IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

132/2022

Case no: [redacted]

In the matter between:

BLISS BRANDS (PTY) LTD LIMITED	Applicant
and	
ADVERTISING REGULATORY BOARD NPC	First Respondent
COLGATE – PALMOLIVE (PTY) LIMITED	Second Respondent
COLGATE – PALMOLIVE COMPANY	Third Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

GAIL DIANE SCHIMMEL VAN ONSELEN

do hereby state under oath:

1 I am the Chief Executive Officer of the first respondent ("**the ARB**"). I am duly authorised to depose to this affidavit on behalf of the ARB.

2 The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true.

3 Where I make legal submissions, I do so on the advice of the ARB's legal representatives.

4 I have read the founding affidavit of Liezel Veronica Bygate on behalf of the applicant and respond herein to its contents. I do not intend to respond to each and every allegation in the founding affidavit in chronological order and will instead do so thematically. To the extent that I failure to address any particular allegation in the founding affidavit it must be taken to be denied.

OVERVIEW

5 The ARB is an independent, self-regulatory body funded by its members. These members view advertising self-regulation as a service to the public and seek to ensure that advertising published by ARB members is informative, factual, honest, decent and lawful.

6 The ARB does so by determining and administering the Code of Advertising Practice ("**the Code**"). The Code is a contract entered into between those participants in the advertising industry for the purpose of self-regulation. The Code is based on international best practice for advertising self-regulation.

7 The present matter arises because the applicant, Bliss Brands, is not prepared to be constrained by the Code or the decisions of the ARB. Bliss Brands wants to be able to publish any advertisement in media owned by the ARB's members – but wants to ensure that it can do so without having to comply with the Code.

8 In order to achieve this aim, Bliss Brands sought and obtained relief from the High Court which effectively dismantles the system of self-regulation of advertising in its entirety. This despite the fact that this is the only system for regulation of advertising in South Africa.

9 The case brought by Bliss Brands to the High Court was for interim interdictory relief (which was unsuccessful) followed by a garden-variety review – brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") and the principle of legality – of two rulings made by the ARB's Final Appeals Committee ("**FAC**"), which decided against Bliss Brands in a Complaint brought against it by Colgate in respect of alleged violations of the Code. The ARB chose to abide both proceedings.

10 Bliss Brands is not a member of the ARB. However, it elected to submit, without any reservation, to the jurisdiction of the ARB and participated in the processes of the ARB leading to the rulings. This was despite an express indication by the ARB to Bliss Blands that it was not obliged to participate in the ARB's processes, and was asked to inform the ARB if it did not consider itself to be bound by the ARB.

11 The issue about the constitutionality of the ARB did not arise from Bliss Brands or its pleadings. Instead, the judge allocated to hear the review application (Fisher J) *mero motu* questioned the constitutionality of the ARB's processes and jurisdiction over non-members and requested two sets of written submissions on the issue. After the ARB argued that the constitutional issue could not be determined in the absence of a constitutional case being made on the papers,

the High Court postponed the hearing of the review in order to allow Bliss Brands to supplement its papers in respect of the constitutional issue.

12 Bliss Brands accepted the High Court's invitation, and thereafter delivered an amended notice of motion and supplementary founding affidavit in the PAJA review, making out an entirely new case. As primary relief, it sought an order declaring the whole of the Memorandum of Incorporation of the ARB to be unconstitutional and invalid. In the alternative, it sought various orders declaring Clause 3.3 of the ARB's MOI to be unconstitutional and severing part of that clause, together with declarations of the scope of the ARB's powers over non-members.

13 The High Court granted an order *inter alia* declaring Clause 3.3 of the ARB's MOI to be unconstitutional, void and unenforceable and declaring that the ARB has no jurisdiction over a non-member of the ARB and may not issue rulings against or in relation to a non-member or that non-member's advertising. The High Court did not determine the review.

14 The effect of the High Court's order was to dismantle the system of self-regulation of advertising in South Africa in its entirety.[1]

15 ARB and Colgate were granted leave to appeal by the High Court, and the Supreme Court of Appeal ultimately upheld the appeal. In doing so, the SCA:

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1 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 3.

15.1 Found it "regrettable" that the High Court had "disregarded" the admonition that a court should decide only the issues before it, as pleaded by the parties.[2]

15.2 Found that the amended papers filed by Bliss Brands "bore little resemblance" to its original application.[3]

15.3 Found that Bliss Brands "unquestionably" submitted to the jurisdiction of the ARB, on which basis alone the appeal could be disposed of.[4]

15.4 Elected nevertheless to evaluate the full judgment of the High Court on the ground that if the ARB's and Colgate's criticisms of statements of principle by the High Court were valid, they ought to be addressed or those statements of principle would remain authoritative.

15.5 Found that the statements of principle in the judgment by the High Court were not correct.

16 Bliss Brands now seeks leave to appeal against the judgment of the SCA to the Constitutional Court. It asks this Court:

16.1 to determine the constitutional challenge to the powers and processes of the ARB to which Bliss chose to submit; and

16.2 to do so even though the issue was never pleaded by Bliss until after it was raised *mero motu* by the High Court.

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2 SCA judgment, annexure A to Bliss Brand's founding affidavit, paras 9 and 10.

3 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 3.

4 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 13.

17 Even worse, Bliss Brands now attempts to place new evidence before this Court in an attempt to cure the deficiencies in its pleaded case before the High Court.

17.1 It has not sought to do so by way of an application to adduce further evidence, but has simply included the additional evidence in its founding affidavit in the application for leave to appeal.

17.2 It impermissibly seeks a third bite at the cherry, a third opportunity to frame its case to its advantage

18 The ARB opposes the application by Bliss Brands for leave to appeal against the judgment of the SCA on the following grounds:

18.1 The constitutional challenge ought not to have been raised *mero motu* by the High Court because it did not emerge from the evidence, was not necessary for the decision of the case and there were no exceptional circumstances. That ought to be the end of the enquiry.

18.2 Bliss Brands consented to the jurisdiction of the ARB in full knowledge of its rights. That too ought to be the end of the enquiry because the constitutional issue simply does not arise in this case.

18.3 Bliss Brands ought not to be permitted to re-frame its case once again, as it attempts to do by seeking to introduce new evidence before this Court which was not before the High Court.

18.4 Clause 3.3 of the ARB's MOI, the source of all of Bliss Brands' dissatisfaction, is taken *verbatim* from an order by the SCA.

18.5 The grounds of appeal have no prospects of success.

18.6 The test for leave to appeal has not been satisfied.

19 I address each aspect below.

THE NATURE OF THE ARB

20 The ARB has not, as alleged by Bliss Brands in paragraph 9 of the founding affidavit before this Court, "appointed itself as the regulator as to what advertising is acceptable and decent".

21 The ARB was created after its predecessor, the Advertising Standards Authority, went into liquidation. The ARB is a voluntary association, regulating the conduct of its members, in the public interest by making decisions in respect of the Code. The Code is based on international best practice for advertising self-regulation.

22 The ARB discharges a public function. The Courts have confirmed that the ARB is the official regulator of the advertising industry and renders a service in the public interest.[5]

23 The Code binds members of the ARB only. The ARB and its members are contractually bound to one another. Members of the ARB (and non-members who agree to submit to its jurisdiction) agree that the ARB will act as the arbiter of disputes concerning the breaches of the Code. It does so through its decision-

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5 *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others* [2015] ZAGPPHC 243 (GP 2331/15) para 28.

making structures who may impose certain sanctions. Once a ruling has been given by the ARB:

23.1 It is the responsibility of the complainant to monitor whether or not the ruling is adhered to and carried into effect.

23.2 Should the respondent in the complaint ignore a reasonable request for co-operation, the ARB may issue an Ad Alert to its members.

24 The ARB has no jurisdiction over non-members and cannot require them to participate in its processes in the absence of consent to its jurisdiction. Clause 3.3 of its MOI – the clause that is the subject of the High Court and SCA judgments – provides as follows:

> *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 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.*

25 The whole of clause 3.3 is taken *verbatim* from an order by the SCA in the case of *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) ("**Herbex**").

26 The ARB's sanctions are effective only insofar as the members of the ARB agree to enforce them, and they are effective only in the media owned by ARB members. The rulings of the ARB are not legally enforceable against non-members. The only consequence of a non-member's refusal to comply with an

ARB ruling is that the members of the ARB may decline to accept advertising from that non-member.

27 The ARB is an adjudicative administrative tribunal. Its decisions constitute administrative action as defined in PAJA. Indeed, Bliss Brand's case as originally formulated was a review of the rulings of the FAC of the ARB in terms of PAJA.

28 Adjudicative administrative tribunals are nothing new. Nor is it a new concept that adjudicative administrative tribunals do not have to be established by statute. Tribunals established by contract can still exercise public power. There are literally hundreds of adjudicative administrative tribunals in operation in South Africa, for example the Broadcasting Complaints Commission, the Press Council and countless others. Some are created by statute or regulation, others by contract. All are subject to judicial control in the form of review.

29 Bliss Brands is not a member of the ARB or a member of a member of the ARB. It simply does not wish to be bound by the standards of advertising enshrined in 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.

30 Bliss Brands wants to be free to publish advertising of whatever standard it wants, wherever it wants, in whatever manner it wants.

31 Throughout the proceedings before the ARB, Bliss Brands was satisfied to submit to the jurisdiction of the ARB. It was only after the High Court raised the

constitutional challenge *mero motu* that Bliss Brands complained of the ARB's jurisdiction over it.

THE CONSTITUTIONAL CHALLENGE WAS NEVER PLEADED

32 Bliss Brands says at paragraph 8 of its application that the "main issue" before the High Court was the constitutionality of the public power exercised by the ARB over non-members who have not agreed to be bound by the ARB's MOI and/or the Code. It was not.

33 The complaint that was laid by Colgate against Bliss Brands in terms of sections 8 (exploitation of advertising goodwill) and 9 (imitation) of the Code and its Procedural Guide concerned soap packaging, which is included in the Code's definition of "advertisement".

