

---

**BEFORE THE ADVERTISING REGULATORY BOARD ADVERTISING APPEAL  
COMMITTEE (HELD AT BRYANSTON)**

In the matter between:

**CHICKEN LICKEN**

Appellant

and

**SANDILE CELE**

Respondent

---

**RULING: CHICKEN LICKEN // SANDILE CELE 30/11/18**

---

**INTRODUCTION**

1. This is an appeal to the Advertising Regulatory Board (“the Board”) against a decision of the Advertising Regulatory Board’s Directorate (“the Directorate”) of 14 December 2018.
2. In its ruling the Directorate held that the Appellant’s commercial trivialises an issue that is “*triggering and upsetting*” for many South African people, and ordered that the Appellant withdraw the television commercial in its current format.

**THE COMPLAINT**

3. The Respondent lodged a complaint against the Chicken Licken advertisement which he saw on SABC 1 on 28 November 2018. He described the advertisement as depicting a *“voyage by a young African man travelling to the Dutch to colonise their land”*. The gist of his complaint being that the advert *“makes a mockery of the struggles of the African people against the colonisation by the Europeans in general, and the persecutions suffered at the hands of the Dutch in particular”*.

### **RELEVANT CLAUSES OF THE CODE OF ADVERTISING PRACTICE**

4. The Directorate advised the Appellant that the complaint will be considered in terms of the following clause of the Code as relevant:
  - Offensive advertising – clause 1 of section II

### **RESPONSE**

5. The Respondent denied that the content of the advert *“seeks to make a mockery of the struggles of colonisation and its effects on Africa and her people.”* Instead, it sees the advert as a means to uplift the South African spirit and show that South Africa has all the potential to conquer the world *“and rewrite history from an African perspective”*. It contends that the advert is a tongue in cheek sense of humor.

### **THE APPEAL**

6. Golden Fried Chicken (Pty) Ltd t/a Chicken Licken filed a Notice of Appeal against the Directorate's ruling.
7. In its grounds of appeal the Appellant points out that the Directorate recognized that *"turning the usual colonisation story around might be perceived as having a certain element of humour and that the commercial has certainly been crafted with the "intention" of being humorous"*, yet the Directorate went on to hold that: "The legacy of colonisation, which is a sensitive and divisive topic, is one that is not open for humorous exploitation – no matter how amusing some people may find the end result".
8. The Appellant contends that the Directorate came to a subjective decision since it based its view of the advertisement on a *"distorted bias, created by the complainant's vague and incorrect description of the advertisement and arbitrary ground of objection"*, and failed to apply various principles and criteria for judging advertisements including its failure to apply the *"hypothetical reasonable man test"* and that it failed to take into consideration factors that are set out in Section II, Clause 1 of the Code.
9. The Respondent responded to the Notice of Appeal. He contends that the advert is set in the context of colonisation of South Africa which began at about 1652 by colonisers who had apparently embarked on a journey of exploration and decided to colonise the country upon "discovering" it. He contends that contrary to the Appellant's assertion that the advertisement is intended to

empower and to imbue South Africans with a sense of pride and patriotism and enthusiasm for adventure, no proudly South African person can possibly find the advertisement to be what the Appellant contends for but offensive.

### **BEFORE THE ADVERTISING APPEALS COMMITTEE**

10. The relevant advertisement is a television commercial advertisement. The AAC had the benefit of viewing the commercial and that of the description thereof by the Directorate and the Appellant in its Notice of Appeal. The Directorate describe the commercial as follows:

#### ***“Description of the advertising***

*The commercial shows a young man, called John Mjohnana, leaving his village in a boat in 1650 aiming to satisfy his hunger for adventure. He encounters obstacles like being confronted by a jaguar (he instructs the jaguar to fetch and the jaguar obliges); a whale splashes his boat with water in an attempt to topple it over (he rebukes the whale by indicating “Haai maan Hey”); a shark approaches his boat and he threatens it with his knife and it turns away; a giant squid appears behind him (he seems not worried about it); thunder and lightning obstructs his boat. He arrives in Holland in 1651 and finds two white gentlemen looking at a map as they seem to be preparing for a voyage. He greets them in what is well known as “Tsotsitaal” in South Africa, saying “Hola MaNgamla” (Hello white people), and tells them that he likes the place, and it should be called Europe.*

*The voice-over narrates the story as follows:*

*“A long time ago Big Mjohnana left home to satisfy his hunger for adventure. His spirit was unstoppable, and his hunger was too big. Ja, Big Mjohnana did many things, but he will always be remembered for discovering a foreign land”.*

The commercial ends with an elderly man in a Chicken Licken outlet indicating to few customers that *“that is the legend of Big John”*, and he leaves the outlet laughing. The next customer in the queue orders the advertised product.

