

# The Jurisdiction of the Advertising Regulatory Board over Non-members: The Supreme Court of Appeal confirms its Herbex-order in the Bliss-matter

J Visagie\*

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## Author

Jeanette Visagie

## Affiliation

North-West University  
South Africa

## Email

Jeanette.Visagie@nwu.ac.za

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## Abstract

This contribution seeks to answer the following question: To what extent does the Advertising Regulatory Board (ARB), as a public watchdog in the advertising industry, have the jurisdiction to consider advertising complaints filed against a person or entity which is not a member of the ARB?

In *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 JDR 0769 (SCA), the Supreme Court of Appeal confirmed its earlier order in *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA) that the ARB possesses the jurisdiction to consider an advertising complaint irrespective of whether or not the relevant advertiser is a member of the ARB. Although non-member advertisers may elect not to subject themselves to the jurisdiction of the ARB or comply with an ARB ruling, all ARB rulings are issued for the adherence by the ARB's members. In the instance of a non-member who exercises its constitutional right to dissociate from the ARB and its adjudication process, the ARB may nevertheless consider an advertising complaint if there is a potential contravention of the ARB's *Code of Advertising Practice*.

The SCA's ruling should be considered in the context of the important role that the ARB performs as a service to the general public. While the court *a quo* in the *Bliss*-matter attempted to derail this public function, the SCA has come to the aid of the general public in justifying the jurisdiction and public function of the ARB as a body which sets out and rules on ethically acceptable and responsible advertising for the benefit of consumers. Given the advantages of the ARB mechanism as it currently stands, it is submitted that the broader public interest may very well prevail should leave to appeal to the Constitutional Court be granted.

## Keywords

Advertising Regulatory Board; advertising; self-regulation; jurisdiction.

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## 1 Introduction

Self-regulation by the South African advertising industry is nothing new. It has been around for more than fifty years. The self-regulatory body in the advertising industry is currently known as the Advertising Regulatory Board (ARB), which is the successor to the Advertising Standards Authority of South Africa (ASA).<sup>1</sup> Following a period of financial distress, the ASA was placed into liquidation and ceased operations in September 2018.<sup>2</sup> Despite this set-back the advertising industry was determined to continue the practice of self-regulation. A month later the ARB was registered<sup>3</sup> and began operations to further advertising self-regulation in continuation of the ASA.<sup>4</sup>

Following in the footsteps of the ASA, the ARB is an independent and voluntary association established and funded<sup>5</sup> by the marketing communication industry,<sup>6</sup> which aims to ensure that its system of self-regulation in the advertising industry serves the public interest.<sup>7</sup> It is also a member of the International Council for Advertising Self-Regulation (ICAS).<sup>8</sup>

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\* Jeanette Visagie. LLB LLM. Senior Lecturer, Faculty of Law, North-West University, South Africa. E-mail: [jeanette.visagie@nwu.ac.za](mailto:jeanette.visagie@nwu.ac.za). ORCID: <https://orcid.org/0000-0002-6984-758X>. I am indebted to Prof Henk Kloppers for his valuable comments on earlier drafts of this article. I must also thank the two anonymous reviewers for their constructive suggestions and commentary. All views and possible errors in this article are, however, entirely my own.

<sup>1</sup> ARB 2022 <https://arb.org.za/>.

<sup>2</sup> Gous 2018 <https://www.timeslive.co.za/sunday-times/business/2018-10-03-the-advertising-industry-watchdog-is-shutting-shop/>.

<sup>3</sup> The ARB was registered as a non-profit company as Advertising Regulatory Board NPC on 4 October 2018. See ARB 2019 <http://arb.org.za/assets/arb-moi-20.03.2019.pdf>; cl 4.2 of Section I of the ARB *Code of Advertising Practice* (ARB 2021 <https://www.arb.org.za/#codes>) (hereafter the *Code*).

<sup>4</sup> See ARB 2022 <http://arb.org.za/>; MarksLive.com 2018 <http://www.marklives.com/radar/advertising-regulatory-board-launches/>.

<sup>5</sup> It should be noted that not all members of the ARB fund it. In fact, less than fifteen per cent of entities that are either direct or indirect members of the ARB fund it. See *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 JDR 0769 (SCA) (hereafter *ARB v Bliss*) para 53.

<sup>6</sup> See cl 1 of the Preface to the *Code*; *Reckitt Benckiser Pharmaceuticals Proprietary Limited v Advertising Regulatory Board NPC* [2020] JOL 49265 (GJ) (hereafter *Reckitt Benckiser v ARB*) paras 6 and 45.

<sup>7</sup> See cl 1 of the Preface to the *Code*; *Reckitt Benckiser v ARB* para 45.

<sup>8</sup> The ARB became a full member of the International Council for Advertising Self-regulation (ICAS) in January 2022. See ICAS 2022 <https://icas.global/south-african-sro-joins-icas-as-full-member/#:~:text=Brussels%2C%2024%20January%202022%2C%20The,2019%20as%20an%20associate%20member>. ICAS is a global platform currently connecting more than 25 national self-regulatory organisations worldwide, allowing

The guiding document of the ARB is the *Code of Advertising Practice* (the *Code*), which regulates all commercial advertising in South Africa.<sup>9</sup> It is subject to the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) and gives effect to the constitutional values and principles.<sup>10</sup> The *Code* is administered and enforced by the ARB.

The members of the ARB include various leading businesses in the advertising industry, such as local newspapers and magazines, radio, television and print industry federations.<sup>11</sup> Approximately 335 entities are either direct or indirect members of the ARB.<sup>12</sup> Familiar businesses include Absa, Allan Gray, Clientèle, Coca-Cola, Colgate-Palmolive, Discovery, FNB, Hollard, Liberty, Nedbank, Outsurance, Sanlam, Tiger Brands, Unilever, Vodacom, Wimpy and Pick 'n Pay.<sup>13</sup>

In addition, section 55(1) of the *Electronic Communications Act 36 of 2005* (the *ECA*) requires that all broadcasting service licensees adhere to the

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them and other ICAS members to exchange best practices and to work together in addressing global challenges in the advertising industry. In addition to the various national self-regulatory organisations, ICAS membership includes self-regulatory organisation associations such as the Global Advertising Lawyers Association, and international industry associations such as the World Federation of Advertisers and the International Advertising Association. ICAS also assists countries in emerging markets to establish national self-regulatory organisations. The history of the ICAS dates back to 2008, when it was established by the European Advertising Standards Alliance. The ICAS Secretariat is based in Belgium. See ICAS 2022 <https://icas.global/about/members/>; ICAS 2022 <https://icas.global/about/history/>.

<sup>9</sup> The word "advertisement" has a wide definition in the *Code*. It refers to any visual or aural communication, representation, reference or notification of any kind which is intended to promote the sale, leasing or use of any goods or services, or appeals for, or promotes, the support of any cause. Common forms of advertising such as those on television, film and radio, and published advertisements in magazines and newspapers are included in this definition. In addition, digital advertisements (including those on social media platforms), promotional content of display material, menus, labels and product packaging also fall within the definition of an advertisement in terms of the *Code*. See cl 4.1 of Section I of the *Code*.

<sup>10</sup> See cl 4 of the Preface and cl 3.10 of Section I of the *Code*. S 18 of the *Constitution of the Republic of South Africa, 1996*, namely the right to freedom of association (which includes the right to self-regulation and dissociation) is of specific relevance to this article and is discussed in part 5.3.3 below. The right to freedom of expression and the right to access to courts, as entrenched in ss 16 and 34 of the *Constitution* respectively, are also touched upon in this article. For other examples of constitutional values and principles that have been considered by the ARB or which form part of the *Code*, see fn. 24 below.

<sup>11</sup> *Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC* 2021 JDR 1019 (GJ) (hereafter *Bliss v ARB*) para 8; cl 6 of the Preface to the *Code*.

<sup>12</sup> *ARB v Bliss* para 53. ARB members include the Association for Communication and Advertising, the Marketing Association of South Africa, IAB South Africa, the National Association of Broadcasters, the Pet Food Industry of Southern Africa and the Association for Alcohol Responsibility and Education. See cl 6 of the Preface to the *Code*.

<sup>13</sup> For a complete list of ARB funders, please see ARB 2022 <https://arb.org.za/>.

