REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes
Of Interest to other Judges: Yes

11 October 2024 Vally J

Case No: **095598 / 2024**

In the matter between:

COLGATE-PALMOLIVE (PTY) LTD First Applicant

COLGATE-PALMOLIVE COMPANY Second Applicant

and

BLISS BRANDS (PTY) LTD First Respondent

THE ADVERTISING REGULATORY BOARD NPC Second Respondent

and

Case no: **095617 / 2024**

In the matter between:

BLISS BRANDS (PTY) LTD Applicant

and

THE ADVERTISING REGULATORY BOARD NPC First Respondent

COLGATE-PALMOLIVE (PTY) LTD Second Respondent

COLGATE-PALMOLIVE COMPANY Third Respondent

THE CHAIRPERSON OF THE FINAL APPEALS COMMITTEE OF THE ADVERTISING REGULATORY BOARD Fourth Respondent

JUDGMENT

Vally J

Introduction

[1] There are two applications before Court. The main protagonists in the two matters are the same. They simply swop sides in each application. While the applications are separate and to an extent distinct, they are so closely interrelated that if the relief sought in the first one is granted, this will significantly impact on the progress of the other. To be more precise: in the first application (Colgate's application) the first and second applicants (Colgate) ask that the first respondent (Bliss) be held in contempt of court, alternatively that it be declared in breach of an order of this Court. The order in question was issued by Manoim J on 21 February 2024. In the second application (Bliss's application) Bliss cites the Advertising Regulatory Board (ARB) as the first respondent and Chairperson of the Final Appeals Committee of the ARB as the fourth respondent. The Chairperson of the Final Appeals Committee of the ARB is the former Judge-President of this Court, Ngoepe JP. Bliss asks that the order issued by Ngoepe JP be stayed pending the outcome of a review of the said order, which it intends to institute in this Court. Both parties seek costs against each other. The ARB and Ngoepe JP both abide the decision of this Court. The ARB however has filed an explanatory affidavit aimed at enlightening this Court of the nature of its work, the importance of the matters being dealt with urgently, and the effect of Bliss's initial consent to the jurisdiction of the ARB.

[2] The controversy between Colgate and Bliss has a long, tortuous history. Before the present application there were two hearings before relevant

structures of the ARB, two urgent applications in this Court before two different judges (Yacoob J and Fisher J), an appeal before the Supreme Court of Appeal (SCA), an application for leave to appeal before the Constitutional Court (CC), a full-blown opposed motion in this Court before Manoim J, a hearing before the fourth respondent, and now a hearing before me in the urgent Court.

[3] Colgate maintains, quite correctly in my view, that the success or not of its application materially impacts upon Bliss's application, as it raises the issue of whether Bliss is entitled to, or should be granted, audience at all by this Court. Consequently, and for purposes of judicial efficiency, it was decided that Colgate's application would be heard first. Whether Bliss's application should be heard if Colgate's application succeeds is an issue in the Bliss application and it will be considered thereafter. If the conclusion is reached that it should not be allowed to continue with its application then that would be the end of the matter in this urgent Court. If it is found that it should be allowed to continue, then the application will be considered in its entirety. The same would apply if Colgate's application failed.

Background Facts

[4] All the facts in this case are common cause. They are:

(i) Colgate and Bliss have been engaged in bruising commercially inspired litigation for over four years – from December 2019 to 21 February 2024. The litigation concerns a single issue: the breach of the ARB's Code of Advertising Practice (Code) by Bliss.

(ii) Colgate owns a brand of soap, labelled Protex. In 2019 it submitted a complaint to the ARB alleging that Bliss was in breach of the Code by exploiting its advertising goodwill and by imitating its Protex packaging. The ARB is a voluntary organisation. Bliss is not a member thereto. However, upon receipt of the complaint, it consented, *de facto and de jure*, to the jurisdiction of the ARB[1]. The essence of the case of Colgate is that Bliss owns a brand of soap, labelled Securex, which is packaged in a manner that is so similar to that of Protex as to be indistinguishable.

(iii) The matter eventually served before the ARB's Advertising Appeals Committee (AAC), which unanimously found that Bliss's packaging of its Securex brand breaches clauses 8 and 9 of the Code. It accordingly ordered Bliss to withdraw the offensive packaging 'in accordance with clauses 15.3 and 15.5 of the ARB's Procedural Guide'. Clause 15.3 prescribes that a packaging that is to be withdrawn must be done: (a) within three months of the ruling - this applies to dissemination of new packaging, but does not require the offending party to withdraw packaging that was already on the shelf; and (b) immediately – deadlines permitting - from the internet unless otherwise determined by the ARB. Clause 15.5 prescribes that the offending advertisement must be withdrawn from every medium in which it appears.