11. In the Notice of Appeal the Appellant describes the TV commercial as follows:
  19. *The full-length advertisement is 02 minutes and 06 seconds in length. It begins very clearly with the narrator stating that “...a young man left his home to satisfy his hunger for adventure...”. The Narrator goes on to state that “...his hunger was too big...”. and at approximately 01 minute and 15 seconds into the advertisement the narrator states that “...the one thing he will always be remembered for is discovering a foreign land”. Up to this point in the advertisement, there is no indication, whatsoever, that the young African man (“Big Mjohnana”) sought to travel to Europe or the Dutch with the aim of colonising their land.*
  20. *For the next 33 seconds of the advertisement, there are absolutely no indications or inuendo’s whatsoever of conflict, dominance or superiority*

*over a minority, racial superiority, enslavement, indentured servitude, forceable importation of people or slaves, exploitation, conquests, military action, etc., all of which are elements which may be deemed to be indicative of, or related to, colonisation). The same jovial music that has been playing in the background throughout the advertisements continues to be heard - along with comical faces / expressions by the actors (for example, Big Mjohnana shakes his head and rolls his eyes when he realises that the “settlers” are looking at their map upside down) – all of which further humourizes the particular scenario of Big Mjohnana “discovering a foreign land”. This scene does not touch on the issue of colonisation. The scene is about exploration and discovery, not colonisation. To view this scene as akin to colonisation would be to say that every explorer of land colonises that land – this is simply not correct, both factually and in principle.*

21. *The remaining 15 seconds of the advertisement cut to the present day, inside a Chicken Licken franchise, where a gentleman (being the narrator and resembling Big Mjohnana, himself) finishes telling the story of “the legend of Big John”.*
22. *The abridged version of the advertisement as appearing on television is 60 seconds and/or 45 seconds in length. However, save for the advertisement being a shortened version of the above, the above commentary and the below submissions apply equally to the abridged*

*advertisement as the nature, concept, story-line, content etc. is no different.”*

### **SUBMISSIONS BY THE APPELLANT**

12. The Appellant’s submissions are summarised in the Notice of Appeal as follows:

*“13.1 the content of the advertisement in no way, shape or form, seeks to make a mockery of the struggles of colonisation and its effect on Africa and her people;*

*13.2. the Appellant is a proudly South African brand;*

*13.3. the Appellant is acutely aware of the need to uplift the South African spirit;*

*13.4. the advertisement is derived from the Appellant’s awareness of the need to uplift the South African spirit;*

*13.5. the advertisement was derived to show South African’s that the Appellant believes South Africa has the potential to conquer the world and re-write history from an African perspective;*

*13.6. the advertisement is derived from the Appellant’s tongue-in-cheek sense of humour; and*

*13.7. the advertisement's underlying purpose is to create a sense of pride and patriotism amongst South Africans."*

13. At the hearing the Appellant's representative was questioned mainly on whether the advert, considered as a whole, was a depiction of "reverse" colonisation and whether its contention of rewriting history from an African perspective is "accurate" when the history of colonisation cannot be rewritten as it has been accurately recorded throughout history and not subject to correction.
14. The panel finds the Appellant's denial that the advert juxtaposes the colonisation of South Africa and colonisation in general with Big Mjohnana's adventure to the Dutch, discovering a foreign land which he likes and choosing a name for it, Europe, as incredulous.
15. The incredibility of the Appellant's submission is based on the facts that:
  - Big Mjohnana supposedly left his home in order to go on an adventure.
  - He discovered a foreign land.
  - The voyage takes place in about 1650
  - He arrives in Holland in 1651; and
  - Thrusts his spear onto the wooden deck as he names the place Europe.
  - The message is that Africans are capable of conquering just as South Africa was conquered.