*Code* as determined and administered by the ARB.<sup>14</sup> Familiar broadcasting service licensees include television broadcasters such as the South African Broadcasting Corporation, MNet, eTV and MultiChoice. Radio stations such as Jacaranda FM, 5 FM, Metro FM, RSG, 94.7 FM, and 702 are also included.<sup>15</sup>

All ARB members have undertaken to comply with the *Code*. As part of that undertaking, members have agreed never to prepare advertising which conflicts with the *Code*; never to accept advertising of others that conflicts with the *Code*; and to withdraw any advertising which has been held to be unacceptable by the ARB.<sup>16</sup> As illustrated by the cases that are discussed in parts 4 and 5 below, advertising content in South Africa is, however, not limited to ARB member advertising only.<sup>17</sup>

The principle of privity of contract is an important consideration when dealing with the jurisdictional parameters of a voluntary organisation such as the ARB. This principle essentially entails that a person or entity which is not a party to a contract cannot be bound by the contract or sue or be sued on the basis of such a contract to which it is an independent third party.<sup>18</sup> This principle has never been disputed by the ARB or its predecessors, which has conceded that only members of the ARB who have, through consensus, voluntarily agreed to be bound by the *Code*, are bound by it, and that the ARB and its members cannot by agreement between themselves extend the application of the *Code* to non-members.<sup>19</sup>

Following the above, an area of contention in recent years has been the jurisdiction of the ARB (and its predecessor, the ASA) to consider and rule on complaints that have been filed against an advertiser who is not a

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<sup>14</sup> While the *Electronic Communications Act 36 of 2005* (hereafter the *ECA*) refers to "the Code of Advertising Practice as administered by the ASA", the Supreme Court of Appeal (the SCA) has confirmed that this provision is equally applicable to the *Code* which is currently administered by the ARB. See *ARB v Bliss* para 1.

<sup>15</sup> See National Association of Broadcasters 2022 <https://www.nab.org.za/members>.

<sup>16</sup> See cl 11 of the Preface to the *Code*.

<sup>17</sup> Other examples of complaints filed with the ARB against non-member advertising include *John Alexander / FAW Vehicle Manufacturers SA (Pty) Ltd* Directorate Ruling of 5 August 2019; *Steers Proprietary Limited / Burger King South Africa (Proprietary) Limited* Directorate Ruling of 25 September 2019; *Ebenhauzer Keun / Philip Morris South Africa (Pty) Ltd / 589* Directorate Ruling of 21 January 2020; and *Doris de Jager / Massbuild (Pty) Ltd t/a Builders Warehouse / 857* Directorate Ruling of 10 July 2020.

<sup>18</sup> *Herbex (Pty) Ltd v Advertising Standards Authority* 2016 5 SA 557 (GJ) (hereafter *Herbex v ASA*) paras 25-27, 37; *Hutchinson et al Law of Contract* 233.

<sup>19</sup> *Herbex v ASA* paras 25, 27 and 37.

member of the ARB. This contribution seeks to answer the following question: To what extent does the ARB, as a public watchdog in the advertising industry, have the jurisdiction to consider advertising complaints filed against a person or entity which is not a member of the ARB?

To answer the question, this contribution discusses whether or not a lower court would be bound by an order of the Supreme Court of Appeal (the SCA) which was based on a settlement agreement between the parties. As a second objective, consideration is given to whether or not clause 3.3 of the ARB's Memorandum of Incorporation (MOI) infringes on the right to freedom of association (which includes the right to dissociate) of non-members. Additionally, the aspect of whether or not the ARB, as an administrative adjudicating tribunal, infringes on the right to access to courts in terms of section 34 of the *Constitution* is also touched upon.

The question and objectives are considered in the light of relevant case law, notably *Herbex (Pty) Ltd v Advertising Standards Authority* 2016 5 SA 557 (GJ) and the subsequent SCA ruling in *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA) (referred to collectively as the *Herbex-matter*).<sup>20</sup> More recently, the issue of jurisdiction was considered again in *Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC* 2021 JDR 1019 (GJ) and, on appeal before the SCA, in *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 JDR 0769 (SCA) (referred to collectively as the *Bliss-matter*). The original contribution of this article is to set out the advantages of the SCA's ruling from the perspective of consumers that are exposed to advertising content in South Africa.

Part two below sets out a discussion on the *Code*, which is followed by a discussion on the complaints process before the ARB in part three. Both the court *a quo* and SCA rulings in the *Herbex-matter* are discussed in part four, which is followed by a discussion of the court *a quo* and SCA rulings in the *Bliss-matter* in part five. Part six sets out the discussion and concluding remarks.

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<sup>20</sup> In 2016 the jurisdiction of the Advertising Standards Authority of South Africa (hereafter the ASA) over non-members was challenged by two businesses in the complementary medicines industry in *Medical Nutritional Institute (Pty) Limited v Advertising Standards Authority* 2016 JDR 0900 (GJ) and *Herbex v ASA*. The legal arguments regarding the jurisdiction of the ASA were similar in both matters. This contribution focusses on the *Herbex-matter* as it forms that backbone of the jurisdictional challenge to the ARB which re-surfaced before the courts more recently in the *Bliss-matter*.

It should be noted that this contribution focusses on the jurisdiction of the ARB in the light of relevant local case law and relevant legislative provisions under the *ECA* and the *Promotion of Access to Justice Act 3 of 2000 (PAJA)*. The *Consumer Protection Act 68 of 2008* and the *Independent Communications Authority of South Africa Act 13 of 2000* fall outside the scope of this contribution.

## 2 The Code of Advertising Practice

As mentioned above, the *Code* is the guiding document of the ARB. The main purpose of the *Code* is to protect members of the public, and to set out the principles of fair play amongst advertisers in South Africa.<sup>21</sup> Clause 11 of the Preface to the *Code* provides:

Advertising is a service to the public and, as such, should be informative, factual, honest, decent and its content should not violate any of the laws of the country. All entities bound by the Code must neither prepare nor accept any advertising which conflicts with the Code and must withdraw any advertising which has subsequently been deemed to be unacceptable by the ARB, Advertising Appeals Committee or Final Appeal Committee.

The *Code* is based upon the internationally accepted *ICC Advertising and Marketing Communications Code* (the *ICC Code*) as prepared by the International Chamber of Commerce (ICC).<sup>22</sup> It applies to all commercial advertisements for the supply of any goods or services, the provision of facilities, and other advertisements which may be placed in the course of trade by or on behalf of any trader in South Africa.<sup>23</sup> The *Code* is subject to the *Constitution* and gives effect to the constitutional values and

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<sup>21</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) (hereafter the *Telematrix* case) para 4; *Herbex v ASA* para 17.

<sup>22</sup> See cl 4 of the Preface to the *Code*; ICC 2018 <https://iccwbo.org/content/uploads/sites/3/2018/09/icc-advertising-and-marketing-communications-code-int.pdf> (hereafter the *ICC Code*). Internationally, the *ICC Code* is considered to be the "gold standard" for principles relating to self-regulation in the advertising industry. It was first introduced by the ICC in 1937, and is updated on a regular basis to keep up to date with developments in the advertising industry. The most recent update to the *ICC Code* was in 2018. The *ICC Code* forms the basis of self-regulatory organisation advertising codes in approximately 50 countries around the world, including those countries that are affiliated to the ICAS as discussed in fn. 8 above. Although the *ICC Code* serves as the starting point for most self-regulatory organisation codes globally, self-regulatory organisations in most countries, including South Africa, have shaped their domestic advertising codes in such a manner that they also conform with national laws, and domestic social, economic and cultural aspects. See ICAS 2021 [https://icas.global/wp-content/uploads/2021-Global-Factbook\\_ICAS.pdf](https://icas.global/wp-content/uploads/2021-Global-Factbook_ICAS.pdf) 6, 10; ICAS 2022 <https://icas.global/advertising-self-regulation/faq/>. Also see fn. 24 below for the constitutional provisions and considerations incorporated in the South African *Code*.

<sup>23</sup> See cl 2.1 of Section I of the *Code*.

principles.<sup>24</sup> It consists of various parts, including Section I, which deals with aspects such as the aims, scope, interpretation and definitions; Section II, which sets out nineteen general principles of acceptable advertising;<sup>25</sup> and the *Procedural Guide*, which sets out the procedural aspects and remedies relating to the lodging and adjudication of a complaint with the ARB. These substantial parts of the *Code* were also incorporated in the *Code of Advertising Practice* of the ASA (*ASA Code*).

