

SCA ruling vindicates ARB's powers to make rulings

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A recent ruling by the Supreme Court of Appeal (SCA) has allowed the Advertising Regulatory Board (ARB) to retain the power to make rulings on commercials of non-members.



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Since 1962, the Advertising Regulatory Board (ARB), and the Advertising Standards Authority before it, have played a vital role in the South African advertising landscape.

It is the sole body that regulates advertising in the country according to widely accepted international standards. Not only does it provide consumers with a forum for complaints, but it also provides protection for brand owners through dedicated resources and mechanisms which are less costly and more expedient than procedures through the courts.

The High Court's determination that the ARB has no jurisdiction over non-members has been overturned by the Supreme Court of Appeal (SCA) confirming the ARB's powers of and position in advertising regulation.

The matter began when Colgate-Palmolive (a member of the ARB) lodged a complaint with the ARB arguing that Bliss Brands' (a non-member of the ARB) Securex hygiene soap packaging imitated its Protex hygiene soap packaging.



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The complaint was adjudicated by the ARB, which decided that the Securex packaging had breached provisions of the Code protecting against the deception of trade source/trade connection and protection against imitation.

Bliss Brands was ordered by the ARB to withdraw the packaging. It appealed the decision to the High Court, which delivered its decision in 2021. The High Court decided that:

- The provisions of the ARB's Memorandum of Incorporation (MOI) were unconstitutional as they sought to allow for the exercise of a public power not sourced in law;
- The provisions of the MOI and Code which allowed the ARB to issue rulings against a non-member were an exercise beyond the jurisdiction of the ARB; and
- The proceedings allowed in terms of the MOI went beyond the jurisdiction of the ARB, since they exercised a judicial function.



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This determination was a devastating blow for the ARB and its members, as the inability to make rulings where non-members were concerned meant that the ARB's effectiveness would be severely undermined.

Furthermore, the weakening of the ARB's regulatory mechanisms caused concerns that a 'Wild West' would follow, with parties able to escape the application of advertising standards by withdrawing from ARB membership and jurisdiction.

The ARB and Colgate-Palmolive took the matter on appeal to the SCA, which decided that the High Court had erred in its decision.

Following consideration of the arguments raised by Bliss Brands in the High Court, the SCA upheld the ARB's appeal, making the following findings:

- The ARB validly exercises its public power as its MOI and Code sufficiently amount to its empowering provisions;
- The ARB's decisions and regulatory mechanisms only have indirect impacts upon non-members and therefore do not go beyond its jurisdiction. It was further clarified by the SCA that the ARB may only make rulings on the advertisements of non-members for the benefit of its own members; and
- The ARB's MOI and Code were found to be sound in terms of the law, as they only allow the ARB to determine whether its Code has been breached and the engaged proceedings do not amount to judicial function.

The SCA's decision is a welcome victory for the ARB, brand owners, and consumers. It has strengthened the ARB's position as an effective regulator of advertising and given clarity to players within the print, digital, and broadcast media space in South Africa.

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