

ADVERTISING REGULATORY BOARD
(ADVERTISING APPEALS COMMITTEE)

In the matter between:

BLISS BRANDS (PTY) LTD

Appellant/Advertiser

and

COLGATE-PALMOLIVE (PTY) LTD

Respondent/Complainant

**RULING ON CONDONATION FOR THE LATE FILING OF THE APPEAL
BY THE ACTING CHAIRPERSON
OF THE ADVERTISING APPEALS COMMITTEE**

1. On 30 August 2019, the Directorate of the Advertising Regulatory Board (“ARB”) ruled that the advertising complained of by Colgate-Palmolive (Pty) Ltd (“Colgate”) constituted a breach of clause 9 of Section II of the Code. The Directorate also ruled that the advertising was not in breach of clause 8 of Section II of the Code.
2. The sanction imposed by the Directorate on 30 August required Bliss Brands (Pty) Ltd (“Bliss”) to withdraw the advertising (or amend the packaging) by 23 November 2019.
3. On 21 October 2019, almost two months after the ruling of the Directorate, Bliss filed an appeal in terms of clauses 8.9 and 8.10 of the ARB Procedural

Guide, directed against the sanction imposed by the Directorate and only in relation to its 500ml fabric conditioner soft refill packs. On the same day, 21 October 2019, Bliss filed an application for the suspension of the ruling of the Directorate in terms of clause 9.12. This was in fact the second suspension application filed by Bliss. Its first suspension application was dismissed on 2 October 2019, on the ground that a suspension application is not competent when no appeal has been filed.

4. On 12 November 2019, I handed down the ruling on the second suspension application, concluding: *“The decision of the Directorate, dated 30 August 2019, is suspended pending the outcome of the appeal in this matter, but only in respect of the Advertiser’s “MAQ-SOFT” 500ml fabric conditioner soft refill packs.”*
5. In its notice of appeal, filed on 21 October, Bliss seeks to challenge the time period within which it is required to withdraw its 500ml fabric conditioner soft refill packs. In doing so, it seeks an extension of a further three months to 24 February 2020.
6. The appeal was set down for hearing on 2 December 2019, together with an application for condonation for the late filing of the appeal, also filed by Bliss on 21 October 2019. The condonation application was argued first, after which I reserved my ruling. The appeal was argued thereafter.
7. Three issues must be considered in an application for condonation: first, the degree of lateness; second, the explanation for the lateness; and third, the

prospects of success in the main proceedings. These three issues must be considered together. None of them is decisive on its own.

Degree of lateness

8. Clause 8.9 provides: “Any party who feels aggrieved by a ruling of the Directorate may, within ten days of the date on which such party is informed of the ruling, appeal to the Advertising Appeals Committee. ...” (Underlining added.)
9. The ten day period is repeated in clause 8.10, which provides: “The notice of appeal must, within ten days on which such a party is informed of the ruling, be given in writing and must be communicated to the [ARB] in any manner acceptable for the lodging of complaints. The notice of appeal should set out concisely the grounds of appeal.” (Underlining added.)
10. Bliss felt aggrieved by the ruling of the Directorate. It nevertheless decided to accept part of the ruling, but it could not accept part of the sanction imposed. In terms of clauses 8.9 and 8.10, it had 10 days from 30 August 2019 within which to file a notice of appeal. The notice of appeal ought therefore to have been filed by 13 September 2019.
11. The notice of appeal was filed on 21 October 2019. It was therefore 25 days late. The total time taken by Bliss to file its notice of appeal (35 days) is 3.5 times the period allowed. It is trite that there is a need for speedy resolution of disputes before the ARB. In the circumstances, the delay is excessive.

Explanation for the lateness

12. The sole ground relied upon by Bliss in its application for condonation is that it was badly advised by the ARB regarding the procedure it should follow if it required an extension of time in order to comply with a sanction imposed by the Directorate. Bliss blames, in particular, Ms Schimmel (the CEO) and Mr Kotze (an Internal Adjudicator) for its failure to file its notice of appeal within the 10 day period.
13. The ARB is not an advisory body. Whatever advice it gives to parties is given in good faith to assist in the expeditious processing of complaints. Its giving of advice does not relieve the parties of their obligation to ensure that they abide by the provisions of the Procedural Guide. Advice given by the ARB is not binding.
14. In any event, on 5 September 2019, in response to a request from attorneys acting on behalf of Bliss (Eversheds Sutherland) for an extension of time, Ms Schimmel stated *inter alia* that the Directorate was then *functus officio* and therefore unable to revisit its decision, and “*The only remedy I can see is the rather expensive one of appealing the time period set by the decision.*”
15. Ms Schimmel was correct. That is precisely what Bliss ought to have done. As at 5 September, it still had time to comply with clauses 8.9 and 8.10. Had it heeded Ms Schimmel’s advice, Bliss could have filed its notice of appeal by 13 September 2019, in compliance with clauses 8.9 and 8.10.