### 3 The ARB complaints process

The *Code* allows for the filing of consumer complaints<sup>26</sup> and competitor complaints.<sup>27</sup> Therefore, any member of the public or a business which is disgruntled by current or recent local advertising content<sup>28</sup> and who believes that it is unacceptable has the option of lodging a complaint with the ARB. This process is discussed below.

Consumer complaints are filed with the ARB by using the online complaint form available on the website of the ARB.<sup>29</sup> Competitor complaints must be submitted to the ARB via electronic mail.<sup>30</sup> Once the complaint is received, the ARB will notify the relevant advertiser by sending the complaint to that

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<sup>24</sup> See fn. 10 above. The Constitutional values and principles relating to non-discrimination form part of the *Code*. Cl 3.4 of Section II of the *Code* provides that advertisements may not contain content of any description that is discriminatory, unless, in the opinion of the ARB, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Where relevant, constitutional provisions and values are also considered by the ARB in reaching decisions. For example, in the matter of *Golden Fried Chicken (Pty) Ltd / Sandile Cele* FAC Ruling of 10 July 2019 (hereafter the *Golden Fried Chicken* case) the Constitutional Court case of *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC) was considered by the Final Appeals Committee (the FAC) in balancing the right to freedom of expression and the right to dignity in an advertisement for a fast food outlet that depicted a parody of colonialism.

<sup>25</sup> Those general principles cover aspects such as offensive advertising, discrimination, truthful presentation, substantiation of claims and comparative advertising.

<sup>26</sup> A consumer complaint refers to a complaint that has been lodged by a member of the public or an organisation operating in consumer-related matters, which concerns the compliance with the *Code* of a specific advertiser or advertisement. See cl 4.12 of Section I of the *Code*.

<sup>27</sup> A competitor complaint refers to a complaint that has been lodged on behalf of a commercial entity or an individual with a commercial interest concerning compliance with the *Code* by a commercial entity. See cl 4.10 of Section I of the *Code*.

<sup>28</sup> The advertising forming the subject of a complaint must either be current or have appeared during a period of 90 days prior to the date of lodging the complaint. See cl 3.3 of the *Procedural Guide* in the *Code*.

<sup>29</sup> See cl 4.1 of the *Procedural Guide*; ARB 2022 <https://arb.org.za/complaints.html>. Cl 3 of the *Procedural Guide* sets out the information that should be included in a complaint.

<sup>30</sup> See cl 4.2 of the *Procedural Guide*. Competitor complaints should be sent via email to [complaint@arb.org.za](mailto:complaint@arb.org.za).

advertiser and affording it an opportunity to respond to the complaint.<sup>31</sup> These written representations by both the complainant and the respondent are then considered.<sup>32</sup>

The *Procedural Guide* sets out a three-tier process for the adjudication of complaints before the ARB.<sup>33</sup> The ARB's Directorate has the primary responsibility of ensuring compliance with the *Code* and will generally in the first instance consider all possible breaches of the *Code* when complaints are filed.<sup>34</sup> When a complaint is received the Directorate may attempt to resolve the matter between the parties without issuing a formal decision.<sup>35</sup> If this is not possible, the Directorate will consider the complaint and issue a ruling.<sup>36</sup>

A party who feels aggrieved by a ruling of the Directorate may appeal to the Advertising Appeals Committee (AAC), which is chaired by an independent practising advocate.<sup>37</sup> As a final recourse, the Final Appeals Committee (FAC) will consider any appeal lodged against a ruling of the AAC.<sup>38</sup> The FAC, which must be chaired by an independent practising or retired judge,<sup>39</sup> is an instance of final resort and there is no further appeal beyond it.<sup>40</sup>

Where an appeal has been filed, a ruling of the ARB must generally be adhered to pending the outcome of that appeal. It is possible, however, to request a suspension of a ruling which may be granted in the discretion of the ARB or a court, as the case may be.<sup>41</sup> A practical justification for this

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<sup>31</sup> See cl 8.2.2 of the *Procedural Guide*. Usually the respondent will be afforded five days to file a response.

<sup>32</sup> The complainant is usually not afforded an opportunity to file a reply. See cl 8.3 of the *Procedural Guide*.

<sup>33</sup> See *Reckitt Benckiser v ARB* para 7.

<sup>34</sup> See cl 8.1 and 8.2 and 8.7 of the *Procedural Guide*.

<sup>35</sup> During 2021, 80% of complaints filed with the ARB were resolved without the need for a formal decision. See ARB 2022 <https://arb.org.za/assets/arb-newsletter-2022-q1.pdf> 3.

<sup>36</sup> In certain instances, however, the Directorate may decide to refer the matter directly to the Advertising Appeals Committee (the AAC) for consideration. See cl 8.5 and 8.7 of the *Procedural Guide*.

<sup>37</sup> See *ARB v Bliss* para 53. The appeal process before the AAC is set out in cl 9 of the *Procedural Guide*.

<sup>38</sup> The appeal process before the AAC is set out in cl 12 of the *Procedural Guide*. As the ARB is not a court, the doctrine of *stare decises* does not, strictly speaking, apply to this body. That being said, the ARB often refers to its previous rulings when issuing decisions and will treat a previous ruling as being binding, unless it considers a particular decision to be wrong. See *Reckitt Benckiser v ARB* para 40. In the *Golden Fried Chicken* case, it was held that the rulings of the FAC set a precedent for the Directorate and the AAC, and that the FAC decisions provide guidance to industries. *ARB v Bliss* para 53. The FAC of the ARB has in recent years been chaired by Judge BM Ngoepe. Also see ARB 2022 <https://arb.org.za/> for the details of the current committee members of the AAC and FAC, respectively.

<sup>40</sup> See *Golden Fried Chicken* case para 23.7.

<sup>41</sup> *ARB v Bliss* para 25.



approach would be that, if a ruling were to be automatically suspended pending an appeal, advertisers would simply appeal all adverse ARB rulings issued against them, thereby effectively buying time to phase out advertising pending an appeal. Considering the nature of advertising and that a large portion of advertisements has a limited lifespan, this approach would arguably not be in the public interest.

Decisions of the ARB are deemed to be administrative actions in terms of *PAJA*.<sup>42</sup> Decisions that have been issued by the ARB are therefore reviewable before the courts in terms of section 6 of the *PAJA*.<sup>43</sup>

Turning to sanctions, where a complaint is upheld the respondent advertiser will usually be ordered to withdraw the advertisement in its current format and from any medium in which it appears.<sup>44</sup> Where a respondent advertiser fails to comply with a reasonable request for cooperation during the course of an ARB complaint or following the issuing of a ruling, the ARB may issue a so-called Ad Alert to all of its members.<sup>45</sup> Through the Ad Alert mechanism, ARB members are notified of any advertiser which has been found to be in contravention of the *Code* and which has failed or refused to bring its offending advertising in line with the objectives of the *Code*. The ARB members will then subsequently decline to publish or broadcast any advertising of the offending advertiser in any medium in South Africa.<sup>46</sup>

The jurisdiction of the ARB in respect of non-member advertisers that have elected not to agree to abide by the *Code* was challenged by non-member advertisers both in the *Herbex*-matter against the ASA and, more recently, against the ARB in the *Bliss*-matter. These matters are discussed in parts four and five, respectively, to follow.

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<sup>42</sup> An administrative action includes any decision taken, or any failure to take a decision, by a juristic person other than an organ of state (such as the ARB) when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. See s 1 of the *Promotion of Access to Justice Act* 3 of 2000 (*PAJA*).

<sup>43</sup> *Reckitt Benckiser v ARB* para 6.

<sup>44</sup> See cl 14.1 read with cl 15.5 of the *Procedural Guide*. The advertisement should be withdrawn as soon as possible, but no later than the prescribed phase-out period relevant to the specific media platform (unless the ARB orders otherwise). For example, radio, television and online advertisement should be phased out immediately after a ruling (or so soon thereafter as deadlines permit), and product packaging should be phased out within three months. See cl 15.3 of the *Procedural Guide*.

<sup>45</sup> See cl 15.4 of the *Procedural Guide*.

<sup>46</sup> *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA) (hereafter *ASA v Herbex*) para 6.

