



*9.2 The Ruling of the Advertising Standards Authority Appeal Industry Tribunal, dated 17 June 2017, is hereby confirmed, subject to paragraphs 9.3 and 9.4 below;*

*9.3 Paragraph 32.2 of the Ruling is replaced by the following: The continued use of the advertisement in the current format is in contravention of clauses 2, 4.2.1 and 4.2.6 of Section II of the Code.*

*9.4 Paragraph 33.3 of the Ruling is replaced by the following: Vodacom is directed to withdraw all material that bears this claim in its entirety with immediate effect on receipt of this Ruling.*

*9.5 Vodacom to pay costs of this appeal”.*

2. The breach complaint was lodged with the Advertising Regulatory Board (the “ARB”) on 2 April 2019. It is common cause that the ARB is now the competent body to deal with matters of this nature stepping, as it were, into the shoes of the defunct Advertising Standard Authority of South Africa. The complaint is that Vodacom is acting in breach of the above Order. I do not intend to delve much into the history of the original complaint; I will only touch on it for the purpose of providing some background to the breach complaint. In issue was Vodacom’s claim that it was the country’s best network. It appeared during the appeal that what was in issue was the context in which the claim was made. There were two contexts, referred to by the FAC as the “*old context*” and the “*new context*.” The *old context* (i.e the old basis for the claim): For years, Vodacom legitimately put itself forth as the best network in the country. This claim was based on Vodacom’s objectively assessed quality of its network. However, it is now common cause that such a claim (based on the objectively

assessed quality of its network) can no longer be justified. The new context (i.e. the new basis on which the claim is allegedly based): On the basis of subjective data collected during a survey, Vodacom continued to make the same claim in its advertisements that it was the country's best network. MTN had basically no problem with the claim, provided that Vodacom would make it clear in its disclaimers that the claim was based on subjective data or consumer opinions as opposed to objectively assessed quality of network.

3. For the reasons fully set out in its Decision referred to above, which need not be repeated here, the FAC held that Vodacom's disclaimer was not sufficient to disabuse the consumer of the impression that the claim of best service was no longer within the old context, but the new one. The finding was that Vodacom misleadingly perpetuated the impression that it offered the best service in terms of objectively assessed network quality.
4. Paragraph 4 of the Decision of the FAC stated that the appeal turned on one point: *"does the disclaimer sufficiently make it clear to the consumer that the claim of being the best network is no longer within the old context but within the new one, or is it misleading? Vodacom argued that the consumer would be able to tell the difference and therefore not be misled. In this respect, Vodacom sought to rely on a report by SAsci, referenced by the asterisk."*
5. The FAC rejected Vodacom's reliance on the report by SAsci 2017; the reasons appear in paragraph 5.1 of the Decision. The main reason was that whereas the report was merely a reflection of subjective data collected in a survey, the disclaimer did not sufficiently convey this (the new context). The disclaimers did not disabuse the consumer of the long held impression that the claim was based on network quality. That was misleading because, as said earlier, the claim of best network could no longer be justified on the latter basis (old

context). The disclaimers were obscure in terms of the size of the letters and location. Vodacom had also relied on a Consulta report. It too was found to be a subjective data.

6. MTN's complaint is put as follows in its Breach Complaint, dated 2 April 2019:

*“Vodacom’s advertising between October 2018 (when the ruling of the ASA’s Final Appeal Committee was received) and the date of this complaint has retained prominent references to being “SA’s Best Network” in a manner that contradicts likely consumer interpretation (given Vodacom’s historic use of this claim) and without clearly alerting consumers to the fact that the claim has nothing to do with actual network performance. This was the essence of MTN’s complaint in 2018, and the basis on which ASA’s Advertising Standards Industry Tribunal, and subsequently its Final Appeal Committee ruled against Vodacom’s claim”.*

7. The gist of the complaint is therefore that the current claim is *“the result of a consumer satisfaction survey relating to subjective consumer opinion and not in any way related to actual performance of their work, as had been the case for years”*. That being the case, the argument goes, the current claim continues to be misleading in breach of the FCA’s Order of 2 October 2018.

