

ADVERTISING REGULATORY BOARD
(ADVERTISING APPEALS COMMITTEE)

In the matter between:

UNILEVER (SOUTH AFRICA) (PTY) LTD

Appellant/Advertiser

and

**RECKITT BENCKISER PHARMACEUTICALS
SOUTH AFRICA (PTY) LTD**

Respondent/Complainant

JUDGMENT

1. This is an appeal in terms of clause 8.9 of the Procedural Guide of the ARB (Advertising Regulatory Board) against a decision of the Directorate in which it partially upheld a complaint against the appellant (“Unilever”) brought by the respondent (“Reckitt Benckiser”).
2. The complaint against Unilever concerned the advertising on its 175g hygiene soap bar marketed and sold under the *Lifebouy* trade mark, referred to below as “the *Lifebouy* 175g bar”.
3. There were two parts to the complaint before the Directorate. The first part concerned the claim of “25g *EXTRA VALUE*”, with an explanation on the back of the pack reading: “*vs leading competitors*”; the second part concerned the

claim, “*10 infection causing germs, 1 protection*”, also explained on the back of the pack as follows: “*As per lab test*”.

4. On 7 October 2019, the Directorate handed down its ruling in which it decided that Unilever’s “*25g EXTRA VALUE*” claim was ambiguous and misleading, and therefore a breach of clause 4.2.1 of section II of the Code of Advertising Practice (“the Code”). The clarification of the claim, “*vs leading competitors*”, was held to be not adequately substantiated and therefore a breach of clause 4.1 of section II of the Code.
5. The Directorate dismissed the second part of the complaint, concerning the claim, “*10 infection causing germs, 1 protection*”, finding that “... *the claim is adequately substantiated in terms of clause 4.1 of section II of the Code. It is also not misleading in terms of clause 4.2.1 of section II of the Code.*”
6. The sanction imposed by the Directorate on 7 October required Unilever to withdraw its packaging of the *Lifebouy* 175g bar within three months, stating that “*This deadline is understood to apply to new packaging disseminated by the advertiser after the three month period.*”
7. On 21 October 2019, Unilever filed an application for the suspension of the ruling of the Directorate in terms of clause 9.12.
8. The Acting Chairperson handed down the decision on the application on 15 November 2019, ruling: “*The decision of the Directorate, dated 7 October 2019, is suspended pending the outcome of the appeal in this matter.*”

9. Unilever's appeal is directed against the decision of the Directorate in relation to the first part of the complaint. In its notice of appeal, Unilever relies on the following grounds of appeal:

1. That the Directorate erred in finding that a hypothetical consumer would understand that the price of the *Lifebouy* 175g bar is either the same as, or lower than, a *Lifebouy* 150g bar; or that the price of the *Lifebouy* 175g bar is the same as, or lower than, the 150g bars of its competitors; the fact that Unilever has never had a 150g bar is, according to the appellant, irrelevant;
2. That the Directorate's finding is not supported by the facts presented in Unilever's response to the complaint, i.e. that a hypothetical consumer would be faced with all the competitors' products on the shelf and would be able immediately to compare the prices and weights of the products on offer;
3. That the disclaimer on the back of the pack, on wobblers and point of sale material, draws a hypothetical consumer's attention to the fact that the comparison is between leading competitors and not Unilever's own products;
4. That the Directorate erred in finding that a hypothetical consumer might reasonably assume that the pricing of Unilever's *Lifebouy* 175g bar had been adjusted and was giving 25g free compared to a previous price;

5. That the Directorate's finding in relation to the *AC Nielsen* data, insofar as the *Dettol* 150g bar is concerned, ought to be supplemented by further *AC Nielsen* data relating to the price per gram of the *Lifebouy* 175g bar, compared to the *Dettol* 150g bar and the *Protex* 150g bar; the appellant submits however that part of the further *AC Nielsen* data, relating to the *Protex* 175g bar, is irrelevant because it "*represents phasing out of the 175 gram stock at retailers.*"

10. The appeal was set down for hearing on 2 December 2019. Unilever did not appear at the hearing. Instead, attorneys acting on behalf of Unilever sent an email to the ARB to advise that, because of certain unforeseen circumstances, Unilever was unable to send a senior representative to attend the hearing. The attorneys requested a postponement of the hearing.

11. The Acting Chairperson discussed the request for a postponement with the other members of the Committee, Ms Sadika Fakir, Ms Elouise Kelly, and Mr Lesiba Sethoga. It was agreed that, given the circumstances leading up to the hearing, Unilever had not advanced a proper basis for a postponement. The respondent also opposed Unilever's request. The Acting Chairperson refused the request for a postponement.

12. Unilever's attorneys made further requests in the event that the hearing was continued in the absence of Unilever. First, Unilever persists with the grounds of appeal, set out in the notice of appeal. Second, if the appeal is dismissed, Unilever submits that the time periods in the decision of the Directorate (dated 7 October 2019) only start running from the date of the decision on appeal.

Third, in the event of Reckitt Benckiser attempting to introduce new evidence on appeal, this should be refused. If such evidence is admitted, the appellant requests a period of 6 months to comply with the appeal ruling.

