

Advertising & Marketing

Contributing editor
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GETTING THE
DEAL THROUGH

South Africa

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Adams & Adams

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

There are numerous pieces of legislation and areas of the common law that regulate and affect advertising in South Africa. The Trade Marks Act of 1993, Copyright Act of 1978 and Consumer Protection Act of 2008, as well as the common law remedies of passing-off and unfair competition, are particularly relevant. There are also numerous laws containing provisions affecting advertising of certain products or categories of products, for example, the Regulations to the Foodstuffs, Cosmetics and Disinfectants Act. The Advertising Standards Authority of South Africa (ASA) is a self-regulatory body. The ASA and its Code of Advertising Practice play a significant role in the regulation of advertising in South Africa.

2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The ASA is the primary regulator of advertising in South Africa. However, in cases where advertising amounts to, for example, trademark infringement or unlawful competition, a competitor could also approach the High Court for an interdict (injunction) against the advertiser. In terms of concurrent jurisdiction, a complaint may be referred either to the ASA or the High Court, but the ASA will not hear a complaint that is already before the court.

3 What powers do the regulators have?

The following sanctions may be imposed by the ASA Directorate, Advertising Industry Tribunal or Final Appeal Committee should an advertisement be found to be in breach of the ASA Code:

- withdrawal of an advertisement in its current format;
- the advertiser may be directed to submit the proposed amendment, original advertisement and relevant ASA ruling to the Association for Communication and Advertising (ACA) Advisory Service for pre-publication advice;
- the respondent may be directed to submit all future advertising to the ACA Advisory Service, at the cost of the respondent, prior to publication thereof (this sanction is only imposed if more than one adverse ruling against the respondent has been made by the ASA in a period of 12 months and if certain additional aggravating factors are present);
- adverse publicity, including the publication of the names of defaulters;
- the respondent may be ordered to publish a summarised version of the ruling in all or some of the media in which the advertising complained about appeared, or media considered appropriate by the ASA, and the cost of such publication will be borne by the respondent; or
- the matter may be referred to a disciplinary hearing.

It is the complainant's responsibility to check whether or not the respondent has adhered to the ASA ruling. In the event that the respondent simply ignores a ruling, the complainant may lodge a breach complaint

with the ASA. Should the respondent still fail to comply, the ASA will issue an 'Ad Alert' to its members (including newspapers, magazines, radio, television and the Printing Industries Federation) warning them to withdraw the advertisement and that future advertising from the advertiser in question should not be accepted. Unfortunately, the ASA is not empowered to enforce its rulings beyond this. However, the ASA Code does not prevent an aggrieved party from approaching the High Court for relief.

4 What are the current major concerns of regulators?

The regulation of advertising of foods and beverages that are not essential to a healthy lifestyle is often at the forefront of the issues being dealt with. This is because of the high rate of obesity in South Africa. The debate as to how far the government can go in regulating how such foods may be marketed to children, in particular, has raged on for many years, with ongoing discussions around the advertising of 'unhealthy' foods and the imposition of taxes, such as the 'sugar tax'. There has also been much debate around the advertising and marketing of alcohol products as the proposed National Liquor Policy, if it comes into force, will empower the Minister of Trade and Industry to impose restrictions on and parameters for the advertisement and marketing of alcohol products. The Control of Marketing of Alcoholic Beverages Bill, which has been approved by cabinet but not published for public comment, is mentioned in the National Liquor Policy as specifically seeking to restrict the advertisement of alcohol and prohibit sponsorships and promotions associated with alcohol products. It is likely that in coming years the ability of advertisers to promote alcohol products freely will be fairly limited, with likely restrictions, for example, on times when such advertisements may be aired and locations where they may be placed (not near schools, for example). Draft Regulations Relating to the Labelling, Advertising and Composition of Cosmetics were also published in August 2016 and are to be enacted in terms of the Foodstuffs, Cosmetics and Disinfectants Act of 1972. There is much industry concern in respect of these draft regulations, which are similar to the EU regulations relating to cosmetics, as they place fairly onerous requirements on the cosmetics industry. For example, if enacted, the regulations will require manufacturers or producers of cosmetics to maintain a 'product information file' in respect of each cosmetic product to be launched in South Africa, setting out a detailed description of the product, its composition and manufacture. The draft regulations also contain provisions regarding information, warnings and the like that ought to appear on product labels.

5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The ASA Code of Advertising Practice is the primary code of practice for the advertising industry. It is available online at www.asasa.org.za. The ASA Code covers virtually all forms of advertising, such as, for example, television, radio and print advertisements, and also 'point-of-sale' materials, such as menus, labels, letterheads, circulars, stickers and product packaging. Particular industries also have self-regulating bodies with codes of conduct that usually include guidelines for advertising.

