IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: 132/22

In the matter between:

BLISS BRANDS (PTY) LTD **Applicant**

and

ADVERTISING REGULATORY BOARD NPC **First Respondent**

COLGATE-PALMOLIVE (PTY) LTD **Second Respondent**

COLGATE-PALMOLIVE COMPANY **Third Respondent**

SECOND & THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

PRIYAN RADHAKRISHNAN PILLAY

state under oath as follows:

1 I am employed by the Second Respondent ("Colgate South Africa") as its Regional Legal Director: Sub-Saharan Africa.

2 I am authorised by Colgate South Africa and the Third Respondent, Colgate-Palmolive Company (collectively referred to as "Colgate") to depose to this

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affidavit. I have deposed to various affidavits in these proceedings on behalf of Colgate.

3 The facts contained in this affidavit are within my personal knowledge, unless otherwise stated, and are true and correct, to the best of my knowledge and belief.

4 Where I address the relevant law, I do so on the advice of Colgate's legal representatives.

INTRODUCTION AND OVERVIEW

5 The applicant, Bliss Brands (Pty) Ltd ("Bliss"), is a soap producer. It received an adverse decision from the Advertising Regulatory Board ("ARB") which found that its soap packaging breached the Code of Advertising Practice ("Code").

6 Bliss submitted to the ARB's jurisdiction, was successful at first instance, lost on an internal appeal, and then launched a further internal appeal which was ultimately unsuccessful. It did not object to the ARB's jurisdiction, nor did it claim that its participation in the ARB's processes was anything but voluntary.

7 Bliss launched two separate urgent applications for interim relief in the High Court, together with a review application based on the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). These applications did not question the ARB's jurisdiction and powers. Bliss even sought an alternative order of remittal back to the ARB if its review was successful.

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8 Bliss' case changed fundamentally when Fisher J, of her own accord, directed the parties to address constitutional issues that did not appear on the papers. Bliss seized the opportunity. It introduced a wide-ranging attack on the constitutionality of the ARB's Memorandum of Incorporation ("MOI") and claimed, for the first time, that it had not consented to the ARB's jurisdiction. This new version was opportunistic.

9 In the High Court, Fisher J granted a series of orders, dismantling the system of self-regulation of the advertising industry that has existed for many years. In doing so, the High Court disregarded the Supreme Court of Appeal's ("SCA") 2017 judgment in *Herbex*[1], which had endorsed this system and defined its powers in respect of non-members. The original review by Bliss simply fell by the wayside.

10 The SCA correctly held that there was no proper foundation for the High Court's *mero motu* interventions. It further held that the High Court breached the doctrine of precedent by granting orders that were in conflict with *Herbex*. Either of those grounds would have been sufficient to dismiss Bliss' challenge. Nevertheless, the SCA judgment went on to address each of the further grounds raised by Bliss and rejected them in turn.

11 Colgate submits that it is not in the interests of justice to grant leave to appeal for the following reasons:

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[1] *Advertising Standards Authority v Herbex* 2017 (6) SA 354 (SCA).

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11.1 First, Bliss has failed to demonstrate any reasonable prospects of success in overturning the SCA's findings and order. The SCA's judgment dealt with Bliss' constitutional challenge comprehensively and correctly, applying settled principles laid down by this Court.

11.2 Second, while this matter raises constitutional issues, those issues were the product of an impermissible *mero motu* intervention in the High Court. Bliss has opportunistically pressed those issues in pursuit of its narrow commercial interests.

12 In what follows, I address the following topics in turn:

12.1 First, the relevant factual background to this matter and the litigation history;

12.2 Second, jurisdiction and leave to appeal;

12.3 Third, self-regulation of the advertising industry promotes the rights to freedom of association and expression.

12.4 Fourth, why Bliss' grounds of appeal lack any reasonable prospects:

12.4.1 There was no basis for the High Court to challenge the constitutionality of the ARB's jurisdiction *mero motu*;

12.4.2 The ARB's powers are lawful;

12.4.3 The SCA's judgment in *Herbex* was binding and determinative;

12.4.4 The ARB's powers are consistent with the section 34 right of access to court.

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12.4.5 The SCA's orders are sound.

BACKGROUND

Self-regulation of the advertising industry

13 Advertising in South Africa is governed by a system of self-regulation, administered by the ARB.

14 The ARB is an independent, non-profit body established with the purpose of regulating the advertising industry in the public interest. It was created to fill the gap that was left when its predecessor, the Advertising Standards Authority ("ASA"), went into liquidation.

15 The ARB is the custodian of the Code, a set of ethical standards based on the International Code of Advertising Practice. The Code seeks to ensure that advertising is informative, factual, honest, decent, and lawful. In doing so, it addresses a range of important matters of public interest, including:

15.1 The protection of children;

15.2 The prohibition of gender stereotyping and other forms of unfair discrimination;

15.3 The depiction of violence, including gender-based violence;

15.4 Honesty and the avoidance of deception; and

15.5 The maintenance of basic professional standards in the advertising industry.

16 The ARB provides an efficient, cost-effective complaints mechanism where an advertiser breaches the Code. Members of the public may submit complaints at no charge. The ARB's Directorate is responsible for receiving and adjudicating complaints at first instance. Aggrieved parties may appeal the ruling to the Advertising Appeals Committee ("AAC"). A further appeal lies to the Final Appeal Committee ("FAC").

17 For the most part, the ARB's powers are sourced in contract, except for broadcasters who are bound by the Code in terms of section 55 of the Electronic Communications Act 36 of 2005.

18 The ARB currently has six industry bodies as its members. In terms of its MOI, each of its members is bound by the Code and undertakes to bind its respective members to the Code. Accordingly, where I refer to members of the ARB, I include members of members.

The ARB's powers in respect of non-members

19 The SCA has previously upheld the lawfulness of this scheme of self-regulation in *Herbex*, a judgment handed down in 2017.