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[1] The SCA and the CC found this to be the case: *Advertising Regulatory Board NPC an d Others v Bliss Brands (Pty) Ltd*, 2022 (4) SA 57 (SCA); *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others* 2023 (10) BCLR 1153 (CC) at [18].

(iv) Bliss appealed the order to the Final Appeals Committee of the ARB (FAC). By a split decision the FAC upheld the ruling. This occurred on 3 August 2020. Bliss was given until 30 September 2020 to comply with the order of the AAC.

(v) Bliss instituted an application for interim relief on an urgent basis in this Court. It asked for the ruling and order of the FAC to be temporarily suspended pending a review of both the ruling and the order. The matter was called before Yacoob J, who, on 28 September 2020, dismissed it with costs of two counsel. The review application remained alive. Bliss did not comply with the order while it awaited the finalisation of the review application. Bliss in the meantime instituted another urgent application in this Court. This urgent application was called before Fisher J on 2 October (a mere four days after Yacoob J's order). Fisher J *mero motu* raised the issue of the constitutionality of the ARB's powers. She issued an interim interdict and made a far-reaching order that included the setting aside of the FAC ruling. The matter was sent to the SCA on appeal. On 12 April 2022 the SCA set aside the order of Fisher J, save for the interim interdict. Bliss applied for leave to appeal to the CC. The CC dismissed the application. The review application, which was still alive, was now finally considered by Manoim J. On 21 February 2024 Manoim J discharged the interim interdict issued by Fisher J and ordered that Bliss 'must comply with the FAC decision within three months of date of order.' Bliss did not lodge an appeal against his order.

(vi) From December 2019 to 21 February 2024 Bliss continued with the conduct that was ultimately – by dint of Manoim J's order - found to be offensive of the ARB's Code. Colgate found this to be deeply disconcerting. Bliss, cannot however be faulted as this was the consequence of the Fisher J order.

(vii) Any hope that Manoim J's order brought finality to this matter was soon scuttled. Bliss indicated that it would comply with the order. It made certain changes to the old offending packaging of Securex.

(viii) According to Colgate, these changes were wholly inadequate as Bliss had failed to discharge its obligations in terms of the FAC order. Bliss's failure was two-fold: (a) it only 'slightly modified' the offending packaging; and, (b) it continued to market the offending packaging on various online platforms.

(ix) On 17 July 2024 Colgate lodged a detailed breach complaint with the ARB. The matter served before Ngoepe J who, after considering the evidence and the submissions of the parties, handed down a ruling on 12 August 2024. He found that the new packaging was a 'continuation of, and part and parcel of, the Offending Packaging'. 'Minor alterations' were effected but these were really insignificant. His finding reads:

> 'First to consider is whether or not the Slightly Modified Offending Packaging sufficiently departs from the Offending Packaging. To substantiate their case, the applicants submitted, for comparison, pictures of the Offending Packaging and of the Slightly Modified Offending Packaging. The comparison between the two would be in accordance with clause 3.6 of Section 1 of the Code which states: "When objections in respect of advertisements that were amended resulting from an ARB ruling are received, both the original (the Offending Packaging) and amended version (the Slightly

> Modified Offending Packaging) will be taken into consideration." A comparison of the two shows very minor alterations, also listed by the applicants. They include the mere shifting of some words from one side to the other; same colour contours are used. The alterations do not, in the words of the FAC Ruling, remove the visual or conceptual similarities between the two packagings; the visual distance is absent. The Slightly Modified Offending Packaging does not therefore constitute new packaging; it is a continuation of, and part and parcel of, the Offending Packaging. The latter is the foundation, and both are the subject matter, of the Breach Complaint. Moreover, the respondent has been engaging in a continuous minor tweaking in imitation of the applicants' packagings referred to.'

(x) He ordered Bliss to, amongst others, remove the 'Offending Packaging and [the] Slightly Modified Packaging from all mediums in which it appears.'

(xi) An exchange of correspondence between the attorneys of Bliss and Colgate took place relating to the order of Ngoepe JP. They reveal that Bliss was adamantly of the view that the ruling was incorrect and as a result it would not be complying with it. It would also stridently oppose any attempt by Colgate to compel it to comply therewith. The impasse between the parties resulted in the present two applications.

Urgency

[5] Both parties claim that their application is urgent, while the other party's is not. I am unconvinced in both cases. I would treat both applications as urgent. They both stand to suffer considerable commercial prejudice should their application be struck from the roll. Both have no alternative but to seek redress from this Court in order to prevent the prejudice. In my judgment, both applications are urgent enough to be placed on the roll for this week.

