**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 132/22

In the matter between:

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| **BLISS BRANDS (PTY) LIMITED** | Applicant |
| and | |
| **ADVERTISING REGULATORY BOARD NPC** | First Respondent |
| **COLGATE-PALMOLIVE (PTY) LIMITED** | Second Respondent |
| **COLGATE-PALMOLIVE COMPANY** | Third Respondent |

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| **Neutral citation:** | *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19 |
| **Coram:** | Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J |
| **Judgment:** | Madlanga J (unanimous) |

**Heard on:** 2 March 2023

**Decided on:** 26 June 2023

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**ORDER**

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On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Johannesburg):

Leave to appeal is refused with costs, including the costs of two counsel.

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**JUDGMENT**

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MADLANGA J (Zondo CJ, Kollapen J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J concurring):

*Introduction*

[1] Bliss Brands (Pty) Ltd (Bliss Brands), the applicant, is a company that sells cleaning and hygiene products. At issue in this matter are questions of a constitutional and administrative law nature. They have a reach beyond the role players in this matter. Chief amongst the issues is whether a non-profit company, the Advertising Regulatory Board NPC (ARB), the first respondent, which is a non-statutory body, has authority to take regulatory action against an entity that is not its member. This question arises because Bliss Brands is not a member of the ARB. Despite the magnitude of the questions and the allure of grappling with them, the decision we reach highlights the fact that at times the imperative of judicial avoidance does and must carry the day. Indeed, in *Albutt* Ngcobo CJ tells us that—

> "[s]ound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide [for example] an ancillary issue in the public interest."[1]

[2] What dictates the adoption of a minimalist approach in this matter will soon become apparent.

*Background*

[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.

[4] The relationship between the ARB and its members is contractual.[2] It is in terms of that contractual relationship that members are bound by the Code. In the main, the

[1] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 82, referred to with approval in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (5) BCLR 527 (CC) at para 252.

[2] There is statutory dimension – which will be elaborated upon later – provided for in section 55 of the Electronic Communications Act 36 of 2005 (ECA).

Code prescribes that members must not prepare or accept any advertising that conflicts with it and must withdraw any advertising that is subsequently deemed to be unacceptable by certain functionaries of the ARB.

[5] Although the ARB's Memorandum of Incorporation (MOI) says that – absent submission to jurisdiction – the ARB has no jurisdiction over non-members, the ARB may issue rulings that impact negatively on the rights or interests of non-members. This is in instances where – by means of a ruling – the ARB directs its members not to accept an advertisement if it is yet to be published or to withdraw it if it has been published. A ruling of this nature is called an ad-alert.[3] The effect of the direction will be that a member will have to withdraw a non-member's advertisement that has been published or refuse to accept a non-member's advertisement that is yet to be published.[4]

[6] Colgate-Palmolive (Pty) Ltd, the second respondent, and Colgate-Palmolive Company (Colgate), the third respondent, are competitors of Bliss Brands. Colgate lodged a complaint with the ARB against Bliss Brands. It alleged that the packaging of Securex, a soap manufactured by Bliss Brands, breached the Code in that it imitated the packaging architecture of Protex, a soap manufactured by Colgate, thereby improperly exploiting the advertising goodwill of Protex.

[7] Bliss Brands, a non-member of the ARB, did not object to the ARB's exercise of jurisdiction over it. Instead, it participated in the ARB proceedings, engaging with

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[3] An ad-alert is an enforcement notice by the ARB to its members. The ARB's MOI and the Code provide for rulings and orders to be made by the ARB against non-members. If a non-member refuses to comply with a ruling, members of the ARB (including members' members) are obliged not to accept the non-compliant advertisement or to withdraw it, if it has already been accepted, upon the issuing of a notice (i.e. an ad-alert) to that effect from the ARB.

[4] Clause 3.3 of the ARB's MOI provides:

> "The [ARB] has no jurisdiction over any person or entity who is not a member and may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. However, the [ARB] may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published."

the merits of the complaint. The first letter of response to the complaint written by Bliss Brands' attorneys which engaged with the complaint in detail[5] is notable for the fact that, despite its length, it contained nary a word about the ARB's lack of jurisdiction. I cannot but emphasise the fact that the engagement with the merits of the complaint totalled 11 pages and just under 70 paragraphs. This, despite a request by the ARB that Bliss Brands indicate "if [it did] not consider itself to be bound by the [jurisdiction of the] ARB".

[8] The Directorate, which is the first-instance level in the ARB's hierarchy of deciding complaints, found for Bliss Brands. Colgate went on appeal to the Advertising Appeals Committee (AAC) within the hierarchy. It succeeded. Bliss Brands appealed to the ARB's Final Appeal Committee (FAC). The FAC ruled that Bliss Brands should stop its distribution of the Securex packaging.

[9] At none of the three levels of the ARB's decision-making, did Bliss Brands object to the ARB's exercise of jurisdiction over it.

[10] After its appeal was dismissed by the FAC, Bliss Brands brought a review application in the Gauteng Division of the High Court, Johannesburg (High Court) in which it attacked the FAC's decision on review grounds founded on the Promotion of Administrative Justice Act[6] (PAJA) and the principle of legality. Crucially, part of the relief it sought was remittal to the ARB's FAC in the event of the prayer for a substituted decision being unsuccessful, something consonant with acceptance of the ARB's jurisdiction.

[11] It was only after it was prompted by a directive issued by Fisher J in the High Court that Bliss Brands added wide-ranging constitutional issues to the review

[5] There are other letters from Bliss Brands attorneys, but the first to engage with the merits of the complaint in detail was this one.

[6] 3 of 2000.

application thereby bringing about a significant change to its nature. Pursuant to the directive, Bliss Brands sought an order declaring the ARB's MOI unconstitutional. Alternatively, it asked the Court to declare that: clause 3.3 of the MOI is unconstitutional;[7] and the ARB has no power to exercise jurisdiction over non-members and their advertising. The High Court made an order along the lines of the alternative relief. As a consequence, it set aside the FAC's decision.

[12] On appeal, the Supreme Court of Appeal reversed the High Court's decision. It first criticised the High Court for raising issues that had not been raised by Bliss Brands.[8] It held that Bliss Brands had submitted to the ARB's jurisdiction and that – on this basis alone – the appeal had to succeed. At the urging of counsel for the ARB, the Supreme Court of Appeal did not end there. Counsel urged that Court to deal with the issues which had been raised by Bliss Brands at the instance of, and had then been decided by, the High Court (constitutional issues). Counsel submitted that, if left undisturbed, what the High Court held on the constitutional issues would result in legal uncertainty and that this would impede the proper functioning of the ARB. The Supreme Court of Appeal obliged and dealt with the constitutional issues. On these as well it held against Bliss Brands.

*Before this Court*

[13] Bliss Brands raises the following grounds of appeal:

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[7] See clause 3.3 of the ARB's MOI above n 4.

[8] In this regard the Supreme Court of Appeal relied on its decision in *Fischer v Ramahlele* [2014] ZASCA 88; 2014 SA 614 (SCA); [2014] 3 All SA 395 (SCA) at para 13 and this Court's judgments in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 234 and *Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 58. In *Fischer* the Supreme Court of Appeal held:

> "[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."

(a) The Supreme Court of Appeal should not have made an issue of the fact that the constitutional issues were raised by the High Court because this was not a ground of appeal. In any event, once Bliss Brands amended its notice of motion, the constitutional issues were properly before the High Court.

(b) Bliss Brands' consent or submission to the jurisdiction of the ARB was not a ground of appeal before the Supreme Court of Appeal. Thus, that Court ought not to have decided that question. Nevertheless, argues Bliss Brands, the participation of a non-member in ARB processes cannot amount to "true" consent to the jurisdiction of the ARB because: regardless of whether Bliss Brands participated in or objected to the ARB's jurisdiction, the ARB would have determined the complaint and issued a ruling or decision which its members would enforce, any objection to jurisdiction by Bliss Brands being of no consequence; and any participation was effectively coerced by the threat of an ad-alert.

(c) What the Supreme Court of Appeal held in respect of section 55 of the ECA[9] is correct but of no relevance to Bliss Brands.[10] That is so because

[9] Section 55 of the ECA provides:

> "(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.
>
> (2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the [Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)], as well as complaints concerning alleged breaches of the advertising regulations.
>
> (3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority of South Africa, is found to have breached the Code or advertising regulations, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act."

Section 1 of the ECA defines the "Advertising Standards Authority of South Africa" (ASA) as "the entity which regulates the content of advertising, or any entity that replaces it but has the same functions". It is common cause that the ARB replaced the ASA.

[10] The Supreme Court of Appeal held that section 55 of the ECA obliges all broadcast service licensees – whether ARB members or not – to comply with the Code contemplated in that section which, because the ARB replaced the ASA, is the ARB's Code. The Supreme Court of Appeal further held that the section empowers either of the following bodies to adjudicate complaints of alleged breaches of the Code: the ARB (in respect of its members

Bliss Brands is not a broadcast licensee under the ECA, which means section 55 of the ECA is not applicable to it.

(d) The Supreme Court of Appeal's previous decision in *Herbex*[11] is no authority for the legality of the ARB's exercise of jurisdiction over non-members. In *Herbex*, the Supreme Court of Appeal made a settlement agreement an order of court.[12] And, in its reasoning, it endorsed the content of the settlement agreement. In the present application, the Supreme Court of Appeal affirmed *Herbex*.[13] Bliss Brands argues that because the settlement agreement in *Herbex* refers only to the ASA, and not the ARB, *Herbex* cannot afford the ARB the authority it purports to exercise over it.

(e) What the Supreme Court of Appeal held in relation to ARB members' rights to freedom of expression and association was unrelated to the issue before this Court, i.e. whether the ARB may impose its jurisdiction on a non-member. For clarity with regard to the rights to freedom of expression and association, the Supreme Court of Appeal held:

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that are broadcast services licensees); or the Complaints and Compliance Committee of the Independent Communications Authority of South Africa (ICASA) (in respect of non-ARB broadcast services licensees), in terms of section 17C of the ICASA Act. See *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; 2022 (4) SA 57 (SCA); [2022] 2 All SA 607 (SCA) (Supreme Court of Appeal judgment) at para 21.

[11] *Advertising Standards Authority v Herbex (Pty) Ltd* [2017] ZASCA 132; 2017 (6) SA 354 (SCA).

[12] Id at para 18. The order (incorporating the settlement agreement) reads in relevant part:

> "1. It is declared that:
> 1.1 the Advertising Standards Authority of South Africa (the ASA) has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it;
> 1.2 the ASA may consider and issue a ruling to its members (which is not binding on non-members) on any advertisement, regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.
> 2. The ASA is directed to include in its standard letter of complaint the contents of paragraph 1 and that a non-member is not obliged to participate in any ASA process, but that should it not participate, the ASA may still consider the complaint, for the purposes set out in paragraph 1.2."

[13] Supreme Court of Appeal judgment above n 10 at paras 25-34.

> "As regards the powers of the ARB. . . the ARB is entitled to consider, on behalf of its members, complaints in respect of advertisements published by non-members of the ARB, so that its members may make an election whether or not they wish to publish that advertisement. This is an incident of their constitutional rights to freedom of expression and association. The high court's order prevents the members of the ARB from using their chosen method of deciding which advertisement they wish to publish and which advertisers they wish to associate with. This constitutes an unjustifiable limitation on the rights of members to freedom of expression and association."[14]

(f) The ARB's processes offend section 34 of the Constitution by ousting the jurisdiction of courts in respect of the merits of complaints on matters involving fundamental rights (chiefly, freedom of expression). Further, the ARB's adjudicative processes are not procedurally fair, this too being a breach of section 34 of the Constitution.

[14] The ARB and Colgate oppose the application, submitting that Bliss Brands' case cannot meet this Court's jurisdictional or leave to appeal thresholds, in that no constitutional issues of import have been raised nor are there any points of law that are arguable. In the main, the respondents submit that the relief sought by Bliss Brands effectively dismantles the legitimate system of self-regulation of advertising undergirded by the ARB's members' rights to freedom of association and expression and exercised via the Code and the ARB's MOI. They contend that, as the Supreme Court of Appeal held, the members of the ARB "have organised around the shared goal of promoting ethical standards in advertising, as reflected in the Code", adding that "[t]hey have agreed to collectively delegate decision-making to the ARB's expert adjudicative bodies that determine complaints on their behalf". According to the respondents, the ARB is the instrumentality of the will of its members; the ARB – through its decision-making power – is the conduit through which its members collectively enjoy and exercise their rights to freedom of association and

[14] Supreme Court of Appeal judgment above n 10 at para 24.

expression. This, notwithstanding the fact that the ARB's decisions may have an effect on non-members since the decisions may require members to act in a manner that has an adverse impact on non-members.

*Analysis*

[15] Bliss Brands' counsel conceded that if this Court holds that Bliss Brands did consent to the ARB's jurisdiction, that will be dispositive of this matter. That means it will not be necessary to determine any of the other issues Bliss Brands has raised. The concession is well-made. Viewed closely, the springboard for all the grounds of appeal is the idea that the ARB was not entitled to exercise its jurisdiction over Bliss Brands. Indeed, the Supreme Court of Appeal held – correctly so – that the appeal could be disposed of solely on the basis that Bliss Brands consented to the jurisdiction of the ARB.[15] Also, and more directly, if Bliss Brands submitted to the ARB's jurisdiction, the grounds of appeal become academic. Counsel did not argue that there are any interests of justice considerations that make it necessary for us to consider these grounds of appeal. Nor can I think of any. That being the case, I must next consider whether Bliss Brands did submit to the ARB's jurisdiction. I must do so because, if there was no submission to jurisdiction, it may well become necessary to deal with the grounds of appeal.

[16] In *Purser* Mpati AJA held:

> "It is in any event clear. . . that, by defending the action, the appellant wished to avoid execution against assets which he still had in the United Kingdom. He wanted to protect such assets and, judging from his plea, thought that he had a good defence to meet the appellant's claim. He participated fully in the proceedings and, having failed in his defence, cannot now be heard to say that he participated only so as to protect his assets in the United Kingdom. A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way

[15] Supreme Court of Appeal judgment above n 10 at para 13.

> which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his defence, the doctrine of *res judicata* will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it. In my view, the facts point overwhelmingly to the appellant having submitted to the jurisdiction of the English Court."[16]

[17] Bliss Brands' argument suggests that this principle on submission to jurisdiction does not apply to the situation in which Bliss Brands found itself. It argues that the idea of submission makes practical sense if a refusal to submit has the benefit that there will be no adverse consequences for the party concerned; a refusal to submit to jurisdiction must have a "result". Bliss Brands illustrates this by making the point that if a litigant does not submit to the jurisdiction of, for example, a court, the court cannot exercise jurisdiction over that litigant and nothing adverse will befall that litigant. That is the "result". Bliss Brands contrasts this with ARB proceedings and says even if a non-member does not consent to jurisdiction, the ARB may still entertain the proceedings and issue an ad-alert. The effect of an ad-alert is that ARB members may not accept the advertisement in issue from the non-member concerned or, if the advertisement has already been accepted and published, must withdraw the publication. Thus, a refusal to submit to the jurisdiction of the ARB does not afford the non-member a beneficial result. If I were to paraphrase what comes out of the argument, Bliss Brands' point is that, with ARB proceedings, circumstances are such that non-members are coerced to participate.

[18] At first blush, the argument is attractive. However, it does not hold up to scrutiny. In the first place, in 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 carry the impugned advertisement but there is nothing to stop the non-member from continuing to advertise in media belonging to

[16] *Purser v Sales* [2000] ZASCA 46; 2001 (3) SA 445 (SCA); [2001] 1 All SA 25 (A) at para 22.

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.

[19] In any event, I think that it is too much of a leap for Bliss Brands to suggest that all non-members that participate in ARB proceedings without demur do so under coercion. Surely, one cannot discount the possibility that some non-members participate in the proceedings willingly, thus submitting to the ARB's jurisdiction. It seems to me that the question whether a non-member has submitted to the ARB's jurisdiction depends on the facts: what did the non-member do or not do? Based on the facts, the next question is whether the legal conclusion that there was submission can be drawn.

[20] With the above in mind, did Bliss Brands submit to the ARB's jurisdiction? The Supreme Court of Appeal held that it did. It held thus based on the following facts.[17] The letter that advised Bliss Brands of the complaint "requested it to 'inform us if you do not consider yourself to be bound by the ARB', and advised that Bliss Brands was not obliged to respond or furnish a defence".[18] Bliss Brands rendered a detailed response to the merits of the complaint without any objection to the ARB's jurisdiction. The letter from Bliss Brands' attorneys not only fully addressed the merits of the complaint but also concluded with a request that, if the Directorate found that Securex was in contravention of the Code and directed Bliss Brands to withdraw or amend its product packaging, Bliss Brands be afforded six months from the date of the ruling in which to do so. This was an unambiguous intimation by Bliss Brands that it was submitting itself to the ARB's jurisdiction. It participated at all stages of the ARB proceedings without a whimper of protest. It was happy with the Directorate's finding (the first instance finding) which was in its favour. When the AAC upheld Colgate's appeal, Bliss Brands appealed on the merits to the FAC. In the review application,

[17] On these facts see Supreme Court of Appeal judgment above n 10 at paras 11-2.

[18] Id at para 11, quoting the *Herbex* order.

Bliss Brands, inter alia, sought remittal to the FAC in the event of the prayer for a substituted decision being unsuccessful.

[21] Ordinarily, this Court does not grapple with contested factual issues. It goes by factual findings made by the courts below. Jafta J puts it thus in *Makate*:

> "[T]his being the highest Court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this Court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily, an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this Court on appeal, they are adjudicated on the facts as found by the lower courts."[19]

There is an exception to this rule. Where the dictates of justice so require, an appellate court may interfere with the factual findings of a lower court.[20]

[22] 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. Therefore, the application for leave to appeal must fail. To conclude, because Bliss Brands consented to the jurisdiction of the ARB, it is not in the interests of justice to entertain any other issue in this matter.

*Order*

[23] The following order is made:

Leave to appeal is refused with costs, including the costs of two counsel.

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[19] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39.

[20] See *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106; and *Makate* id at para 40.

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| For the Applicant: | C Loxton SC and F Southwood SC instructed by Eversheds Sutherland (SA) Incorporated |
| For the First Respondent: | S Budlender SC, N Ferreira, K Harding-Moerdyk and K Mvubu instructed by Willem de Klerk Attorneys |
| For the Second and Third Respondent: | G Marcus SC and C McConnachie instructed by Kisch Africa Incorporated |