20 For a number of years, Herbex, a manufacturer of complementary medicines, submitted to the jurisdiction of the ARB's predecessor, the ASA. After receiving adverse decisions, Herbex then launched a far-reaching constitutional challenge, in which it sought an order declaring that the ASA's rulings were not legally enforceable against non-members.

21 In that litigation, the ASA acknowledged that it had no jurisdiction over non-members, absent their consent, and that its rulings were not legally binding on non-members. Instead, it argued that it was entitled to make determinations on non-members' advertisements for the benefit and guidance of its own members.[2]

22 In 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, absent the consent of the non-member.[3]

23 The SCA's judgment overturned the High Court judgment and order. The SCA granted a declaratory order, endorsing a settlement agreement, in which it clarified the ASA's powers in respect of non-members in the following terms:

> *"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 para 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 para 1.2."*

24 After the ASA went into liquidation, the ARB was created to continue the ASA's work in upholding and administering the Code.

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[2] Ibid at para 16.
[3] Ibid at para 31.

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25 The ARB's MOI reproduced the *Herbex* order, almost word-for-word, in clause 3.3:

> *'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 an advertisement regardless of by whom it is published (including non-members) to determine on behalf of its members whether its members should accept any advertisement before it is published or should withdraw an advertisement if it has been published."*

26 The ARB is therefore empowered to consider complaints concerning non-members' advertisements, for the benefit of its own members. Unless the non-member submits to its jurisdiction, the ARB cannot compel non-members to participate in its processes and its decisions are not legally binding on them. Its decisions nevertheless provide important guidance to members on their obligations under the Code.

The complaint

27 In December 2019, Colgate lodged a complaint with the ARB against Bliss' Securex soap packaging. Colgate contended that this packaging breached the Code in two respects: it exploited the advertising goodwill of Colgate's Protex packaging architecture, in contravention of clause 8 of the Code; and it imitated the Protex packaging architecture, in contravention of clause 9 of the Code.

28 Bliss is not a member of the ARB. The ARB accordingly received and considered the complaint on the strength of the *Herbex* order and its powers under clause 3.3 of the MOI.

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29 On 10 December 2019, the ARB sent a letter to Bliss informing it of the complaint. As the SCA's *Herbex* order directed, the letter set out clause 3.3 of the MOI in full, informed Bliss of the limits of its jurisdiction over non-members, and requested Bliss to "*inform us if you do not consider yourself to be bound by the ARB*". Bliss was specifically informed that it was not obliged to respond or to furnish a defence.

30 In response to this letter, Bliss contested the merits of the complaint without raising any objection to the ARB's jurisdiction. It then participated fully at all stages of the proceedings, without a hint of protest.

31 This was not Bliss' first time before the ARB. It had previously submitted to the ARB's jurisdiction in the *Sta-Soft / Maq-Soft*[4] matter and complied with its ruling without any objection.

32 In early 2020, the ARB Directorate, the first level of the ARB's adjudicative process, found that Bliss' Securex packaging did not contravene the Code.

33 Colgate then appealed against the Directorate's decision to the AAC, which gave a unanimous decision finding that Bliss' packaging breached clauses 8 and 9 of the Code.

34 Bliss then launched an appeal to the FAC, which found in favour of Colgate in a split decision. Its chairperson, Judge Ngoepe, cast the deciding vote. The FAC's order required the withdrawal of the offending packaging within three months.[5]

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[4] No 327 - MAQ Soft - Sta-Soft (ARB).
[5] In terms of clause 15.3.7 of the ARB's Procedural Guide, this applies to the dissemination of new packaging, and does not require on-shelf removal.

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The High Court proceedings

35 Bliss proceeded to launch an urgent application to suspend the FAC rulings, pending a review application which had not been launched. Yacoob J dismissed the application in its entirety.

36 Undeterred by this set-back, Bliss launched a second urgent application for interim relief, which was framed in almost identical terms. The only difference was that Bliss now included a review application for final relief.

37 The review application was a garden variety PAJA review, brought on narrow technical grounds. Bliss made no attempt to challenge the constitutionality of the ARB's jurisdiction, nor did it suggest that its participation in the ARB's proceedings was anything but voluntary.

38 The complexion of the case then changed fundamentally before Fisher J. The learned judge questioned the constitutionality of the ARB's jurisdiction *mero motu* and issued directives to the parties to address these matters in argument.

39 Fisher J proceeded to grant Bliss' second application for interim relief, based on the constitutional issues that she had raised *mero motu*. The interim relief judgment concluded that *"the advent of the constitutional challenge which I have raised has changed the inquiry as to whether interim relief should be granted to Bliss"* and that this new development warranted interim relief.

40 Bliss then seized on the opportunity created by Fisher J's *mero motu* interventions. It delivered an amended notice of motion and supplementary

founding affidavit in which it raised various constitutional attacks on the ARB's powers and MOI. It further contended, for the very first time, that its participation in the ARB's processes was not consensual.

The judgment of Fisher J

41 Fisher J handed down judgment in the application for final relief on 21 May 2021. The order declared clause 3.3 of the ARB's MOI to be unconstitutional and invalid, as it permits the ARB to determine complaints regarding the advertisements of non-members,[6] even where they submit to the jurisdiction of the ARB.[7] Fisher J further declared that the ARB has no jurisdiction over non-members in any circumstances, and may not issue any rulings in respect of non-members' advertising.[8]

42 In paragraph 5 of the order, the Court proceeded to declare unlawful and set aside the FAC decisions, in which the FAC upheld Colgate's complaints against Bliss Brands' soap packaging.[9] Fisher J did so without deciding the original grounds of review as pleaded by Bliss, holding that it was unnecessary to determine those grounds in light of the constitutional challenge.[10]

43 The respondents then appealed to the SCA, with the High Court's leave. The parties agreed to confine the appeal to the constitutional challenge, on the basis

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[6] HC Judgment para 1.
[7] Ibid para 2.
[8] Ibid p 715 paras 3 – 4.
[9] Ibid p 715 para 5.
[10] Ibid p 713 para 135.

