

ADVERTISING REGULATORY BOARD

ADVERTISING APPEALS COMMITTEE

In the matter between:

HEALA.ORG

Appellant

and

CONSUMER

Respondent

ADVERTISING APPEALS COMMITTEE RULING

INTRODUCTION

- 1 The Advertising Appeal Committee (“AAC”) was convened to consider an appeal lodged by Heala.org. The appeal concerned a radio advertisement in Afrikaans, the words of which are as follows:

“Gaskoeldrank and vrugtesap maak ons kinders siek. Met elke slukkie word suiker in hulle liggame gestort, wat lei tot vetsug, hartsiekte en diabetes soos hulle ouer word. Ons moet ons kinders teen alle drinkgoed met suiker in beskerm. Dring nou aan op ‘n strenger gesondheidsbevorderingsheffing. Onderteken die petisie op heala.org. Dis H-E-A-L-A punt org.”

2 The English translation which the parties did not dispute during the hearing of the appeal is as follows:

“Fizzy drinks and fruit juice make our children sick. With every sip, sugar is dumped into their bodies, leading to obesity, heart disease and diabetes as they age. We must protect our children from all drinks with sugar in them. Insist on a stricter health promotion levy now. Sign the petition on heala.org That’s H-E-A-L-A.org.”

3 The Directorate noted that the translator had added a note that the word “levy” is the direct translation of the word “heffing” but in this context it appears to mean “tax.”

4 The Complaint was made by a consumer who was driving in his car with his young daughter when the advertisement came on the air. She reacted in a scared manner after hearing the advertisement and asked her father why her School was trying to poison the kids in her school because there was fruit juice served with school lunch every day. As a result of this interaction, the consumer laid a complaint with the ARB. During the hearing he indicated that he is not opposed to advertisements about the dangers of sugar consumption *per se* but that this particular advertisement was designed to create fear in the public that any consumption of sugary drinks is harmful in the extreme.

5 Specifically, the complaint was that *“the advert incorrectly states that consumption will cause heart and intestine disease. It would be correct if it stated that excessive consumption can cause these diseases. Instead, it currently creates the impression that any consumption will cause disease.”*

6 The Advertiser responded as follows:

- 6.1 The advertisement makes a very narrow claim – that sugary beverages make children ill by leading to obesity, heart disease and diabetes later in life.
- 6.2 The advertisement does not refer to intestine disease. The advertisement also specifically refers to consuming sugary drinks, not sugar.
- 6.3 The advertisement is clear that sugar in fizzy drinks and fruit juices which, when consumed by children can lead to obesity, diabetes and heart disease when they get older.
- 6.4 The advertisement does not claim definitively that consuming sugar-sweetened drinks will always cause this disease though it is incontrovertible that sugary drinks cause certain diseases and health harms in children and adults. In support of this, HEALA points out that its website provides research and scientific information in support of its position on sugar consumption. HEALA's advocacy is not based on opinion or speculation but anchored in robust scientific evidence and validated through context specific expertise.
- 6.5 Even if the complainant's characterization is correct, the Code does not require HEALA to quantify and provide granular details about exactly how much sugar should be consumed to result in what degree of increased health risks.

6.6 An analogy to this would be to claim that warning labels on cigarette cartons that say, “Smoking kills” or “Smoking causes cancer”. By the complainant’s view, these warnings (which are view, these warnings (which are mandated by government regulation and carried on all tobacco advertising) are misleading because the warnings do not stipulate the amount someone needs to smoke or that not all smokers get lung cancer. It is therefore sufficient to warn of adverse health consequences in general rather than in a specific and detailed manner.

6.7 This advertisement is not asking consumers to buy anything. HEALA is a non-profit civil society organization that used this campaign to improve consumer awareness about the health promotion levy and try to garner support for a stronger levy.

6.8 All the advert seeks to do is make consumers aware of a potential problem and encourages them to sign a petition on Heala’s website.

7 The parties all agreed, as they do in the appeal that the advertisement saying nothing about intestine disease. Both the Directorate and this Panel therefore only consider the diseases mentioned in the advertisement namely, obesity, heart disease and diabetes.