The merits of the appeal

13. Clause 4.2.1 of section II of the Code deals with "Misleading claims". It states: "*Advertisements should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer.*"
14. The clause is focused on claims that are likely to mislead the consumer. The test is an objective one, based on the hypothetical (or reasonable) consumer. It does not matter whether the claim expressly misleads, or whether it is likely to mislead by implication, omission, ambiguity, inaccuracy, exaggeration, or otherwise.
15. In the top right-hand corner of the *Lifebouy* 175g bar, above the claim of "25g *EXTRA VALUE*", there appears a very small "x". The "x" is not an asterisk, but it is intended to refer to an even smaller "x" on the back of the pack, next to which is typed, in equally tiny print, the words: "*vs leading competitors*".
16. The Directorate found that the disclaimer ("*vs leading competitors*") would go largely unnoticed by the hypothetical consumer. We agree. Besides the fact that it is by no means clear that the "x" in the top right-hand corner is intended to refer to a disclaimer on the back, the size of the disclaimer is so small that it can only be read with considerable difficulty, and would probably need to be

magnified by the hypothetical consumer before it could be read at all. In our view, the hypothetical consumer would probably not see the disclaimer at all, and if it was seen, would not bother to read it.

17. Unilever's reliance on wobblers and point of sale material is not supported by the evidence before the Directorate. There is no evidence of where and how extensively the wobblers and point of sale material are placed. In addition, by the time the hypothetical consumer has been attracted by the claim of "25g *EXTRA VALUE*", the wobblers and point of sale material are unlikely to make any impact. In our view, the hypothetical consumer is likely to understand that, by purchasing the *Lifebouy* 175g bar, he or she is getting 25g for free.
18. The Directorate found that the first assumption of the hypothetical consumer would be that the value proposition is between a *Lifebouy* 150g bar and a *Lifebouy* 175g bar. We agree. The claim of "25g *EXTRA VALUE*" is printed over a red band on the right-hand side of the pack, demarcated by colour from the rest of the pack. It appears as if the bar has been "extended" by 25g. This is likely to mislead because there is no *Lifebouy* 150g bar, and the disclaimer is not clear or legible.
19. The hypothetical consumer could also reasonably assume that the price of the *Lifebouy* 175g bar has been reduced so that 25g is being given away for free. Unilever does not explain why this is not a reasonable assumption, except to state that the hypothetical consumer would have been aware of the disclaimer. This too is likely to mislead, because it is not the case.

20. On the assumption that the hypothetical consumer has been able to read and comprehend the disclaimer, it could be understood that the *Lifebouy* 175g bar is claimed as being sold at the same price as the 150g bars of its competitors. The competitors in this instance are the respondent's *Dettol* 150g bar, and the *Protex* 150g bar.
21. Unilever sought to justify the claim, that its *Lifebouy* 175g bar gives 25g extra value, by adducing pricing data provided by *AC Nielsen*. The Directorate found that the pricing data proved the claim in relation to the *Dettol* 150g bar, but that no such data was provided in relation to the *Protex* 150g bar.
22. On appeal, Unilever sought to introduce such evidence. Ironically, in the email from Unilever's attorneys, Unilever objected to new evidence being adduced by the respondent. The Acting Chairperson decided that it would not be in the interests of justice to admit any new evidence on appeal. In any event, in light of the view taken by this Committee, the *AC Nielsen* data proved superfluous.
23. The prices at which the various bars of soap are sold in retail stores may vary from store to store. The manufacturer's price is a recommended retail price, so that the prices of the various bars at *Pick 'n Pay* could differ from the prices of the same bars at *Spar* or *Checkers*, for example. Also, by way of example, it may be, because of specials, that the prices could differ at different outlets of say *Pick 'n Pay*.
24. Unilever is aware of this. In its response to the complaint, at par. 2.2, it states: "*The complainant has suggested that when compared at a price per gram comparison, the Lifebouy 175g bar is priced higher than that of [the] Dettol*

150g bar. In paragraph 25 of the complaint, the complainant sets out one such price comparison. This is not a true reflection and comparison given that it is [an] example of an isolated retail store pricing and is not representative of the complete South African soap bar market...”

25. Unilever states that a more reasonable and meaningful comparison must take account of average prices per gram across all retail stores in South Africa over an extended period. It attaches a document compiled by AC Nielsen, which it says proves its claim. The document is annexure “C”.
26. Annexure “C” to Unilever’s response records the Rand price per 100g, over the period August 2018 to June 2019, for the *Lifebouy* 175g bar, the *Dettol* 175g bar, and the *Dettol* 150g bar. The average price for each of these bars over the period was R6.32, R7.05, and R7.34 respectively. This means that the average price of the *Lifebouy* 175g bar was R6.32 multiplied by 1.75, i.e. R11.06; the average price of the *Dettol* 175g bar was $R7.05 \times 1.75 = R12.34$; and the average price of the *Dettol* 150g bar was $R7.34 \times 1.5 = \underline{R11.01}$.
27. The average price of the *Lifebouy* 175g bar was therefore almost the same as the average price of the *Dettol* 150g bar (5 cents more). It is on this basis that Unilever contends (almost correctly) that “... *Lifebouy* continues to provide ... in this instance an extra 25 grams of value.”
28. However, Unilever ignores the comparison with the *Dettol* 175g bar. We have taken the average price of the *Lifebouy* 175g bar and divided it by the Rand price per 100g of the *Dettol* 175g bar. $R11.06$ divided by $R7.05$ Rand per 100g = 1.57. To calculate the number of grams of the *Dettol* 175g bar one could get

for R11.06, one must multiply the 1.57 by 100g. This equals 157g; and is 18g less than the *Lifebouy* 175g bar. In the words of the advertisement, this means that the *Lifebouy* 175g bar represents “18g extra value” over the *Dettol* 175g bar.