## 4 The *Herbex*-matter

At the outset it should be noted that the order of the SCA was based on a draft settlement agreement between the parties. As such, in the matter before the SCA it was not necessary for the court to consider and comment on a number of the points of contention argued by Herbex and held by the court *a quo* regarding the jurisdiction of the ASA. These issues surfaced again in the *Bliss*-matter, however, which is discussed in part five that follows.

### 4.1 Facts

The applicant, Herbex, manufactured, sold and advertised complementary medicines in South Africa.<sup>47</sup> Although it was not a member of the ASA, Herbex had for many years submitted to the jurisdiction of the ASA and defended a number of complaints filed against its advertising.<sup>48</sup> Following legal advice on the jurisdiction of the ASA in respect of non-members, Herbex instituted legal proceedings against the ASA before the High Court, seeking an interdict and a number of declaratory orders against the ASA.<sup>49</sup> The crux of the dispute was whether or not the ASA had any lawful basis to exercise jurisdiction over non-members who had not consented thereto.<sup>50</sup>

Herbex contended that the ASA, as a private company, had no jurisdiction over non-members or their advertising. It argued that the ASA's standard cover letter which accompanied a complaint submitted to the advertiser was misleading and failed to disclose this aspect. In its answering papers, the ASA acknowledging that non-member advertisers were legally entitled to elect not to comply with the *ASA Code*. However, the ASA further argued that members were legally entitled to elect not to accept the advertising of a non-member, and that such conduct did not impose the contractual arrangement between the ASA and its members on a non-member.<sup>51</sup> On this basis the ASA set out three instances where, in its view, it possessed the jurisdiction to consider complaints against non-member advertisers, namely:

- a) where the relevant advertisement is broadcast by a broadcasting service licensee under the *ECA*, given that all broadcasting service licensees are required by the *ECA* to adhere to the *ASA Code*;<sup>52</sup>

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<sup>47</sup> *Herbex v ASA* para 1. For a definition of complementary medicine, see reg 1 of GN 859 in GG 41064 of 25 August 2017.

<sup>48</sup> *ARB v Bliss* para 25.

<sup>49</sup> *Herbex v ASA* para 10.

<sup>50</sup> *Herbex v ASA* para 12; *ASA v Herbex* para 1.

<sup>51</sup> *Herbex v ASA* para 33.

<sup>52</sup> *ASA v Herbex* paras 10, 11.

- b) where the publisher of the relevant advertisement is a member of the ASA, or a member of an industry body or association which is a member of the ASA, as that publisher has agreed to abide by the *ASA Code* and not to accept advertising that conflicts with the *ASA Code*;<sup>53</sup> and
- c) advertisements of non-member advertisers and non-member publishers, on behalf of the ASA members, in order to enable those members to decide whether or not they wish to publish or broadcast an advertisement by an advertiser who has breached the *ASA Code* or who has failed to participate in the ASA's system of self-regulation. On this basis, it was argued that the Ad Alert mechanism which was adopted in the instance of non-compliance with an ASA ruling allowed ASA members to exercise their right to decline publishing advertising inconsistent with the *ASA Code*.<sup>54</sup>

#### **4.2 Judgment of the court a quo**

Having considered the ASA complaint procedure and sanctions, the High Court noted that, in adjudicating complaints against non-members who did not wish to subject themselves to the jurisdiction of the ASA, the ASA was effectively imposing the terms of its association with its members upon such non-members against their will.<sup>55</sup> This had the practical effect of the ASA's actions resulting in both members and non-members being treated the same, rendering Herbex a *de facto* member of the ASA although it did not wish to belong to this association.<sup>56</sup> This, held the court, constitutes a violation of the right to freedom of association as set out in section 18 of the *Constitution* and, more specifically, the right to dissociate from the ASA.<sup>57</sup>

Following the above, the High Court held that the ASA and its members could not, by agreement between themselves, impose the *ASA Code* which they had agreed to comply with, on non-members who had not contractually undertaken to abide by the *ASA Code*, or confer jurisdiction upon the ASA over the advertising of non-members.<sup>58</sup> The court further held that, in the absence of express consent to its jurisdiction, there was no legal basis on which the ASA could claim to possess jurisdiction over the advertising of a non-member irrespective of where such advertising was published or

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<sup>53</sup> *Herbex v ASA* para 17.2; *ASA v Herbex* paras 10, 11.

<sup>54</sup> *Herbex v ASA* para 17.3; *ASA v Herbex* paras 10, 11.

<sup>55</sup> *Herbex v ASA* para 50.

<sup>56</sup> *Herbex v ASA* para 21.

<sup>57</sup> *Herbex v ASA* para 50-53.

<sup>58</sup> *Herbex v ASA* para 30.

broadcast.<sup>59</sup> The most relevant portion of the court order, paragraph 90.1, is set out below:

In the premises I make the following order:

It is declared that the respondent has no jurisdiction over any person or entity who is not a member of the respondent and that the respondent may, in the absence of a submission to its jurisdiction, not require the applicant to participate in its processes, issue any instruction, order or ruling against the applicant or sanction it.<sup>60</sup>

The ASA subsequently obtained leave to appeal to the SCA.

### **4.3 Judgement of the SCA**

On appeal the ASA argued that paragraph 90.1 of the court *a quo's* order was "extraordinarily wide and curtailed the ASA's ability to perform its function of self-regulation of the advertising industry in the public interest", in that it completely precluded the ASA from considering an advertising complaint against a non-member.<sup>61</sup>

Having noted that the issues between the parties were confined and that there was a real prospect of potential settlement, the SCA afforded the parties an opportunity to consider settlement.<sup>62</sup> The parties were able to reach an agreement on the merits and prepared a draft order. On this basis the SCA was ultimately tasked to consider only if the draft order was acceptable and to determine the issue of costs.<sup>63</sup> In endorsing the draft settlement agreement, upholding the appeal and replacing a substantial part of the order of the court *a quo*,<sup>64</sup> the SCA declared that:

- 1.1 the Advertising Standards Authority of South Africa (the ASA) has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it;
- 1.2 the ASA may consider and issue a ruling to its members (which is not binding on non-members) on any advertisement, regardless of by whom it is published, to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.

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<sup>59</sup> *Herbex v ASA* para 31.

<sup>60</sup> Paragraph 90.5 set out information to be disclosed in the standard cover letter accompanying complaints sent to an advertiser. The orders set out in paras 90.2, 90.3, 90.4, 90.6, and 90.7 fell away during the appeal. See *ASA v Herbex* paras 13, 14.

<sup>61</sup> *ASA v Herbex* para 10.

<sup>62</sup> *ASA v Herbex* para 13.

<sup>63</sup> *ASA v Herbex* para 2. The SCA ordered that the ASA pay the costs of the court *a quo*, and that each party pay its own costs in the appeal.

<sup>64</sup> *ARB v Bliss* para 27.

2. The ASA is directed to include in its standard letter of complaint the contents of para 1 and that a non-member is not obliged to participate in any ASA process, but that should it not participate, the ASA may still consider the complaint, for the purposes set out in para 1.2.<sup>65</sup>

Mathopo JA (with all four other justices concurring) confirmed that the ASA was a body set up to ensure the proper functioning of the system of self-regulation in the advertising industry, and the main purpose of the *ASA Code* was to protect members of the public and to ensure fair play among advertisers in South Africa. On this basis, and having made the above order, Mathopo JA noted:

[I]n my view, the ASA had to approach this court to reverse the wide-ranging effect of para 90.1 of the court *a quo*'s order, particularly as regards its prohibition from determining whether any advertisement breaches the Code, so as to enable it to determine, on behalf of its members, whether they should accept an advertisement for publication or withdraw the advertisement if it has been published.<sup>66</sup>

The above extract clearly demonstrates that the SCA considered the arguments regarding the jurisdiction of the ASA and disagreed with the court *a quo* that the ASA possessed no jurisdiction to consider or rule on complaints regarding non-member advertising. In making the settlement agreement an order of court, which included clause 1.2, the SCA effectively confirmed that members of the ASA were legally entitled to elect not to accept the advertising of a non-member in terms of the Ad Alert mechanism in the *ASA Code* (as retained in the *Code* of the ARB).

## 5 The *Bliss*-matter

With the incorporation of the ARB following the *Herbex*-matter, the ARB ensured that both its MOI and the *Code* mirrored the SCA's order regarding non-member advertising complaints.<sup>67</sup> Clause 3.3 of the ARB's MOI, which became one of the key aspects in the *Bliss*-matter, provides:

The Company has no jurisdiction over any person or entity who is not a member and may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. However, the Company may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw an advertisement if it has been published.