34 When the ARB communicated the complaint to Bliss Brands (a copy of which is attached as annexure "**GS1**"), it reproduced clause 3.3 of the MOI and expressly stated that:

> *"…if you are not a member and do not submit to the jurisdiction of the ARB, the ARB will consider and rule on your advertising for the guidance of our members.*
>
> *We would appreciate it if you could inform us if you do not consider yourself to be bound by the ARB. However, you are not obliged to respond, nor are you obliged to furnish a defence."*

35 It is undisputed that Bliss Brands did not at any stage during the ARB processes (comprising at least three stages of internal decision-making) object to the jurisdiction of the ARB, despite the unequivocal indication by the ARB that it was

not, as a non-member, obliged to participate in the complaint brought against it by Colgate.

36 Bliss Brands instead participated in the ARB processes and responded to the complaint, which went through three stages of internal decision-making:

36.1 The Directorate (which decided the complaint in Bliss Brands' favour).

36.2 The Advertising Appeals Committee (which decided an appeal by Colgate in its favour).

36.3 The FAC (which decided an appeal by Bliss Brands in Colgate's favour). Its decisions (the dismissal of the appeal and a clarification in respect of costs) were made on 3 and 11 August 2020 respectively.

37 On 25 August 2020 Bliss Brands brought an urgent application for interim interdictory relief suspending the FAC's decisions pending a review to be instituted. A copy of the notice of motion is attached as annexure "**GS2**". Its application was dismissed by the High Court. ARB abided the decision. Colgate opposed.

38 Bliss Brands instituted its main application as a review of the rulings of the FAC in terms of PAJA, alternatively the principle of legality, on 2 October 2020. A copy of the notice of motion is attached as annexure "**GS3**". The ARB abided the decision. Colgate opposed.

39 On 30 October 2020 the High Court *per* Fisher J issued a directive in which it *mero motu* questioned the constitutionality of the ARB's Code and MOI. The

parties, including the ARB, were directed to make written submissions on the constitutional issue. The parties were again requested to make written submission on the constitutional issue on 12 November 2020.

40 The ARB argued, in its written submissions and at the hearing, that the High Court ought not to determine the constitutional issue in circumstances where such a case had not been pleaded by Bliss Brands and ARB had not had an opportunity to answer it. In its judgment dated 30 November 2020, a copy of which is attached as annexure "**GS4**", the High Court:

40.1 Noted, at paragraph 21, that it had raised the constitutional issue.

40.2 Postponed the determination of the constitutional issue to allow for the filing of further evidence, at paragraph 23.

40.3 Nevertheless made various comments and findings about the fairness of the ARB's processes, at paragraphs 10 to 20.

40.4 Granted the interim interdictory relief that had been dismissed by the High Court previously on the basis that the constitutional issue – raised *mero motu* by the Court – made it a fundamentally different case to the first instance in which the interim interdictory relief had been sought, at paragraph 35.

41 On 11 December 2020 Bliss Brands delivered a notice of intention to amend its notice of motion, together with a supplementary founding affidavit. On 29 December 2020 Bliss Brands delivered its amended notice of motion, a copy of which is attached as annexure "**GS5**".

42 As noted by the SCA in its judgment in the appeal, the High Court's directive "resulted in virtually a new case for decision"[6] and the amended notice of motion and supplemented founding papers "bore little resemblance" to the original application.[7]

42.1 In its original notice of motion, Bliss Brands sought an order *inter alia* "reviewing" two rulings by the FAC of the ARB and "setting them aside", together with an order substituting the two rulings. It sought, in the alternative, a remittal of the matter to the FAC for re-hearing. The review was brought in terms of PAJA, alternatively the principle of legality, on grounds rooted in administrative law principles.

42.2 In its amended notice of motion, a copy of which is attached as annexure "**GS5**", Bliss Brands sought vastly different relief in terms of a "constitutional challenge". It sought the following orders:

42.2.1 A declaration that the whole MOI of the ARB is "unconstitutional and void".

42.2.2 On that basis, a declaration that the rulings of the Final Appeals Committee are unlawful and are set aside.

42.2.3 Also on that basis, an order directing the ARB to repay to Bliss Brands certain sums of money lodged by it during the internal processes (this relief was also sought in the original review).

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6 SCA judgment, annexure A to Bliss Brands' founding affidavit, para 10.

7 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 3.

42.3 In the alternative to the declaration that the whole MOI of the ARB is unconstitutional and void, Bliss Brands sought:

42.3.1 A declaration that only clause 3.3 of the MOI is unconstitutional, void and unenforceable.

42.3.2 An order severing the clause "in the absence of a submission to its jurisdiction" in the first sentence and the whole second sentence in clause 3.3 of the MOI.

42.3.3 An order declaring that the ARB has no jurisdiction over any person or entity who is not a member or is not a person or entity who is bound by the Code.

42.3.4 An order declaring that the ARB may not issue rulings against or in relation to a non-member or non-member's advertising.

42.4 In the further alternative to the declaration that the whole MOI of the ARB is unconstitutional and void and the orders in paragraphs 42.3.1 to 42.3.4 above, declaring that clauses 8 and 9 of the Code, as well as paragraphs 9.2 and 12.6 of the Procedural Guide, are unconstitutional and void.

42.5 In the further, further alternative to the declaration that the whole MOI of the ARB is unconstitutional and void, the orders in paragraphs 42.3.1 to 42.3.4 above, and the alternative order in paragraph 40.4 above, an order declaring that the ARB MOI is not enforceable against any person or entity on whom it is not binding in terms of section 15(6) of the Companies Act 71 of 2008.

42.6 In the alternative to the order directing the ARB to repay to Bliss Brands certain sums of money lodged by it during the internal processes, a substitution of the rulings of the FAC.

42.7 In the alternative to that, an order referring the matter back to the Final Appeals Committee for re-hearing.

43 Bliss Brands based its constitutional challenge on the following grounds:

43.1 That the ARB arrogated to itself the power to impose a constraint on the person or property of another without recourse to a court or other tribunal appointed by the State.

43.2 The ARB ousts the jurisdiction of the ordinary courts.

43.3 The ARB is not an independent tribunal.

43.4 The process of an ARB hearing is not fair.

43.5 The ARB exercises judicial authority that is, properly speaking, vested in the courts.

44 The constitutional challenge was not based on any alleged infringement of either Bliss's right to freedom of expression or its right to freedom of association, and it did not plead any such infringements. Yet it now apparently wishes to advance this new case in this Court for the first time.[8]

[8] Bliss Brands FA in application for leave to appeal at para 15.

45 In effect, the amended notice of motion and supplementary founding affidavit made out a brand-new case for Bliss Brands, incorporating the constitutional challenge raised *mero motu* by the High Court and the issues that the Court had raised in its 30 November 2020 judgment. The ARB opposed the new case by Bliss Brands.

46 The High Court handed down its judgment in favour of Bliss Brands in respect of the constitutional challenge on 21 May 2021. As noted by the SCA in its judgment on appeal, the effect of the relief granted by the High Court was to dismantle the system of self-regulation of advertising in South Africa in its entirety.[9] It declined to determine the review – the case which had been brought to it originally – at all.[10]

47 Colgate and the ARB were granted leave to appeal to the SCA, which handed down judgment in their favour on 12 April 2022. In its judgment overturning the High Court's judgment on appeal, the SCA *inter alia*:

47.1 Quoted and relied upon the authority of the SCA and this Court emphasising that a court should only decide the issues before it, as pleaded by the parties, at paragraph 9.

47.2 Found it regrettable that the High Court had disregarded that admonition, at paragraph 10.

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9 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 3.

10 High Court judgment, annexure B to Bliss Brands' founding affidavit, para 135.

47.3 Relied upon authority from this Court that constitutional issues should only be raised by courts *mero motu* in exceptional circumstances which this was not, at paragraph 10.

47.4 Found that Bliss Brands' submission to the ARB's jurisdiction ought to have put paid to any constitutional challenge, at paragraphs 10 to 13, because failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate jurisdiction.

47.5 Nevertheless proceeded to address the statements of principle made by the High Court (the merits of the constitutional challenge) because if the criticisms by ARB and Colgate were correct, the statements could not be left standing, at paragraph 14.

48 Bliss Brands did not "adapt its case during proceedings" as it claims at paragraph 58 of its application. Bliss Brands seized the opportunity to bring an entirely new case, seeking wholly new relief, at the prompting of the High Court. In particular, Bliss's contention that it "could not and did not voluntarily submit to the jurisdiction of the ARB" was never advanced at any time until the High Court prompted it to bring a case based on lack of consent, and is unsustainable on the facts.

49 The fact that Bliss Brands filed a new notice of motion and supplementary founding affidavit to give life to the constitutional challenge raised *mero motu* by the High Court does not mean the constitutional issue was squarely before the High Court.

50 The authorities of the SCA and this Court quoted by the SCA, at paragraph 9 of its judgment, makes plain that a constitutional complaint may be raised a court *mero motu* where it raises "a question of law that emerges fully from the evidence and is necessary for the decision of the case". In this case, the question of law (the constitutionality of the ARB's processes and jurisdiction over non-members) did not "emerge fully from the evidence". The question of law was raised by the Court in the absence of any evidence whatsoever on the issue, so Bliss Brands had to place that evidence before the Court by filing a 67-page supplementary founding affidavit. Nor was the question of law necessary for the decision of the case. The case that was brought to the High Court was a PAJA review of the FAC's rulings. There was no question in the original case of the ARB's jurisdiction over Bliss Brands.

51 The SCA, with respect, correctly found that the constitutional challenge should not have been raised *mero motu* in the first place because there were no exceptional circumstances and it was not pleaded.

52 Similarly, leave to appeal ought not to be granted by this Court because the constitutional challenge which Bliss Brands seeks to have determined was not pleaded by it and should not have been raised *mero motu* by the High Court. It also does not arise on the facts.

BLISS BRANDS CONSENTED TO THE JURISDICTION OF THE ARB

53 The SCA correctly found that Bliss Brands consented to the jurisdiction of the ARB, with reference to the letter from the ARB in which the complaint was

communicated to Bliss Brands, at paragraph 11. It also correctly found that the constitutional challenge ought to have been dismissed on that basis alone.