29. The claim of “25g EXTRA VALUE” is therefore ambiguous. It does not apply to all the soap bars of Unilever’s leading competitors. It only applies to some and, in our view, is likely to mislead the hypothetical consumer.
30. The hypothetical consumer at a *Pick ‘n Pay*, *Spar* or *Checkers* store would be faced with shelves fully packed with bars of soap, including the *Lifebouy* 175g, *Dettol* 175g, *Dettol* 150g and *Protex* 150g bars. It is unreasonable to assume that the hypothetical consumer would compare the prices and weights of all the hygiene bars on offer, so as to verify their relative prices per 100g.
31. In particular, it cannot be assumed that the hypothetical consumer would be making the same calculations in every store. This is because retail prices differ between stores. Unilever agrees. In paragraph 2.3 of its response, it states: “*Retail selling prices are independently controlled by retailers, and as a result, Lifebouy’s claim on pack is not based on retail selling prices...*” (Underlining added.)
32. The hypothetical consumer would not know this. The disclaimer does not say “*vs leading competitors, but not based on retail selling prices*”. In our view, this is another instance where the “25g EXTRA VALUE” claim is likely to mislead. The claim is ambiguous, inaccurate and exaggerated.

33. Clause 4.1 of section II of the Code deals with “Substantiation”. The test once again is objective. Clause 4.1.1 provides: “*Before advertising is published, advertisers must hold in their possession documentary evidence as set out in Clause 4.1, to support all claims, whether direct or implied, that are capable of objective substantiation.*”
34. The Directorate found that the evidence adduced by Unilever, to substantiate the claim that its *Lifebouy* 175g bar provides 25g extra value, when compared with the bars of its leading competitors, was incomplete because it omitted the pricing data of the *Protex* 150g bar.
35. In our view, the finding of the Directorate is correct. Unilever has conceded as much by seeking to adduce further evidence on appeal. However, for reasons stated above, it is not necessary to consider whether the *Lifebouy* 175g bar provides “25g EXTRA VALUE” over the *Protex* 150g bar.
36. In the circumstances, the sanction imposed by the Directorate is fully justified. There is no basis to extend the withdrawal period as contemplated in clause 9.12 of the Procedural Guide. The default position remains. It follows that the appeal ought to be dismissed.

Costs

37. Clause 8.9 of the Procedural Guide empowers this Committee to award costs in certain circumstances:

“... To cover the costs of the First Appeal, both the appellant and respondent to the First Appeal will be required to lodge a sum of money, in an amount to be advised by the [ARB], with the Directorate. Consumers or organisations serving the public interest lodging appeals are not required to pay for the cost of an appeal.

The Chairperson of the Advertising Appeals Committee may, either at the conclusion of the First Appeal hearing or within a reasonable period thereafter, award the cost of the First Appeal against any or other of the parties, in such proportion as the Advertising Appeals Committee may determine. ...” (Underlining added.)

38. The Advertising Appeals Committee is thus limited, in the amount of costs it may award, to the sum of money lodged by the parties with the Directorate. The total of the amounts lodged by the parties is intended to cover the costs of the First Appeal. In our view, the costs of the First Appeal include not only the costs of the parties but also the costs of the ARB in facilitating the First Appeal.
39. The parties are aware, from the website of the ARB, that they will be entitled to a refund of part of the money lodged with the Directorate to cover the cost of the First Appeal. The website states: *“The successful party in an Advertising Appeals Committee (AAC) matter receives a R30 000 refund, and for a Final Appeal Committee (FAC) matter a R40 000 refund - regardless of whether they are a contributor or not.”*

40. In light of clause 8.9, and the discretion vested in the Committee, it appears that the successful party in a matter before the Committee is entitled to be awarded the R30 000 as its costs on appeal, but that this amount may be reduced in the discretion of the Committee. It may be, in a particular matter, that the Committee decides to award less than R30 000, having regard to the conduct of the successful party. However, this is not such a matter.

41. We therefore make the following order:

1. The appeal is dismissed.
2. In relation to the costs of the appeal, the respondent (Reckitt Benckiser) is entitled to be refunded by the Directorate in the amount of R30 000.

Daniel Berger SC

Acting Chairperson

Advertising Appeals Committee

Sadika Fakir

Member: Advertising Appeals Committee

Elouise Kelly

Member: Advertising Appeals Committee

Lesiba Sethoga

Member: Advertising Appeals Committee

23 December 2019