16. All of the above depicts the reverse journey of Jan van Riebeeck who left Holland at about the same time on an adventure and voyage to set up a half-way station to supply refreshments to the Dutch East India Company on their onward journeys to the East in search for spices and other goods. The Dutch land in the Cape and subsequently made the Cape a permanent post for the Dutch East India company which led to the Cape being colonised by the Dutch. The Appellant conceded in the hearing that in the event that the panel finds that the advert depicts a scene of colonisation then it would be offensive to flight an advert in that context.

17. However, the Appellant makes the following submission<sup>1</sup>:

*“20. For the next 33 seconds of the advertisement, there are absolutely no indications or inuendo’s whatsoever of conflict, dominance or superiority over a minority, racial superiority, enslavement, indentured servitude, forceable importation of people or slaves, exploitation, conquests, military action, etc., all of which are elements which may be deemed to be indicative of, or related to, colonisation). The same jovial music that has been playing in the background throughout the advertisements continues to be heard - along with comical faces / expressions by the actors (for example, Big Mjohnana shakes his head and rolls his eyes when he realises that the “settlers” are looking at their map upside down) – all of which further humourizes the particular scenario of Big Mjohnana “discovering a foreign land”. This scene does not touch on the issue of*

---

<sup>1</sup> Record p.16 par 20

*colonisation. The scene is about exploration and discovery, not colonisation. To view this scene as akin to colonisation would be to say that every explorer of land colonises that land – this is simply not correct, both factually and in principle."*

18. This submission misses the point that throughout Jan van Riebeeck's journey, such as in Big Mjohkana's journey, there were no indications or suggestions during the journey of setting off with an intention to unleash all the things that are set out above as indicating absence of an intention to colonise, but that in both cases the voyage ends with discovery and colonising by flying the flag of the coloniser in the case of the colonisation of the Cape and the liking of the place by thrusting the spear into the wooden deck of the harbour and naming the place in the case of Big Mjohkana. The panel therefore rejects the submission in this regard because the advert depicts a scene akin to colonisation. We agree that not every voyage of exploration of land ends with colonisation of the land that is being explored. Indeed Mjohkana's life ends with him being back home after the adventure.

19. The Appellant makes further submissions in defence of the advertisement. Section II Clause 1 provides as follows:

*"No advertising may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Advertisements should contain nothing that is likely to cause serious or wide-spread or sectoral offence. The fact that a particular product, service or*

*advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection to an advertisement for that product or service. In considering whether an advertisement is offensive, consideration will be given, inter alia, to the context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest.”*

20. The question is how a reasonable person would have viewed the advert. The test has been applied on numerous times by the Advertising Standards Authority (“the ASA”), and is now trite. In Marie Stopes South Africa / Buthelezi (2004/2005) the ASA final appeal committee said the following:

*“One cannot assess an advertisement in isolation. In order to ascertain the meaning of an advertisement due regard has to be had to the surrounding circumstances, the language and the probable impact of the advertisement as a whole upon the reasonable viewer or listener. These criteria have to be looked at objectively. Further, it must be accepted that advertisers use a certain amount of hyperbole in order to promote their product or their cause. Advertising by its nature contains innuendos and ambiguities and as such one cannot apply literal and realistic claims tests absolutely without becoming open to ridicule. ... Further, the committee has to look at advertisements in the context of the Constitutional right of freedom of expression and the right to reproductive autonomy subject to the limitations placed on these rights by section 36 of the Constitution. In looking at an advertisement as a whole due regard must be paid to each part of its contents, visual and aural and to the nature of the medium to which it is conveyed.*

*The reasonable viewer is a fictional person. This fictional, reasonable person is the normal, balanced, right thinking and reasonable person who is neither hypercritical nor over sensitive. The reasonable person postulated is one who gives a reasonable meaning to the advertisement and excludes a person who is prepared to give an interpretation which cannot reasonably be attributed thereto. The assessment of the impact of the advertisement on a reasonable person must be objectively done. It excludes matters of personal predilection, taste and the like.”*