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that Bliss' original grounds of review would be remitted back to the High Court if the constitutional challenge failed.

The SCA judgment

44 In a unanimous judgment authored by Schippers JA (Petse DP, Plasket and Hughes JJA and Matojane AJA concurring), the SCA upheld the respondents' appeal and dismissed Bliss' constitutional challenge. The SCA judgment makes six key findings:

44.1 First, there were no exceptional circumstances, let alone pleaded facts, which warranted the High Court's *mero motu* interventions on the constitutionality of the ARB's powers.[11] This was because the constitutional issues did not arise on the papers, Bliss had clearly submitted to the jurisdiction of the ARB, and it raised no complaint until the High Court raised the issue for the first time. In reaching this conclusion, the SCA applied this Court's guidance in *NDPP Transvaal*[12] and *Amabhungane*[13] on the scope and limits of *mero motu* interventions.

44.2 Second, while the appeal could be disposed of on that basis alone, the SCA held that it was necessary to address and correct the High Court's mistaken findings, to ensure legal certainty going forward.[14]

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[11] SCA Judgment paras 10 – 13.
[12] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 40 - 41
[13] *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.
[14] SCA Judgment para 14.

44.3 Third, on the legality of the ARB's powers, the SCA held that the absence of a statutory source for the ARB's powers does not render its functions unlawful. It exercises its powers in terms of empowering provisions, found in its MOI and the Code. In respect of broadcasters, these powers have a statutory source under section 55 of the ECA.[15]

44.4 Fourth, on the *Herbex* judgment, the SCA confirmed that *Herbex* was binding and determinative of the ARB's powers to consider complaints regarding the advertisements of non-members.[16] The *Herbex* order was an order *in rem*, binding on the world, and the High Court was not entitled to disregard it, let alone make an order directly in conflict with that order. This was consistent with this Court's judgments underlining the importance of the doctrine of precedent.[17]

44.5 Fifth, on the implicated rights, the ARB's powers of self-regulation are consistent with the rights to freedom of association and freedom of expression.[18] In reaching this conclusion, the SCA faithfully applied this Court's recent judgments on the scope and limits of the rights to association and dissociation.[19]

44.6 Sixth, the ARB's adjudicative powers do not deprive non-members of their rights to access court under section 34 of the Constitution.[20] Bliss' further

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[15] SCA Judgment paras 15 – 24.
[16] SCA Judgment paras 25 – 34.
[17] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC) para 29.
[18] SCA Judgment paras 35 – 48.
[19] *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; *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.
[20] SCA Judgment paras 49 – 58.

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complaints about alleged unfairness in the ARB's processes and the alleged usurpation of judicial functions lacked any merit.[21] This was a direct application of this Court's previous judgments on this right.[22]

JURISDICTION AND LEAVE TO APPEAL

45 Colgate accepts that this application raises constitutional issues. However, it is not in the interests of justice to grant leave to appeal for two primary reasons.

46 First, and most significantly, Bliss' grounds of appeal lack any reasonable prospects of success, as I will demonstrate below. These grounds are all comprehensively addressed in the SCA's judgment. Bliss has failed to demonstrate any reasonable prospect that this Court would come to a different conclusion on matters of settled law.

47 Second, the constitutional issues in this matter arose through an improper *mero motu* intervention, which ought not have occurred, and which Bliss has pursued solely for the purpose of advancing its narrow commercial interests.

48 Bliss has launched this application to keep alive the interim interdict granted by the High Court, which allows it to continue using soap packaging that is in breach of the Code pending the final determination of the constitutional challenge. Bliss has made a commercial calculation that this application will buy it more time, even though its application lacks any prospects.

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[21] SCA Judgment paras 52 – 58.

[22] *Chief Lesapo v North West Agricultural Bank And Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC); *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC); *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC).

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THE NATURE AND IMPORTANCE OF SELF-REGULATION

49 Before addressing Bliss' individual grounds of appeal, it is necessary to respond to an insinuation running throughout Bliss' application: that the ARB's powers of self-regulation are inherently unconstitutional and oppressive.

50 As the SCA correctly held, the ARB serves a vital public purpose, by maintaining ethical standards in the advertising industry. In doing so, this system of self-regulation promotes the rights to freedom of association, freedom of expression, and the public interest.

51 This Court held in *National Union of Metal Workers of South Africa*[23] that freedom of association "*enables individuals to organise around particular issues of concern*" and "*to collectively contest and ameliorate the structure of social power within its midst*".

52 This, the SCA held, is "*precisely what the members of the ARB have done*", as "*[t]hey have organised around the shared goal of promoting ethical standards in advertising, as reflected in the Code.*" The SCA added that "*[t]hey have agreed to collectively delegate decision-making to the ARB's expert adjudicative bodies that determine complaints on their behalf.*"[24]

53 The ARB members' exercise of associational rights gives effect to two important components of the section 18 right: the right to self-regulate and the right to dissociate.[25]

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[23] *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 para 33.
[24] SCA Judgment paras 41 – 42.
[25] SCA Judgment para 42.

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54 The SCA noted that the African Commission on Human and People's Rights has acknowledged self-regulation as an essential component of freedom of association. Its "Guidelines on Freedom of Association and Assembly in Africa" emphasise that "*[a]ssociations shall be self-governing and free to determine their … internal accountability mechanisms and other internal governance matters.*"[26]

55 The SCA further referred, with approval, to *R v Panel on Take-overs and Mergers, ex parte Datafin plc* (*Datafin*),[27] where Sir John Donaldson MR explained the value of this type of self-regulation in the following terms:

> "'*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.*" (Emphasis added)

56 The ARB exercises similar powers of self-regulation as described in this passage, but its powers in respect of non-members are circumscribed.[28] Where a non-member does not submit to the ARB's jurisdiction, it 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.