54 Bliss Brands accepts that it did not at any stage before its re-framed case object in any manner to the jurisdiction of the ARB. However, it says the SCA's conclusion is incorrect because its consent to the jurisdiction of the ARB was coerced (at paragraphs 156 to 171 of its application). If the ARB can make a ruling on advertising for the benefit of its members in Bliss Brands' absence, so the argument goes, then non-participation is not really an option because an uncontested ruling communicated to the ARB's membership base would have a far-reaching impact.

55 Bliss Brands made out a case of "coerced consent to jurisdiction" for the first time in its replying affidavit to ARB's answering affidavit before the High Court, It based the argument on the allegedly "far-reaching" impact of an Ad Alert due to the ARB's membership base, which it alleged for the first time in reply comprised "effectively the whole of the print, digital and broadcast media in South Africa" (at paragraph 18).

56 It failed to convince the SCA that its voluntary submission to the jurisdiction of the ARB without any reservation of rights at any stage was coerced.

57 Bliss Brands now seeks to convince this Court that its submission to the ARB's jurisdiction was coerced by relying on new evidence that was not placed before the High Court at any stage or even the SCA. That is impermissible. It does so

without even disclosing to this Court that this is new evidence, still less by seeking leave to have it admitted.

58 Under the heading "THE PARTIES" in its founding affidavit in this application, Bliss Brands refers in paragraphs 21 to 24 to the following evidence that was not placed before the High Court or SCA:

58.1 A request in terms of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") to the ARB and its response thereto.

58.2 A request in terms of PAIA to the National Association of Broadcasters ("**NAB**"), a member of the ARB, and its response thereto.

58.3 PAIA requests apparently made to other members of the ARB.

58.4 The membership of the Association for Communication and Advertising ("**ACA**"). Bliss Brands said at paragraph 17.1 of its replying affidavit that the membership of ACA was 43 members but now claims in its founding affidavit that ACA "counts at least 46 advertising agencies amongst its members" (at paragraph 24.1).

58.5 The membership of the Marketing Association of South Africa ("**MASA**"). Bliss Brands said at paragraph 17.2 of its replying affidavit only that MASA has members "all over South Africa and internationally" but now claims in its founding affidavit that MASA's members include Multichoice, MTN, Google and Telkom (at paragraph 24.2) despite the screenshot of MASA's website attached to its replying affidavit as annexure RA3 listing no member details whatsoever.

58.6 The membership of Aware.org. Bliss Brands said at paragraph 17.4 of its replying affidavit only that aware.org's membership includes "manufacturers of alcoholic beverages, many distributors and retail chains" but now claims in its founding affidavit that aware.org's membership includes Heineken, Distell and Diageo (at paragraph 24.3), despite the screenshot of aware.org's website attached to its replying affidavit as annexure RA5 listing no member details whatsoever.

59 The attempt by Bliss Brands to convince this Court to accept an argument that did not find favour with the SCA by bolstering it with new evidence in its founding affidavit is impermissible and worthy of censure by this Court. It is established by this Court that new evidence on appeal is only admitted in very rare circumstances and when there is "a reasonably sufficient explanation for the failure to tender the evidence earlier in the proceedings".[11]

60 Bliss Brands has made no attempt to offer any explanation for the failure to tender the evidence in paragraphs 21 to 24 of its founding affidavit earlier in the proceedings. It has not even formally requested the admission of such evidence. It has simply slipped it into the "PARTIES" section of the affidavit as if it was established on the papers before the High Court.

61 Accordingly, there is no evidence – either before the High Court or the SCA or before this Court – that the membership of the ARB is so far-reaching and its

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11 *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* (2009 (2) SA 466 (CC) at para 70.

ability to enforce its rulings through its members so effective as to coerce non-members to participate in its processes.

62 What was established on the papers is that:

62.1 Clause 3.3 of the ARB's MOI prohibits it from requiring non-members to participate in its processes or from making a ruling or order against such a non-members in the absence of a submission to its jurisdiction.

62.2 In the absence of submission to its jurisdiction by a non-member it may issue a ruling to its members in respect of a non-member's advertising which is not binding on the non-member, to determine on behalf of its members whether they should accept the advertisement or withdraw it if already accepted. It cannot impose sanctions against such a non-member.

62.3 Even where a non-member has participated in the processes of the ARB, it is the responsibility of the complainant to monitor whether or not the ruling is adhered to and carried into effect.

62.4 Should the respondent in the complaint ignore a reasonable request for co-operation, the ARB may issue an Ad Alert to its members.

62.5 The sanctions that the ARB may impose are not nearly as broad or far-reaching as Bliss Brands makes out. Sanctions are imposed by the ARB in relation to a specific piece of advertising in its current format, with regard to the mediums in which it was published.

63 Accordingly, the fact remains that Bliss Brands consented unconditionally to the jurisdiction of the ARB. That, with respect, is the end of its constitutional challenge. It does not arise in this case.

64 There is thus no basis upon which the constitutional challenge – to the extent that it ought to have been permitted in the first place – ought to be entertained by this Court.

CLAUSE 3.3 OF ARB'S MOI COMES VERBATIM FROM THE SCA'S ORDER IN HERBEX

65 Clause 3.3 of the ARB's MOI, which Bliss Brands sought to challenge and claims is unconstitutional, is taken *verbatim* from the order of the SCA in Herbex, which was made by agreement between the parties as part of a reasoned judgment by the SCA as follows:

> *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 anu instruction, order or ruling against the non-member or sanction it;*
>
> *1.2 the ASA may consider and issue a ruling to its members (which is not binding on non-members) on any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.*
>
> *2 The ASA is directed to include in its standard letter of complaint the contents of paragraph 1 and that a non-member is not obliged to participate in any ASA process, but that should it not*

> *participate, the ASA may still consider the complaint, for the purposes set out in paragraph 1.2.*[12]

66 After the ASA was liquidated and the ARB was incorporated, the SCA's order was included *verbatim* in clause 3.3 of the ARB's MOI.

67 The High Court held that it was not bound by the SCA's order in *Herbex* because:

67.1 Paragraphs 1.2 and 2 were orders *in personam* and only paragraph 1 was an order *in rem*.

67.2 The order was intended to be and was understood by the SCA to be confined to the parties themselves and not of general application.[13]

68 The SCA – a bench including two of the judges who sat in Herbex – confirmed in its judgment on appeal that the whole of the order of the SCA in Herbex was *in rem*.[14] Accordingly, in order to grant the relief sought by Bliss Brands, this Court would have to declare that the order granted in Herbex and in the appeal before the SCA in this matter are unconstitutional.

69 There is no basis upon which to do so. The SCA, with respect, correctly found that the High Court was bound by the doctrine of precedent and that on that basis too, the constitutional challenge ought to have been dismissed.[15]

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12 *Herbex* at para 18.

13 High Court judgment, annexure B to Bliss Brands' founding affidavit, paras 80 and 81.

14 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 32.

15 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 34.

70 Before this Court, Bliss Brands argues that the SCA mistakenly relied on "footnote 14 para 17.2" of Herbex when the judgment has no such footnote and therefore could not rely on that part of the judgment. In doing so, Bliss Brands has misunderstood the SCA's reference in its footnote 20.

71 Footnote 20 of the SCA judgment – in which it refers to "*Herbex* fn 14 para 17.2" – does not make reference to footnote 14 in Herbex (i.e the SCA judgment in Herbex), but to footnote 14 in the judgment in the appeal because that is where the citation for the High Court judgment in Herbex is set out.

72 The SCA's reference to the High Court judgment in Herbex does not justify the hearing of the appeal. The SCA was applying the principle that 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. Paragraph 17 of the High Court judgment set out the legal basis for the ASA's (now ARB's) consideration of complaints. That was the main issue in dispute in Herbex. If the issue before the High Court on the merits was the legal basis of the ARB's jurisdiction to consider complaints, then in setting aside the High Court decision in Herbex on appeal, the SCA must have been satisfied in respect of that issue that setting the order aside was justified. The SCA – a bench including two of the judges who sat in Herbex – confirmed that the SCA was so satisfied in Herbex,

73 Even if the reference to the High Court judgment in Herbex was erroneous (which is denied), that does not justify the use of this Court's resources to hear an appeal

which ought not to be entertained and which otherwise has no prospects of success.

74 As a last-ditch attempt to avoid being bound by the SCA's order in *Herbex* by virtue of the doctrine of precedent, Bliss Brands now argues that *Herbex* is not binding because the ARB is not the successor in title to the ASA, the body that was the subject of the *Herbex* judgment. The argument is unsustainable:

74.1 In the founding affidavit in its original review application, Bliss Brands accepted that the ARB had stepped into the shoes of the ASA.

74.2 Even in the supplementary founding affidavit in Bliss Brands' re-framed case, it accepted the ARB had taken over from the ASA in administering the Code.

74.3 Even in its founding affidavit before this Court, Bliss Brands says it only disputed whether the ARB is the successor-in-title to the ASA in oral argument for the first time before the SCA (paragraph 105).

74.4 There is no basis upon which Bliss Brands can expect this Court to come to the conclusion that the ARB is not the successor-in-title to the ASA (and therefore not bound by the judgment in *Herbex*) when that issue was not pleaded and when the position it took during oral argument contradicted the position it took in its own papers.

75 In conclusion on this issue, the judgment of the SCA in *Herbex* is binding on Bliss Brands, the ARB, the SCA and the High Court. Clause 3.3 of the MOI was taken *verbatim* from that order, and a declaration that it is unconstitutional is thus a

declaration that the binding precedent of the SCA (now confirmed by the SCA in its judgment in the appeal) is unconstitutional.

76 In light of the above, leave to appeal ought not to be granted on the following grounds:

76.1 The constitutional challenge ought not to have been raised by the High Court *mero motu*.

76.2 In light of Bliss Brands' submission to the jurisdiction of the ARB, the constitutional challenge simply did not arise.

76.3 The clause of the ARB's MOI that Bliss Brands seeks to have declared unconstitutional was taken *verbatim* from an order of the SCA, which has now been confirmed by the SCA in its judgment in the appeal and is binding.