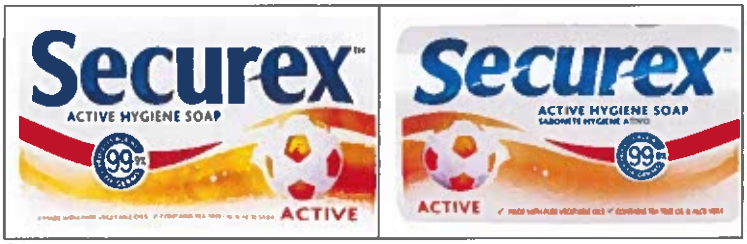
The Contempt

[6] Bliss is allegedly in contempt of the Manoim J order in two respects: (i) tampering with the old packaging in such a way that in all material and important aspects it remains unchanged and, (ii) failing to remove the advertisement of Securex in the old packaging from certain websites.

[7] As to the first allegation, Bliss maintains that it has made significant changes to the old packaging, and therefore has complied with the Manoim J order.

[8] The following is a pictorial depiction of the two packagings:

Offending (Old) Packaging	New Packaging
	
	
	



[9] A comparison of the two packagings, Bliss claims, demonstrates that the changes are substantial. In substantiation of this claim it points out:

(i) The trade mark, 'Securex', is now printed in a 'lighter shade of blue' and the font has been italicised;

(ii) 'a graphic embellishment has been added in the form of two stripes, the first of which runs diagonally from the foot of the letter S to the top of the letter U, and the second of which runs diagonally from the bottom of the letter R to the top of the letter X';

(iii) Of the four products, the names of two of them have been changed in the following respects: from 'Fresh' to 'Fresh Dew' and from 'Herbal' to 'Herbal Essence';

(iv) The image of the product variant now appears on the bottom left as opposed to the bottom right as was previously the case on the old packaging;

(v) The variant name has been shifted from the right to the left; and finally,

(vi) It is also important to bear in mind that the printing of the brand name in blue text is common for this category of products. This, as I understand the claim, is that the lighter shade of blue is different from the shades of blue used in the case of other products in the same category.

[10] In sum, Bliss claims that these substantial changes depart from the characteristics identified in the AAC ruling as being offensive. Hence, it cannot be said that it has failed to comply with the Manoim J order. Mr Loxton for Bliss submitted that the correct approach in determining the allegation of contempt is to compare the new Securex packaging with that of Protex. There certainly does appear to be significant differences between the packaging of Securex (old and new) and that of Protex. However, this comparison is inappropriate for our present purposes. That comparison has already taken place. It was the focus of the hearings before the AAC, the FAC and review application before Manoim J. A decision on the similarities between Protex and Securex occurred in those *fora*. It is not a matter that can be revisited at this hearing. This Court can only look at what Manoim J found by dint of his refusing the relief sought in the review application, the order he issued and the steps taken by Bliss to comply therewith. This requires a comparison between the old and the new Securex packaging.

[11] The claim that the new packaging is significantly different from the old one is contrary to what was found by Ngoepe JP. Scrutinising these two packagings, there is certainly substance in the finding of Ngoepe JP. Despite moving the variant name from left to right, the renaming of two of the variants, the italicising of the brand name 'Securex' and the slight change in its colour, these do not detract from the fact that to a common eye there is no significant alteration in the packaging. As can be seen from the pictorial depiction above, the new packaging very closely resembles the old one. In fact, the two

packagings are so similar that it is difficult to distinguish one from the other except with a keen eye looking for the differences.

[12] The conclusion of this holding is that the Manoim J order has not been complied with.

[13] As to the second allegation, Colgate showed that as at the date it launched its application the old packaging was still advertised on some websites. Bliss admits that this was the case as at the date of institution of the contempt application. It has been, and is, advertised on websites under its control and on websites of third parties. For websites under its control, it says that it has taken steps to ensure that the offending advertisements are removed. Old packaging is no longer advertised on the sites. However, it did not show that the steps it has taken to have the offending advertisements removed have actually yielded any positive results. Hence, as of the date of this hearing it has to be accepted that the offending advertisements have yet to be finally and permanently removed from all websites under its control. At the hearing Mr Marcus, for Colgate, drew attention to the fact that the old packaging is still to be found on the Bliss Brand's website. This submission was not refuted.