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<sup>65</sup> *ASA v Herbex* para 18.

<sup>66</sup> *ASA v Herbex* para 17.

<sup>67</sup> *Bliss v ARB* para 67; *ARB v Bliss* para 28; cl 3.3 of the ARB's MOI (Memorandum of Incorporation) and cl 3 of the Preface to the *Code*.

## 5.1 Facts

The *Bliss*-matter was set in motion following a competitor complaint filed by Colgate Palmolive (Pty) Ltd and Colgate Palmolive Company (collectively referred to as "Colgate") against Bliss Brands (Pty) Ltd ("Bliss") with the ARB.<sup>68</sup> Colgate and Bliss are competitors in the consumer products industry and both manufacture hygiene soap.<sup>69</sup> Colgate manufactures Protex hygiene soap, which was the market leader in this product category.<sup>70</sup> Bliss manufactures and sells Securex hygiene soap. Colgate is a member of the ARB, whilst Bliss is not.<sup>71</sup>

In 2019 Colgate filed a complaint against Bliss with the ARB. In essence, it argued that the packaging architecture<sup>72</sup> of the Securex soap contravened clauses 8 and 9 of Section II of the *Code*, and that it constituted an exploitation of the advertising goodwill in the Protex soap packaging, and imitated that packaging to the extent that the packaging of Securex would be likely to cause confusion amongst consumers of the respective products.<sup>73</sup> The ARB notified Bliss of the complaint. In accordance with clause two of the SCA's order in the *Herbex*-matter, the cover letter accompanying the complaint requested Bliss to inform the ARB if it did not consider itself to be bound by the ARB, and stipulated that Bliss was not obliged to respond to the complaint or furnish a defence.<sup>74</sup>

Bliss responded to the complaint and participated fully in the ARB process.<sup>75</sup> It denied that its Securex packaging contravened the *Code* and successfully defended the complaint before the Directorate, which dismissed the complaint.<sup>76</sup> Colgate filed an appeal before the AAC, which overturned the ruling of the Directorate and upheld the complaint. The AAC directed that Bliss withdraw the packaging of the Securex product within three months of its ruling, and that it immediately cease all advertising in any other medium which depicts the Securex product in that packaging.<sup>77</sup> Bliss subsequently appealed to the FAC, which, chaired by Judge BM Ngoepe,<sup>78</sup> upheld the

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<sup>68</sup> See *Colgate-Palmolive Company and Colgate-Palmolive (Pty) Ltd / Bliss Brands (Pty) Ltd* ARB Directorate Ruling of 30 August 2019.

<sup>69</sup> *Bliss Brands (Pty) Ltd / Colgate Palmolive (Pty) Ltd* FAC Ruling of 3 August 2020 para 2 (hereafter the *Bliss / Colgate* FAC Ruling).

<sup>70</sup> *Bliss / Colgate* FAC Ruling para 5.

<sup>71</sup> *ARB v Bliss* para 2.

<sup>72</sup> See *Bliss / Colgate* FAC Ruling para 8.1.

<sup>73</sup> *Bliss / Colgate* FAC Ruling para 3; *Bliss v ARB* para 29.

<sup>74</sup> *ARB v Bliss* para 11.

<sup>75</sup> *ARB v Bliss* para 12.

<sup>76</sup> *Bliss v ARB* para 30.

<sup>77</sup> *Bliss v ARB* para 31.

<sup>78</sup> Judge Ngoepe, which has acted as a judge of the SCA and the Constitutional Court, served as a judge of the High Court for eighteen years before taking optional retirement. See ARB 2022 <https://arb.org.za/assets/2nd-quarter-2022-newsletter-pdf.pdf> 6.

ruling of the AAC, ordering Bliss to withdraw the packaging of its Securex product range.<sup>79</sup>

At this stage, it is noteworthy to highlight that, despite being a non-member of the ARB, Bliss participated fully in the ARB process by defending the advertising complaint, defending Colgate's appeal before the AAC and filing an appeal before the FAC. At no stage throughout the three-tier process did it contest or object to the jurisdiction of the ARB to consider and rule on the complaint that Colgate had filed against it.<sup>80</sup>

Subsequent to the FAC ruling, Bliss approached the High Court on an urgent basis, seeking an order suspending the operation of the FAC's ruling, pending a review application.<sup>81</sup> The urgent application was dismissed.<sup>82</sup> The review application was re-enrolled and heard before Fisher J. In neither of these review applications filed by Bliss was the jurisdiction of the ARB raised as an issue. In fact, up to that point there was no suggestion that Bliss' participation in the ARB's process was anything but voluntary.<sup>83</sup>

At the time of hearing the review application, Fisher J *mero motu* questioned the constitutionality of the ARB's process and powers, an aspect which had never been raised in the pleadings.<sup>84</sup> A directive was subsequently issued by the court, affording the parties an opportunity to amend their pleadings to address this issue, which had been introduced by the judge.<sup>85</sup> Bliss filed an amended notice of motion. Its amended founding papers "bore little resemblance" to the review application that it had originally filed.<sup>86</sup> The court's directive resulted in virtually an entirely new case for determination,<sup>87</sup> and the relief sought by Bliss was completely different to what had initially been set out in the prayers. It now sought an order declaring:

- the ARB's MOI void and unconstitutional in its entirety or, in the alternative, that clause 3.3 of the MOI was unconstitutional;

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<sup>79</sup> *Bliss / Colgate* FAC Ruling paras 12, 13.1 and 13.3; *ARB v Bliss* para 4. The FAC panel consisted of four persons, and there was initially a split ruling with two members in favour of upholding the appeal and two in favour of overturning it. As the chair of the FAC, and in terms of cl 14.3 of the *Procedural Guide*, Judge Ngoepe exercised his casting vote in favour of dismissing the appeal and confirming the ruling of the AAC. See *Bliss / Colgate* FAC Ruling para 13.

<sup>80</sup> *ARB v Bliss* para 2.

<sup>81</sup> *ARB v Bliss* para 5.

<sup>82</sup> *Bliss v ARB* para 15; *ARB v Bliss* para 5.

<sup>83</sup> *ARB v Bliss* para 5.

<sup>84</sup> *Bliss v ARB* paras 16, 19; *ARB v Bliss* para 3.

<sup>85</sup> *ARB v Bliss* para 6.

<sup>86</sup> *ARB v Bliss* para 3.

<sup>87</sup> *ARB v Bliss* para 10.

- that the ARB has no jurisdiction over any person who is not a member of the ARB;
- that the ARB may not issue rulings in relation to any non-member or advertising of a non-member; and
- that the ruling of the FAC, in which it upheld Colgate's complaint against Bliss' Securex product packaging, was unlawful.<sup>88</sup>

The court *a quo* identified the legal crux of the matter in the amended pleadings before it to be the constitutionality of the ARB process with specific reference to the effects of an Ad Alert mechanism on non-members of the ARB.<sup>89</sup>

On the aspect of the jurisdiction of the ARB over non-member advertising, the ARB raised two arguments. In line with the principle of *stare decises*, it was argued that the SCA had already ruled on the issue in the *Herbex*-matter, and that the High Court was bound by that ruling.<sup>90</sup> On this basis it was argued that the striking down of clause 3.3 of the ARB's MOI, which mirrors the SCA's ruling, would be in direct conflict with the order of the SCA in the *Herbex*-matter.<sup>91</sup> Furthermore, it was argued that the removal of the ARB's power to consider and rule on non-member advertising from its MOI would result in the de-regulation of the advertising industry and be contrary to the public interest.<sup>92</sup>

## **5.2 Ruling of the court a quo**

The court *a quo* interpreted the Ad Alert mechanism as a blanket refusal by ARB members to publish or broadcast any advertisement which the ARB has held to violate the *Code*. Based on this understanding, the court noted that the Ad Alert mechanism has a coercive effect on non-members,<sup>93</sup> and that it "has all the features of an indirect boycott".<sup>94</sup>

In considering the SCA's order in the *Herbex*-matter, the High Court indicated that it understood paragraph 1.1 of the order to be *in rem* (i.e., of general application). As to paragraphs 1.2 and 2, however, the court reasoned that the SCA intended for those orders to be confined to the parties to the settlement agreement only and that they were, therefore, *in*

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<sup>88</sup> *ARB v Bliss* para 7.