57 The impact of ARB decisions on non-members, who have not submitted to its jurisdiction, is therefore indirect. In practical terms, this means that:

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[26] African Commission "Guidelines on Freedom of Association and Assembly in Africa", adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, at para 36(a).
[27] *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564 at 567.
[28] SCA Judgment para 45.

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57.1 A non-member is only affected by the Code and ARB rulings where it engages the services of an ARB member to approve, create, disseminate or publish its advertising;

57.2 Those ARB members are bound to comply with the Code and ARB rulings and will be obliged to refuse to approve, create, disseminate or publish advertisements that breach the Code;

57.3 Non-members who do not wish to meet the ethical standards embodied in the Code are free to approve, create, disseminate and publish their advertising using non-members or platforms beyond the ARB's control, such as websites and social media, as they see fit.

58 In *Telematrix*,[29] the SCA acknowledged the lawfulness of such indirect regulation by professional bodies. It explained that "*[b]y engaging the services of someone who is a member of a professional organisation, one has to accept the consequences of that person's professional rules and standards.*"

59 This type of indirect regulation is a common and natural consequence of freedom of association. For example:

59.1 When an attorney engages the services of an advocate who belongs to a voluntary bar association, the attorney cannot instruct an advocate to disregard the ethical rules of her bar association. The attorney is not directly bound by the bar association's rules or rulings, but must accept

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[29] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 27.

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that her dealings with members will be indirectly regulated by these professional obligations.

59.2 A member of the public who writes a letter to a newspaper belonging to the Press Council will be indirectly bound by the ethical requirements of the Press Code, even though she may not have agreed to the Code. The newspaper can legitimately refuse to publish her letter if it would be in breach of the Code.

59.3 Soccer fans are indirectly regulated by the rules of FIFA and the South African Football Association, even though they are not members of these associations. When fans choose to misbehave at regulated matches, resulting in their clubs being docked points or subjected to other penalties, the fans feel the indirect effect of these rules, even though they may not have agreed to them.

60 Where indirect regulation adversely impacts on the rights and interests of non-members, the law provides ample remedies to aggrieved parties. Non-members are fully entitled to review the decisions of the associations, either under the common law or PAJA, and to seek other remedies such as interdicts or declaratory orders.

61 Indirect self-regulation advances a second component of freedom of association: the right to choose not to associate. This Court and the SCA have both

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acknowledged that this right to "dissociate" is an integral component of the section 18 right.[30]

62 As the SCA explained, the 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. Their rights to freedom of expression also give them the right not to be forced to engage in expression against their will.[31]

63 Through the ARB, the individual members have chosen to pool these individual decision-making powers, by creating a Code and an expert adjudicative body to make decisions on their behalf. What is permissible for individual advertisers is equally permissible as a collective.

64 In choosing to join the ARB and agreeing to be bound by its rulings, members are actively exercising their rights of association and dissociation. They do not abandon those rights at the door, as Bliss now suggests.

65 Bliss seeks to advance a distorted conception of the right to association in arguing that the ARB somehow limits its rights. It claims that by choosing not to join the ARB, it is entitled to demand ARB members to carry advertising that is in breach of the Code, even if this would mean that the members would breach their obligations to the ARB.

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[30] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* 2020 (6) BCLR 725 (CC); (2020) 41 (ILJ) 1846 (CC) at paras 32 – 36, fn 45*; New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) at para 58.
[31] SCA Judgment paras 35 – 38.

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66 The SCA delivered a sharp rejection of that argument. Bliss and other non-members have exercised their right to dissociate by choosing not to join the ARB. Having made that election, Bliss "*cannot now demand that members of the ARB should ignore their contractual obligations by carrying advertisements that breach the Code.*" Bliss also cannot *"lawfully demand that the ARB may not issue rulings for the guidance of its members.*" Bliss' right to dissociate from the ARB and the Code does not give it the right to "*dictate to the ARB and its members how they should exercise their rights of association.*"[32]

67 Bliss again seeks to portray the ARB and its membership as a "*near-monopolistic*" entity,[33] that exercises improper coercive control over the advertising industry. The SCA correctly rejected these allegations as being entirely unsubstantiated on the papers.[34] The ARB's membership is limited and does not cover the field.[35]

68 Even on Bliss' own version, it is still free to advertise products in breach of the Code, using agents or outlets that are not members of the ARB. It is also free to use platforms that are unconnected to the ARB, such as its own website and social media.[36] Bliss does not dispute these facts.

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[32] SCA Judgment para 48.
[33] Bliss FA para 125.
[34] SCA Judgment paras 39 – 40.
[35] Id.
[36] SCA Judgment para 40.

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IMPROPER MERO MOTU INTERVENTION

69 The SCA correctly held that the High Court's *mero motu* intervention, in which it directed the parties to address the constitutionality of the ARB's powers, was unwarranted.

70 Bliss contends that the SCA's criticism of the High Court was inappropriate as this was not raised as a ground of appeal. This is incorrect. Colgate raised the point squarely in argument in the leave to appeal application before the High Court and the point was further argued before the SCA.

71 Bliss makes no attempt to defend the High Court's *mero motu* intervention, nor does it suggest that the "exceptional circumstances" test laid down by this Court was satisfied.[37]

72 Instead, Bliss argues that the *mero motu* intervention was permissible, as Bliss later amended its papers to introduce these points, after the High Court raised these issues and directed the parties to address them. However, the fact that Bliss ran with the High Court's prompting does not make the initial *mero motu* intervention appropriate.

73 In any event, the SCA judgment made it clear that it did not dismiss the constitutional challenge solely on this basis, as it went on to address each of the further grounds in turn.[38]

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[37] *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.
[38] SCA Judgment para 14.

