

## ASA rules against MTN TV ad campaign

The Advertising Standards Authority of South Africa (ASA) has ruled that MTN copied the concept of Cell C's "Tell Someone" TV commercial campaign, and has dismissed an appeal with costs.

On 5 July 2002 Cell C lodged a complaint with the Advertising Standards Authority of South Africa (ASA) against MTN's television commercial campaign in which a gardener is shown striking oil in a vegetable patch with a small garden trowel and immediately using her cellphone to telephone someone to tell that person of her good fortune. Another ad in the campaign shows a miner who mines from South Africa through to China and immediately telephones on his cellphone and tells someone using his cellphone. The voice over says "got a lot to say".

Cell C complained that the concept for both commercials of immediately telephoning someone on a cellphone about an event being experienced because there was no one to tell about the event amounted to a breach of clauses 8.1 and 9.1 of section 11 of the Code, having regard to Cell C's "Tell Someone" advertising campaign. In this campaign over 13 different TV commercials had been flighted from April 2002 showing different events but having no one to tell and followed by the voice over "Tell Someone" and the Cell C logo implying tell someone on your cellphone.

Cell C said that their campaign had started in April 2002 and it had invested some R11,5 million in the campaign. It claimed that the concept was central to the theme, namely showing someone experiencing a somewhat special event but having no one to tell and then telling someone by using a cellphone. In one example, a lone man on a golf course achieves a hole in one and looks around but there is no one to tell of this special event and the implication is that he should use his cellphone to telephone someone with the use of the service provided by Cell C. Cell C claimed that the concept had been crafted and was not in common use in the cellphone market. It also pointed out that the cellular industry is one of the most competitive in South Africa.

In answer to this complaint MTN contended that the concept of communicating with someone is generic to the telecommunication industry and that the depiction and execution of the MTN and Cell C commercials are not similar. In reply Cell C said that the manner and form of the MTN commercials imitate the first 20 seconds of the Cell C commercials and that the issue is one of recognisable equity.

The Advertising Industry Tribunal ruled that MTN had overstepped its territory by using extremely similar concepts and that this had diminished the property of Cell C; further that while the treatment may be different, both advertisers had used the same concept. The Tribunal consequently ruled that MTN was in breach of clauses 8 and 9 of the Code and that their commercial should be withdrawn as soon as possible within the provisions contained in clause 15 of the procedural guide.

MTN was late in filing its notice of appeal, but condonation was granted for it to do so and the appeal was duly argued. Mr Goldberg, who appeared for MTN, showed several commercials during his argument depicting scenes which could be described as special or unique events, such as talking to the stomach of a pregnant woman with the pay-off line "The best conversation we could have is with the future". These commercials and his arguments were directed to making the point that Cell C could not claim ownership or advertising goodwill in situation concepts which could be anywhere, any place and concerning anyone. Cell C did not purport to do so, but said that the combination of factors in its campaign made the concept a crafted one, namely creating situations where the person concerned would want to tell someone, but there was no one to tell. Cell C contended that its series of 13 commercials exhibited a distinctive emotive theme, namely that all "strong personal moments/experiences of an idiosyncratic nature, or out of the ordinary, which the respondent (Cell C) encourages the protagonist in the commercial to share with a person close to them". Consequently, there was no claim by Cell C that the 13 commercials were recognisable by the scenes alone nor did they claim any ownership of the scenes.

On appeal MTN also argued that to the extent that there was any similarity between the oil and miner advertisements and the 13 Cell C commercials, it was limited to the first 20 seconds (approximately 60% of the time of the commercial) of the commercials and that when viewed in totality there is no confusing similarity. We agree with this submission that there can be no confusing similarity viewed as a totality which is the correct test. Viewed as a totality the logos are well-known and

distinctive and as a totality the reasonable viewer could not be confused within the meaning of section 8.1 of section II of the Code. This does not, of course, deal with the question of imitation.

MTN also argued that the Advertising Industry Tribunal finding violated their constitutional rights in that the ruling conferred monopoly rights of scenes which were in the public domain and further that the Tribunal had considered the evidence of industry analysts, which evidence MTN had not been given an opportunity to examine. In regard to the latter point the complete answer is that the appeal is a rehearing and not an appeal *strictu sensu* based on the record of the Tribunal's finding and of first instance. In regard to the point of monopoly rights Cell C does not claim ownership of the scenes themselves, but of the concept or the central theme of their commercials.

The mischief which is sought to be punished under clause 9.1 is the copying of original intellectual thought. There must be conscious copying and it is not sufficient for there to be a coincidental similarity. It is significant to note that MTN denied that it had imitated Cell C's commercial or that its commercials evoked the Cell C concept. The denial, however, was a bald one because there was no evidence by way of deposition or averment how the make-up of their commercials was compiled from original thought. This is a case where not only can an adverse inference be drawn from what has not been said, but it can also be drawn from what was said in the grounds for accelerated appeal and heads of argument.

Firstly, it is conceded by MTN that there is a similarity in that the scenes, whilst general in nature, are ones where a person experiences something unique or special, but has no one to tell. Thus, the woman in the oil advertisement or the miner in the mining advertisement and the golfer on the golf course hole in one advertisement or the couch potato with a car smashing through the wall while he watches TV are situations which are special and one would like to share with someone, but there is no one to tell. In argument MTN said that the original intent of their commercials was to create commercials which would attract users to the MTN network, get the users to use the MTN network and to stay with the MTN network. The concept of their campaign was devised to show persons in situations where they would have a lot to say and would use their MTN service to do so. Further, MTN says that they devised their commercials to promote their MTN pay-as-you-go campaign which was a prepaid service and the rewards are greater the more you talk. If that was their primary intent it would have been directed, as they said, to their clients which connotes existing users of their service and not, as they said in argument, to attract new users. Further, the commercial and "Got a lot to say" are inconsistent with a campaign for people to talk more on their cellphones. One would have thought that the reverse of a special event and rather an everyday occurrence would be used to promote the greater use of the cellphone such as discussing the formulation of a contract, teenagers talking about a proposed party, a young expectant mother talking to a friend about a baby shower etc.

Be that as it may, as MTN refers to the Cell C commercials as Cell C's concept, Cell C commercials do have a concept and that concept is of a special event in which the person involved would like to tell someone, but there is no one to tell. This, the committee concluded, was central to the theme, distinctive from other commercials involving the advertising of service providers in the cellphone industry such as shown at the hearing and was crafted as opposed to common use. The so-called everyday situational scene are nothing more than a prop for this crafting.

The ASA concluded that there was intentional copying of that concept by MTN which may result in the likely loss of potential advertising value. This applies even if there is no likelihood of confusion or deception. The matters for consideration under clause 9, namely extent of exposure, period of usage, advertising spend and the concept were all proven by Cell C. The competitors' sphere of the two parties is the same.

In consequence, the appeal committee has concluded that MTN was in breach of clause 9.1 of the ASA Code and that the appeal should be dismissed with costs, such costs to be taxed on the scale of the High Court as between party and party.

**Source:** [ASA](#)