[14] I hold that the changes made to the old packaging are insufficient, and as a result, Bliss fails to comply with the Manoim J order. At the same time, Bliss has continued to advertise with the old packaging. Thus, it contravenes the said order. Whether the contravention constitutes contumacious conduct is the issue to which I now focus my attention.

[15] The legal principles applicable to a contempt of court application have been summarised in a single short paragraph by Khampepe J, who wrote:

> '...it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.'[2]

[16] Acutely aware of the evidentiary burdens resting upon it Bliss claims that, firstly, it has discharged them by actively taking steps to alter the old packaging, and secondly, the fact that it made the changes demonstrates that it cannot be *mala fide.*

Wilfulness

[17] Bliss concentrated on dispelling the presumption of *mala fides*, while ignoring the issue of wilfulness. This is unsurprising for it had failed to put up convincing evidence showing that:

(i) using the old packaging to advertise on its sites (the Bliss Brand's site for example) was not wilful. It put up a meek defence-that these were on a site it no longer relies upon. Hence, failure to remove them was not wilful; and,

(ii) changes to the old packaging were designed to avoid falling foul of the order. The changes were so minimal that they failed to produce a

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[2] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma and Others* 2021 (5) SA 327 (CC) at [37], footnotes omitted.

packaging that was materially distinguishable from the old one. Only one conclusion can be drawn from this: they were wilfully designed so as not to be materially distinguishable from what existed previously.

Mala fides

[18] Bliss's contention that the mere effort taken to make the changes is *per se* demonstrative of the fact that it did not act *mala fides*. The changes, in other words, were aimed at complying with the Manoim J order. The ambition to comply dispels the presumption of *mala fides*. I cannot agree. The new packaging is, as I said above, not significantly different from the old one. It cannot simply say: 'We made changes, therefore we cannot be held to be acting *mala fide*'. It must show much more in order to demonstrate that it genuinely and in good faith tried to comply. The changes are cosmetic in nature. It is difficult to infer therefrom that there was a genuine *bona fide* attempt at complying with the order. Looked at differently, as the changes are not material, the act of making them cannot be said to have had the intention of complying with the Manoim J order. I hold that in itself is insufficient to discharge the presumption of *mala fide*s. Bliss is required to show that the changes were a genuine, and not an artful attempt at complying with the order. To this effect, it should have put up a reasonably detailed explanation of what steps it had taken to comply. This it has not done.

[19] Further, Bliss did not dispel the presumption of *mala fides* in regard to the continuation of the advertisement using the old packaging on its own sites.

[20] Having found that Bliss has failed to discharge the evidentiary burden resting upon it, the conclusion that it is in contempt of the Manoim J order is ineluctable. And so, it is found.

Should Bliss be precluded from moving its application while remaining in contempt of the Manoim J order?

[21] Mr Loxton pointed out that Colgate did not seek this relief in its notice of motion, nor did it make out such a case in its founding affidavit. Mr Marcus responded by stating that Bliss's application, while launched on the same day as that of Colgate, was only seen by Colgate after its own application was already launched. Hence it could not ask for the relief. In any event, Mr Marcus pointed out, Colgate has raised this in its answering affidavit to Bliss's application.

[22] As both applications are before me, it is not inappropriate for Colgate to rely on what it said in its answering affidavit. In any event, the decision as to whether Bliss is to be precluded from continuing with its application while remaining in contempt is one to be made on Bliss's and not on Colgate's application. It is an issue separate from the merits in that application. In other words, while the merits of Bliss's application would remain undetermined, one issue in the application, unrelated to the merits, nevertheless, would be determined. As the decision on that issue is predicated on the outcome of Colgate's application, the hearing seamlessly moved from Colgate's case to Bliss's case. This was on the understanding that the outcome in Colgate's case would affect a determination on Bliss's preclusion from continuing with the

merits of its case. In a sense, this is not much different from determining only a *point in limine* in a matter, and effectively, that is what occurred here. The order made on the point *in limine* would be on Bliss's and not Colgate's application.

[23] Bliss was fully apprised of Colgate's claim, and Bliss was aware of Colgate's request for it to be precluded from proceeding with the merits of its application. It took full advantage to present comprehensive written as well as oral submissions thereto.

