

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Nonkazimale Mbanjwa
Advertiser	Department of Health
Consumer/Competitor	Consumer
File reference	Department of Health – Nonkazimale Mbanja
Outcome	Upheld
Date	13 March 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a complaint from Nonkazimale Mbanjwa against a billboard for the Department of Health situated on the N1 and N3 Highway.

Description of the advertising

The billboard has an image of a woman and baby, and the claim “PREVENT 6 LIFE THREATENING DISEASES WITH ONE VACCINE”.

Complaint

In essence, the Complainant submits that her image is used without her permission.

The Complainant, represented by TJ Moraka, Legal Practitioner, explained that her image had been contracted for a particular modelling assignment many years ago.

The photographer has now sold her image to various organisations, including the advertiser.

The use of her image in this advertisement is not with her consent.

Response

Despite numerous attempts, the ARB was unable to secure a response from the Advertiser.

Application of the Code of Advertising Practice

The following clauses were considered in this matter:

Protection of privacy and exploitation of the individual – Clause 11 of Section II

Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

Jurisdiction

The Advertiser has not responded in this matter and the ARB will therefore assume that it does not consider itself bound by the ARB and the Code of Advertising Practice.

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.

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

The ARB will therefore proceed to consider this matter for the guidance of its members.

Merits

The situation in this case is complicated. The Complainant entered into a contract with a third party regarding the use of her image and that contract was *ex facie* breached by the third party. The Directorate must, in the absence of evidence to the contrary, assume that this is an accurate reflection of what occurred.

The Advertiser in this matter is, it appears, an innocent party to this situation. The Advertiser has presumably used the Complainant's image in good faith, believing that the correct permissions were in place.

The ARB is not mandated to unravel the contractual web that is presumably behind this situation – the original contract and the Department of Health's contract with its agency, and the agency's contract with the photographer who provided the image.

What is before the ARB is only one question – is the use of the Complainant's image against the Code of Advertising Practice.

Clause 11 of Section II states, "Advertisements should not. . .portray or refer to, by whatever means, any living persons, unless their express prior permission has been obtained. . .".

On the facts before the Directorate:

- The Complainant's image is used;
- She did not give her express prior permission;
- None of the exceptions set out in Clause 11 of Section II apply.

The Directorate is keenly aware that it appears that the Advertiser is an innocent party in this situation. The fact remains, however, that in the absence of submissions to the contrary, the image is used without the Complainant's permission.

Given this, and given the lack of response before the Directorate, the Directorate has no choice but to conclude that the advertising is in breach of Clause 11 of Section II.

Sanction

Members of the ARB are advised not to accept the advertising in question.