8 The Directorate found that it was required to determine whether the advertisement was likely to mislead the public in terms of Clause 4.2.1 of Section II (misleading claims) of the Code.

9 The Directorate pointed out a contradiction in the argument made on behalf of HEALA in that on the one hand it states that the advertisement clearly makes a very narrow claim: that sugary beverages make children ill by leading to obesity, heart disease and diabetes later in life but on the other hand it states:

“the advertisement does not claim definitively that consuming sugar sweetened drinks will always cause disease though it is incontrovertible that sugary drinks cause certain diseases and health harms in children and adults.”

10 The Directorate found this to be the crux of the issue because the complainant argues that consumption of sugary drinks does not always lead directly to various diseases while the advertisement says that it does. The Directorate was therefore of the view that the hypothetical reasonable person will understand that obesity, heart disease and diabetes are an inevitable consequence of consuming fizzy drinks and fruit juices. This does not appear to have been substantiated in its view, as moderate consumption appears to be acceptable to the WHO.

11 The Directorate further found that HEALA is correct that granular detail to substantiate its claims but pointed out that the Code does guard against omissions and inaccuracies that are likely to mislead the consumer. The absolute claim that sugary drinks cause disease is therefore an example of omission or inaccuracy according to the Directorate.

12 It found the advertisement to be misleading to consumers and therefore in contravention of Clause 4.2.1 of the Code.

The Appeal

13 On appeal, HEALA dealt with three issues:

13.1 The late filing of the appeal and its condonation application.

13.2 The advertisement was advocacy rather than advertising and is therefore exempt from the provisions on misleading advertising.

13.3 The substantive grounds of appeal relating to why the advertisement was not misleading.

14 On the question of condonation, we are satisfied that HEALA fully explained and accounted for the delay in submitting its appeal. No prejudice was caused by its delay, and we accordingly condone such delay.

Advertisement or Advocacy?

15 In relation to the question of whether not ARB has jurisdiction over the advertisement in question, Ms. Kruger on behalf of HEALA submitted that this is a non-commercial advertisement – and is more akin to advocacy than advertising. The advertisement formed part of HEALA’s public advocacy campaign and was aimed at encouraging citizens to sign a petition for government to strengthen the Health Promotion Levy (sometimes referred to as the sugar tax). It was argued on behalf of HEALA that the Directorate failed to consider Clause 2.4 of Section I of the Code which provides:

Controversial subjects/Advocacy advertising

To the extent that any advertisement:

- *expresses an opinion on a matter which is the subject of controversy; and*
- *that controversy involves issues within the areas, broadly defined, of public policy and practice, then that opinion will not be subject to the provisions of the Code relating to misleading claims except that–*

All advertisements which contain such controversial statements should:

- *Be readily recognisable as advertisements;*
- *cause no confusion as to the identity or status of the advertiser;*
- *whenever such information is not readily available state the advertiser's address and telephone number.*

16 In this regard, HEALA made comprehensive submissions in its notice of appeal as to why this particular advertisement falls within the realm of non-commercial advertising and constitutes advocacy rather than commercial advertising. We have considered these submissions carefully. However, notably absent from HEALA's analysis is consideration of whether the advertisement in question expresses an opinion on a matter which is the subject of controversy.

17 To fall within the ambit of Clause 2.4, an advertisement must:

17.1 Express an opinion

17.2 On a matter which is the subject of controversy; and

17.3 That controversy involves issues, within the areas broadly defined of public policy and practice.

- 18 If these requirements are met, then “that opinion will not be subject to the provisions of the Code relating to misleading claims.”
- 19 In addition, the advertisement containing such controversial statement should:
- 19.1 Be readily recognisable as advertisements;
 - 19.2 cause no confusion as to the identity or status of the advertiser;
 - 19.3 whenever such information is not readily available state the advertiser’s address and telephone number.
- 20 This latter part of the clause is clearly met in this case as there is no dispute that the advertisement is clearly recognisable as such, there is no confusion as to the identity of the advertiser and the reference to the advertiser’s website directs consumers to the organisation’s telephone number and address.
- 21 The issue of sugar consumption, the extent of consumption and the impacts thereof on health is clearly an issue which is the subject of some controversy. Were it not, HEALA would not need to advertise and motivate for the signing of a petition to increase the Health Promotion Levy. The existence of the petition also confirms that the questions raised by the consumption of sugary beverages amount to issues of public policy and practice. This is an extremely contentious space with one of most prominent issues in the South African context being that of the negative impact of the tax on South Africa’s sugarcane farmers and their employees. This is self-evidently an issue of public policy

where the impact of sugar (and sugary drink consumption) on public health, employment and the economy must all be weighed in the scales.

22 The final requirement to fall within the protections of Clause 2.4 is that the advertisement must express an opinion as distinct from a fact. This is where HEALA's argument falls short. The advertisement in our view clearly contains expressions of fact rather than opinion. That this is so, is clear from HEALA's own response to the complaint in which it refers to its website containing extensive research and scientific information in support of its position on sugar consumption. The response specifically states that HEALA's advocacy is evidence based and involves extensive consultations with experts in a variety of fields. *"Consequently HEALA's advocacy is not based on opinion or speculation but anchored in robust scientific evidence and validated through context-specific expertise."*¹ HEALA goes further by offering affidavits by experts to confirm the scientific validity of the claims that HEALA makes.

23 Our Courts have engaged with the distinction between fact and opinion in different contexts, often in relation to defamation. In *Yazbek v Seymour*² the Court held that:

*"The defence of truth in the public benefit is only available for defamatory allegations of fact. This is so because the expression of comment or opinion is said to involve a value judgment, the truth of which is not susceptible of proof..."*³

24 In *Pearce v Argus Printing & Publishing Co Ltd*⁴ Davis J held that:

¹ Para 38 of HEALA's response to the complaint.

² *Yazbek v Seymour* 2001 (3) SA 695 (ECD)

³ At 701

⁴ *Pearce v Argus Printing & Publishing Co Ltd* 1943 CPD 144

“What differentiates a comment from a statement of fact? I venture to think that the test may be thus stated. If the statement is such that a reasonable hearer or reader will perceive it to be an opinion or inference drawn from the facts stated, then it is a comment. If, on the other hand, a reasonable man would think that it is not based on those facts, but stands alone, or that it is based on other facts which are within the knowledge of the speaker or writer, but which he has not stated, then it is a statement of fact.”⁵

25 The Constitutional Court in *DA v ANC*⁶ had to consider an SMS stating - “The Nkandla report shows how Zuma stole your money to build his R246m home.”

26 The Court held that this was a comment. In doing so it relied heavily on the fact that the statement was making reference to an external source – the Public Protector’s Report – and merely gave the DA’s interpretation of this Report. It was thus a comment, rather than a statement of fact. As the judgment of Cameron J at al explained:

“This then is the reason why the SMS falls altogether outside the ambit of these provisions. It was not a statement of fact. It was an interpretation of the content of the Report. What is significant is that the SMS does not convey a factual assessment by the DA itself. It offered those who received it an interpretation of a separate source. That source, it said, “shows how” something occurred. The source was the Report, to which it directly referred for its authority.

This, on its own, is enough to warrant the conclusion that the SMS, being comment on and interpretation of a separate source, does not fall within the section 89(2) or item 9(1)(b) prohibition.”⁷

27 The judgment added:

“[Defamation law] recognises that something qualifies as a factual claim when it ‘depends upon nothing but the writer’s own authority’.

⁵ At 144; see also *South African Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 453E - 454H and *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 27

⁶ *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; **2015 (2) SA 232** (CC)

⁷ At paras 146-147

On the contrary, the SMS was a statement that merely pointed to the existence of extrinsic facts its author considered warranted the language he used. In short, even if viewed from the perspective of defamation law, it was comment, rather than a statement of fact.”⁸

28 Of relevance to the present case, HEALA does not refer to an external source of facts justifying its opinion but rather states the propositions as fact. The only reference to an external source is to its website but this is for purposes of signing the petition. The listener does not know that the website contains evidence on which the statements may be said to be based.

29 In this case, the consumer’s daughter heard the advertisement and immediately reacted to it as conveying facts – causing her distress. This together with HEALA’s own description of the contents of its advertisement and of the information to which consumers are directed suggests to us that this advertisement is not conveying an opinion but rather a series of facts.