8. I have gone through the examples of misleading claims submitted by MTN. They are substantially similar in nature, and all based on the fundamental point that the disclaimers do not sufficiently inform the consumer that the claim is within the new context referred to above. That is apparent from the basis and nature of the objection raised in relation to each complaint raised as an example. Likewise, the responses by Vodacom to each example are substantially similarly worded, repeatedly. There is therefore no need for me to

deal with either each example submitted by MTN, or each response thereto by Vodacom.

9. This time round Vodacom, for its claim that it is the country's best network, relies on an accolade or award it received, namely, the Sunday Times Top Brands Awards 2018. The methodology used in coming to the award is set out in a document annexed by MTN to the breach complaint. The heading of the document reads: "*Sunday Times/KANTAR TNS TOP BRANDS 2018: METHODOLOGICAL NOTE*". Thereafter follows the sub-head: "*OVERVIEW OF THE TOP BRANDS STUDY.*" What follows further thereafter is an explanation as to how a decision to grant the accolade was reached:

*"2018 brings the tenth successful year in partnership with KANTAR TNS South Africa for the Sunday Times Top Brands. The study applies the same methodology since 2009.*

*The approach looks at a brand's penetration in the marketplace whilst also examining its relative strength amongst its users and its relative attraction amongst non-users – the concept of relative advantage.*

*This was accomplished by asking three questions:*

- 1. Brands used within a defined time period (this period differed for each category)*
- 2. Brands with which people were familiar enough to rate a 10-point scale*
- 3. The actual rating of all those brands on a 10-point scale*

*From this, an index score for each brand is generated from three variables derived from the questions above: the actual usage of a brand in a specified time period, the rating it receives from its users relative to others in the category, and the rating it receives from those*

*non-users aware of it, also relative to competitors in the category. The non-users rating carries only half the weight of the user rating in the final algorithm.*

*The final index can be thought of as the brand's standing in both the market place and in people's heads. ..."*

It is clear from the foregoing that the determination and the accolade on which Vodacom bases its claim are the products of a collection of data which is the subjective views of users and non-users ( thus still the second context). This therefore brings the report into the same category as the SAcsi and the Consulta reports. Secondly, here too the disclaimers on which Vodacom seeks to rely on are cast in minimal letters and obscurely located. Having gone through the disclaimers, I hold the view that they do not disabuse the consumer of the old context. The contents of paragraphs 5 and 6 of the Decision of the FAC therefore equally hold good in respect of Vodacom's new disclaimers.

10. It is necessary to restate what the real issue in this breach complaint is: The Order of the FAC was an injunction against Vodacom to make it clear in its disclaimers that its best network claim was no longer on the basis of objectively assessed network quality, but on the basis of subjective opinions of consumers. Yet, still in its new advertisements that came after the Decision of the FAC, Vodacom fell short of doing as ordered. Coming up with all sorts of new disclaimers, however many or differently worded they may be but which still fail to comply with the FAC's injunction to make it clear that the claim is not based on its objectively assessed quality network but on opinion survey, puts Vodacom in breach. Had the FAC's Order of 2 October 2018 been a Court Order, Vodacom would have been in real peril of being convicted of contempt of court. What about breaching Orders of tribunals such as the FAC? *En*

*passant:* Apart from chairing the FAC, I also chair three other final appeal panels in the country at the national level, both in the private and public sector. Amongst them, I chair the Appeals Panel of the Press Council of South Africa. I am therefore, like many people, a champion of self-regulation as opposed to regulation by government. But we all know that self-regulation will only work if subscribers thereto commit to abiding and executing Decisions of the tribunals; otherwise the self-regulation mechanism would collapse and, in the case of the Press Council for example, give justification for the government to step in to take control.

11. For all the reasons given above:

11.1 Vodacom (Pty) LTD is declared to be in breach of the Order of the Final Appeals Committee dated 2 October 2018.

11.2 The said Order is hereby made applicable *mutatis mutandis* to the advertisements complained about by Mobile Telephone Network (Pty) LTD in its Breach Complaint dated 2 April 2019.

11.3 Vodacom (Pty) LTD must pay the costs of the Breach Complaint.

Dated this 1st day of May 2019

Judge B M Ngoepe, Chair, Final Appeals Committee of the Advertising Regulatory Board.