<sup>89</sup> *Bliss v ARB* para 11.

<sup>90</sup> *Bliss v ARB* para 65.

<sup>91</sup> *Bliss v ARB* para 66.

<sup>92</sup> *Bliss v ARB* para 64.

<sup>93</sup> *Bliss v ARB* para 10.

<sup>94</sup> *Bliss v ARB* para 60.



*personam* and not of general application.<sup>95</sup> In following this reasoning, Fisher J pointed out that, on her reading of the SCA's order in the *Herbex*-matter, the lawfulness of the Ad Alert was not considered by the SCA.<sup>96</sup> In addition, the court noted that in its view para 90.1 of the court *a quo*'s ruling stands, and used that order as a basis to conclude that there can be no Ad Alert issued against a non-member.<sup>97</sup> On this basis, the court held the provisions of *the Code* and MOI that underlie the Ad Alert mechanism to be unconstitutional.

Furthermore, it was held that Bliss' partaking in the ARB process "cannot be said to constitute actual consent to the jurisdiction of the ARB."<sup>98</sup> In considering the merits of Colgate's complaint, the court held that the ARB's determination of complaints in terms of clauses 8 and 9 of Section II of the *Code* falls foul of the right to access to courts in terms of section 34 of the *Constitution*.<sup>99</sup> The order issued included the following:

1. Clause 3.3 of the MOI, which has the effect of granting the ARB jurisdiction over non members, is declared unconstitutional, void and unenforceable.
2. The clause "*in the absence of a submission to its jurisdiction*" in the first sentence as well as the second sentence in its entirety are severed from clause 3.3 of the MOI.
3. It is declared that the ARB has no jurisdiction over a non-member of the ARB, meaning a person or entity who is not a member of the ARB or is not a person or entity who is bound by the Code as a result of its/her/his membership of a member of the ARB.
4. The ARB may not issue rulings against or in relation to a non-member or that non-member's advertising.
5. The FAC rulings in this matter are unlawful and are set aside.<sup>100</sup>

With leave to appeal having been granted by the High Court, the ARB approached the SCA.<sup>101</sup>

### **5.3 Ruling of the SCA**

The legal question before the SCA was whether or not the court *a quo* was correct in making the series of orders, including the order declaring clause 3.3 of the ARB's MOI unconstitutional, void and unenforceable, given that

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<sup>95</sup> *Bliss v ARB* paras 79-81.

<sup>96</sup> *Bliss v ARB* para 81.

<sup>97</sup> *Bliss v ARB* paras 82 and 83.

<sup>98</sup> *Bliss v ARB* para 134.

<sup>99</sup> *Bliss v ARB* para 133.

<sup>100</sup> *Bliss v ARB* para 142. Other aspects of the order related to costs.

<sup>101</sup> *ARB v Bliss* para 3.

those orders "effectively dismantled the system of self-regulation of advertising in South Africa in its entirety."<sup>102</sup>

Before considering the merits of the order of the court *a quo*, the SCA highlighted the firmly entrenched principle in our law that a court is tasked to decide only the issues before it that have been pleaded by the parties. In issuing the directive to the parties which resulted in essentially an entirely new case before it, the court *a quo* failed to take heed of this principle.<sup>103</sup> While exceptional circumstances may warrant a court raising constitutional issues *mero motu*, the SCA noted that this was not such a case.<sup>104</sup>

Turning to the aspect of Bliss' consent to the jurisdiction of the ARB, the SCA held that the findings of the court *a quo* on this aspect were incorrect and unsustainable based on the facts of the case.<sup>105</sup> By participating fully in the ARB process and raising no objection to jurisdiction (despite the contents of the standard cover letter which accompanied the complaint), Bliss had submitted to the jurisdiction of the ARB.<sup>106</sup> This finding was based on the evidence before the court, and past precedent confirming that a party's failure to raise an objection to jurisdiction followed by participation in proceedings clearly demonstrates submission to jurisdiction.<sup>107</sup>

The SCA then went on to consider the validity of the various criticisms against the ARB by the court *a quo*, including:

- the issue of *stare decises* where an order of a higher court is based on a settlement agreement between parties;
- that the powers exercised by the ARB in relation to the regulation of advertising by non-members is not sourced in law and is unconstitutional;
- the acceptability of the Ad Alert mechanism in the context of the right to self-regulation and the right to dissociate; and
- the ARB as a forum that limits the right of access to courts.

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<sup>102</sup> *ARB v Bliss* para 3. See *Fischer v Ramahlele* 2014 4 SA 614 (SCA) para 13; *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 234.

<sup>103</sup> *ARB v Bliss* para 10.

<sup>104</sup> *ARB v Bliss* para 10. Also see *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* 2021 3 SA 246 (CC) para 58.

<sup>105</sup> *ARB v Bliss* para 11.

<sup>106</sup> *ARB v Bliss* para 13.

<sup>107</sup> *ARB v Bliss* para 13.

Each of these aspects is discussed under a separate heading below.

*5.3.1 Following the doctrine of precedent where an order of the higher court is based on a settlement agreement between the parties*

As a first consideration, the SCA noted that the reasoning of the court *a quo* on paragraphs 1.2 and 2 of the *Herbex*-order being *in personam* and not of general application was incorrect.<sup>108</sup> Turning to the precedential value of the *Herbex*-order, the SCA noted that, when exercising that discretion and considering a draft settlement agreement prepared by parties to a dispute, a court cannot simply accept the draft settlement agreement at face value. Rather, the court is required to assess the potential wider impact of such an order.<sup>109</sup> On this basis, the court is vested with the discretion to accept a draft settlement agreement and make it an order of court, to insist on amendments to the draft settlement agreement, or to reject it outright.<sup>110</sup> As such, a settlement agreement which has been made an order of court "stands to be interpreted like any other order."<sup>111</sup>

Following the above, the SCA noted that, while the *Herbex*-order was granted by consent between the parties, it was no less binding or effective than any other SCA order.<sup>112</sup> The SCA commented:

Applied to the present case, this Court in *Herbex* was satisfied that on the merits, setting aside the prohibition on the ASA from deciding whether an advertisement breached the Code, so as to enable it to determine, on behalf of its members, whether they should accept an advertisement for publication or withdraw the advertisement if it has been published, was justified. Consequently, the declaratory relief which this Court granted in *Herbex* – the whole order – was plainly one *in rem*: it pronounced upon the limits and powers of the ASA in relation to every non-member advertiser, not only *Herbex*.<sup>113</sup>

Against this background, the SCA held that the court *a quo*'s order declaring clause 3.3 of the ARB's MOI unconstitutional was contrary to the precedent established by it in the *Herbex*-matter. The SCA further highlighted the fact that the doctrine of precedent is "an intrinsic feature of the rule of law" which, if not adopted, would lead to a lack of legal certainty, predictability and cohesion in our law, and would "invite legal chaos". On this basis, the SCA confirmed that its order in the *Herbex*-matter should have disposed of Bliss' constitutional challenge to the ARB's process and jurisdiction over non-members.<sup>114</sup>

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<sup>108</sup> *ARB v Bliss* paras 29, 30.

<sup>109</sup> *ARB v Bliss* para 14.

<sup>110</sup> *ARB v Bliss* para 30.

<sup>111</sup> *ARB v Bliss* para 30.

<sup>112</sup> *ARB v Bliss* para 30.

<sup>113</sup> *ARB v Bliss* para 32.

<sup>114</sup> *ARB v Bliss* para 34.