77 Even if the insurmountable hurdles above are disregarded, there was and is no merit in the constitutional challenge or the grounds of appeal in Bliss Brands' application.

MERITS OF THE APPEAL

The ARB's exercise of power is not sourced in law

78 Bliss Brands is aggrieved by two findings of the SCA, namely that:

78.1 PAJA gives the ARB powers. First, because PAJA does not confer any powers and second, because PAJA does not apply to the ARB at all.

78.2 The ARB's powers are sourced in section 55(1) of the Electronic Communications Act 36 of 2005 ("**the ECA**").

79 In respect of the first "finding", the SCA did not find that PAJA gives the ARB powers or provides powers to perform any act as alleged by Bliss Brands. It found that the definition of "empowering provisions" in PAJA is wider in respect of persons other than organs of state, than it is in respect of organs of state. Therefore, it concluded, the ARB's MOI and Code still constitute "empowering provisions" for the purposes of PAJA even though they are not sourced in statute, and it cannot be said that the absence of a statutory source for its powers is *per se* a barrier to their exercise.

80 The SCA did go on to consider the lawfulness of exercising such powers and found that the ARB's exercise of powers over non-members is lawful because:

> *"...the ARB is entitled to consider, on behalf of its members, complaints in respect of advertisements published by non-members of the ARB, so that its members may make an election whether or not they wish to publish that advertisement. This is an incident of their constitutional rights to freedom of expression and association. The high court's order prevents the members of the ARB from using their chosen method of deciding which advertisement they wish to publish and which advertisers they wish to associate with. This constitutes an unjustifiable limitation on the rights of members to freedom of expression and association..."* (paragraph 24)

81 In an about turn, Bliss Brands now alleges for the first time that the exercise by the ARB of its powers "is not administrative action reviewable in terms of PAJA" (paragraph 65). But the original case brought by Bliss Brands was a review of

the ARB's decisions in terms of PAJA. Its criticism of the SCA is thus entirely unsustainable on its own pleadings before the High Court.

82 In respect of the second finding by the SCA, Bliss Brands says the SCA's finding that section 55(1) of the ECA empowers the ARB to consider breaches of the Code where the broadcast licensee is a member is irrelevant because Bliss Brands is not a broadcast licensee (paragraph 78).

83 Section 55 of the ECA provides:

> *(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.*
>
> *(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the 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*

84 It cannot be argued seriously by Bliss Brands that the ARB is not empowered by section 55(1) and (2) of the ECA to adjudicate complaints concerning alleged breaches of the Code by broadcast service licensees who are members of the ARB.

85 Yet it tries to do so by disregarding the words "who are not members of the Advertising Standards Authority of South Africa" in section 55(2) of the ECA (which is plainly unsustainable) and saying that ICASA's Complaints and Complaints Committee is empowered by section 17B(a) of the "Independent Broadcasting Board Act 13 of 2000" to adjudicate complaints concerning alleged breaches of the Code by broadcast service licensees who are members of the ARB.

86 Act 13 of 2000 is not the Independent Broadcasting Board Act, it is the Independent Communications Authority of South Africa Act ("**the ICASA Act**") and section 17B (functions of the Complaints and Compliance Committee) only applies in respect of a member of the ARB once there has been a finding of a breach of the Code by the ARB in terms of section 55(2) of PAJA.

87 In any event, the SCA did not find that section 55(1) of the ECA gives the ARB the power to determine a complaint against a non-member. It found that the order granted by the High Court had the effect of preventing the ARB from exercising its statutory duty in terms of section 55 of the ECA because it is prevented by the order from determining complaints in respect of non-member advertising even where the advertisement is broadcast by a broadcast service licensee (at paragraph 23).

88 There are no prospects that this Court will find that section 55(1) of the ECA gives the ARB no powers in respect of broadcast service licensees, or that the order of the High Court is not so wide that it does not prevent the ARB from performing that function or exercising those powers.

The right to freedom of expression and association

89 Bliss Brands says that the MOI and the Code infringe its constitutional right not to associate with the ARB, and its rights of freedom of expression.

90 These alleged infringements were never pleaded before the High Court, not even after Bliss Brands amended its entire case to bring the constitutional challenge. In any event, they are unsustainable.

91 Bliss Brands does not have the right to publish whatever advertisement it wants in whatever medium it wants and in whatever manner it wants.

92 The SCA correctly found that the ARB's members are entitled to refuse to publish advertising as part of their right to freedom of expression in section 16 of the Constitution. Bliss Brands has no answer to this:

92.1 It simply seeks to avoid the finding in its application by saying that it was "not the issue before the Court" (paragraph 111).

92.2 It does not attempt to address paragraphs 35 to 37 of the SCA's judgment in its application, which held that such a conclusion is supported by international law, English authority, American authority and authority of the European Court of Human Rights.

92.3 It does not attempt to address the finding in paragraph 41 of the SCA's judgment that the power to consider complaints relating to advertisements

by non-members for the benefit of its own members, advances the right to freedom of association on the authority of this Court.[16]

93 Therefore, the SCA, with respect, correctly found that:

> *"...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."* (paragraph 45, emphasis added)

94 There are no prospects that this Court will find that the rights of Bliss Brands to freedom of association and expression have been infringed because it cannot publish advertisements whatever it wants, wherever it wants, however it wants.

Access to court

95 Bliss Brands says that the ARB's processes violate the right of access to courts in section 34 of the Constitution because it ousts the jurisdiction of the courts and it does not follow the same processes as a Court, specifically:

95.1 It does not follow the same rules of evidence.

95.2 It is only subject to oversight by a Court in review proceedings, not in respect of the merits of a decision.

95.3 It is not fair and independent.

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16 *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* 2020 (6) BCLR 725 (CC).

96 The SCA, with respect, correctly found that there was no merit in these challenges.

97 The ARB is an administrative adjudicative tribunal (as correctly found by the SCA at paragraph 50). Bliss Brands cannot seriously dispute that in light of the fact that its case as originally pleaded was a review of the ARB's decisions in terms of PAJA in which it said (at paragraph 57 of its founding affidavit in the review) the ARB's decisions are "of an administrative nature by a juristic person exercising a public power or performing a public function in terms of an empowering provision".

98 It is well established that an adjudicative administrative tribunal is not required to follow the same procedures and technical rules of evidence as a Court. Bliss Brands does not dispute the well-known authority relied upon (correctly) by the SCA in *Turner*[17] that:

> *"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."*

99 Furthermore, PAJA provides for flexible procedural fairness requirements. Section 3(2)(a) expressly provides that what is fair administrative procedure depends on the circumstances of each case.

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17 *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646F.

100 The SCA, with respect, correctly overturned the High Court's finding that the ARB is not independent due to its funding model. On the evidence before the High Court, the SCA correctly found that no reasonable, objective and informed person would consider it likely that the few funders of the ARB influence the running of the entire ARB.[18] Bliss Brands does not dispute any of the underlying facts.

101 More importantly, however, any complaint about a lack of independence (to the extent that it is raised timeously and not after the fact once the decision is unfavourable) could never be a basis to declare the exercise of its powers, its very foundation, to be unconstitutional. At best, it could be a ground of review in relation to a specific decision.

102 In respect of ousting the jurisdiction of the courts, it is well-established (by this Court) that the Courts do not have jurisdiction to determine the merits of disputes before an adjudicative administrative tribunal – the role of Courts is to control these decisions through a review.[19] The SCA correctly found that no dissatisfied respondent in an adjudicative administrative process is entitled to "appeal" to a court against an administrative decision – the remedy is a review under PAJA (paragraph 55).

103 None of the other points made by Bliss Brands in respect of ousting the jurisdiction of the courts hold any water either.

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18 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 53.

19 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 45.

104 Bliss Brands takes issue with the SCA's reliance on this Court's decision in *Metcash*[20] as support for its finding that the ARB is a "tribunal or forum" envisaged in section 34 of the Constitution. *Metcash* provides that section 34 is infringed and the rule of law breached when self-help is sanctioned (paragraph 50 of *Metcash*)

105 Bliss Brands says paragraph 47 of *Metcash* (referenced in footnote 39 of the SCA's judgment) is obiter and the facts of *Metcash* are distinguishable.

106 Even if that were correct (which it is not) the SCA correctly referred to paragraphs 58, 60 and 62 of *Metcash* as authority for the principle that it is not a complete bar to access to the courts where there is opportunity for fair judicial determination in due course, in other words where the decision is subject to judicial review, or suspension.

107 The SCA correctly found that there is no violation of section 34 of the Constitution because the decisions of the ARB are subject to judicial oversight and because a dissatisfied respondent can apply to a Court for an interdict suspending the operation of a decision pending such a challenge (which is precisely what Bliss Brands did originally).

108 Bliss Brands is further aggrieved by the fact that the SCA did not refer to or rely on the case of *Lufuno* at paragraph 201 which Bliss Brands says provides that

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20 *Metcash Trading Limited v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC).

section 34 only refers to tribunals established by law.[21] That's not what *Lufuno* says. Paragraph 201 says:

> *[201] On a straightforward reading, [section 34 of the Constitution] provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public hearing by a court or by another independent or impartial tribunal. Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice. The question that then arises is whether an arbitrator is 'another independent and impartial tribunal or forum' as contemplated in the section. It seems to be beyond doubt that these words apply to other tribunals established by law such as the CCMA. Such tribunals must also conduct 'fair public hearings' as provided for in s 34. The more difficult question, however, is whether these words apply to private dispute mechanisms established by parties by consent.*

109 The Court concluded:

> *[218] In the light of the foregoing, on a proper construction of s 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.*

110 *Lufuno* does not say that tribunals not established by law are not included in the ambit of section 34 of the Constitution. It says that tribunals established by law are included in the ambit of section 34 of the Constitution.

111 Finally in respect of ousting the jurisdiction of the courts, and remembering that the complaint laid against Bliss Brands was in respect of packaging, Bliss Brands says that the SCA ought to have found that the jurisdiction of the courts is ousted

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21 *Lufuno Mphaphuli and Associates (Pty) Limited v Andrews and Another* 2009 (4) SA 529 (CC).

where there is an overlap in a complaint before the ARB with elements of a cause of action that may be pursued in a court. While Bliss Brands disputes the SCA's reliance on *Nestlé*[22], it does not dispute any of the underlying factual conclusions that:

111.1 The ARB and courts are different fora with distinct powers.

111.2 The ARB operates consensually and is not permitted to determine questions whether the packaging or getup of a particular product constitutes passing-off or breach of copyright.

