

# Is the ASA flouting the CPA?

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Does the Advertising Standards Authority flout the Consumer Protection Act, which prohibits false, misleading or deceptive misrepresentations?



## Introduction

1. Some time ago, a former Head of Legal and Regulatory Affairs at the ASA (Advertising Standards Authority of South Africa) and now a practicing Attorney, Gail Schimmel, commented that she was deeply concerned about symptoms of ["an illness within the ASA"](#).
2. In this article I discuss what seems to be a more chronic "illness within the ASA in the context of the Standard Letter the ASA addresses to advertisers in which it initiates complaints and induces advertisers who are not its members to participate in ASA processes, abide by ASA rulings and pay the ASA so-called "appeal fees" ("the ASA's Standard Letter").
3. In its Standard Letter the ASA incorrectly holds itself out as empowered to perform a regulatory function and exercise jurisdiction over all advertisers in South Africa and purports to be entitled to sanction and effectively ban what it deems to be offending advertising in all media throughout South Africa.
4. Ironically, according to the ASA itself, however, non-members of the ASA are legally entitled to ignore the ASA's letters, procedures and rulings and it has no jurisdiction over website advertising.
5. Despite these concessions in High Court affidavits, the ASA continues to subject non-member advertisers (including website advertisers) to its Code, procedures and rulings, and extract funds (so-called "appeal fees"), from them all on the strength of the ASA's incorrect non-disclosures.

6. The ASA's Standard Letter may well contravene Section 41 of the Consumer Protection Act No. 68 of 2008 ("the Consumer Protection Act") which prohibits false, misleading or deceptive misrepresentations.

## The ASA, its articles and Code

7. The ASA is not clothed with statutory or regulatory powers<sup>[1]</sup>. It is a company registered and incorporated pursuant to the Companies Act of 1973. As such, its powers are circumscribed by its Memorandum of Incorporation and Articles of Association ("Articles").

8. In essence, the ASA's Articles expressly provide it to be a self-regulatory body whose membership is voluntary and whose rules only bind its members. In this regard the ASA's Articles provide (*inter alia*) that :

8.1 one of the main aims of the ASA is to "adopt and enforce, as far as reasonably possible, a code of advertising ... which sets out the rules which advertising men ... agree to follow ... through self-imposed regulation, ... ;

8.2 the ASA seeks to persuade all persons, corporations or organisations or anybody to which they may be affiliated to become members of the ASA.

9. The ASA presently only has about 20 members which have "**agreed**" to be bound by the ASA's Code and voluntary system of self-regulation. The vast majority of other "persons", "corporations" and "organisations" in South Africa have not however been "persuaded" by the ASA to become members of the ASA and accordingly have not volunteered to be subject to the ASA's Code and system of voluntary self-regulation.

10. The ASA has published its own Code of Advertising Practice ("the ASA Code"). The ASA Code provides that the ASA may ban advertising in South Africa, by directing certain media, including effectively the whole of the print and television media in South Africa, not to publish or accept advertisements for publication.

11. The ASA's Code is accordingly general and coercive in effect in that it provides that advertisements that fall foul of its rulings cannot be published throughout most media in South Africa irrespective of whether or not the advertiser is a member of the ASA, subject to its jurisdiction or even privy to a contractual relationship (such as a service agreement) with the ASA.

12. The ASA, however, fully appreciates the limits of its powers and jurisdiction as circumscribed by its Articles and has accepted in High Court Affidavits that the ASA Code binds only its members and no other party ; the ASA does not have jurisdiction over non-members of the ASA and that non-members of the ASA are accordingly legally entitled to ignore the rulings and procedures of the ASA.

13. Significantly the ASA also appreciates and accepts that by virtue of its limited membership and its limited powers (set out in its Articles) that it has no jurisdiction whatsoever in respect of website advertising and advertising which appears in other media of non-members of the ASA.

## The ASA'S Standard Letter to non-member advertisers

14. The ASA however operates contrary to the recognised limits of its jurisdiction as enunciated in its Articles and accepted by it in High Court Affidavits. Any advertiser who has ever received a complaint from the ASA will be familiar with the ASA's Standard Letter pursuant to which it initiates complaints against advertisers.

15. In the ASA's Standard Letter, the ASA typically notifies advertisers that a complaint has been lodged against its advertising; calls on the advertiser to respond to the complaint and prove the truth or accuracy of its advertisements within a brief and arbitrary deadline unilaterally stipulated by the ASA ; threatens that in the absence of a response from the advertiser, a ruling will be made against the advertiser; threatens to impose sanctions such as an Ad-Alert against the advertiser in the event of an adverse Ruling by the ASA, and notifies the advertiser that it is entitled to appeal against an

adverse ruling if aggrieved, subject however to payment by the advertiser to the ASA of appeal fees exceeding R150 000 per advertisement.

## The ASA'S non-disclosures

16. Conspicuous in its absence from any of the ASA's Standard Letters initiating complaints against advertisers, is a disclosure of the material facts that :

16.1 **the ASA does not have jurisdiction over persons who are not its members;**

16.2 **the ASA Code binds only its members and no other party;**

16.3 **the ASA has no jurisdiction over website advertising or advertising placed with other media who are non-members of the ASA;**

16.4 **Advertisers who are not ASA members are legally entitled to ignore the ASA's Standard Letters rulings and procedures.**

17. It seems that the ASA is duty bound to disclose these material facts to advertisers to whom it addressed its Standard Letters initiating complaints.

18. Arguably, many (if not most) of the recipients of these Standard ASA Letters were and are induced (often at great cost and inconvenience) to respond to ASA complaints and participate in ASA processes under the mistaken belief that they were or are obliged to participate in the ASA processes (including ASA appeals) and abide by ASA rulings - which such advertisers were and are legally entitled to ignore.

19. Section 41 of the Consumer Protection Act deals with "**False misleading or deceptive misrepresentations**". It prohibits the use of innuendo or ambiguity as to a material fact or the failure to disclose a material fact " ... *if that failure amounts to a deception*". It also categorises the failure to correct a misapprehension as "**...a false, misleading or deceptive misrepresentation**" (emphasis added).

20. It seems to be an indictment on the ASA that it continues to call on advertisers who are not members of the ASA and website advertisers over which it has no jurisdiction, to respond to ASA complaints, participate in its processes, abide its rulings and pay the ASA appeal fees if aggrieved thereby, without informing such advertisers that they are not legally obliged to do so. The ASA continues to do this despite Section 41 of the Consumer Protection Act and the ASA's acknowledged lack of jurisdiction and power to do so and in the absence of any service agreement with such non-member advertisers.

21. Non-member advertisers who have been induced to respond to ASA Standard Letters; participate in ASA processes (including ASA appeals) and abide by ASA rulings, may well have actionable claims against the ASA, particularly if they were induced to pay the ASA so-called "**appeal fees**" and/or if they were subjected to negative publicity in the form of ASA rulings without being made aware of the ASA's limited jurisdiction.

[1] *The Electronic Communications Act No. 36 of 2005 affords the ASA Code limited statutory recognition in regard to broadcasting service licensees which are members of the ASA.*

## ABOUT THE AUTHOR

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