[24] This Court is vested with remedial powers entitling it to refuse to grant a contemnor audience until it purges its contempt. The CC had the following to say about imposing a sanction of this nature:

> 'Such a sanction, which may at first sight appear to run counter to the right of access to courts enshrined in section 34 of the Constitution, is ... wholly appropriate in circumstances when one is dealing with conduct that may be described as contemptuous of the authority of the order issued by a court. It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order.'[3]

[25] Unfortunately, disregard of and disrespect for orders of a court are not uncommon in our country. This very Court, - the urgent Court – is inundated on a weekly basis by applications for contempt of court. Many of them involve family matters with dire consequences for the party in whose favour the order was granted. The courts in many divisions in the country have also had to deal with applications for contempt of court by organs of the state, or by state officials who

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[3] *SS v VV-S* 2018 (6) BCLR 671 (CC) at [31], footnotes omitted.

have shown complete disrespect, if not disdain, for court orders. This is unacceptable. Courts cannot remain pusillanimous in the face of such an onslaught on their dignity. One way it can and should respond is by refusing to allow a contemnor access while they remain in contempt. Put differently, courts should not allow a contemnor to seek its protection, save in the most exceptional circumstances, such as a matter involving life and death.

[26] Allowing Bliss to continue with its application while carrying the stain of a contemnor would not only harm the repute and dignity of this Court, it would also be telling Colgate – the party prejudiced by Bliss's contempt – that its interests count for nothing.[4]

[27] Accordingly, I conclude that Bliss should not be allowed audience in this Court while it remains in contempt of the Manoim J order. Its application should only be entertained once it purges its contempt. To the extent that this impedes its right of access to court, Bliss itself is responsible for the impediment. The impediment, of course, is not permanent. Bliss can easily overcome it by purging its contempt. Bliss, therefore, cannot claim that it is being denied access to a court. Its access is delayed, and the length of the delay depends on its own conduct.

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[4] *SS v VV-S* 2018 (6) BCLR 671 (CC) at [35]

Costs

[28] The matters combined are voluminous. The employment of at least two counsel was certainly justified. In fact, both sought costs of two counsel if they were successful. This is not a case of either party engaging in litigation in order to protect a constitutional right. They are both large commercial corporations engaged in a dispute, which has turned out to be commercially bruising to both of them. That unfortunately is one of the risks (and consequences) of doing business in an economy that allows for, and promotes, competition between private individuals and corporations. Costs in the circumstances should follow the result. But there is more to consider. Colgate asked for costs on an attorney and client scale in both applications.

[29] As for Colgate's application, contempt of court, albeit civil contempt, is a serious offence and should in itself attract a punitive costs order. There is substantial authority to this effect. It would have application in this case, especially since Bliss had the benefit of escaping the consequence of the AAC and FAC rulings for four years. While it was not responsible for this state of affairs, it has benefitted nevertheless.

[30] As to Bliss' application, it should not be ordered to pay costs at all. The merits of that application is still to be dealt with. Bliss is already being punished with a punitive order in Colgate's application. It should not be prejudiced twice for the same conduct. Hence, each party should pay its own costs.

Order

[31] The following order is made:

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1. The ordinary forms and service provided for in the Uniform Rules of Court are dispensed with and this application is heard and determined on an urgent basis in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court.
2. It is declared that the First Respondent is in contempt of paragraph 3 of the order of Manoim J in case no **2020/22061**, handed down on 21 February 2024, a copy of which is annexed hereto marked **Annexure A** ("the Manoim J order").
3. The First Respondent is ordered to comply with paragraph 3 of the Manoim J order, forthwith, and no later than 30 calendar days from the date of this order, by withdrawing the Offending Packaging and the Slightly Modified Offending Packaging, depicted in **Annexures B** and **C** annexed hereto, from every medium in which it appears. In the event that the First Respondent fails to comply with this order, the Applicants are authorised to approach the Court on the same papers, duly supplemented, for further relief.
4. The First Respondent is to pay the costs of this application on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two counsel.

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5. The matter is struck from the roll.

6. The Applicant is not entitled to enrol the matter until it has purged its contempt of the Manoim J order.

7. Each party is to pay its own costs.

Vally J
Gauteng High Court, Johannesburg

Date of hearing:	10 October 2024
Date of judgment:	11 October 2024
In case no.: 095598 / 2024	
For the Applicants:	G Marcus SC with R Michaw SC and L. Harilal Heads compiled by G Marcus SC with R Michau SC, L. Harilal and C. McConnachie
Instructed by:	Kisch Africa Inc
For the First Respondent:	C Loxton SC with I Leamonth
Instructed by:	Eversheds Sutherland
In Case no: 095617 / 2024	
For the Applicants:	C Loxton SC with I Leamonth
Instructed by:	Eversheds Sutherland
For the First and Second Respondents:	G Marcus SC with R Michau SC and L. Harilal
Instructed by:	Kisch Africa Inc
For the First and Fourth Respondents:	K Harding-Moerdyk
Instructed by:	Willem De Klerk Attorneys