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THE ARB'S POWERS ARE LAWFUL

74 In the High Court and in the SCA, Bliss argued that the ARB's powers are unlawful because it exercises public powers that are not sourced in law, by which it meant a statute. The High Court accepted that argument.

75 The SCA correctly rejected this argument for the following reasons:

75.1 Our law draws a distinction between organs of state and private individuals or juristic persons.[39]

75.2 Where an organ of state exercises public powers or performs public functions, those powers and functions must be sourced in the Constitution or other legislation.[40]

75.3 By contrast, where a natural or juristic person exercises public powers and public functions, those powers and functions need only be sourced in an "*empowering provision*".[41]

75.4 An "*empowering provision*" is broadly defined in PAJA as including "*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*".

75.5 The ARB's MOI and Code, incorporating its Procedural Guide, constitute empowering provisions. The mere absence of a statutory source for these

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[39] SCA Judgment para 16.
[40] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.
[41] PAJA section 1(i).

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powers is therefore no barrier to the ARB validly exercising public functions.

75.6 Requiring that private bodies may only exercise public powers or public functions where they are empowered to do so by a statute would have startling consequences:

75.6.1 First, it "*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, the Press Council, professional associations and the like.*"[42]

75.6.2 Second, it would result in courts "*adopting 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.*"[43]

75.7 The ARB's powers have statutory support in section 55 of the ECA, in the context of broadcasting.[44]

75.8 In any event, these powers are an incident of the ARB members' rights to freedom of expression and association.[45]

76 Bliss has now fundamentally changed its argument. In this application, it concedes that "*[t]here is no doubt that a contract may provide a basis for the*

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[42] SCA Judgment para 17.
[43] Id.
[44] SCA Judgment paras 18 – 23.
[45] SCA Judgment para 24.

lawful exercise of public powers".[46] It therefore accepts that public powers can be lawfully exercised by private bodies without a statutory source. That ought to be the end of the matter.

77 However, Bliss argues that this principle only applies where the ARB exercises public powers in matters that affect its members. Where non-members are indirectly affected by an ARB decision, those powers could only be lawful if they have some statutory backing.[47]

78 This shifting position is fatal to Bliss' argument. There is no requirement in PAJA or elsewhere that different types of empowering provisions are required for the same exercise of public powers by a private body, depending on who is affected.

79 Bliss further seeks to argue that reliance on PAJA is impermissible, as the definition of administrative action does not confer powers on private bodies. That misses the point. The definition of "administrative action" and "empowering provision" in PAJA reflect the basic conceptual distinction in our law between organs of state and private bodies.

HERBEX

80 The High Court disregarded the SCA's previous order in *Herbex*. It held that the operative part of the order was *in personam*, only binding on the parties to that litigation. The High Court proceeded to grant an order declaring clause 3.3 of the ARB MOI to be invalid, in direct conflict with the *Herbex* order.

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[46] Bliss FA para 66.
[47] Id para 66 – 68.

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81 The SCA held that the High Court erred in two fundamental respects.

82 First, the *Herbex* order, while granted by consent, was still an order of court with full force and effect, that stands to be interpreted like any order.[48] Bliss does not dispute this.[49]

83 Second, in overturning the High Court's order, and replacing it with a new order, the SCA granted an order *in rem* in *Herbex* – an order that is binding on the whole world, not only on the parties before it. The SCA reasoned that:

83.1 The High Court's order in *Herbex* was an order *in rem.* Therefore, the SCA in *Herbex* had to be satisfied, and was so satisfied, that overturning and modifying that order was justified by the merits of the appeal.

83.2 This was a straightforward application of the principle in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*,[50] where this Court held that "*[f]or a judgment in rem to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting-aside is justified by the merits of the appeal.*"

83.3 The SCA in *Herbex* was indeed satisfied that its order was warranted by the merits of the case.[51]

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[48] SCA Judgment para 30, applying *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).
[49] SCA Judgment para 31.
[50] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) at para 1.
[51] SCA Judgment para 32.

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83.4 This conclusion is strengthened by the terms of the order, as 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 words "*any advertisement*" and "*regardless of by whom it is published*", placed it beyond doubt that the *Herbex* order applied generally, and was not limited to the parties.[52]

84 Bliss continues to assert that the SCA did not apply its mind in *Herbex*, and simply rubber-stamped a consent order.

85 This is an astonishing allegation, suggesting that five judges of the SCA in *Herbex* - Navsa ADP, Mathopo JA, Plasket JA, Rogers JA and Schippers JA – uncritically endorsed an order without reason. The allegation is also unsustainable, as the SCA's reasoning in the *Herbex* judgment clearly reflects that it was satisfied that the ASA's appeal had merit, that the order was warranted, and that the ASA had achieved substantial success.[53] Furthermore, two of the judges who sat in the present matter, Schippers JA and Plasket JA, concurred in *Herbex*. In effect, Bliss now accuses these judges of being disingenuous as to what the court decided in *Herbex*.

86 Bliss further argues that the ARB is not the legal successor-in-title to the ASA and therefore cannot benefit from the *Herbex* order. This argument places form

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[52] SCA Judgment at para 33.
[53] See *Advertising Standards Authority v Herbex* 2017 (6) SA 354 (SCA) at paras 10 – 11 and 17.

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over substance. The *Herbex* judgment was concerned with a matter of principle: the scope and limits of self-regulation under the Code. This principle applies with equal force to the ARB, as the new custodian of the Code. The objects of the ARB, as set out in its MOI, are clear that it was created to "*fill the lacuna*" that was left when the ASA went into liquidation and that its primary purpose is to "*adopt and enforce, as far as reasonably possible, the existing and established Code of Advertising Practice in the Republic*".[54] The ARB is therefore the successor to the ASA as the body responsible for enforcing the Code. The binding principles established in *Herbex* are of equal application to its functions.