### 5.3.2 *The ARB's powers are sourced in law*

As a starting point, the SCA noted that the ARB's MOI and *Code*, which incorporates the *Procedural Guide*, constitute empowering provisions under *PAJA*. The fact that there is no statutory source for those powers does not preclude the ARB from lawfully exercising a public function.<sup>115</sup> On this basis the SCA confirmed that the ARB is empowered to consider advertising complaints in the following four circumstances:

- (a) if the advertiser is a member of the ARB, or a member of one of the industry bodies that is a member of the ARB;
- (b) where the publisher of the advertisement is a member of the ARB, or a member of an industry body or association which is a member of the ARB;
- (c) advertisements of non-member advertisers and non-member publishers, on behalf of the ASA members, to enable them to decide whether or not they wish, in future, to publish or broadcast an advertisement by an advertiser who has breached the *Code* or who has failed to participate to the ARB's process; and<sup>116</sup>
- (d) where the relevant advertisement is broadcast by a broadcasting service licensee under the *ECA*, irrespective of whether or not such as broadcasting service licensee is a member of the ARB.<sup>117</sup>

The SCA further confirmed that, in the instance of (a), (b) and (c) above, the ARB is entitled to consider, on behalf of its members, advertising complaints against non-members to allow its members the opportunity to elect whether or not they wished to publish the relevant advertisement(s) of that non-member. It noted that the order of the court *a quo*:

prevents the members of the ARB from using their chosen method of deciding which advertisement they wish to publish and which advertisers they wish to associate with. This constitutes an unjustifiable limitation on the rights of members to freedom of expression and association.<sup>118</sup>

As a final remark on this issue, the SCA outright dismissed the court *a quo*'s views regarding the alleged "effect of a boycott" of an Ad Alert, noting that this issue did not form part of the pleadings.<sup>119</sup>

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<sup>115</sup> *ARB v Bliss* para 17.

<sup>116</sup> *ARB v Bliss* para 18.

<sup>117</sup> *ARB v Bliss* para 21.

<sup>118</sup> *ARB v Bliss* para 24.

<sup>119</sup> *ARB v Bliss* para 57.

### 5.3.3 *The acceptability of the Ad Alert mechanism in the context of the right to self-regulation and the right to dissociate*

The SCA noted that the court *a quo*'s inference that the Ad Alert mechanism of the ARB serves to completely cut off a non-member from commercial activity in South Africa was not pleaded in the founding papers and was not substantiated by the evidence before the court.<sup>120</sup> In addition, the effect of an Ad Alert issued by the ARB to its members is that they will decline to publish a particular advertisement. The non-member advertiser is nevertheless at liberty to publish its advertisement in any media which are not connected to the ARB, such as social media accounts, its own website, or a media house that is not a member of the ARB.<sup>121</sup> The SCA confirmed its *dictum* in the *Herbex*-matter that rulings against non-member advertising are not binding on, or legally enforceable against, non-members. On this basis, it held:

The impact of ARB rulings on non-members is therefore indirect, in cases where they engage the services of an ARB member to approve, create, disseminate or publish their advertising. Members of the ARB are bound to comply with the Code and ARB decisions, and are obliged to decline to approve, create or carry advertisements that breach the Code. Non-members who do not wish to meet the ethical standards contained in the Code are free to approve, create and publish their advertising using the services of non-members of the ARB.<sup>122</sup>

As such, the SCA noted that the power of the ARB to consider complaints against non-members, on behalf of its members, advances the right to freedom of association of those members.<sup>123</sup> In addition, the SCA confirmed that ARB members' right to refuse to publish advertising of non-members accords with their right to freedom of expression in section 16 of the *Constitution*.<sup>124</sup> In analysing this issue, the SCA noted that the ARB's members share the common goal of promoting ethical standards in advertising, as reflected in the *Code*. Collectively, those members have agreed to delegate the complaints process and decision-making to the "expert adjudicative bodies" of the ARB, on their behalf. This mechanism gives effect to two components of section 18 of the *Constitution*, namely the right to self-regulation (by members of the ARB), and the right to dissociate (both by members and non-members of the ARB).<sup>125</sup>

In contextualising the right to dissociate, the SCA noted that every person or entity in the advertising industry is afforded the right of association and the right of dissociation in the context of advertisers or advertising content.

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<sup>120</sup> *ARB v Bliss* para 39.

<sup>121</sup> *ARB v Bliss* para 40.

<sup>122</sup> *ARB v Bliss* para 45.

<sup>123</sup> *ARB v Bliss* para 41.

<sup>124</sup> *ARB v Bliss* paras 35-37.

<sup>125</sup> *ARB v Bliss* para 42.

This includes the right of ARB members to choose to dissociate from non-member advertising. By the same token, it includes the right of non-members to dissociate from the ARB, which they are at liberty to do.<sup>126</sup> Having decided to dissociate from the ARB, however, non-members cannot demand that the ARB members disregard their contractual commitment not to publish or broadcast advertising in breach of the *Code*. Moreover, non-members cannot lawfully demand that the ARB declines to consider an advertising complaint against a non-member on behalf of its members. On this basis, the right to dissociate does not afford a non-member like Bliss "the unfettered right to dictate to the ARB and its members" how they should exercise their right of association, which includes the right to dissociate from non-members.<sup>127</sup>

#### 5.3.4 *The ARB functions as an adjudicative administrative tribunal and does not limit the right to access to courts*

In considering section 34 of the *Constitution* the SCA noted that the ARB qualifies as a "tribunal or forum" in terms of that constitutional provision. It went on to confirm that that the ARB, as an adjudicative administrative tribunal, does not limit the right to access to courts, given that its process is subject to judicial control in two ways. Firstly, following exhaustion of the internal appeal opportunities, an FAC ruling is subject to judicial review in terms of *PAJA*. In addition, a court may issue an interdict suspending the operation of an ARB decision pending a challenge to a ruling, a procedure which was followed by Bliss.<sup>128</sup>

In noting that elements of a complaint based on clauses 8 and 9 of the *Code* may overlap with claims based on passing off and/or copyright infringement, the SCA noted:

The mere fact that elements of a complaint before the ARB might overlap with elements of a cause of action that could be pursued in a court or other tribunal, does not mean that the ARB ousts the court's jurisdiction. The ARB and the courts are different fora with distinct powers.<sup>129</sup>

The SCA upheld the appeal and set aside the order of the court *a quo*. In recent developments Bliss has filed an application for leave to appeal the SCA's ruling to the Constitutional Court.<sup>130</sup>

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<sup>126</sup> *ARB v Bliss* paras 47, 48.

<sup>127</sup> *ARB v Bliss* para 48.

<sup>128</sup> *ARB v Bliss* para 50.

<sup>129</sup> *ARB v Bliss* para 58.

<sup>130</sup> ARB 2022 <https://arb.org.za/assets/2nd-quarter-2022-newsletter-pdf.pdf> 3; The Media Online 2022 <https://themediainline.co.za/2022/08/landmark-ruling-confirms-arb-can-make-decisions-on-non-members-advertising/>.

## 6 Discussion and concluding remarks

The SCA ruling in the *Bliss*-matter confirms its order in the *Herbex*-matter that the ARB, as the successor of the ASA, possesses the jurisdiction to consider an advertising complaint irrespective of whether or not the relevant advertiser is a member of the ARB. Although non-member advertisers may elect not to subject themselves to the jurisdiction of the ARB or comply with an ARB ruling made against their advertising, all ARB rulings are issued for the adherence of the ARB's members.

The SCA has also held that, in the instance of a non-member who exercises its constitutional right to dissociate from the ARB and its adjudication process, the ARB may nevertheless consider any advertising complaint, provided that there is a potential contravention of the *Code*. At the instance of ARB members, this mechanism supports their constitutional right to dissociate from advertising content which has been held by the ARB not to comply with the responsible and ethical marketing principles in the *Code*. On this basis non-member advertisers are required to respect clause 3.3 of the ARB's MOI.<sup>131</sup>

On a practical level, the outcome of the SCA's ruling means that any advertiser may broadcast or publish its advertising through any medium in South Africa provided that the relevant advertising complies with the *Code*.<sup>132</sup> If, however, the advertising is held by the ARB to be non-complaint with the *Code*, an advertiser or publisher that is required to comply with the *Code*<sup>133</sup> should not accept, alternatively cease broadcasting or publishing, that advertising.<sup>134</sup> In the instance of non-compliant advertising of a non-member advertiser which is broadcast or published by an entity which is required to comply with the *Code*,<sup>135</sup> that advertiser runs the risk of its advertising being withdrawn by such a broadcaster or publisher.<sup>136</sup> In such

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<sup>131</sup> Despite the principle of privity of contract mentioned in part 1 above, there may nevertheless be a duty on a third party to respect the contractual relationship between parties to an agreement. See Hutchinson *et al Law of Contract* 233.

<sup>132</sup> If an advertisement is acceptable in terms of the *Code*, there will generally be no restrictions on where such advertising content may be broadcast or published irrespective of whether or not the relevant advertiser or publisher is a member of the ARB.

<sup>133</sup> Either contractually by virtue of direct or indirect membership, alternatively in terms of s 55(1) of the *ECA*. See the discussion in parts 1 and 2 above.

