore bore an evidentiary burden before Vally J to show that its breaches of the Manoim J1 order were not wilful or mala fide. What became pivotal in the outcome of the proceedings before Vally J were: (i) that Colgate claimed that Bliss Brands changed the packaging in such a manner that it, in all material and important respects of the packaging, remained unchanged; and (ii) that Bliss Brands persisted in marketing Securex in the old packaging, on certain websites. Bliss Brands, however, contended that it had complied with the Manoim J1 order by making significant changes to the old packaging and was therefore not in contempt. Pictures were submitted to the court, and Bliss Brands claimed that the pictorial depictions demonstrated that the changes were substantial. Whether these changes were substantial can best be illustrated by comparing the pictorial images of the packaging, an exercise that was conducted by Vally J.

[14] Pictorial images of the packaging

ORIGINAL OFFENDING PACKAGING MANOIM, J1	**MAY 2024 MODIFIED PACKAGING**	**OCTOBER 2024 MODIFIED PACKAGING**

[15] *Zuma* fn 14 above para 37, re-emphasised the requirements set out in *Fakie*, ie (a) is there is a court order against the alleged contemnor; (b) did the alleged contemnor had knowledge of it; and (c) did the alleged contemnor failed to comply with the order.

[15] The changes relied on as substantial were described by Vally J, in paragraph 9 of the judgment:[16]

'(i) The trade mark, 'Securex', is now printed in a 'lighter shade of blue' and the font has been italicised;

(ii) A graphic embellishment has been added in the form of two stripes, the first of which runs diagonally from the foot of the letter S to the top of the letter U, and the second of which runs diagonally from the bottom of the letter R to the top of the letter X;

(iii) Of the four products, the names of two of them have been changed in the following respects: from "Fresh" to "Fresh Dew" and from "Herbal" to "Herbal Essence";

(iv) The image of the product variant now appears on the bottom left as opposed to the bottom right as was previously the case on the old packaging;

(v) The variant name has been shifted from the right to the left; and finally,

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[16] *Colgate-Palmolive (Pty) Ltd and Another v Bliss Brands (Pty) Ltd and Another* (095598/2024) [2024] ZAGPJHC 1089 (Vally J judgment) para 9.

(vi) It is also important to bear in mind that the printing of the brand name in blue text is common for this category of products. This, as I understand the claim, is that the lighter shade of blue is different from the shades of blue used in the case of other products in the same category.'

[16] Given the nature of the changes made to the packaging, Vally J concluded that they were not significant. The pictorial images above of the May 2024 packaging support the conclusion reached by Vally J. The packaging very closely resembles the original offending packaging. Vally J finally concluded that such similarity resulted in non-compliance with the Manoim J1 order.

[17] Once the breach was established, it was necessary to consider the reasons for the non-compliance. To paraphrase the wording of *Fakie*,[17] did Bliss Brands advance evidence that could establish reasonable doubt that its non-compliance with the Manoim J1 order was neither wilful nor mala fide? Bliss Brands produced the new packaging, not as part of their papers before Vally J, but as part of their heads of argument filed before the court. No evidence was placed before Vally J that Bliss Brands did everything in its power to comply with the Manoim J1 order within three months of the order.

[18] Vally J held that the matter is straightforward, since the comparison between Securex (old and new) and Protex had already taken place and was also considered in the hearings before the ARB and the FAC, as well as in the review application before Manoim J. He held that the said fora had already decided on the similarities between Protex and Securex and that it was not a matter that could be revisited. Accordingly, he found that the old and new Securex packaging had to be compared.

[19] Vally J carefully evaluated the pictorial depictions that were submitted to the court and after consideration, reached the conclusion that the May 2024 packaging very closely resembled the old one and that the two packagings are so similar in appearance that 'it is difficult to distinguish one from the other except with a keen eye looking for the differences'.[18] Based on the aforesaid conclusion that minor

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[17] *Fakie* fn 14 above.
[18] Vally J judgment fn 16 above para 11.

modifications were made to the packaging, coupled with the concession made by Bliss Brands that at the time of the contempt application the old packaging was still advertised on some websites, without tendering evidence as to what instructions were given to finally remove the old packaging from all the websites under its control, including its own website, Bliss Brands failed to rebut the presumption of wilfulness that arose from the prima facie breach of the Manoim J1 order. It was made abundantly clear in Vally J's judgment in paragraph 13. For the sake of completeness, I shall repeat what was stated:

'As to the second allegation, Colgate showed that as the date it launched its application the old packaging was still advertised on some websites. Bliss admits that this was the case as at the date of institution of the contempt application. It has been, and is, advertised on websites under its control and on websites of third parties. For websites under its control, it says that it has taken steps to ensure that the offending advertisements are removed. Old packaging is no longer advertised on the sites. However, it did not show that the steps it has taken to have the offending advertisements removed have actually yielded positive results. Hence, as of the date of the hearing it has to be accepted that the offending advertisements have yet to be finally and permanently removed from all websites under its control. At the hearing Mr Marcus, for Colgate, drew attention to the fact that the old packaging is still to be found on the Bliss Brand's website. This submission was not refuted.'

[20] Before this Court Bliss Brands relied on *Initiative Promotions and Designs CC v Initiative Media South Africa (Pty) Ltd* (*Initiative Promotions*)[19] as authority that a genuine attempt to modify offending labels, excluded wilfulness and mala fides. This necessitates a consideration of the ratio of *Initiative Promotions.* Levinsohn J, dealt with the civil contempt complaint as follows:[20]

'. . . The respondents' evidence shows that *every effort was made to comply with the Court order*. Instructions were given to subordinates on its contents, and all these persons were enjoined not to use stationery or business cards bearing *the old logo.* The first respondent took steps to modify the logo in the way that I have described. It seems to me that *the first respondent genuinely believed that this modification would bring it within the ambit of the Court order.* As I have said, it seems to me I do not have to decide whether this was achieved or not, since on any footing first respondent's efforts in this regard cannot be branded as wilful or mala fide.' (Emphasis added.)

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[19] *Initiative Promotions and Designs CC v Initiative Media South Africa (Pty) Ltd* 2005 BIP 516 (D) (*Initiative Promotions*).
[20] Ibid at 534H.

[21] In *Initiative Promotions*, evidence was placed before the court of all attempts made to comply with the court order. This was not done by Bliss Brands when the matter served before Vally J. What would have been required of Bliss Brands was to first address its understanding of the order and then demonstrate how it went about complying with the said order. Bliss Brands did not show that they made several efforts, or had given specific instructions to the subordinates involved in designing the packaging. Had it done so, it would have been able to discharge its evidentiary burden, but it failed to do so. Their reliance on *Initiative Promotions* is therefore misplaced.

[22] It is significant that Bliss Brands made further changes to the Securex packaging, as considered by Vally J. This approach is indicative of the fact that they were aware of what was required of them to comply with the Manoim J1. The mala fides of their conduct is shown by their delay in complying with the Manoim J1 order. The non-compliance with the order of Manoim J1 resulted in Bliss Brands exposing its brand, Securex, to the market in that offending packaging for a longer period. I agree with Vally J that the changes that were made to the packaging were not significant. Moreover, the fact that Bliss Brands continued to advertise its soap in the old packaging on certain websites supports the conclusion that it was disobeying the order of Manoim J1 and was in contempt of the order. The court was not misdirected in its finding that Bliss Brands had failed to provide a detailed explanation of the steps it took to bring its packaging into compliance with the Manoim J1 order, more specifically, paragraph 3 of that order. Its non-compliance with the order was wilful and mala fide and Bliss Brands made themselves guilty of civil contempt.

The comparison issue

[23] Bliss Brands contended that both Vally J and Manoim J compared the wrong versions of the Securex packaging. The question is: did the packaging 'depart significantly'[21] from the offending packaging? The answer, as it often is in passing off and other cases, is that 'one knows it when one sees it'.[22] However, what we have

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[21] *Milestone Beverage CC and Others v The Scotch Whisky Association and Others* [2020] ZASCA 105; [2020] 4 All SA 335 (SCA); 2021 (2) SA 413 (SCA); 2020 BIP 505 (SCA); [2020] 2 CPLR 447 (SCA) para 31.

[22] This phrase originally stems from a 1964 United States Supreme Court case where Justice Potter Stewart had to describe his threshold test for obscenity in *Jacobellis v Ohio* 378 US at 197 (Stewart J concurring). It has been referenced by the Constitutional Court in *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617; 1996 (5)

before us is not a matter of passing off,[23] where a court would consider extraneous factors in reaching a conclusion that there is a likelihood of confusion of certain products of brand goodwill as provided for by an advertising regulatory regime. It was not brought before the courts under the principles of passing off or the intellectual property legislation but commenced with breaches of the ARB's code and its jurisdiction.

[24] Importantly, as referred to earlier in this judgment, the exercise to compare the different packaging versions had been conducted by Ngoepe JP, Manoim J and Vally J. All of the judges tasked with the comparison exercise did so by comparing the packaging with the original packaging. They reached the same conclusion: the packaging is not materially different from the original packaging, and there was an ongoing breach of the Manoim J1 order.