THE RIGHT OF ACCESS TO COURT

87 The SCA accurately characterised Bliss' remaining grounds of appeal as "*variations on a theme*".[55] Bliss sought to argue that the ARB's adjudicative processes deprive non-members of their section 34 constitutional right of access to court and usurp judicial functions in various respects.

88 The SCA held that there is no limitation of section 34 for two primary reasons:

88.1 First, the ARB's adjudicative bodies constitute a "*tribunal or forum*" as envisaged in section 34 of the Constitution.[56]

88.2 Second, non-members are not deprived of access to the ordinary courts, as the ARB's decisions are subject to judicial control at all levels, as a

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[54] ARB Memorandum of Incorporation, clauses 3.1 and 3.3.
[55] SCA Judgment para 49.
[56] SCA Judgment para 50,

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dissatisfied non-member can take ARB decisions on review and obtain interdictory relief, among a range of other remedies.[57]

89 Bliss does not meaningfully contest the second basis of the SCA's decision, and for good reason. The fact that Bliss has launched no less than two applications for urgent interim relief, a PAJA review application, a constitutional challenge, and the present application is ample demonstration that its rights of access to court remain fully intact and unimpeded.

90 The fact that Bliss and other non-members have access to review proceedings and other judicial remedies to address adverse ARB decisions is the complete answer to any section 34 concerns. In both *Armbruster*[58] and *Metcash*,[59] this Court has held that where judicial review proceedings are available, offering sufficient remedies to address adverse decisions, there is no violation of the right of access to court.

91 In the High Court, there was no dispute that the ARB's adjudicative decisions are reviewable by the courts in terms of PAJA.[60] Indeed, Bliss based its review application squarely on PAJA and pleaded that the decisions under review are all administrative acts.[61] Bliss' new denial that ARB decisions are reviewable, which is stated for the first time in these papers,[62] is baffling and contradicts its pleadings.

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[57] Id.
[58] *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC) at para 61.
[59] *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para 47.
[60] *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others* [2015] ZAGPPHC 243 at paras 26 – 34.
[61] High Court FA Vol 1 p 74 para 57.
[62] Bliss FA para 65.

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92 Furthermore, Bliss does not offer any persuasive response to the SCA's finding that the ARB's adjudicative bodies are "*another ... tribunal or forum*" for the purposes of section 34. This finding was supported by this Court's judgment in *Metcash*, where this Court recognised that specialist administrative tribunals can constitute a "tribunal or forum" for the purposes of section 34.[63]

92.1 Bliss seeks to distinguish *Metcash*, as it contends that the specialist tribunal in issue there – a "Special Court" created under the Income Tax Act – was a statutory body and it was presided over by a judge.

92.2 However, this Court did not suggest that either of those factors were decisive. Instead, this Court had regard to all relevant features of the tribunal in concluding that its operations were more akin to an ordinary court than not.[64] The ARB's adjudicative bodies satisfy these requirements, as they allow for speedy resolution of disputes, with appeals processes before qualified lawyers (at the level of the AAC) and a retired judge (before the FAC), allowing for full ventilation of factual and legal issues.

92.3 Bliss refers to this Court's judgment in *Lufuno Mphaphuli &Associates*,[65] which, it claims, stands for the proposition that the reference to "*other tribunals*" in section 34 is to tribunals established by law.

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[63] *Metcash Trading Limited v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) para 47.
[64] Id.
[65] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) (20 March 2009)

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92.4 However, Bliss misstates this Court's reasoning in *Lufuno*, which concerned whether private arbitrations fall under section 34. The fact that private arbitrations are sourced in contract was not considered decisive of the application of section 34. Instead, this Court held that private arbitrations are not subject to section 34 primarily because they lack the public character of ordinary courts, given that private arbitrations are usually confidential.[66] By contrast, ARB decisions are public in nature, as is confirmed by the ARB's Procedural Guide. It explicitly alerts parties to the fact that all ARB decisions will be placed on its website, identifying the parties, in the interests of transparency.[67]

93 The SCA's findings are dispositive of Bliss' further complaints of alleged breaches of section 34. Nevertheless, I will briefly address each of these complaints and the SCA's reasoning.

No self-help

94 Bliss continues to argue that the ARB's powers somehow constitute impermissible self-help.[68] It relies on a single line from this Court's judgment in *Chief Lesapo,* where this Court stated that any "*constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land*".[69]

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[66] Id para 211 – 213.
[67] ARB Procedural Guide clause 5.5: "*Parties are alerted that the decisions of the ARB are published on the ARB website In the interests of transparency. This will include the name of the complalnant(s) and the Advertiser.*"
[68] Bliss FA paras 138 – 142.
[69] *Chief Lesapo v North West Agricultural Bank And Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 16.

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95 The SCA correctly held that Bliss has failed to read *Lesapo* in its proper context.[70] *Lesapo* concerned the far-reaching statutory powers of a bank to sell property in execution, without any recourse to the courts. That is the very definition of unlawful self-help, as the bank was entitled to be the judge in its own cause, deciding its own claims, to the exclusion of judicial processes.

96 By contrast, the ARB's decision-making processes cannot be equated with such unlawful self-help.[71] The ARB is 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 unilateral action; and members and non-members alike have full recourse to judicial review proceedings, including interdictory relief to suspend the effect of adverse decisions.

97 The SCA's conclusions are further supported by this Court's judgments in *Armbruster,* and *Metcash*, where this Court elaborated on the principles in *Lesapo*. In particular, this Court held that there is no impermissible self-help, and no breach of section 34, in circumstances where administrative acts are subject to effective judicial control through review proceedings.[72]

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[70] SCA Judgment para 51.
[71] Id.
[72] See *Armbruster* at para 60.