111.3 The ARB may only determine whether its Code has been breached.

111.4 It does not exercise any judicial function when doing so.[23]

112 Accordingly, there are no prospects that this Court will find that the process of the ARB – an administrative adjudicative tribunal – infringe upon Bliss Brands' right in terms of section 34 of the Constitution.

The issues before the SCA

113 Bliss Brands says that the SCA mistakenly referred to the wrong paragraphs of the amended notice of motion in its order. Even if that were the case, incorrect paragraph numbers in a court order do not warrant intervention (together with the associated time, effort and costs) of this Court.

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22 *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA).

23 SCA judgment, annexure A to Bliss Brand's founding affidavit, para 58.

114 If Bliss Brands believes that the SCA mistakenly referred to one or two incorrect paragraph numbers in its order, then the correct procedure is to apply to the SCA for a correction or rectification of its order, not to approach the Constitutional Court to make a new order on appeal, at great expense to all the parties involved.

115 There are no prospects in respect of any of the grounds of appeal raised by Bliss Brands, even if it were appropriate for the Court to consider the merits of the constitutional challenge. But the Court need not get there, as the constitutional challenge was not appropriately raised *mero motu* and did not arise on the facts of this case.

THE TEST FOR LEAVE TO APPEAL HAS NOT BEEN SATISFIED

116 The appeal by Bliss Brands does not satisfy either of the requirements for leave to appeal.

117 The case that was brought by Bliss Brands was a garden-variety review in terms of PAJA of two rulings of the ARB's FAC, made after its unequivocal submission to the jurisdiction of the ARB and participation in the processes of the ARB.

118 To the extent that there is any question of the lawfulness of the ARB's powers or processes in terms of section 34 of the Constitution, it was raised *mero motu* by the High Court in an impermissible manner. It was not open the High Court to consider the constitutional issue, nor is it, with respect, open to this Court to consider the constitutional issue. The Constitutional issue simply does not arise on the facts of this case.

119 Furthermore, in respect of each of the issues which Bliss Brands says are in the interests of justice to decide (paragraphs 185.1 to 185.6 of its application), there is already binding authority which is on point and the intervention of this Court is not necessary:

119.1 It is already established that a constitutional issue may be raised *mero motu* in exceptional circumstances, where the question of law emerges fully from the evidence and it necessary for the decision of the case.[24]

119.2 It was already established in *Herbex* that the ARB's determination of complaints in respect of non-member advertising, for the purpose of advising ARB members whether to accept that advertising, is lawful. The SCA has in its judgment in the appeal confirmed that precedent.

119.3 It is well-established by this Court that when a court considers a judgment *in rem* on appeal it must be satisfied that the setting-aside is justified by the merits of the appeal.[25]

119.4 It is also established that failure to raise any objection to jurisdiction and subsequent participation in proceedings in sufficient to demonstrate submission to jurisdiction.[26]

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24 *Fischer and Another av Ramahlele and Others* 2014 (4) SA 614 (SCA) para 13; *Pubic Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 234; *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC) at para 58; referred to in the SCA judgment, annexure A to Bliss Brand's founding affidavit, paras 9-10.

25 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) para 1; referred to in the SCA judgment, annexure A to Bliss Brand's founding affidavit, para 31.

26 *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; referred to in the SCA judgment, annexure A to Bliss Brand's founding affidavit, para 13.

119.5 There is no question of a non-statutory body deciding disputes involving parties which have not agreed to it deciding the dispute because in this case both parties did agree to the ARB deciding the dispute between them. Bliss Brands unequivocally submitted to the jurisdiction of the ARB.

119.6 There is no question of "the jurisdiction of the SCA and what matters it can decide", or the "content of the orders it can make". There is nothing unusual about the SCA deciding an appeal from the High Court after having been granted leave by the High Court or confirming the contents of its own order in *Herbex*.

120 Accordingly, there are no issues of general public importance to be decided in this case and it is not in the interests of justice to grant leave to appeal. The case does not involve any arguable points of law.

CONCLUSION

121 The suspension of the rulings of the FAC, which prohibit Bliss Brands from using the offending soap packaging, will remain in effect as long as the application for leave to appeal by Bliss Brands remains alive, allowing the packaging which has been found to violate the Code to remain on the shelves.

122 Leave to appeal ought not to be granted in this instance. To the extent that there is a constitutional issue, it was impermissibly raised *mero motu* by the High Court and given life by Bliss Brands in a brand-new case. But the constitutional issue that was raised does not arise on the facts of this case because Bliss Brands

submitted to the jurisdiction of the ARB. Its attempt to clear that hurdle by informally introducing new evidence before this Court ought not to be countenanced.

123 The SCA's dismissal of the constitutional challenge and overturning of the High Court's order and judgment is, with respect correct.

124 ARB therefore asks that the application for leave to appeal be dismissed with costs, including the costs of two counsel.

GAIL DIANE SCHIMMEL VAN ONSELEN

I hereby certify that the deponent declares that she knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Hyde Park on this the 20th day of **MAY 2022** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS:
FULL NAMES AND SURNAME:
DESIGNATION:
ADDRESS:
TELEPHONE NUMBER:

ADÈLE ELS
Commissioner of Oaths
Practising Attorney R.S.A.
Cnr. Albury Road & Jan Smuts Avenue
Hyde Park
Johannesburg

AAY

Koketso Molope GS 1 012-102

From: Stephan <stephan@arb.org.za>
Sent: Friday, 28 June 2019 10:27
To: Liezel Bygate; Sara-Jane Pluke
Subject: 327 - MAQ Soft - Sta-Soft
Attachments: CPSA - Bliss Brands Advertising Regulatory Board Letter 21062019.pdf; Annexures A1-A2.pdf; Annexures B1 - B2.pdf; Annexure C.pdf; Annexure D.pdf; Annexure E.pdf; Annexure F.pdf; Annexure G.pdf; Annexure H.pdf; Annexure I.pdf; Annexure J.pdf

Importance: High

Dear Ms Bygate and Ms Pluke,

We are contacting you on behalf of the Advertising Regulatory Board (ARB)

The ARB is the body that considers complaints about the content of advertising on behalf of the marketing and advertising industry. You can read about us at www.arb.org.za.

We have received the attached complaint. If this complaint is not meant for you, please let us know immediately.

We have not made a finding about the matter yet. We have simply received a complaint that meets our requirements for a valid complaint and we must now investigate the matter.

We are requesting your response.

We are now giving you an opportunity to respond to the complaint. Please provide us with your response by close of business on **3 July 2019.**

The ARB can consider the advertising of non-members

The Memorandum of Incorporation of the ARB states:

> *"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 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."*

In other words, if you are not a member and do not submit to the jurisdiction of the ARB, the ARB will consider and rule on your advertising for the guidance of our members.

We would appreciate it if you could inform us if you do not consider yourself to be bound by the ARB. However, you are not obliged to respond, nor are you obliged to furnish a defence.

We will, however, rule on whatever is before us when making a decision for the guidance of our members. This ruling will be binding only on ARB members and on broadcasters in terms of the Electronic Communications Act.

Please feel free to contact us if you have any queries about your status.

Confidential documentation

If any documentation submitted to the ARB is confidential, clearly mark the documents as "confidential" and explain to us why they are confidential. You must also submit a non-confidential summary of each confidential document. If we do not agree that a document qualifies as confidential, you will have a chance to withdraw that document.

Relevant clause(s) of the Code

The matter will be considered in terms of the following clause(s) of the Code, which have been identified by either the complainant or the Directorate to be relevant:

012-102

- Clause 8 of Section II (Exploitation of advertising goodwill);
- Clause 9 of Section II (Imitation).

The Directorate usually makes the initial decision.

Once we have a response, we will refer the file to an external adjudicator of the Directorate. In certain circumstances, we might refer the file straight to the Advertising Appeals Committee for a decision. We will tell you about this process if it happens.

Once the decision is made, we will communicate it to you and the Complainant.

You can appeal the decision

If you are unhappy with the initial decision, you have 10 working days to appeal to the Advertising Appeals Committee. The other party also has the right to appeal. Please note that there are fees applicable to appeals, unless you are defending an appeal lodged by a consumer. You can find more information about the fees on our website, http://www.arb.org.za/complaints.html.

You must explain exactly why you are appealing. The other party will have the chance to comment on your grounds of appeal. They also get 10 working days to respond.

The matter will then be set down for hearing, and we will explain the process to you at that time.

If you still are not happy with the decision of the Advertising Appeals Committee, you can appeal to the Final Appeals Committee. You have 20 working days from receiving the decision of the Advertising Appeals Committee to lodge this second appeal. Again, you need to clearly make your case, and the other party will be given 10 days to respond.

The ruling is binding until appealed

The rulings of the Directorate and the Advertising Appeals Committee are binding until overturned on appeal.

Communication

We will keep you informed of the progress of your file.

If you wish to query anything, please contact the writer.

If you wish to complain about the service you are getting from us, you can email our CEO on gail@arb.org.za.

Regards

ADVERTI
REGULAT
BOARD

Stephan Kotzé
Internal Adjudicator

(011) 463-5340
stephan@arb.org.za arb.org.za
54 Queens Road Bryanston Sandton 2191 South Africa

012-103
SNM

GS 2 C002-1

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/22061

In the matter between:

BLISS BRANDS (PTY) LIMITED Applicant

and

ADVERTISING REGULATORY BOARD NPC First Respondent

COLGATE – PALMOLIVE (PTY) LIMITED Second Respondent

COLGATE – PALMOLIVE COMPANY Third Respondent

NOTICE OF MOTION

TAKE NOTICE that on Tuesday, 22 September 2020 at 10h00 or as soon thereafter as counsel may be heard, the applicant intends making application to the above Honourable Court for an order in the following terms:

1. This matter is heard as one of urgency in accordance with the provisions of Uniform Rule 6(12) and the failure of the applicant to comply with the forms and service provided for in the Uniform Rules of Court is condoned.

