

**ADVERTISING REGULATORY BOARD**

**ADVERTISING APPEALS COMMITTEE**

In the matter between:

**PETRONELL KRUGER**

Appellant

and

**FAIR CAPE DAIRIES**

Respondent

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**ADVERTISING APPEALS COMMITTEE RULING**

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**INTRODUCTION**

- 1 The Advertising Appeal Committee (“AAC”) was convened to consider an appeal lodged by the appellant, Petronell Kruger in relation to full cream chocolate milk produced by Fair Cape Dairies (“Fair Cape”). The product contains a depiction of Barbie on the label and is marked “Full cream chocolate

flavoured milk." The label also states that the product is "sterilised" and "sweetened". A photo of the product is contained in the Directorate's decision.

2 The complaint is that

*"The product is clearly an unhealthy sugary drink, yet it is designed to appeal to young children through the use of the Barbie doll image. The Food and Beverage Code provides in 7.3. that 'Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product'."*

3 In response to the complaint, Fair Cape denied that the product is unhealthy or that its advertising has contravened Appendix J of the Food and Beverage Code of the Advertising Regulatory Board ("the Code"). Specifically Fair Cape contended that:

3.1 The product is a nutritious whole milk dairy product.

Notwithstanding this, the product's packaging makes no claims about the benefits of the product and even if it did make such claims, *"the standard is not the subjective opinion of the complainant but what the reasonable person would judge as provided for in Appendix J of the Code."*

3.2 In addition, a substantial part of the sugar in the product is intrinsic sugar in the form of lactose.

3.3 The effect of the complaint is that any product which contains any sugar that may appeal to children may not be advertised in any way.

3.4 The complaint misinterprets the requirements of clause 7.3 and 8 of the Code which read together and properly construed does not prohibit the use of characters on product packaging.

4 The ARB Directorate considered the complaint and the advertisers response and found that the advertising was not in breach of Clause 7.3 of Appendix J. The complainant appealed against the Directorate's decision and Fair Cape filed a response to the complaint.

### ***The Appeal***

5 The Appeal Panel accordingly convened a hearing of the appeal at which the complainant and a representative of Fair Cape addressed us on the issues in the appeal.

6 In her address, the complainant impressed on the Panel the stark issues of childhood obesity in South Africa and the relationship between this and the presence of more than average amounts of sugar in food products targeted at children. In the chocolate milk at issue in this case, the complainant pointed out that in this one serving of milk, there was 36.6g of sugar present which is far in excess of a child's total recommended sugar intake per day. These statistics are not disputed by Fair Cape. The complainant also accepted that the Code as it stands does not necessarily preclude Fair Cape from advertising its product as it does. However, she contended that this was a flagship case on advertising to children and that this panel ought to interpret the Code purposively and in such a way so as to preclude advertising of products containing sugar to children. When pressed about the specifics of

the interpretation she advocated for, the complainant argued that clause 7.3 should be read by this panel to replace the word “persuade” with “communicate” as follows:

*“Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade **communicate to** their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.”*

- 7 As we understood the argument, it is that there is concern with the use of persuasion in Clause 7.3 because it is commonly accepted that children are not able to persuade their parents to purchase particular products and instead, parents are the ones making the purchasing decisions. While we as parents on the Appeal Panel may have experiential knowledge of the ability or otherwise of children to persuade their parents to purchase certain products over others, there is no expert evidence placed before us to support this assertion, nor is it in any event relevant to the enquiry that we are called upon to determine. The question before us is whether Fair Cape has contravened the Food and Beverage Code of the ARB, and related to that is the question of the correct construction of Clause 7.3 and 8 of the Code.
- 8 In response, Fair Cape argued that they are required to comply with the Code, which they have done. Fair Cape does not dispute the arguments made about the harmful effects of sugar and its effect on children’s health but the question for this Panel is whether Fair Cape has contravened the Code – which they submit they have not done.

### ***The Relevant Provisions of the Code***

9 Clause 7.3 of the Code is the pertinent provisions at issue. It is situated under the heading “social values” and provides:

*“Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.”*

10 Notably section 7.1 and 7.2 of the Code also fall under the heading “social values” and recognise that children under 12 are impressionable and therefore food and beverage advertising should not mislead them about product benefits from use of the product. In addition, food and beverage advertising should not undermine the role of parents or others responsible for the child’s welfare in guiding diet and lifestyle choices.

11 Clause 8 of the Code provides:

#### ***“8. Product endorsement”***

*8.1 Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at children of twelve years old and under.*

*8.2 Clause 9.1 does not apply to company-owned characters.*

*8.3 Clause 9.1 does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.” (emphasis added)*

12 The reference to Clause 9.1 in Clause 8 is clearly a typographical error and this should be read to refer to Clause 8.1 on both instances.

## ***Findings***

- 13 The mandate of the Appeal Committee is limited to infractions of the Code. Notwithstanding the broader content of the Complainant's appeal submissions we are limited to making a ruling on whether Fair Cape has contravened the Code.
- 14 Our findings are as follows:
- 15 The Complainant has referred extensively to the jurisprudence of our courts on the issue of the proper approach to statutory interpretation. It is now settled in our law that interpretation is the process of attributing meaning to words used in a document, having regard to the context provided by reading the particular provision/s in light of the document as a whole and the circumstances attendant on its coming into existence.

*"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to*

*the preparation and production of the document. . .” (emphasis added).<sup>1</sup>*

- 16 Clause 7.3 of the Code specifically addresses itself to advertising of food and beverage products and to the attempt through advertising to influence a child under 12 to persuade their parents or others to buy the product. There is no ambiguity in the language used in Clause 7.3 and its meaning when purposively construed is clear. Clause 7.3 must be read in the context of the Clause 7 as a whole which clearly prohibits advertising that directs itself to children with the purpose of getting them to persuade their parents or others to purchase the product or to suggest that negative consequences will follow if the product is not purchased.
- 17 In the present case, the packaging does not in our view fall foul of Clause 7.3 properly construed.
- 18 It is correct that the product is directed at children through the use of the Barbie character but it makes no claims that are designed to induce a child to persuade their parents or others to buy the product. This is specifically permitted under the Code. In this regard Clause 8.3 specifically provides that the prohibition against the use of celebrities or cartoon characters in television advertising targeted at children under 12 does not apply to packaging that does not appear in television advertising. In other words, the use of characters on products such as chocolate milk is permitted.

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<sup>1</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18

- 19 Fair Cape is therefore not in contravention of the Code.
- 20 We understand the complainant's concerns with the high levels of added sugar to products targeted at children but the interpretation contended for by the complainant is so broad that it would require us to change the very clear language and purpose of Clause 7 and effectively introduce a provision which prohibits the advertising of products containing a particular amount of sugar to children. There is simply no basis in the Code to support such an interpretation.
- 21 Moreover, the relief sought by the complainant is therefore beyond the remit of this Panel.

## **CONCLUSION**

- 22 For the reasons set out above, the Committee concurs with the Directorate's decision and outcome. The appeal is hereby dismissed.

**NASREEN RAJAB-BUDLENDER SC**

Chairperson: Advertising Appeals Committee

**ALISON DEEB**

Member: Advertising Appeals Committee

**SARAH DEXTER**

Member: Advertising Appeals Committee

**SHARON KEITH**

Member: Advertising Appeals Committee

**LESIBA SETHOGA**

Member: Advertising Appeals Committee

7 October 2024