30 For all these reasons, clause 2.4 does not assist HEALA. We must therefore consider whether the advertisement was misleading.

Was the advertisement misleading?

31 The Preamble provides

31.1 All advertisements should be legal, decent, honest and truthful
(clause 1.1)

⁸ At para 148

31.2 that all advertisements should be prepared with a sense of responsibility to the consumer. (clause 1.2)

32 In relation to commercial or non-commercial advertising, the Code provides that the primary object of the Code is the regulation of commercial advertising however, clause 2.2 provides that the Code also applies to advertisements by non-commercial organisations and individuals.

33 Clause 3 provides that the Code is to be applied in the spirit and the letter. The Code also provides in clause 3.2 that in assessing an advertisement's conformity to the terms of the Code, the primary test to be applied will be that of the probable impact of the advertisement as a whole upon those who are likely to see or hear it. The Code further sets out factors to consider in assessing an advertisement's impact which include:

“3.3.1 The surrounding circumstances;

3.3.2 that the language used in the advertisement as a whole may justify departure from the literal meaning thereof; and

3.3.3 survey data, conforming to the requirements of Clause 4.1 of Section II, indicating the probable impact as a whole upon those who are likely to see or hear it.

34 Notably Clause 3.5 provides that:

“In advertising aimed at, featuring or likely to influence children, it should be realised that because of the credulity and lack of experience of a child, the interpretation of the Code as embodied in Section I, Clause 3 will be interpreted narrowly, as children would be likely to attach a more literal meaning to advertising.

In the interpretation of this Clause, the word “children” will also include “young people”.

35 An advertisement is defined in Clause 4 of Section I of the Code as:

“Advertisement” means any visual or aural communication, representation, reference or notification of any kind -

4.1.1 which is intended to promote the sale, leasing or use of any goods or services; or

4.1.2 which appeals for or promotes the support of any cause.”

36 The advertisement in question is in our view non-commercial advertising that falls under the Code.

37 Listening to the advertisement, it is clear that the message that a reasonable consumer would receive is that any consumption of fizzy sugary drinks leads to disease. Once that message is received, the action asked of consumers is to go to the website to learn more but the message conveyed is very clear and unequivocal – sugary drinks causes disease in our children and must be stopped.

38 HEALA says the advertisement is not misleading because its based on scientific evidence and that there is a massive body of evidence that demonstrates how harmful sugar is for adults and children alike. The advertisement is clearly designed to shock the consumer sufficiently that they visit the HEALA website sign the petition and stop drinking sugary drinks. The thrust of the advertisement is that any consumption of sugary drinks will lead to disease and this is clearly not accurate.

39 The evidence does not show that any consumption of sugary drinks necessarily leads to disease. In fact the WHO calls for a reduction in consumption of sugar to less than a single serving a day:

“Nutritionally, people don’t need any sugar in their diet. WHO recommends that if people do consume free sugars, they keep their intake below 10% of their total energy needs, and reduce it to less than 5% for additional health benefits. This is equivalent to less than a single serving (at least 250 ml) of commonly consumed sugary drinks per day,” says Dr Francesco Branca, Director of WHO’s Department of Nutrition for Health and Development”⁹

40 In light of the Code’s requirements for advertising to be honest and truthful and prepared with a sense of responsibility to the consumer, and further because children are clearly the recipients of the information conveyed by the advertisement – we consider that the advertisement is misleading and ought rather to have warned against the consumption of “excessive sugary drinks” or “regular consumption of sugary drinks” for example.

41 The advertisement therefore violates the Code in our view.

42 Notwithstanding our conclusion, we recognize and commend the work that HEALA is doing in the interests of public health. However, a core part of the role of this Committee is to ensure that advertising is not misleading to the general public and the language of this particular advertisement falls short of the required standard.

⁹ <https://www.who.int/news/item/11-10-2016-who-urges-global-action-to-curtail-consumption-and-health-impacts-of-sugary-drinks#:~:text=Need%20to%20reduce%20sugar%20intake&text=According%20to%20the%20new%20WHO,children%2C%20adolescents%20and%20young%20adults>

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SADIKA FAKIR

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LESIBA SETHOGA

Member: Advertising Appeals Committee

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