16. In my view, the explanation advanced by Bliss for the lateness of its notice of appeal is without merit.

Prospects of success

17. Bliss argues that it filed its response to the complaint on 11 July 2019, but the decision of the Directorate was only handed down on 30 August 2019, a period of approximately six weeks. During this period of waiting, says Bliss, it was assured by Mr Kotze that the Directorate's decision would be issued by 2 August 2019, and that Bliss would be able to apply for an extension of time within which to comply with the ruling.
18. Once again, it seems that Bliss ignored its own obligation to understand the powers of the Directorate and the provisions of the Procedural Guide. There is no provision in the Procedural Guide that empowers the Directorate to make further rulings after it has handed down its decision. Most importantly, Bliss ought to have performed its own risk assessment as to its prospects of success, and ought not to have relied on any advice given by Mr Kotze.
19. However, if Bliss was in discussions with Mr Kotze regarding an application for extension of time, before the Directorate had made its decision, it seems that Bliss was already anticipating an unfavourable decision on the merits of the complaint.
20. Bliss states that "... towards the end of July 2019, [it] placed and finalised additional future orders using the "offending" product packaging complained of, in anticipation of the European summer break and relying on the fact that

it would be able to apply for an extension of time within which to comply with an unfavourable ruling.” (Underlining added.)

21. As stated above, the Procedural Guide has no provision in terms of which a party may apply, after the Directorate has handed down its decision, for an extension of time within which to comply. The only procedure available for dealing with an adverse decision of the Directorate (including a decision on sanction) is to lodge an appeal to the Advertising Appeals Committee.
22. Significantly, Bliss did not even wait for 2 August 2019 to pass before placing its orders with its European supplier. That was the date when, according to Bliss, Mr Kotze had said the Directorate would make known its decision.
23. In my view, Bliss placed and finalised its orders with its European supplier in the knowledge that an unfavourable ruling was likely and could be imminent. This was a commercial decision taken in light of the fact that the 500ml fabric conditioner soft refill packs make up by far the largest component of its fabric conditioner sales.
24. Bliss states that it will suffer financial prejudice if it is compelled to withdraw the advertising on its 500ml soft refill packs before 24 February 2020. This is because the stock that was ordered in July 2019 will run out at the end of February 2020.
25. Bliss confirms that the redesigned packaging, complying with the decision of the Directorate, has arrived from Europe and is ready to be distributed once the existing stock has run out.

26. It is clear that Bliss took a commercial risk when it placed its order towards the end of July 2019. It cannot use this as a basis for seeking a revision of the period within which it is required to comply with the sanction imposed by the Directorate.
27. I have discussed this aspect of my ruling with my fellow panel members, Ms Sadika Fakir, Ms Elouise Kelly, and Mr Lesiba Sethoga. We are in agreement that Bliss's prospects of success in the appeal are weak.
28. My conclusion therefore is that Bliss's application for condonation ought to be dismissed.

Costs

29. Colgate seeks an order that Bliss pay the costs of this matter, including the costs of the matter before the Directorate, and the costs associated with the employment of senior and junior counsel. I assume that Colgate also seeks the costs associated with the employment of its attorneys.
30. In support of its submission that it is entitled to costs, Colgate referred me to the decision of the Final Appeal Committee in the matter of *Leonard Dingler (Pty) Ltd v British American Tobacco South Africa (Pty) Ltd* (matter no. 2015-2816F) at p 12, par 5. The passage referred to is simply an order as to costs. It does not explain on what basis the costs order was made.
31. The explanation for the costs order in *Leonard Dingler* is set out at p 11, par [19]. The relevant part reads: "*The parties discussed, but could not reach an*

agreement on, the question of costs ... Our orders below will show that the appellant is in any event the successful party, at least substantially so. There is no reason why costs should not follow the results ..."

32. The Final Appeal Committee therefore followed the principle applied in the High Court that costs usually follow the result. The (substantially) successful party in the High Court is usually entitled to costs, including the costs of one or two counsel, where appropriate.
33. Different considerations apply in proceedings before the Directorate and the Advertising Appeals Committee.
34. Clause 8 of the Procedural Guide deals with the Directorate's role in dealing with complaints, and with appeals to the Advertising Appeals Committee. No provision is made in clause 8 for the Directorate to make a costs order.
35. Clause 3.1.7 deals with the filing fee that must be lodged with the Directorate when a complaint filed. The clause makes it clear that the filing fee is non-refundable. The filing fee therefore cannot be made part of any costs order; nor is there any basis on which legal costs can be awarded by the Directorate or in respect of a decision of the Directorate.
36. By contrast, the Advertising Appeals Committee is empowered by clause 8.9 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.)

37. 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 my 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.
38. 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.*”
39. In light of clause 8.9, and the discretion vested in the Advertising Appeals Committee, it appears that the successful party in an AAC matter 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.

40. There is a further reason why no costs can be awarded relating to Colgate's employment of attorneys and counsel. Clause 9.5 of the Procedural Guide stipulates that no outside legal representation shall be permitted, except in exceptional circumstances.
41. No outside legal representation was permitted in this matter. It follows that the costs incurred by Colgate in the employment of attorneys and counsel, to advise and assist in its opposition to the appeal, must be borne by Colgate.
42. I therefore make the following order:
 1. The application for condonation is dismissed.
 2. The appeal is dismissed.
 3. In relation to the costs of the appeal, the respondent (Colgate) is entitled to be refunded by the Directorate in the amount of R30 000.

Daniel Berger SC

Acting Chairperson

Advertising Appeals Committee

19 December 2019

Sadika Fakir

Member: Advertising Appeals Committee

Elouise Kelly

Member: Advertising Appeals Committee

Lesiba Sethoga

Member: Advertising Appeals Committee