21. The Appellant criticises the decision of the Directorate on the basis that the decision does not deal with each of the considerations of context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest, and the constitutional right of freedom of expression.
22. As we have already found above that the advertisement is a parody of colonisation of South Africa and a “rewriting” of history by suggesting in the advertisement that Big Mjohnana could satisfy his hunger for adventure by exploring the world and discovering foreign lands, just like many world renowned European explorers who “made discoveries” in Africa, South America and Asia without colonising, the only question that remains is whether a reasonable person would interpret the advert as offensive.
23. One of the requirements of Section II Clause 1 is that the advertising must be “reasonable and justifiable in an open and democratic society based on human

dignity, equality and freedom". This requisite is lifted directly from section 36 of the Constitution of the Republic of South Africa under its Bill of Rights which provides that the rights in the Bill of Rights, including the right to freedom of expression may be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

24. Clause 1 further raises caution in advertising to the effect that advertisements should not contain anything "that is likely to cause serious or widespread or sectoral offence". Whilst the words "widespread" or "sectoral" offence are easy to interpret, "serious" offence is more difficult to quantify. The first two mean a large number of people that are likely to be offended or a sector such as a religious or traditional community, respectively. Serious offence would apply more appropriately to both the gravity of the offence even if not to a widespread number of people and to a group of people. The latter could apply to a minority or small group of people but against whom serious offence is perpetrated by publishing offending material about them. It could also mean that the repercussions of the offending material could be widespread. Therefore, the fact that only one complainant lodged a complaint could mean that the gravity of the offence caused by an advertisement is serious enough so as to fail the constitutional test of reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. As it has been found above that the advert depicts colonisation which visited upon the people of South Africa all the atrocities referred to in paragraph 20 of the Appellant's Notice of Appeal, the question is whether the advertisement can still survive on

the grounds of, *inter alia*, parody, humour, tongue in cheek humour and lack of intention to create an advert that depicts colonisation. Added to that is the question whether the advert achieves its purported object of uplifting the South African spirit, rewriting history in a positive manner, and invoking the spirit of adventure, pride and the spirit to conquer.

25. In balancing the right to freedom of expression and the offence that the AAC may find in the advertisement, the words of the Constitutional Court in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005)*, where it was stated “*the Constitutional guarantee of free expression is available to all under the sway of our Constitution, even where others may deem the expression unsavoury, unwholesome or degrading,*”<sup>2</sup> are apposite.
26. The Appellant quotes Justice Sachs in the same judgment liberally at paras 107 to 109. However, first, it must be recognized that the case dealt with a commercial case. Both the majority and Justice Sachs’s minority judgments were careful not to suggest that everything that clothes itself in humour or comedy passes constitutional muster. In the majority what would pass constitutional muster is expression that others may deem unsavoury, unwholesome or degrading. Sachs J expresses the context of this case as one where laughter is “*used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity*”. In other words, the

---

<sup>2</sup> At para 55

context was one of amongst others advancing human dignity of the workers as opposed to erasing dignity. Furthermore he stated that the Court was not called upon to be arbiters of the taste displayed or judges of the humour offered. The Appellant criticises the Directorate for finding that the advertisement was a success in achieving humour and parody but still clamped down on the advert. In this case before us not only did the Appellant concede that if the advertisement is about colonialism it would be unacceptable but it was also the animated manner in which the Appellant's representatives said it that registered the fact that certain areas of humour may be regarded as "no go" areas.

27. The Appellant states that it agrees with the test laid out in the matter of KFC Crunch Master / Rhoda Heyns et al (7 December 2018) (Directorate of the ARB) to the effect that there are certain subject matters such as sexual violations, human trafficking and murders that cannot be (glamourized or satirized under any circumstance", but disagrees that the Chicken Licken advertisement as a whole contains any negative references to the aspect or issue of colonialism and can thus be differentiated from those topics referred to in the KFC ruling. As stated above the Appellant accepts that if the subject matter of the advertisement matter is colonialism then it will be one of those subject matters that should not be satirized or made a subject of any humour. The only defence that the Appellant proffers at paragraph 41<sup>3</sup> is that its advertisement does not contain any negative references to the aspect issue of colonialism. A somewhat contradictory submission is made at paragraph 42 of the Notice of Appeal

---

<sup>3</sup> Record p. 25

where the Appellant challenges the categorization of the issue of colonialization as a “no go” topic. The Appellant asserts that such a categorisation would fly in the face of the Constitutional guarantee of freedom of expression which is anti-censorship. However, even if this were the core of the Appellant’s defence, it would not pass the Constitutional imperative under Section 36 thereof which permits limitation of rights (even approving censorship) where the exercise of such a right is not reasonable and justifiable as stated and erases dignity.