002-1

2. The rulings of the Final Appeal Committee ("**FAC**") of the first respondent, dated 3 August 2020 and 17 August 2020 (titled "Clarification of the Cost Orders"), respectively, and, in the event that the review application is successful and the matter is referred back to the FAC for a re-hearing, the ruling of the Advertising Appeals Committee of the first respondent dated 27 April 2020, in the matter between the applicant and the second and third respondents, are suspended pending the outcome of a review application (including any appeals in relation thereto) that is to be brought by the applicant in this Court in relation to these rulings by a date to be determined by the Court.

3. If the applicant fails to bring the review application by the date determined by the Court, the order of suspension shall lapse with immediate effect from that date.

4. The second and third respondents (and the first respondent if it opposes this application), jointly and severally, are ordered to pay the costs of this application, including the costs of two counsel.

TAKE NOTICE FURTHER that the applicant will rely on the accompanying affidavit of **LIEZEL VERONICA BYGATE** together with annexures and supporting and confirmatory affidavits, for the relief which it seeks.

TAKE NOTICE FURTHER that the applicant has appointed the address of its attorneys below as the address at which it will accept notice and service of all process in these

proceedings.

TAKE NOTICE FURTHER that if you intend opposing the relief sought you are required:

(a) in the instance of the first respondent, to appoint in such notice an address referred to in Rule 6(5)(b) of the Rules of the above Honourable Court at which you will accept notice and service of all process in these proceedings; and

(b) to deliver your answering affidavit, if any, by 16 September 2020.

KINDLY ENROL THE MATTER ACCORDINGLY.

DATED at JOHANNESBURG on this 25 day of AUGUST 2020.

EVERSHEDS SUTHERLANDS (SA) INC

Applicant's attorneys

Third Floor, 54 Melrose Boulevard

Melrose Arch, Melrose North, 2196

Tel: 010 003 1470

Email: sarajanepluke@eversheds-sutherland.co.za

Ref: MAT30036/SJP/tn

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

JOHANNESBURG

AND TO:

ADVERTISING REGULATORY BOARD
First respondent

Block 4, Albury Office Park

1 Magalieszicht Road

Dunkeld West

Johannesburg

AND TO:

COLGATE – PALMOLIVE (PTY) LIMITED

Second respondent

c/o Second respondent's attorneys

Kisch IP

5 Inanda Greens Business Park

54 Wierda Road West

Wierda Valley

Sandton

Tel: 011 324 3000

Email: andrewp@kisch-ip.com

GS3

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/22061

In the matter between:

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

NOTICE OF MOTION

TAKE NOTICE that on the 20th day of October 2020, at 10h00 or so soon thereafter as counsel may be heard, the applicant intends making application to the above Honourable Court for an order in the following terms:

1. This matter is enrolled and heard as one of urgency in accordance with the provisions of Uniform Rule 6(12) and the failure of the applicant to comply with the forms and service provided for in the Uniform Rules of Court is condoned.

2. The applicant's failure to comply with the requirements of Uniform Rule 16A is condoned.

3. Pending the final decision of this application and any subsequent appeals, the rulings of the Final Appeals Committee ("**FAC**") of the first respondent, dated 3 August 2020 ("**the FAC Ruling**") and 17 August 2020 (titled "Clarification of the Cost Orders") ("**the Costs Decision**"), respectively, (collectively "**the Rulings**") are suspended.

4. Declaring that the Memorandum of Incorporation of the first respondent is not enforceable against any person or entity on whom it is not binding in terms of section 15(6) of the Companies Act 71 of 2008.

5. Reviewing the Rulings, and setting them aside.

6. Substituting the FAC Ruling and the Costs Decision with the following:

   6.1. Declaring that the SECUREX packaging does not breach clauses 8 or 9 of Section II of the Code of Advertising Practice of the first respondent;

   6.2. Declaring that the applicant's appeal to the FAC succeeds;

6.3. Directing that the first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 12.6 of the Procedural Guide;

6.4. Declaring that the Ruling of the Advertising Appeal Committee ("**AAC**") of the first respondent, dated 27 April 2020, ("**the AAC Ruling**") is substituted with the following:

6.4.1. The appeal is dismissed;

6.4.2. The first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 8.9 of the Procedural Guide.

7. Alternatively to paragraph 6, referring the matter back to the FAC for a re-hearing, and suspending the AAC Ruling, pending the outcome of that hearing.

8. Directing the applicant's costs of suit be paid by the first respondent, and if the matter is opposed by another respondent, by the first respondent and such other respondent(s), jointly and severally, including the costs of two counsel.

9. Granting the applicant such further and/or alternative relief as the Court deems fit in the circumstances.

TAKE NOTICE FURTHER that the applicant will rely on the accompanying affidavit of **LIEZEL VERONICA BYGATE** together with annexures and supporting and confirmatory affidavits, for the relief which it seeks.

TAKE NOTICE FURTHER that the applicant has appointed the address of its attorneys below as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing the relief sought you are required:

(a) to serve and file a notice of intention to oppose by 5 October 2020;

(b) to serve and file your answering affidavit, if any, by 12 October 2020.

TAKE NOTICE FURTHER that if no intention to oppose be given, application will be made on 13 October 2020 at 10h00 or so soon thereafter as counsel may be heard.

BE PLEASED TO ENROL THE MATTER ACCORDINGLY.

DATED at Melrose on this 2nd day of October 2020.

EVERSHEDS SUTHERLANDS (SA) INC

Applicant's attorneys

Third Floor, 54 Melrose Boulevard

Melrose Arch, Melrose North, 2196

Tel: 010 003 1470

Email: sarajanepluke@eversheds-sutherland.co.za

Ref: MAT30036/SJP/tn

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

JOHANNESBURG

AND TO:

FAIRBRIDGES WERTHEIM BECKER ATTORNEYS INC.

First respondent's attorneys

Ground Floor

33 Fricker Road

Illovo

Johannesburg

Tel: (011) 268-1130

Email: mvdwant@fwbattorneys.co.za

mmakhubedu@fwbattorneys.co.za

Ref: ADV15/0001 MW Van DER Want

AND TO:

D M KISCH INCORPORATED

Second and Third respondents' attorneys

KISCH IP House, 5 Inanda Greens Business Park

54 Wierda Road West

Wierda Valley, Sandton

Docex: DX17, Sandton Square

Tel: (011) 324 3012

Fax: 086 603 6118

Email: andrewp@kisch-ip.com

Ref: R4717ZA02/AP/TP

GS4

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2206/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO
30/11/2020
DATE SIGNATURE

In the matter between:

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

JUDGMENT

FISHER J:

Introduction

[1] This is an application for the urgent review of the rulings and directives (the rulings) of the first respondent (the ARB) taken against the applicant (Bliss) arising from complaints of the second respondent and third respondents (collectively Colgate) against Bliss to the ARB. Ancillary to this review is a claim for interim relief pending

the determination of the review. This judgment deals only with the interim relief in that the review cannot be determined urgently.

Background

[2] The ARB is an independent body established and paid for by its members which comprise major participants in the advertising industry, including Colgate. It is alleged that the purpose of the ARB is the self-regulation by the advertising industry of itself in the public interest. The ARB and its predecessor, the Advertising Standards Authority of South Africa (ASA), have developed standards for the advertising industry that are contained in the Code of Advertising Practice (the Code). The Code, including its Procedural Guide, is the guiding document for assessing advertising and sets out the procedure for determining complaints against advertising.

[3] Colgate and Bliss are direct competitors in inter alia the market for disinfectant soap bars. The brand of Colgate is *Protex* and Bliss' is *Securex*. The two brands have competed in the market since February 2011 when Bliss launched four *Securex* soap variants. During 2018, Bliss made some changes to its product. Bliss alleges that this served only to 'refresh' the existing brand which included changes to the get-up or what is referred to by Colgate as the packaging 'architecture'. In March 2019 Colgate raised concerns that this change contravened the Code. On 9 December 2019, Colgate lodged a complaint to the ARB, contending that the packaging contravened the Code in that it exploited the advertising goodwill of the packaging architecture of the Colgate's *Protex* soap and imitated the *Protex* packaging get- up / architecture. Colgate alleged this was in contravention of clauses 8 and 9 of the Code.[1] Colgate has stated in correspondence that this also constitutes passing -off.

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[1] Clause 8 (exploitation of advertising goodwill) provides in relevant part:
"8.1. Advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or advertising goodwill relating to another party's advertising campaign or advertising property, unless the prior written permission of the proprietor of the advertising goodwill has been obtained. In considering matters raised under this clause consideration will be given to, inter alia, the likelihood of confusion, deception and the diminution of advertising goodwill. Furthermore, whether the device or concept constitutes the 'signature' of the product or service, is consistently used, expended throughout media and is prominent in the mind of the consumer."
Clause 9 (Imitation) provides in relevant part: "9.1. An advertiser should not copy an existing advertisement, local or international, or any part thereof in a manner that is recognisable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value. This will apply notwithstanding

[4] Colgate's complaint and Bliss' defence thereto had a chequered progression up the ranks of the ARB process. The Directorate, being the first decision making body in the administration of the ARB dismissed the complaint. Colgate appealed to the next body, the Advertising Appeal Committee (AAC) which upheld the complaint and directed Bliss to withdraw its advertising of the product in the impugned get-up immediately and its packaging within three months and to stop. Presumably a longer period was given for the packaging because this change involves logistical factors such as taking the product off retail shelves and seeking to design a new brand and manufacture the new package get-up, whilst the withdrawal of the advertising in the advertising media can happen almost overnight. The product and its get-up are a composite in that this the thing sold to the consumer. Bliss appealed the decision of the AAC to the final appeal level of the ARB being the Final Appeal Committee(FAC) and the decision, which was ultimately against Bliss, came down to the exercise of a casting vote by the Chairman of the FAC.

[5] Thus, Bliss has been left subject to a ruling that it must change its packaging/ get-up within three months. If it does not comply the ARB, through its membership, can exact penalties which include the members refusing to allow any advertising of the product. If Bliss cannot market its product in popular advertising media, its brand in its existing form will not have the exposure it needs to survive. Advertising is the oxygen of brand survival. Thus, this penalty is an important weapon of the ARB.

Procedural history in the high court

[6] This is not the first application for interim relief brought by Bliss pending a review of the rulings. On 23 September 2020 Bliss argued the first urgent interim application (the first interim application) to suspend the rulings, pending an application for judicial review, which was at that stage still to be instituted. On 26 September 2020, this Court, per Yacoob J, dismissed the first interim application. In particular, Jacoob

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the fact that thereis no likelihood of confusion or deception or that the existing concept has not been generally exposed.

In considering whether or not an infringement has taken place consideration will be given to, inter alia, the extent of exposure, period of usage and advertising spend, whether the concept is central to the theme, distinctive or crafted as opposed to in common use. Furthermore the competitive sphere will also be taken into account

J found, on the papers before her, that the applicant had not demonstrated a prima facie right worthy of urgent protection and further that the applicant had not made out a case for irreparable harm. In this regard Yacoob J said the following.

'In my view, Bliss has not demonstrated nor has it attempted to demonstrate that there is a right under threat which will be vindicated should the review be successful. Bliss has also not demonstrated that there is a threat to it of irreparable harm. There are simply bald allegations that it will suffer irreparable harm. Not only are these allegations not supported by evidence they are not coupled with a right worth of urgent protection.'[2]

[7] Bliss argues that it suffers harm in that it cannot sell *Securex* soap to its customers because it is not in possession of packaging that it is entitled to use, it has not made provision for alternate packaging and, it will be unfair for it to change its packaging pending the outcome of the review proceedings, especially having regard to the costs associated with the change of packaging. It contended that it will not be able to fulfil any orders after 30 September 2020. Ms Southwood SC for Bliss argues that Bliss' predicament is worsening as the weeks go on in that it has no stock.

[8] The application which comes before me is complete with the review application which was only proposed in the application before Yacoob J. It bears mention that the grounds of review were showcased in the first interim application and were also dealt with therein to an extent by Colgate.

[9] The ARB, although it is the respondent against whom the relief is sought – in that it is asked that it be precluded from enforcing its rulings – did not at the stage of the first interim application or, initially, in this application before me take up a cudgel on its own behalf. Instead, it has stated that it will abide this Court's order. It is Colgate that is driving this litigation to its own commercial ends. And this brings me to the significance of litigation in the field of competition.

[2] Judgment in first interim application, para 20.

Litigation and competition

[10] Competitors vie for market share. This involves finding out what attracts customers to the product. What catches the eye of the consumer. They must watch the progress of the successful competitor and try to divine the secret of this success. In this way, they should seek to learn without imitation and to share in the market spoils without placing illegitimate impediments in the path of competitors or hoisting themselves above the limits of fair play and decency. That these normative concepts have a subjective core hardly needs be stated. And then there are the consumers' rights which must be protected against advertising that is confusing or offensive. It is important that it is in the area of confusing get-up that advertising regulation and the common law of unfair competition intersect.

[11] Resort to legal process is a powerful weapon in the competitive arena. This is because a foray into an area where there is some evidence of encroachment by one competitor on another's intellectual property and goodwill which has the element of unlawfulness, inevitably creates an environment where litigation puts one or the other at an advantage as to the continued plying of its trade.

[12] This commercial engagement is made all the more vigorous and creative by the common law's conception of the limits and complexities of competition. This is because the common law regards that, 'imitation is the lifeblood of competition' and 'the bare imitation of another's product, without more is permitted'.[3]

[13] In this matter the gravamen of the complaint of Colgate to the ARB is exploitation of goodwill and imitation. Whilst Colgate has achieved some success in establishing its complaint in the ARB, there have been differing views expressed by those on the various tribunals who have heard the matter. Indeed, as I have said, the final decision came down to a casting vote.

[14] The ARB, when called upon to determine an unfair competition dispute as to get-up on the basis of clauses 8 and 9, to my mind, undertakes the same assessment

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[3] *Schultz v Butt* (327/84) [1986] ZASCA 47; [1986] 2 All SA 403 (A) quoting from American Safety Table Co Inc v Schreiber 269 F.2d 255 (2nd Cir 1959))

of customer confusion as would be undertaken in a breach of copyright or passing- off complaint. Trademark infringement makes for similar comparative approaches but I put this in a different category because it involves a statutory scheme of registration and regulation, however there are also similar characteristics to this process.

[15] A comparative analysis of the two processes shows that a respondent made subject to the ARB process is in a profoundly different position as it would be in had it been taken to court to decide the question of whether it was competing unfairly with a competitor. I turn now to a brief comparison of the impact of the processes on the competitors.

A comparison between the ARB process and the judicial determination of unfair competition.

[16] The law of passing off is not designed to create monopolies or result in other anti-competitive behaviour. Passing off consists in a representation that one's product is that of another or associated with that of another. In order to determine whether passing off has been established the enquiry is as to whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another. As Corbett CJ put it in *Williams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) at 418F-H:

'Such conduct is treated by the law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation. Such a representation may be made impliedly by A adopting a trade name or a get-up or mark for his goods which so resembles B's name or get-up or mark as to lead the public to be confused or to be deceived into thinking that A's goods or services emanate from B or that there is the association between them referred to above. Thus, in order to succeed in a passing-off action based upon an implied representation it is generally incumbent upon the plaintiff to establish, inter alia: firstly, that the name, get-up or mark used by him has become distinctive of his goods or services, in the sense that the public associate the name, get-up or mark with the goods or services marketed by him (this is often referred to as the acquisition of reputation); and,

secondly, that the name, get-up or mark used by the defendant is such or is so used as to cause the public to be confused or deceived in the manner described above.'

[17] The employment of the ARB regulatory scheme by Colgate resulted in Bliss being subject to an extra-judicial ruling by a body that is contractually created but which serves a public function, to the effect that it may no longer use its get-up. The internal appeal process has been exhausted and Bliss' only resort is now to review.

[18] If the judicial route had been chosen by Colgate, the legal process would have unfolded in the normal course on the basis that Colgate would have sought a final interdict which would have been subject to appeal if granted. Such an appeal would automatically suspend the operation of the interdict unless resort was had to the appeal procedure in section 18(3) of the Superior Courts Act[4] where the onus would lie on the applicant to satisfy the court that the applicant stands to suffer irreparable harm if the order is not implemented pending finalization of the appeal proceedings and the respondent will not suffer irreparable harm if the order is so implemented and perhaps more onorous still, the existence of exceptional circumstances. Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present, must necessarily depend on the peculiar facts of each case[5]. In *Incubeta Holdings (Pty) Ltd & another v Ellis & another*[6] Sutherland J put it thus:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves.[7]'

[19] Thus this process is informed by the parties respective predicaments which arise from the finding of the court in the first instance. The court is called on to make findings of fact as to the respective harm of the parties on a balance of probabilities. The process will, to some extent, favour the party who is subject to the interdict in that it will have the benefit of an automatic suspension unless the other party can reverse this automatic position. Thus, in the case of a section 18 application the court

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[4] 10 of 2013

[5]

[6] ***2014 (3) SA 189*** *(GJ)*

[7] Ibid at para 22.

is faced with a different inquiry – which is right based and seeks to avoid irreparable harm in the interim. The prospects of success in the appeal remain a relevant factor in the inquiry and also have a bearing on the degree of exceptionality shown to justify an order in terms of s 18 of the Act[8]. And once this section 18 application is exhausted, the applicant for relief has still another rung on the process, which is an automatic urgent appeal to a full court – where again the prospects of success are considered and yet again the operation of the judgment automatically suspended. Thus clearly the judicial appeal process is geared towards a judicial consideration of the merits and prospects of success of the appeal in circumstances where the order under appeal is suspended and an in depth judicial re-evaluation of the merits and the parties' respective circumstances is undertaken in order to come to as just an interim position as follows.

[20] In contrast, the ARB procedure does not provide for automatic suspension pending appeal. It is up to the party subject to the order to apply for a suspension of the order. Furthermore, this route also operates to preclude reliance on the judicial appeal process in that the only avenue for a revisiting of the matter is judicial review. Whilst a court of appeal is a forum for a rehearing of the merits of the dispute, a court of review is in general concerned only with the lawfulness of the process by which the decision was arrived at. The fact that the process is one of review and not appeal is integral to the courts evaluation of an application for interim relief pending review. This is clear from the judgment of Yacoob J in the first interim application where the Court found that the mere right to a review was not sufficient to found the interdictory relief sought.

The raising of a constitutional challenge to the ARB regulatory scheme

[21] Because of the stark differences in the process to which a respondent is subjected depending on the choice of the complainant, I have asked that I be

[8] *University of the Free State v Afriforum and Another* (929/2016) [2016] ZASCA 165; [2017] 1 All SA 79 (SCA); 2018 (3) SA 428 (SCA) (17 November 2016) at [14].

addressed as to the constitutionality of the ARB process in this context – with specific reference to section 34 of the constitution which reads as follows:

'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.**' (emphasis added).

[22] Thus he appropriateness or otherwise of the ARB process in relation to the inquiry as to whether Bliss has unlawfully exploited the goodwill of the get-up of Colgate's *Protex* soap will require examination in the determination of this question.

[23] In that constitutionality of the regulatory scheme of the ARB has been challenged the ARB has joined the fray. It has sought on behalf of Mr Ferreira who appeared for the ARB that the hearing be postponed to deal with the matter by way of placing further evidence, if necessary, before the court. There is no reason why this should not be allowed and the postponement was not opposed. This new development has made the urgent determination of the review impossible. Indeed as Mr Michau SC for Colgate argued, an urgent review is a rare thing in any event and the delay occasioned by review proceedings are generally taken account of by granting urgent relief. Ms Southwood argued that the need for interim relief had become all the more pressing in the circumstances.

The arguments as to interim relief

[24] As I have said – the ARB does not oppose an order to the effect that the operation of its order is suspended pending the outcome of this court's adjudication on the constitutional point including the other review grounds. In essence, this means that it agrees to being restrained from enforcing its ruling.

[25] Colgate however continues to resist urgent interim relief. Mr Michau agrees that, whilst the relief is cast as a suspension of the ruling of the ARB, what it in fact amounts to is a claim for an interim interdict against the ARB preventing it from requiring its members to co-operate so as indirectly to exact the penalty of not being allowed access to advertising media pending the determination of the review application, including the constitutional point.

[26] Mr Michau argues that Bliss' entitlement to interim relief pending the review has already been definitively and finally determined by Jacoob J in the first urgent interim application. He says that the facts have not changed as to the irreparable harm which Bliss contends that it will suffer and there is no basis upon which the issue of interim relief can be revisited as this would be tantamount to taking the order of Jacoob J on appeal.

[27] Ms Southwood was hard pressed to suggest that there were different facts as to the irreparable harm contended for and thus, it appears, that Mr Michau is correct in this submission. But where he is not correct is in the submission that the case before Jacoob J involved precisely the same inquiry as to that which is now before me. The difference in the two cases exists in the constitutional question which was not before Jacoob J and which has been raised by me *mero motu.*

[28] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[9] Moseneke DCJ said the following:

'It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.'[10] (Emphasis added).

[29] As I have said, on the case before Jacoob J, it was found that there was no prima facie right worthy of protection. Recall, that the right relied on there was simply the right to review the decision.

[30] The Court went on to deal with the irreparable harm contended for in this context – and found that there had been an insufficiency of evidence in this regard.

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[9] CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC)

[10] Ibid at para 45

[31] The case brought now is however a completely new and different case. The fact of the constitutional challenge means two things: First Bliss' prima facie right is founded within the Constitution. Second, once it is accepted that that Bliss' rights in terms of section 34 are implicated, the enquiry as to irreparable harm falls to be considered with reference to the right to fair judicial process – and if it is ultimately found that Bliss has been deprived of this right, this would constitute irreparable harm in itself. In *National Treasury and Others v Opposition to Urban Tolling Alliance*[11] Moseneke DCJ said the following in relation to a claim for an interim interdict in relation to a constitutional right:

'If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought'[12].

[32] As to the balance of convenience, as I have said the ARB agrees that it is proper that it not enforce its ruling whilst there is a constitutional challenge to its scheme. It agrees that the balance of convenience plainly favours the suspension of the ruling in the interim. On this point the only harm raised by Colgate is the fact that its contractual right to compliance with the ARB scheme are affected by a suspension.

[33] To my mind the right of Bliss to fair legal process must trump the potential harm raised by Colgate. If the ruling is enforced there can be no doubt that this will adversely affect the position of Bliss in the market. If it is subsequently found that the scheme is unconstitutional this harm would have been suffered unnecessarily. In contrast if Colgate's contractual rights are suspended in the interim and it is found that the scheme indeed passes constitutional muster, then its position will be vindicated *ex tunc.*

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[11] Supra n 9

[12] Ibid at para 46.

[34] Ms Southwood correctly points out that any loss sustained by Bliss in relation to the changing of its branding and packaging is not recoverable by way of damages against the ARB.[13]

Conclusion

[35] Thus, the advent of the constitutional challenge which I have raised has changed the inquiry as to whether interim relief should be granted to Bliss. This case differs fundamentally from that brought before Jacoob J and the issues before me are not *res iudicata* as contended for by Mr Michau.

[36] On my assessment of the case for interim relief before me there is a right founded in the Constitution which is in issue; Bliss has shown that, if it has to comply with the rulings in the interim to a determination of this right, this will cause irreparable to it if it is ultimately vindicated; the ARB concedes this position and agrees to an interim order against it suspending its ruling; and Colgate has not made out a case that the balance of convenience favours it to any extent.

Order

[37] Thus I make the following order:

1. The interim application is dealt with as one of urgency.
2. The question of whether the ARB process in issue is constitutional and the further questions which arise in terms of the impugned rulings under judicial review by this Court are postponed to a date to be arranged between all parties.
3. The ARB is interdicted from enforcing the impugned rulings of the ARB pending the final determination of these questions.
4. The costs of this application are reserved.

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[13] See: *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73; [2006] 1 All SA 6 (SCA) at paras 26 to 28.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 23 November 2020.

Judgment Delivered: 30 November 2020.

APPEARANCES:

For the Applicant	: Adv F Southwood SC with Adv A Pantazis.
Instructed by	: Eversheds Sutherlands (SA) Inc.
For the 1st Respondent	: Adv N Ferreira with Adv K Harding.
Instructed by	: Fairbridges Wertheim Becker Inc.
For the 2nd & 3rd Respondents	: Adv R Michau SC with Adv I Currie & Adv L Harilal.
Instructed by	: D M Kisch Incorporated.

GS 5

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 2020/22061

In the matter between:

BLISS BRANDS (PTY) LTD Applicant

and

ADVERTISING REGULATORY BOARD NPC First Respondent

COLGATE-PALMOLIVE (PTY) LIMITED Second Respondent

COLAGE-PALMOLIVE COMPANY Third Respondent

AMENDED NOTICE OF MOTION

TAKE NOTICE that on the 20th day of October 2020, at 10h00 or so soon thereafter as counsel may be heard, the applicant intends making application to the above Honourable Court for an order in the following terms:

1. Declaring that the Memorandum of Incorporation ('MOI') of the first respondent is unconstitutional and void.

2. Declaring that the rulings of the Final Appeals Committee ('FAC') of the first respondent, dated 3 August 2020 ('the FAC Ruling') and 17 August 2020 (titled 'Clarification of the Cost Orders') ('the Costs Decision'), respectively, (collectively 'the Rulings') are unlawful and are set aside.

3. Directing that the first respondent is to pay to the applicant the sums of money lodged by the applicant with the first respondent to cover the costs of the appeals to the Advertising Appeals Committee ('AAC') and the FAC in terms of clauses 9.2 and 12.6, respectively, of the Procedural Guide of the first respondent ('Procedural Guide').

4. In the alternative to prayer 1:

   4.1. Declaring that clause 3.3 of the MOI is unconstitutional, void and unenforceable;

   4.2. Severing the clause 'in the absence of a submission to its jurisdiction' in the first sentence and the second sentence in clause 3.3 of the MOI;

   4.3. Declaring that the first respondent has no jurisdiction over any person or entity who is not a member of the first respondent or is not a person or entity who is bound by the Code of Advertising Practice ('Code') of the first respondent as a result of its/her/his membership of a member of the first respondent ('a non-member'); and

   4.4. Declaring that the first respondent may not issue rulings against or in relation to a non-member or that non-member's advertising.

5. In the alternative to prayers 1 and 4, declaring that clauses 8 and 9 of Section II of the Code, as well as clauses 9.2 and 12.6 of the Procedural Guide, are unconstitutional and void.

6. In the alternative to prayers 1, 4 and 5. declaring that the Memorandum of Incorporation of the first respondent is not enforceable against any person or entity on whom it is not binding in terms of section 15(6) of the Companies Act 71 of 2008; and

7. In the alternative to prayer 3:

7.1. Substituting the FAC Ruling and the Costs Decision with the following:

7.1.1. Declaring that the SECUREX packaging does not breach clauses 8 or 9 of Section II of the Code of Advertising Practice of the first respondent;

7.1.2. Declaring that the applicant's appeal to the FAC succeeds;

7.1.3. Directing that the first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 12.6 of the Procedural Guide;

7.1.4. Declaring that the Ruling of the Advertising Appeal Committee ("**AAC**") of the first respondent, dated 27 April 2020, ("**the AAC Ruling**") is substituted with the following:

7.1.4.1. The appeal is dismissed;

7.1.4.2. The first respondent is to pay to the applicant the sums of money lodged by the parties with the first respondent to cover the costs of the appeal, in terms of clause 9.2 of the Procedural Guide.

7.2. Alternatively to prayer 7.1, referring the matter back to the FAC for a re-hearing, and suspending the AAC Ruling, pending the outcome of that hearing.

8. Directing the applicant's costs of suit be paid by the first respondent, and if the matter is opposed by another respondent, by the first respondent and such other respondent(s), jointly and severally, including the costs of two counsel.

9. Granting the applicant such further and/or alternative relief as the Court deems fit in the circumstances.

TAKE NOTICE FURTHER that the applicant will rely on the accompanying affidavit of **LIEZEL VERONICA BYGATE** together with annexures and supporting and confirmatory affidavits, for the relief which it seeks.

TAKE NOTICE FURTHER that the applicant has appointed the address of its attorneys below as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing the relief sought you are required:

a) to serve and file a notice of intention to oppose by 5 October 2020;

b) to serve and file your answering affidavit, if any, by 12 October 2020.

TAKE NOTICE FURTHER that if no intention to oppose be given, application will be made on 13 October 2020 at 10h00 or so soon thereafter as counsel may be heard.

BE PLEASED TO ENROL THE MATTER ACCORDINGLY.

DATED at JOHANNESBURG on this 29TH day of DECEMBER 2020.

EVERSHEDS SUTHERLAND (SA) INC
Applicant's Attorneys
Third Floor, 54 Melrose Boulevard
Melrose Arch, Melrose North, 2196
Tel: 010 003 1470
Email: sarajanepluke@eversheds-sutherland.co.za
Ref: MAT30036/SJP/tn

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT
JOHANNESBURG

AND TO:

FAIRBRIDGES WERTHEIM BECKER ATTORNEYS INC.
First Respondent's attorneys
Ground Floor
33 Fricker Road
Illovo
Johannesburg
Tel: (011) 268-1130
Email: mvdwant@fwbattorneys.co.za
mmakhubedu@fwbattorneys.co.za
Ref: ADV15/0001 MW Van DER Want

AND TO:

D M KISCH INCORPORATED
Second and Third respondents' attorneys
KISCH IP House, 5 Inanda Greens Business Park
54 Wierda Road West
Wierda Valley, Sandton
Docex: DX17, Sandton Square
Tel: (011) 324 3012
Fax: 086 603 6118
Email: andrewp@kisch-ip.com
Ref: R4717ZA02/AP/TP