[25] It cannot be overlooked that Manoim J dismissed the review that was brought by Bliss Brands, which resulted in the findings of the ARB being final, since Bliss Brands elected not to appeal the order dismissing its review. Both the AAC and the FAC held that the original offending packaging was too similar to Colgate's packaging and exploited its advertising goodwill.

[26] In my view, a comparison between the original offending packaging and the two modifications, made in May 2024 and October 2024 of the packaging was all that was needed for conducting the comparative exercises. This was done by Vally J and Manoim J in the two judgments that are the subject of the appeals before us.

Breach finding by Manoim J

[27] In late October 2024, Bliss Brands launched the next iteration of its Securex packaging, referred to above as the October 2024 packaging. In response to the October 2024 packaging, Colgate launched a second contempt application, whereby

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BCLR 608 para 40 and by this Court *in Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103; [2023] 3 All SA 631 (SCA) para 29.

[23] See *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* (553/19) [2021] ZASCA 24; 2021 BIP 15 (SCA); [2021] HIPR 162 (SCA) (19 March 2021) para 19 for the definition of passing-off as defined by Rabie JA in *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A) at 929C.

a declaration of contempt was sought, alternatively that Bliss Brands is in breach of the ManoimJ1 order. By a remarkable coincidence, the urgent application came before Manoim J, the very judge who granted the first order, referred to as the Manoim J1 order. Manoim J was tasked with conducting essentially the same exercise as before. Manoim J concluded that the October 2024 packaging was a continuous breach of the Manoim J1 order. Whether material changes had been made by Bliss Brands required a comparison exercise, which Manoim J duly conducted. I am satisfied that Manoim J was not misdirected in conducting the comparison in the manner he did. Bliss Brands merely tweaked the packaging and did not substantially change the packaging. Accordingly, both appeals must fail.

Colgate's cross-appeal

[28] Colgate's cross-appeal is based on a very narrow issue. It concerns that part of the Manoim J2 order in which it was ordered that the court's order is confined to mediums 'over which the ARB has jurisdiction, by virtue of them being a member'.[24] Colgate contended that Manoim J misconstrued the ARB's powers and the effect of Bliss Brands' submission to the ARB's jurisdiction. Once Bliss Brands had submitted to the ARB's jurisdiction, it was, so it was argued, subject to the full range of the ARB's remedial powers.

[29] The effect of a submission to the jurisdiction of the ARB has been decisively addressed by the Constitutional Court in *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others.*[25] The Court held that:

'…[I]n the case of a complaint to the ARB, non-submission by a non-member to the ARB's jurisdiction does have a "result" which is materially different to that which would flow from submission to the ARB's jurisdiction. If there is no submission, the ARB's members may not

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[24] The entire order issued by the court reads as follows:

'1. The ordinary forms and service provided for in the Uniform Rules of Court be dispensed with and that this application be heard and determined on an urgent basis in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court.

2. The First Respondent is declared to be in breach of paragraph 3 of the order of Manoim J, in case no 2020/22061, handed down on 21 February 2024.

3. The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear. Over which the second respondent has jurisdiction, by virtue of them being a member.'

[25] *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19; 2023 (10) BCLR 1153 (CC).

carry the impugned advertisement but there is nothing to stop the non-member from continuing to advertise in media belonging to non-members and (in a case such as the present) from continuing to use the impugned packaging. Where the non-member submits to the ARB's jurisdiction, by contrast, the ARB can make directions which are binding on the non-member.'[26]

[30] In argument before this Court, Bliss Brands could offer no basis for the restriction imposed by Manoim J. Bliss Brands had, to use the words of the Constitutional Court, participated in all stages of the ARB proceedings 'without a whimper of protest'.[27] In the circumstances, I can find no reason why Manoim J restricted the impact of the court's enforcement order. Accordingly, the cross-appeal must succeed.

[31] In the result, the following order is issued:

1 The appeals are dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal is upheld with costs, such costs to include the costs of two counsel.

3 The order of Manoim J dated 13 December 2024, is hereby set aside and substituted as follows:

'3. The First Respondent is directed to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 15 working days from the date of this order, by withdrawing the Offending Packaging and the Latest Offending Packaging, depicted in Annexures B and C annexed to the Notice of motion, from every medium in which they appear.'

E J S STEYN
ACTING JUDGE OF APPEAL

[26] Ibid para 18.
[27] Ibid para 20.

Appearances:

For the appellant:	C Puckrin SC with C D A Loxton SC, I Learmoth and E Mosito
Instructed by:	Evershed Sutherland (SA) Inc, Johannesburg Honey Attorneys, Bloemfontein
For the respondents	G Marcus SC with R Michau SC, L Harilal and C McConnachie
Instructed by:	Edward Nathan Sonnenbergs Inc, Johannesburg Phatshoane Henney, Bloemfontein.