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The independence of the ARB

98 The SCA held that the funding and structure of the ARB would not lead a reasonable, objective and informed person to conclude that the ARB's processes lacked independence.[73]

99 On the undisputed facts, summarised by the SCA, not every member of the ARB is a funder, funders represent a tiny minority of ARB members (38 of 338), and members of the AAC and FAC are not informed as to whether a complainant is a funder.[74] In addition, Bliss did not present a shred of evidence to suggest that the ARB treats members, funders, or non-members differently in its adjudication of complaints, let alone any facts which would lead a reasonable person to form that impression.

100 As the SCA further noted, there are sufficient structural safeguards in place to ensure independence: the Chairperson of the AAC must be an independent practicing advocate, appointed by the Board; the Chairperson of the FAC must be an independent practicing or retired legal practitioner or judge, with no less than ten years' experience; and the AAC and FAC remain subject to the control of the courts through review proceedings.

101 Bliss does not contest any of these facts. Instead, it wrongly claims that the SCA failed to assess this issue from the standpoint of a "reasonable informed person". On the contrary, the SCA judgment explicitly applied this objective standard, concluding that "*[n]o reasonable, objective and informed person would consider*

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[73] SCA Judgment paras 52 – 53.
[74] SCA Judgment para 53.

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it likely that the few funders (who are almost exclusively individual companies) influence the running of the entire ARB".[75]

No unfairness

102 The SCA rightly rejected Bliss' complaints of unfair processes. The SCA concluded that:

102.1 There is no requirement that an administrative tribunal should perfectly replicate the procedural and evidential rules that apply in the courts.[76]

102.2 In the context of administrative tribunals, there is no automatic right to an appeal to a court or the suspension of an order pending an internal appeal.[77] That is a trite principle, supported by this Court's judgment in *Metcash*.[78]

102.3 Furthermore, Bliss ignores the requirements of procedural fairness under section 3 of PAJA, which afford a degree of flexibility in choosing appropriate procedures for the circumstances.[79]

103 Bliss does not directly address these findings. Instead, it claims that the SCA failed to test the fairness of the ARB's processes against the requirements of section 34 of the Constitution.

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[75] SCA Judgment para 53.
[76] SCA Judgment para 55, citing *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646F.
[77] SCA Judgment para 55.
[78] *Metcash* paras 35 – 36.
[79] SCA Judgment para 56.

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104 Bliss continues to ignore the fact that PAJA gives statutory content and effect to the constitutional rights to fair proceedings before administrative tribunals. PAJA also provides Bliss with ample remedies to address any perceived unfairness in the ARB's processes, on a case-by-case basis. That is evident from the grounds raised in Bliss' initial review application, before it decided to change its case.

105 Bliss has failed to challenge the relevant provisions of PAJA which give effect to the rights to a fair hearing. Accordingly, it is precluded by the principle of subsidiarity from going behind its provisions by seeking to attack the ARB's processes through direct reliance on constitutional rights.[80]

No usurpation of judicial functions

106 Bliss continues to argue that the ARB somehow ousts the courts' jurisdiction, in that clauses 8 (exploitation of advertising goodwill) and 9 (imitation) of the Code allegedly overlap with legal issues that typically arise in cases of passing off and trademark infringement.[81]

107 The SCA rejected this argument, holding that *"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."*[82] The SCA further explained that there are clear differences between the inquiries conducted by the courts and the ARB: they are distinct fora with distinct powers, the ARB may only determine whether its Code

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[80] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 (16 February 2022) at para 102ff.
[81] Bliss FA paras 153 – 155. x
[82] SCA Judgment para 58.

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has been breached, and it is not permitted to determine questions as to whether the packaging or get-up of a particular product constitutes passing off or breach of trademark or copyright.[83]

108 The SCA referred to its earlier judgment in *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[84] which confirmed this principle.

108.1 There it was held that the ASA could not refuse to hear a complaint merely because there was a pending dispute on similar issues before the Registrar of Trademarks, which was ultimately destined for court.

108.2 Nugent AJA (as he was then) emphasised that "*the attempt to find some correspondence between the two proceedings is … misconceived and tends to divert attention from what is the true issue in this appeal.*"[85] This was because "*[t]he Registrar of Trade Marks and the ASA are both obliged to perform their respective functions and neither is entitled to abdicate in favour of the other even if some aspects of their respective inquiries might coincide.*"[86]

108.3 Bliss claims that *Nestle* is distinguishable on the facts, but it fails to address the key principle laid down in that case: the mere fact that inquiries before different bodies may overlap does not entail that there is impermissible encroachment on judicial functions.

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[83] Id.
[84] *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) paras 20 and 21.
[85] Ibid at para 20.
[86] Ibid at para 21.

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109 Our law has always permitted administrative tribunals to determine disputes over questions of law and fact, which may ultimately be decided by a court. This Court has acknowledged that such administrative proceedings have advantages over courts in respect of cost- and time-savings as well as bringing specialist skills to bear on these issues.[87] The mere fact that there are overlaps between administrative and judicial tasks does not amount to unconstitutional usurpation.

THE SCA'S ORDER

110 Bliss alleges that the SCA granted orders that were allegedly "*outside the limits of the appeal*". This complaint has no substance.

111 The order granted by the SCA was in terms of the notices of appeal filed by Colgate and the ARB. Both sought identical relief, dismissing the challenges to the ARB's MOI, as set out in prayers 1, 4, 5 and 6 of its amended notice of motion. I attach a copy of Colgate's notice of appeal as **Annexure PP1**.

112 Bliss did not raise any objection to the relief sought in the notices of appeal, either in its heads of argument or at the hearing. Its complaint is an afterthought.

RESPONSES TO INDIVIDUAL PARAGRAPHS IN BLISS' FOUNDING AFFIDAVIT

113 I now turn to address individual allegations in Bliss' founding affidavit, *ad seriatim*, to the extent necessary. I do not address all of the allegations made by Bliss, which are amply covered by the thematic responses above. Any allegation which

[87] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at paras 34 – 37.