28. The panel takes “judicial notice” of the fact that a subject matter such as the holocaust (the genocide perpetrated against 6 million Jews in Germany and other countries under Nazi occupation between 1941 to 1945 and millions others constituting communists, gypsies, homosexuals, and other undesirable groups under Nazism) remains a “no go” area for humour or denial. The panel takes “judicial notice” also of the devastating and genocidal effects that colonisation carried on South Africa, Namibia, Belgium, Congo (now Democratic Republic of Congo and previously Zaire) and South American countries that fell under Spanish colonisation. Colonialism, with its attendant genocidal effects and brutal methods of subjugating the natives of colonised countries, falls in the same category of subject matters in which it will offend to satirise and therefore fall within the prohibitions set out in section II Clause 1 against causing serious offence, like in matters of the holocaust, human trafficking, sexual violence and abuse and murders.
29. The Appellant relies on the second part of Clause 1 which requires that an advertisement should not be adjudged as non-compliant with the Code merely



on the basis of the offence being caused to some, and that context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest are important. Having taken all these factors into account it is the panel's view that taking into account prevailing standards, degree of social concern, and public interest regarding subject matters that have been described as "no go" areas above, the advertisement does not pass muster with both the Code and the Constitution of the Republic of South Africa.

30. In Marie Stopes the hypothetical reasonable person is postulated as one who gives a reasonable meaning to the advertisement and excludes a person who is prepared to give an interpretation which cannot reasonably be attributed thereto. In this case, it cannot be said that the meaning attributed to the advertisement as depicting colonialism and juxtaposing brutal colonisation of South Africa with friendly colonisation of Holland by Big Mjohnana is reasonable and also that categorizing colonialism along side sexual violations, human trafficking, murders and colonial genocide is equally unreasonable. The panel, just like the Directorate, considered all objective factors and applied the test objectively even where material that is not before the panel was taken "judicial notice".
31. Finally, it might be stated that the fact that the advertisement was found by many commentators on social media as funny and humorous, empowering and not referring to colonialism is not a sufficient yardstick to find it acceptable. This is the other side of the coin of the consideration stated in section II, Clause 1

that the fact that an advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection thereto, being that the fact that an advertisement may be found not offensive to some is not in itself sufficient grounds for dismissing an objection thereto. There can be no plethora of evidence that will make it reasonable and justifiable to attack and erase a peoples' dignity by satirizing sexual abuse and violence, human trafficking, murder and genocide.

### **RULING**

32. In the circumstances, the Advertising Appeals Committee of the Advertising Regulatory Board finds that the advertisement breaches the provisions of section II, Clause 1 of the Code of Advertising Practice in that its context depicts a subject matter of colonialism (with its attendant crimes and devastation in the forms of genocide, murder, maiming, sexual abuse, slavery, and subjugation of the native populations of the colonised countries). The prevailing standards, degree of social concern, public interest and constitutional imperatives to render dignity. The advertisement not to pass muster with Section II Clause 1 of the Code and the Constitution in that it is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The advertisement stands in line with all the subject matters that the Directorate has found to be "no go" areas for depiction in any humorous or glamorous manner.

33. A peoples' right to inherent dignity and the right to have their dignity respected and protected as required by section 10 of the Constitution requires that the right to freedom of expression bows to their right not to have the wounds of genocide, sexual abuse, slavery, human trafficking and subjugation to not be opened, especially to be satirised unless such depiction is reasonable and justifiable in terms of the Code and the Constitution.
34. In the circumstances the AAC upholds the decision of the Directorate and accordingly the Appellant is required to:
- withdraw the television commercial in its current format;
  - the process of withdrawing the commercial must be actioned within immediate effect; and
  - the commercial may not be used again in the future.

**SIGNED AT JOHANNESBURG ON THIS 19<sup>TH</sup> DAY OF FEBRUARY 2019.**



Adv G. Malindi

ACTING CHAIRPERSON

Advertising Appeals Committee (AAC)

19 February 2019