<sup>134</sup> See cl 11 of the Preface to the *Code* and discussion in part 2 above. For example, in the matter of *Steers Proprietary Limited / Burger King South Africa (Proprietary) Limited* Directorate Ruling of 25 September 2019, a competitor complaint was filed against the advertising of Burger King South Africa (Proprietary) Limited, which is not a member of the ARB. The complaint was upheld and the sanction issues by the Directorate included the statement "Members of the ARB are advised not to accept the advertising in question in its current format."

<sup>135</sup> See fn. 133 above.

<sup>136</sup> See cl 11 of the Preface to the *Code* and the discussion in part 2 above.

an instance, the options to the non-member advertiser would essentially be to:

- a) amend its advertising in a manner which complies with the *Code* in order to remove the cause for complaint;<sup>137</sup>
- b) undertake to withdraw the relevant advertisement in its current format;<sup>138</sup> or
- c) seek one or more alternative media platforms that are not bound by the *Code* through which to continue broadcasting or publishing the relevant advertising.<sup>139</sup>

When considering the future of marketing in South Africa, the above situation will place limitations on the right to freedom of association<sup>140</sup> and potentially the right to freedom of expression<sup>141</sup> of non-member advertisers whose advertising content is held not to comply with the *Code*. In effect, the media pool from which such non-member advertisers will be able to select to publish or broadcast their advertising content will be reduced to businesses or platforms that do not have objections to broadcasting or publishing advertising content that contravenes the *Code*.<sup>142</sup>

The abovementioned constitutional rights are, however, not absolute.<sup>143</sup> In this regard it is submitted that the SCA's ruling and the potential limitation of these rights should be considered in the context of the important role that the ARB performs in the advertising industry as a service to the general public. The ARB's primary role can be summarised by its slogan, namely

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<sup>137</sup> The matter of *John Alexander / FAW Vehicle Manufacturers SA (Pty) Ltd* Directorate Ruling of 5 August 2019 serves as an example. In this matter a consumer lodged a complaint against advertising for trucks sold by FAW Vehicle Manufacturers SA (Pty) Ltd, a non-member of the ARB. In responding to the complaint, the advertiser indicated that the advertisement was immediately rectified to correct the non-compliance with the *Code* (by indicating the selling price of the trucks inclusive of value-added tax in the advertising). The advertiser also provided an undertaking that measures had been put in place to avoid a repeat of the issue in future advertising for its trucks. The Directorate deemed the withdrawal of the advertisement and the undertaking provided by the advertiser to be an acceptable resolution of the matter without the need to consider and rule on the merits of the complaint.

<sup>138</sup> See fn. 137 above.

<sup>139</sup> *ARB v Bliss* para 45. See the discussion in part 5.3.3 above.

<sup>140</sup> As non-member advertisers will be restricted from associating with ARB members that exercise their right to dissociate from advertising content that does not comply with the *Code*. See the discussion in part 5.3.3 above.

<sup>141</sup> To the extent that non-member advertisers elect to amend their advertising to comply with the *Code*, alternatively elect to withdraw that advertising held to be non-complaint with the *Code*.

<sup>142</sup> See the SCA's comments in *ARB v Bliss* on this aspect as discussed in part 5.3.3 above.

<sup>143</sup> Currie and De Waal *Bill of Rights Handbook* 150.



"consumer protection through responsible advertising".<sup>144</sup> When standing in the shoes of a consumer, an immediate advantage of the ARB's adjudication process is that it is free of charge.<sup>145</sup> ARB rulings can also be issued within a few weeks of a complaint being filed.<sup>146</sup> In addition, the filing of a complaint is accessible, as any consumer that has access to the ARB's official website can lodge an advertising complaint with the ARB. These are three of the main factors that allow consumers to often use this platform to voice concerns about local advertising.<sup>147</sup> In 2021 the ARB received a total of 559 complaints.<sup>148</sup> During the period January to June 2022 the ARB received 258 complaints.<sup>149</sup> These figures illustrate that there is public support for this advertising adjudication forum.

Furthermore, in the interest of transparency ARB decisions are published on the ARB's official website.<sup>150</sup> As such, these decisions are freely accessible to any consumer, business, ARB member and the media. It is noteworthy to mention that it is not uncommon for the media to report on rulings.<sup>151</sup> Recent examples include media reports published in respect of ARB complaints against Pick 'n Pay,<sup>152</sup> Takealot<sup>153</sup> and Wimpy.<sup>154</sup> A potential consequence of an adverse ruling is negative publicity, which may serve to encourage compliance with the *Code* and ARB rulings even in the case of a non-member advertiser.<sup>155</sup>

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<sup>144</sup> See ARB 2022 <http://arb.org.za/>.

<sup>145</sup> See cl 3.1.6 of the *Procedural Guide*.

<sup>146</sup> As confirmed by the Chief Executive Officer of the ARB, Ms Gail Schimmel, in her online article available on The Media Online 2022 <https://themediainline.co.za/2022/08/landmark-ruling-confirms-arb-can-make-decisions-on-non-members-advertising/>.

<sup>147</sup> There is a filing fee in respect of competitor complaints; it is generally substantially less costly than approaching the courts. See cl 3.17 of the *Procedural Guide*; ARB 2022 <https://arb.org.za/complaints.html>.

<sup>148</sup> ARB 2022 <https://arb.org.za/assets/arb-newsletter-2022-q1.pdf> 3.

<sup>149</sup> ARB 2022 <https://arb.org.za/assets/2nd-quarter-2022-newsletter-pdf.pdf> 4.

<sup>150</sup> See cl 5.4 of the *Procedural Guide* and the ARB 2022 <https://arb.org.za/2022-rulings.html>.

<sup>151</sup> See cl 14.4 of the *Procedural Guide*.

<sup>152</sup> Gifford 2022 <https://www.timeslive.co.za/news/south-africa/2022-08-15-advertising-board-finds-pick-n-pay-milk-advert-a-tad-sour/>.

<sup>153</sup> MyBroadband 2022 <https://mybroadband.co.za/news/business/449314-takealot-slammed-for-false-advertising.html>.

<sup>154</sup> Thukwana 2022 <https://www-businessinsider-co-za.cdn.ampproject.org/c/s/www.businessinsider.co.za/amp/wimpy-ad-showing-older-black-women-eating-burgers-is-not-offensive-2022-6>.

<sup>155</sup> The enforceability of an ARB ruling remains an issue in the instance where neither the advertiser nor the media agency through which the unacceptable advertisement is published or broadcast, is a member of the ARB. That being said, the accessibility to ARB rulings may mitigate the enforceability concern. The potential negative publicity backlash and consequential reputational harm following a ruling may,

A significant portion of the local advertising and marketing industry has for many decades regarded the *Code* as the measuring stick of what is responsible and ethical in advertising. The *Code* is based on an internationally accepted model,<sup>156</sup> and the importance and value of the *Code* has also been recognised by the South African government, given the reference to this *Code* in legislation, namely the *ECA*. Equally important, the value of the ARB and its predecessor, the ASA, as an advertising watchdog for the public has been recognised by South African courts over the years.<sup>157</sup> On this basis it is submitted that it will serve the public interest if all advertising complies with the *Code* irrespective of whether or not the relevant advertiser has expressly undertaken to do so.

While the court *a quo* in the *Bliss*-matter attempted to derail or curtail this public function of the ARB, the SCA has come to the aid of the general public in justifying the jurisdiction and public function of the ARB as a body which sets out and rules on ethically acceptable and responsible advertising for the benefit of consumers. Given the advantages of the ARB mechanism as it currently stands, it is submitted that the broader public interest may very well prevail should leave to appeal to the Constitutional Court be granted.

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therefore, act to encourage non-members to adhere to ARB rulings and comply with the *Code*. See Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 277, 286-287.

<sup>156</sup> *Telematrix* case para 4.

<sup>157</sup> *ASA v Herbex* para 3; *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa* 2015 JDR 0832 (GP) paras 3, 28-29; *Reckitt Benckiser v ARB* para 45.

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### **List Of Abbreviations**

AAC	Advertising Appeals Committee
ARB	Advertising Regulatory Board
ASA	Advertising Standards Authority of South Africa
ECA	Electronic Communications Act 36 of 2005
FAC	Final Appeals Committee
ICAS	International Council for Advertising Self-regulation
ICC	International Chamber of Commerce
MOI	Memorandum of Incorporation
PAJA	Promotion of Access to Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal