



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case No: 786/21

In the matter between:

<b>ADVERTISING REGULATORY BOARD NPC</b>	<b>FIRST</b>
<b>APPELLANT</b>	
<b>COLGATE-PALMOLIVE (PTY) LTD</b>	<b>SECOND</b>
<b>APPELLANT</b>	
<b>COLGATE-PALMOLIVE COMPANY</b>	<b>THIRD</b>
<b>APPELLANT</b>	

and

<b>BLISS</b>	<b>BRANDS</b>	<b>(PTY)</b>	<b>LTD</b>
<b>RESPONDENT</b>			

**Neutral citation:** *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* (case no 786/21) [2022] ZASCA 51 (12 April 2022).

**Coram:** PETSE DP, SCHIPPERS, PLASKET and HUGHES JJA and MATOJANE AJA

**Heard:** 1 March 2022

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 12 April 2022.

**Summary:** Administrative Law – private body exercising public functions – submission to jurisdiction – powers of the Administrative Regulatory Board (ARB) – complaints relating to advertising by non-members of ARB – whether

lawful for ARB to consider – whether ARB structures independent, usurp judicial authority or follow fair procedures – civil procedure – courts should decide issues defined by parties – court raising constitutionality of ARB’s powers *mero motu* – inappropriate.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Fisher J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and replaced by the following:

‘The relief sought in paragraphs 1, 4, 5, 6 and 8 of the applicant’s amended notice of motion is dismissed with costs, including the costs of two counsel.’
- 3 The relief sought by the applicant in paragraphs 2, 3 and 7 of its amended notice of motion is remitted to the Gauteng Division of the High Court, Johannesburg for determination.

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## JUDGMENT

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**Schippers JA (Petse DP, Plasket and Hughes JJA and Matojane AJA concurring)**

[1] The first appellant, the Advertising Regulatory Board NPC (ARB), is a non-profit company which carries on business as an independent, self-regulatory body in the advertising industry. Its members are required to adhere

to the Code of Advertising Practice (the Code), which is based on international best practice for advertising self-regulation and is the guiding document of the ARB. The Code states that its two main purposes are to protect the consumer and to ensure professionalism among advertisers; and that advertising is a service to the public and thus ‘should be informative, factual, honest and decent’. All advertising in the electronic broadcast media is subject to the Electronic Communications Act 36 of 2005 (ECA). Every electronic broadcaster must adhere to the Code as determined and administered by the ARB,<sup>1</sup> which has replaced and performs the same functions as the former Advertising Standards Authority of South Africa (ASA).<sup>2</sup> The second and third appellants, Colgate-Palmolive (Pty) Ltd and Colgate-Palmolive Company (Colgate), and the respondent, Bliss Brands (Pty) Ltd (Bliss Brands), are competitors in the toiletries business.

[2] In December 2019 Colgate lodged a complaint with the ARB that Bliss Brands, in the packaging of its Securex soap, had breached the Code by exploiting the advertising goodwill and imitating the packaging architecture of Colgate’s Protex soap. Although Bliss Brands is not a member of the ARB, it raised no objection to the ARB’s jurisdiction and participated fully in its hearings, taking the matter all the way to the ARB’s Final Appeal Committee (FAC). After the FAC dismissed its appeal, Bliss Brands applied to the Gauteng Division of the High Court, Johannesburg (the high court) to review and set aside the FAC’s decision.

[3] The high court (Fisher J) *mero motu* questioned the constitutionality of the ARB’s powers. Bliss Brands then amended its notice of motion and supplemented its founding papers so that they bore little resemblance to its original application. It raised a number of constitutional points which found

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<sup>1</sup> Section 55 of the Electronic Communications Act 36 of 2005 (ECA).

<sup>2</sup> Section 1 of the ECA defines the Advertising Standards Authority of South Africa as ‘the entity which regulates the content of advertising, or any entity that replaces it but has the same functions.’

favour with the court. It made a series of orders which effectively dismantled the system of self-regulation of advertising in South Africa in its entirety. This included an order declaring part of the ARB's Memorandum of Incorporation (MOI) 'unconstitutional, void and unenforceable', together with further declaratory and interdictory relief. The issue in this appeal, which is before us with the leave of the high court, is whether it was correct in making those orders.

### **The complaint and proceedings below**

[4] The Directorate of the ARB, responsible for adjudicating complaints at first instance, found that Bliss Brands had not breached the Code in the packaging of its Securex soap. Colgate appealed to the Advertising Appeals Committee (AAC), which overturned the Directorate's decision. Bliss Brands then lodged an appeal to the FAC. It found in favour of Colgate in a split decision. Its chairperson, Judge Ngoepe, cast the deciding vote. The FAC's ruling required Bliss Brands to cease distribution of the offending Securex packaging. This was followed by a brief FAC decision clarifying the costs award in its earlier ruling.

[5] Subsequently, Bliss Brands brought an urgent application in the high court to suspend the FAC's ruling, pending a review application. That application was dismissed. Undeterred, on 2 October 2020 Bliss Brands launched another urgent application for interim relief, coupled with an application to review the FAC's ruling based on a violation of the principle of legality and various grounds under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It did not challenge the ARB's jurisdiction, nor did it suggest that its participation in the ARB's proceedings was anything but voluntary.

[6] On 30 October 2020 Fisher J issued a directive that the parties submit argument on the constitutionality of those parts of the Code and the MOI, which authorised the Directorate and the Committees of the ARB to determine whether the packaging of a product constituted passing off or breach of copyright (the directive). The parties were also required to address the basis of the ARB's jurisdiction 'to usurp the function of the courts in relation to these issues'.

[7] The directive resulted in a fundamental change to the relief sought by Bliss Brands. It asked for an order that the entire MOI of the ARB be declared 'unconstitutional and void'. In the alternative it sought declaratory orders that clause 3.3 of the MOI is unconstitutional; that the ARB has no jurisdiction over any person who is not a member of the ARB; that the ARB may not issue rulings in relation to any non-member or that non-member's advertising; and that the rulings of the FAC in August 2020 are unlawful.

[8] The high court made the following declaratory orders. Clause 3.3 of the MOI is unconstitutional and invalid because it permits the ARB to decide complaints concerning advertisements of non-members. The ARB has no jurisdiction over non-members in any circumstances, and may not issue any rulings in relation to non-members or their advertising. The FAC's ruling (upholding Colgate's complaints against Bliss Brands' soap packaging with costs) is unlawful. It was set aside.

[9] Before addressing the correctness of these orders, it must again be emphasised that a court should decide only the issues before it, as pleaded by the parties. In *Fischer v Ramahlele*,<sup>3</sup> this Court said:

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<sup>3</sup> *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13, footnotes omitted; affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234.

‘[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 the 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.’

[10] This admonition, regrettably, was disregarded by the high court. Bliss Brands’ submission to the jurisdiction of the ARB should have put paid to any challenge to jurisdiction, or to the constitutionality of the Code or MOI. Instead, the issuance of the directive resulted in virtually an entirely new case for decision. Most recently, the Constitutional Court has affirmed the rule that constitutional issues should only be raised by courts *mero motu* in exceptional circumstances.<sup>4</sup> This is not such a case.

[11] The high court found that the submission to the ARB’s jurisdiction by Bliss Brands ‘cannot be said to constitute actual consent’. This finding is unsustainable on the evidence. The letter advising 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.

[12] Bliss Brands responded in full, contesting the merits of the complaint without raising any objection to the ARB’s jurisdiction, its legitimacy or its procedures. It participated fully in the hearing of the complaint at all stages of the proceedings, without a hint of protest. It accepted the Directorate’s ruling on

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<sup>4</sup> *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (3) SA 246 (CC) para 58.

the complaint in its favour. When Colgate's appeal to the AAC was upheld, Bliss Brands lodged an appeal to the FAC. It even sought an alternative order of remittal to the FAC for a rehearing, if the main relief for substitution of the FAC's ruling was refused.

[13] This Court has repeatedly held that a failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate submission to jurisdiction.<sup>5</sup> Bliss Brands unquestionably submitted to the jurisdiction of the ARB. Although the appeal could be disposed of solely on this basis, we were urged by counsel for the ARB not to do so, because the high court's pronouncements on the constitutionality of clause 3.3 of the MOI and its finding that the ARB may not issue rulings in relation to non-members or their advertising, will create legal uncertainty. This, in turn, will impede the ARB in carrying out its functions as a self-regulating body in the advertising industry.

[14] More fundamentally, however, the high court's analysis included statements of principle which the appellants have criticised. For example, the high court stated that the ARB is not empowered to determine breaches of the Code under the ECA; that the powers it exercises in relation to the regulation of advertising by non-members is not sourced in law and thus unconstitutional; that a non-member is 'denied the right to defend itself in a court of law on the merits of a complaint'; and that the AAC and FAC may reasonably be perceived to lack independence. We must proceed to address these criticisms and insofar as they are valid, so declare, since otherwise the high court's statements of principle would remain authoritative.

### **The ARB's powers are sourced in law**

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<sup>5</sup> *Naidoo v EP Property Projects (Pty) Ltd and Others* [2014] ZASCA 97 para 27; *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) para 22.

[15] The high court accepted that private bodies are capable of exercising public powers in the absence of statutory authorisation, if sourced in an instrument or agreement, such as the MOI. Despite this, it held that the ARB could not make decisions regarding the advertisements of non-members – even where this was being done for the benefit of the ARB’s members. The issue, the court said, was whether the exercise of public power was lawful.

[16] PAJA expressly contemplates that a juristic entity other than an organ of state may take decisions that constitute administrative action in terms of an ‘empowering provision’. The latter is defined as ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.<sup>6</sup> PAJA deliberately gives a person other than an organ of state a larger set of permissible empowering provisions than those given to organs of state.<sup>7</sup>

[17] The ARB’s MOI and Code, incorporating its Procedural Guide, constitute empowering provisions. The mere absence of a statutory source for these powers is therefore no barrier to the ARB validly exercising public functions. To hold otherwise would invalidate the actions of all other private bodies that perform vital public functions in the public interest, without any empowering statute, such as sports professional bodies,<sup>8</sup> the Press Council,<sup>9</sup> professional associations and the like. It would also force courts to adopt a strained interpretation of the phrase ‘public powers or public functions’ to exclude such private bodies, thereby limiting the protective reach of judicial review proceedings under PAJA and the principle of legality.

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<sup>6</sup> Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

<sup>7</sup> *South African National Parks v MTO Forestry (Pty) Ltd and Another* [2018] ZASCA 59; 2018 (5) SA 177 (SCA) para 50.

<sup>8</sup> *Ndoro and Another v South African Football Association* 2018 (5) SA 630 (GJ).

<sup>9</sup> *Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another* [2014] ZAGPJHC 194 para 19.



[18] The ARB is empowered to consider complaints on four bases:

(a) If the advertiser is a member of the ARB, or a member of one of the industry bodies that is a member of the ARB, then the ARB is entitled to consider the complaint because the advertiser has agreed to be bound by the Code, either directly or indirectly through its membership of an industry representative body or association.

(b) If the publisher of the advertisement is a member of the ARB, then the ARB is entitled to consider the complaint because the publisher has agreed to abide by the Code. The Code precludes those who are bound by it from accepting advertising that conflicts with the Code.

(c) If neither the publisher nor the advertiser are members of the ARB, the ARB is still entitled to consider the complaint on behalf of its members, so that they may decide whether or not to publish that advertisement. In *Herbex*,<sup>10</sup> this Court expressly confirmed that the ARB may do so.

(d) If the advertisement is broadcast by a broadcast service licensee in terms of the ECA, s 55(1) of the ECA confers on the ARB the power to consider complaints in respect of that advertisement.

[19] The high court's orders cut across (b), (c) and (d) and preclude the ARB from exercising its powers on those bases. As to (d), the court held that s 55 'does no more than identifying the Code as a code to which broadcasting service licensees must adhere. It does not empower the ARB to determine breaches of the Code'.

[20] Section 55 of the ECA provides:

**'Control over advertisements**

(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.

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<sup>10</sup> *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA).

(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 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.’

[21] These provisions make three things clear. First, all broadcast service licensees (whether members or non-members of the ARB) are obliged to comply with the Code as administered by the ARB. Second, there are two separate streams for the initial determination of complaints concerning breaches of the Code: if the licensee is an ARB member, the ARB is obliged to decide whether there has been a breach of the Code; where the licensee is not a member of the ARB, the Complaints and Compliance Committee of Independent Communications Authority of South Africa (ICASA) decides that issue. And third, it is only after there has been a finding of a breach of the Code that the licensee must be dealt with in accordance with the applicable provisions of ss 17A to 17H of the ICASA Act.

[22] Any other interpretation would render meaningless the words, ‘who are not members of the Advertising Standards Authority of South Africa’ in s 55(2). It is a settled principle that every word in a statute must be given a meaning and not be treated as tautologous or superfluous.<sup>11</sup> This is buttressed by the provisions of s 55(1), which enjoins all broadcast service licensees to comply with the Code: it cannot be suggested that such compliance by licensees who are members of the ARB, is contractual. Thus, the contention on behalf of Bliss Brands that s 55(2) only applies to non-members and does not confer on the ARB any statutory power to determine breaches of the Code by licensees who

<sup>11</sup> *Wellworths Bazaars Limited v Chandler's Limited and Another* 1947 (2) SA 37 (A) at 43, affirmed in the minority judgment of Cameron J in *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC) para 99.

are its members, because they are subject to contractual obligations, is incorrect. And a construction that the obligation on all broadcast service licensees to comply with the Code, and that the sanctions for its breach are regulated by the ECA, but that breaches of the Code by licensees who are members of the ARB are regulated contractually, is plainly insensible.<sup>12</sup>

[23] Parliament has determined that any advertiser who wishes to advertise by means of a broadcasting service licensee must comply with the provisions of the Code. The order of the high court prevents the ARB from performing this statutory duty in terms of s 55 of the ECA, by prohibiting the ARB from determining any complaint in respect of non-member advertising, even where that advertisement is broadcast by a broadcasting service licensee. It does so in circumstances where the issue did not arise for determination in the context of the dispute between the parties.

[24] As regards the powers of the ARB under (a), (b) and (c), 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.<sup>13</sup> 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. I revert to this aspect below.

### **The *Herbex* decision**

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<sup>12</sup> *Natal Joint Municipal Pension Fund v Endumeni* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

<sup>13</sup> Section 16(1) of the Constitution states that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. Section 18 provides that everyone has the right to freedom of association.

[25] Herbex, a seller of complementary medicines, had for a number of years submitted to the jurisdiction of the ASA, even though it was not a member. It then sought an order declaring that the ASA's rulings were legally unenforceable against non-members. The ASA acknowledged that it had no jurisdiction over non-members, but argued that it was entitled to make determinations on the advertisements of non-members for the benefit of its own members.

[26] The high court (Du Plessis AJ) rejected the ASA's arguments, holding that it had no lawful power to make rulings on the advertisements of non-members in any circumstances, without the consent of the non-member. It made the following order:

'It is declared that the respondent [the ASA] has no jurisdiction over any person or entity who is not a member of the respondent and that the respondent may, in the absence of a submission to its jurisdiction not require the applicant [Herbex] to participate in its processes, issue an instruction, order or ruling against the applicant or sanction it.'<sup>14</sup>

[27] The ASA appealed to this Court. On the day of the hearing the parties reached a settlement. This Court endorsed the settlement, upheld the appeal and set aside the high court's order in substantial part, replacing it as follows:

'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 jurisdiction, require non-members to participate in its processes, issue an 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's is directed to include in its standard letter of complaint the contents of para 1 and that a non-member is not obliged to participate in any ASA process, but that

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<sup>14</sup> *Herbex (Pty) Ltd v Advertising Standards Authority* [2016] 3 All SA 146 (GJ) para 90.

should it not participate, the ASA may still consider the complaint, for the purposes set out in para 1.2.’

[28] The whole of clause 3.3 of the ARB’s MOI is taken almost verbatim from paragraph 1 of this Court’s order in *Herbex*. It states:

‘The Company 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 Company 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.’

[29] The high court declared that clause 3.3 is unconstitutional. It reasoned that the part of paragraph 1.1 of this Court’s order in *Herbex* which states that ‘the respondent [the ASA] has no jurisdiction over any person or entity who is not a member of the respondent’, is an order *in rem*, but that paragraphs 1.2 and 2 are orders *in personam*, confined to the parties to the settlement agreement, and ‘not of general application’.

[30] These conclusions are incorrect. The *Herbex* order, while granted by consent, is an order of court which is no less binding or effective. A court, in exercising its discretion whether to make a settlement agreement an order of court is required to assess the ‘wider impact which its order may potentially have’.<sup>15</sup> It may not simply accept any settlement order proposed by the parties and is required to ‘act in a stewardly manner’. It has the power to insist on changes to proposed terms of the settlement and may even reject the settlement outright.<sup>16</sup> Once a settlement agreement is made an order of court, it stands to be interpreted like any other order.<sup>17</sup>

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<sup>15</sup> *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 23.

<sup>16</sup> *Eke v Parsons* fn 15 para 34.

<sup>17</sup> *Eke v Parsons* fn 15 para 29.

[31] When a court considers a judgment *in rem* on appeal, it may not simply set that judgment aside by virtue of a settlement agreement between the litigating parties. It must be satisfied that ‘the setting-aside is justified by the merits of the appeal’.<sup>18</sup> This is not a novel principle, but settled law that has consistently been applied by this Court.<sup>19</sup>

[32] Applied to the present case, this Court in *Herbex* was satisfied that on the merits, setting aside the prohibition on the ASA from deciding whether an advertisement breached the Code, so as to enable it to determine, on behalf of its members, whether they should accept an advertisement for publication or withdraw the advertisement if it has been published, was justified.<sup>20</sup> Consequently, the declaratory relief which this Court granted in *Herbex* – the whole order – was plainly one *in rem*: it pronounced upon the limits and powers of the ASA in relation to every non-member advertiser, not only Herbex.

[33] This conclusion is reinforced by the terms of the order. It granted the ASA (now the ARB) the power to consider and issue a ruling to its members ‘on any advertisement, regardless of by whom it is published’, and to determine, on behalf of its members, whether they ‘should accept any advertisement before it is published or should withdraw any advertisement if it has been published’. The addition of the phrase ‘regardless of by whom it is published’, places it beyond question that the order in *Herbex* is not confined to the parties in that litigation.

[34] The high court declared that clause 3.3 of the MOI is unconstitutional, contrary to the order made and precedent established in *Herbex*. This Court has

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<sup>18</sup> *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 1.

<sup>19</sup> *Marine 3 Technologies Holdings (Pty) Ltd v Afrigroup Investments (Pty) Ltd and Another* [2014] ZASCA 208; 2015 (2) SA 387 (SCA) para 6; *The Gap Inc v Salt of the Earth Creations (Pty) Ltd and Others* [2012] ZASCA 68; 2012 (5) SA 259 (SCA) para 2.

<sup>20</sup> *Herbex* fn 14 para 17.2.

emphasised that the doctrine of precedent is ‘an intrinsic feature of the rule of law’, without which ‘there would be no certainty, no predictability and no coherence’.<sup>21</sup> To deviate from this doctrine is ‘to invite legal chaos’.<sup>22</sup> The order in *Herbex* ought to have disposed of Bliss Brands’ constitutional challenge.

### **Constitutional rights: freedom of expression and association**

[35] The ARB’s members are entitled to refuse to publish advertising as part of their right to freedom of expression in s 16 of the Constitution, a right recognised in international law. General Comment No 34 of the United Nations Human Rights Committee states:

‘Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society . . .

Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one’s opinion necessarily includes freedom not to express one’s opinion.’<sup>23</sup>

[36] English authority similarly demonstrates that the right to freedom of thought, opinion and expression, extends to the freedom not to hold and not to have to express opinions.<sup>24</sup> American cases are to the same effect: it is a violation of the First Amendment to force an individual to be an instrument for advocating public adherence to an ideological point of view that he or she finds unacceptable.<sup>25</sup> For corporations as for individuals, the right to speak includes within it the choice of what not to say.<sup>26</sup>

<sup>21</sup> *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 100.

<sup>22</sup> *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC) para 29.

<sup>23</sup> General Comment No 34 on Article 19 of the International Covenant on Civil and Political Rights (12 September 2011) paras 2 and 10.

<sup>24</sup> *RT (Zimbabwe) and Others v Secretary of State for the Home Department; KM (Zimbabwe) v Secretary of State for the Home Department* [2012] 4 All ER 843 para 32.

<sup>25</sup> *Wooley v Maynard* 430 U.S. 705 (1977) at 714.

<sup>26</sup> *Miami Herald Publishing Co v Tornillo* 418 U.S. (1974) 241 at 258; *Pacific Gas and Electric Company v Public Utilities Commission of California* 475 U.S. 1 (1986) at 10-11 and 15-17.

[37] In *Remuszko v Poland*,<sup>27</sup> the applicant complained that the refusal by a newspaper to publish a paid advertisement, which was upheld by the courts, violated his right to freedom of expression protected by Article 10 of the European Convention on Human Rights.<sup>28</sup> The European Court of Human Rights (ECHR) agreed with the conclusion of the domestic courts that in a pluralistic media marketplace, publishers should not be obliged to carry advertisements proposed by private parties, and that this was compatible with the freedom of expression standards under the Convention.<sup>29</sup> The ECHR held: ‘[P]rivately held newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State’s obligation to ensure the individual’s freedom of expression does not give private citizens an unfettered right of access to the media in order to put forward opinions. . . . In the Court’s view these principles apply also to the publication of advertisements. An effective exercise of the freedom of the press presupposes the right of the newspapers to establish and apply their own policies in respect of the content of advertisements. It also necessitates that the press enjoys freedom to determine its commercial policy in this respect and to choose with whom it deals.’<sup>30</sup>

[38] The high court distinguished *Remuszko* on the basis that it was ‘not a case where the right to commercial activity was completely cut off, as in the case when an ad alert is issued’. Where an offending advertiser has ignored a reasonable request for co-operation, the ARB may issue an ad alert to its members, who may not carry the offending advertisement.

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<sup>27</sup> *Remuszko v Poland* (Application no 1562/10), 16 July 2013.

<sup>28</sup> Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms states: ‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.  
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

<sup>29</sup> *Remuszko* fn 26 para 86.

<sup>30</sup> *Remuszko* fn 26 para 79.



[39] But the finding that the effect of an ad alert is to completely cut off commercial activity, has no basis in the evidence. The high court concluded that the ARB's public power resides in 'the coercive effect of the ad-alert', because the members of the ARB comprise 'the whole of the print, digital and broadcast media in South Africa'. There is no such allegation in the founding papers. It was made for the first time in reply. This is impermissible.<sup>31</sup> And the allegation that a product with offending packaging cannot be offered for sale, was not pleaded in any of the affidavits. The founding affidavit states that the members of the ARB comprise 'major participants in the advertising industry' and 'represent a wide cross-section of the advertising media, agencies and marketers'. In its answering affidavit, the ARB expressly denied that its members represent the entire advertising industry and set out its membership, which comprises six members and their members.

[40] Even on Bliss Brands' version, the effect of an ad alert issued by the ARB is that ARB members will decline to publish that particular advertisement. It remains open to the advertiser to publish that advertisement on any platform unconnected to the ARB, for example, on its own website, on social media including Facebook or Instagram, or through any advertising or media house which is not a member of the ARB.

[41] The ARB's power to consider complaints relating to advertisements by non-members for the benefit of its own members, advances the right to freedom of association. The Constitutional Court has held that the right of association, 'enables individuals to organise around particular issues of concern' and permits a group 'to collectively contest and ameliorate the structure of social power within its midst'.<sup>32</sup>

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<sup>31</sup> *Director of Hospital Services v Mistry* 1979 (1) SA626 (A) at 635H-636F.

<sup>32</sup> *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* [2020] ZACC 7; 2020 (6) BCLR 725 (CC); (2020) 41 ILJ 1846 (CC) at 737.

[42] This is precisely what the members of the ARB have done. They have organised around the shared goal of promoting ethical standards in advertising, as reflected in the Code. They have agreed to collectively delegate decision-making to the ARB's expert adjudicative bodies that determine complaints on their behalf. In doing so, the ARB's members have given effect to two important components of the s 18 right: the right of self-regulation; and the right to choose not to associate.

[43] The right to self-regulation includes the right of associations to adopt rules and standards to regulate their conduct in their dealings with the outside world.<sup>33</sup> In *Datafin*,<sup>34</sup> Sir John Donaldson MR explained this type of self-regulation as follows:

‘Self-regulation . . . can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not necessarily morally wrong or contrary to the public interest, unlawful or even undesirable.’

[44] *Datafin* has frequently been cited by our courts as a leading authority on the judicial review of private bodies.<sup>35</sup> It concerned the Panel on Takeovers and Mergers which, like the ARB, exercises public powers primarily based in contract. The Panel's Code lacks the force of law but states that those wishing to take advantage of securities markets in the United Kingdom should conduct themselves according to its Code, and that those who do not conduct themselves in this way cannot expect to enjoy the facilities of the securities markets and

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<sup>33</sup> The African Commission on Human and People's Rights has acknowledged self-governance as an essential component of freedom of association. The ‘Guidelines on Freedom of Association and Assembly in Africa’, para 36(a) state: ‘Associations shall be self-governing and free to determine their . . . internal accountability mechanisms and other internal governance matters’.

<sup>34</sup> *R v Panel on Takeovers and Mergers, ex parte Datafin plc and Another (Norton Opax plc and Another intervening)* [1987] 1 All ER 564 at 567.

<sup>35</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 32; *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA) para 25.

may find that those facilities are withheld. The court observed that despite the lack of any authority de jure, the Panel,

‘... exercises immense power de facto by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting on the alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base.’<sup>36</sup>

[45] The ARB exercises similar powers, save that its powers in respect of non-members are circumscribed. As was held in *Herbex*, absent a submission to jurisdiction, the ARB may only make rulings on the advertisements of non-members for the benefit of its own members, which are not binding or legally enforceable against non-members. The impact of ARB rulings on non-members is therefore indirect, in cases where they engage the services of an ARB member to approve, create, disseminate or publish their advertising. Members of the ARB are bound to comply with the Code and ARB decisions, and are obliged to decline to approve, create or carry advertisements that breach the Code. Non-members who do not wish to meet the ethical standards contained in the Code are free to approve, create and publish their advertising using the services of non-members of the ARB.

[46] The right of association includes the right to dissociate, as the Constitutional Court has recently held:

‘In sum, choosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right. A restraint on any of these choices is a negation of the right.’<sup>37</sup>

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<sup>36</sup> *Datafin* fn 33 at 564.

<sup>37</sup> *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11; 2020 (6) SA 257 (CC) para 58.

[47] These rights of association and dissociation entitle every individual member of the advertising industry to choose what advertisers they wish to associate with and what advertisements they approve, create or carry, subject to certain legal limits. This is what the members of the ARB have done.

[48] In turn, Bliss Brands and other non-members have exercised their right to dissociate by choosing not to join the ARB. They are free to make that election. Having done so, Bliss Brands cannot now demand that members of the ARB should ignore their contractual obligations by carrying advertisements that breach the Code. Nor can Bliss Brands lawfully demand that the ARB may not issue rulings for the guidance of its members. In short, the right to dissociate does not give Bliss Brands the unfettered right to dictate to the ARB and its members how they should exercise their rights of association.

### **Access to court**

[49] The remaining constitutional challenges can be dealt with shortly. They are all variations on a theme: the ARB's processes infringe the right of non-members of access to court under s 34 of the Constitution,<sup>38</sup> and usurp judicial functions in various respects. The high court held that 'a constraint on the right to trade freely on the scale precipitated by an ad alert is inherently an infringement of the rights of the person and property and entails the protections under section 34'.

[50] The existence of an adjudicative administrative tribunal such as the ARB does not however limit the right of access to courts. It is a 'tribunal or forum' envisaged in s 34 of the Constitution.<sup>39</sup> Its decisions are subject to judicial control at two levels. First, a dissatisfied respondent is entitled to apply to court

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<sup>38</sup> Section 34 of the Constitution provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

<sup>39</sup> *Metcash Trading Limited v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) para 47.

for an interdict suspending the operation of a decision pending a challenge (as Bliss Brands did in this case). Second, once internal processes are concluded, decisions of the ARB are subject to judicial review.<sup>40</sup> And that is precisely what Bliss Brands did in this case – it took the decisions adverse to it on review.

[51] In this regard, the high court's reliance on *Chief Lesapo*<sup>41</sup> was misplaced. The case involved a constitutional challenge to a legislative provision which permitted a bank to seize a defaulting debtor's property, sell it by public auction and defray the debt owed, without recourse to a court of law. The statute was struck down on the ground that it rendered the bank a judge in its own cause and breached the fundamental principle against self-help in circumstances where the coercive power of the State was invoked without the sanction of a court. By contrast, the ARB's decision-making processes are strictly governed by the Code, the MOI and its internal procedures. Its adjudicative procedures, with rights of appeal before bodies that include legal practitioners and retired judges, are the very antithesis of self-help. As with any completed administrative process that adversely affects a person's rights, a dissatisfied person may approach a court to review decisions taken by the ARB's adjudicative bodies. This is a right guaranteed by ss 33 and 34 of the Constitution.

[52] The high court upheld the complaint by Bliss Brands that the AAC and FAC lack independence due to the funding model which, the court held, 'creates room for the perception of a lack of independence where the complainant is a funder and a member and the respondent is a non-member', and in the nomination process for members of the AAC and FAC.

[53] This finding however is insupportable on the evidence. Not every member of the ARB is a member or funder of, or contributor to, the ARB. On both these committees only one member represents a funder, and not every

<sup>40</sup> *Metcash* fn 35 paras 58, 60 and 62.

<sup>41</sup> *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

member of the AAC or FAC is a funder. No reasonable, objective and informed person would consider it likely that the few funders (who are almost exclusively individual companies) influence the running of the entire ARB. Funders represent a minority: 38 out of more than 335 direct and indirect national and international members of the ARB. The members of the AAC or FAC are not informed as to whether or not a complainant or respondent is a funder. Further, the structure of the committees promotes independence: the Chairperson of the AAC must be an independent practising advocate; and the chairperson of the FAC, an independent practising or retired legal practitioner or judge.

[54] The high court concluded that the procedures of the ARB lack fairness because the ‘Procedural Guide makes no provision for the rules of evidence . . . applicable to court proceedings’, and no appeal to a court lies against a decision of the ARB. Then it said that a non-member is ‘denied the right to defend itself in a court of law on the merits of the complaint’, and that ‘a determination by the ARB as to whether clauses 8 and 9 [of the MOI] have been breached impliedly ousts the jurisdiction of the ordinary courts by establishing a parallel dispute resolution process’.

[55] The court erred. No dissatisfied respondent in an adjudicative administrative process is entitled to ‘appeal’ to a court against an administrative decision – the remedy is to review under PAJA. There is no principle of law requiring an adjudicative administrative tribunal to adopt the same rules of evidence that apply in courts. In *Turner*<sup>42</sup> Botha JA said:

‘The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him.

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<sup>42</sup> *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646F.

[56] The high court seems to have overlooked the flexible requirements of procedural fairness under PAJA. Section 3(2)(a) provides that '[a] fair administrative procedure depends on circumstances of each case'. Section 3(4) permits departures from requirements of procedural fairness under s 3(2) where this is reasonable or justifiable. Section 3(5) of PAJA permits an administrator to follow a procedure that is 'fair but different' to the requirements of s 3(2).

[57] Finally, on this aspect, the high court stated that an ad alert 'has all the features of an indirect boycott', which it said was relevant to a consideration of the constitutionality of the ARB's process because of the element of unfairness. The fact that an ad alert has the effect of a boycott was not pleaded and therefore not traversed in the affidavits before the high court.

[58] The high court held that the issues raised by clauses 8 (exploitation of advertising goodwill) and 9 (imitation) of the Code are squarely legal issues which entail the same enquiries as those which courts are called upon to consider in cases dealing with passing off and contraventions of copyright and trade marks. However, the mere fact that elements of a complaint before the ARB might overlap with elements of a cause of action that could be pursued in a court or other tribunal, does not mean that the ARB ousts the court's jurisdiction.<sup>43</sup> The ARB and the courts are different fora with distinct powers. The ARB operates consensually and is not permitted to determine questions as to whether the packaging or get-up of a particular product constitutes passing off or breach of copyright. The ARB may only determine whether its Code has been breached. It does not exercise a judicial function when doing so.

## **Conclusion**

[59] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

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<sup>43</sup> *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) paras 20 and 21.

2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and replaced by the following:

‘The relief sought in paragraphs 1, 4, 5, 6 and 8 of the applicant’s amended notice of motion is dismissed with costs, including the costs of two counsel.’

3 The relief sought by the applicant in paragraphs 2, 3 and 7 of its amended notice of motion is remitted to the Gauteng Division of the High Court, Johannesburg for determination.

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A SCHIPPERS  
JUDGE OF APPEAL



Appearances:

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