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is not addressed, and which is inconsistent with what is set out above or Colgate's previous affidavits in this litigation, should be taken to be denied.

Ad paragraphs 9 – 15

114 The proper characterisation of the ARB's powers over non-members is addressed in detail in the SCA's judgment, particularly at paragraph 18, and its previous judgment and order in *Herbex*. I again deny Bliss' assertions of impermissible coercion.

Ad paragraph 18

115 Save to admit that Bliss is not a member of the ARB, the contents of this paragraph are denied. Bliss submitted to the ARB's jurisdiction, for the reasons summarised in paragraphs 11 to 13 of the SCA judgment.

Paragraph 20

116 As explained above, the ARB is the successor to the ASA in the sense that it has assumed responsibility for the administration and enforcement of the Code. Whether or not the ARB is the "successor-in-title" in any other sense is irrelevant to the issues in this application.

Paragraphs 21 to 25

117 Save to note the list of ARB members set out in paragraphs 21 to 22, I have no knowledge of the further contents of these paragraphs. Bliss' references to a

PAIA request and its further inquiries to ascertain membership is an impermissible attempt to introduce new evidence on appeal, none of which was canvassed in the papers filed in the High Court or the SCA.

Paragraphs 31 to 32

118 Bliss' new explanation as to why it participated in the ARB proceedings is a belated, after-the-fact explanation. Bliss submitted to the ARB's jurisdiction and participated fully, without complaint.

Ad paragraphs 45 to 46

119 Bliss amended its notice of motion and filed a supplementary founding affidavit after Fisher J granted urgent interim relief. In the judgment granting interim relief, Fisher J made it clear that the interdict was granted on the strength of the constitutional issues that had been raised *mero motu* and that these issues would be finally determined by the Court in hearing the application for final relief.

120 Given the High Court's insistence on deciding these constitutional issues in the main application, Colgate had no option but to go along with the timetable for the amendment and supplementation of the papers.

***Ad paragraphs 53 to 60* (The mero motu interventions in the High Court)**

121 I have addressed the SCA's findings on the High Court's *mero motu* interventions above, at paragraphs 69 to 73.

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Ad paragraphs 61 to 74 (Powers sourced in law)

122 I have addressed these issues at paragraphs 74 to 79 above.

Ad paragraphs 92 to 108 (Herbex)

123 I have addressed the SCA's judgment and order in *Herbex* in detail above at paragraphs 80 to 86 above.

***Ad paragraphs 109 to 126* (Implicated rights)**

124 The rights to freedom of association and expression are addressed at paragraphs 49 to 68 above.

Ad paragraphs 127 to 155 (Access to court)

125 I have addressed the various alleged breaches of section 34 of the Constitution in detail above, at paragraphs 87 to 109.

Ad paragraphs 156 to 171 (Submission to jurisdiction)

126 I have addressed Bliss' submission to jurisdiction above. The uncontested facts supporting the conclusion that Bliss submitted to the ARB's jurisdiction were set out in detail in the High Court papers. Bliss' claim of coercion was introduced as an afterthought.

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Ad paragraphs 172 to 179 (SCA's order)

127 I have addressed these allegations above and I refer again to Colgate's notice of appeal before the SCA.

CONCLUSION AND COSTS

128 For the reasons set out above, I submit that it is not in the interests of justice to grant leave to appeal. The SCA judgment has comprehensively addressed the issues raised by Bliss. I therefore pray that this application for leave to appeal be dismissed with costs, including the costs of two counsel.

PRIYAN RADHAKRISHNAN PILLAY

Thus signed and sworn to before me at **JOHANNESBURG** on this 23rd day of May 2022 by the deponent who has acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that the prescribed oath is binding on his conscience.

COMMISSIONER OF OATHS

Name :

Address:

Capacity:

Silindokuhle Ntandoyenkosi Magagula
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"PP1"

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NO.: _____

***A QUO* CASE NO.: 2020/22061**

In the matter between:

ADVERTISING REGULATORY BOARD NPC	**First Appellant**
COLGATE-PALMOLIVE (PTY) LTD	**Second Appellant**
COLGATE-PALMOLIVE COMPANY	**Third Appellant**

and

BLISS BRANDS (PTY) LTD	**Respondent**

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2021 -08- 10
MR L COETZER
SUPREME COURT OF APPEAL - BLOEMFONTEIN

SECOND & THIRD APPELLANTS' NOTICE OF APPEAL

KINDLY TAKE NOTICE that the Second and Third Appellants ("Colgate"), note an appeal against the whole judgement and order of the Honourable Madam Justice Fisher, handed down on 21 May 2021, in the Gauteng Local Division, Johannesburg, in which she granted the relief sought by the Respondent.

TAKE FURTHER NOTICE that a certified copy of the order of the Honourable Justice Fisher, dated 20 July 2021, granting leave to appeal to the Appellants, is annexed hereto marked "**Annexure A**".

TAKE NOTICE FURTHER that Colgate seeks an order in the following terms:

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1. The appeal is upheld.

2. The order of the High Court is substituted with the following order:

It is ordered that:

(1) Prayers 1, 4, 5, 6 and 8 of the applicant's amended notice of motion are dismissed, with costs, including the costs of the two counsel.

(2) The determination of the relief sought by the applicant in prayers 2, 3 and 7 of its amended notice of motion is remitted to the High Court for determination.

3. The Respondent is to pay the costs of this appeal and the application for leave to appeal, including the costs of two counsel.

DATED AT Sandton **on this** 5th **day of** August **2021.**

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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
BLOEMFONTEIN

AND TO: **THE REGISTRAR OF THE COURT A QUO,**
GAUTENG LOCAL DIVISION, JOHANNESBURG

AND TO: **EVERSHEDS SUTHERLANDS (SA) INC** **BY EMAIL**
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