For consequences of non-compliance, see question 3.

6 Must advertisers register or obtain a licence?

Licences are non-applicable in South Africa.

7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Advertisers cannot approach the ASA for advisory opinions but the ACA provides an advisory service. Most advertisers will rather use advertising law attorneys.

There is no requirement that advertisements be pre-cleared, although the South African Broadcasting Association will not accept an infomercial for broadcast unless it has been pre-cleared.

Certain types of advertisements also require approval from other bodies. For example, if advertising stock remedies, advertisements must comply with the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act of 1947 and must be submitted to the Department of Agriculture for approval.

Private enforcement (litigation and administrative procedures)**8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?**

A competitor may lodge a competitor complaint with the ASA, provided the latter is a member of the ASA or agrees to its jurisdiction by participating in the proceedings. The ASA must inform a non-member respondent that the ASA has no jurisdiction over it and that it is not obliged to participate in the proceedings before the ASA. In terms of a recent court ruling, if a non-member respondent does not participate in the proceedings, the ASA cannot make any rulings against it and any rulings so made will be null and void. The advantages of pursuing a complaint before the ASA are that this is a fairly swift and effective process, but the disadvantages are that complaints to the ASA attract fairly high official fees and the enforcement procedures available are less far-reaching than those of the courts.

A competitor may also approach the High Court for relief and, in light of the recent ruling, will have to do so where the respondent is not a member of the ASA or will not agree to its jurisdiction. The advantage is that a High Court interdict may be enforced by way of contempt of court proceedings (thereby preventing future infringements), and, in addition, the High Court may grant a costs order in favour of a successful litigant. The disadvantage is that this is a lengthier process than that before the ASA. Additionally, High Court judges have a fairly wide discretion in considering the matters before them and applying the law to the facts before them. As a result, in certain instances, the likely outcome of a matter may be less predictable than that before the ASA.

9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

A consumer complaint may be lodged by members of the public or by associations in respect of consumer-related matters on the grounds that the advertising complained about does not comply with the ASA Code. The remedies are as set out in question 3. Consumer complaints are dealt with free of charge.

To bring a civil action, the person wishing to institute proceedings must have a direct interest in the right that forms the subject matter of the litigation. Generally, the litigant would need to prove an interest in a right that has been infringed in some manner, or damage or harm of some sort.

If the advertising falls foul of the provisions of the Consumer Protection Act, a consumer may lodge a complaint with the National Consumer Commission. Similarly, consumers may file complaints with the Broadcasting Complaints Commission of South Africa if the matter concerns content of a television or radio broadcast, or the Independent Communications Authority of South Africa (ICASA) if the complaint is against any person licensed by ICASA to provide communications services such as broadcasting, telecommunications, internet or postal services.

10 Which party bears the burden of proof?

The ASA Code does not specifically set out which party bears the onus of proof, and this proof will depend on the circumstances of each case. For example, if a competitor files a complaint on the basis of an exploitation of its advertising goodwill, it would be required to prove that the alleged goodwill indeed exists and has been exploited. However, if the complaint is based on non-compliance with the Code, for example, that an advertisement is misleading, the advertiser must be able to substantiate its claims and prove that it has indeed complied with the provisions of the Code.

11 What remedies may the courts or other adjudicators grant?

The court may grant an interdict restraining the advertiser from continuing to make use of the advertising complained about; it may also order that, for example, any print advertisements to which a third party's trademarks or copyright works have been applied be delivered to the owner of the intellectual property right to be destroyed. The court is empowered to grant damages (in which case the applicant would have to prove the damage suffered) and may also grant a costs order in favour of the successful litigant. The court has a wide discretion to grant a litigant appropriate relief and the relief sought will differ from case to case. The remedies that the ASA may grant are set out in question 3.

12 How long do proceedings normally take from start to conclusion?

High Court proceedings brought by way of action proceedings (ie, a trial) could take up to three years from institution to finalisation. Generally, however, application (ie, motion) proceedings would be instituted in such matters and the time frame would be approximately four to 12 months, depending on whether or not the matter is defended.

A complaint lodged with the ASA is likely to be dealt with within two to three months. If the matter is very urgent and time-sensitive, proceedings can sometimes be fast-tracked.

13 How much do such proceedings typically cost? Are costs and legal fees recoverable?

High Court proceedings could cost anywhere between 60,000 and 200,000 rand, and possibly more, depending on the particular facts, evidence, cause of action and course the litigation takes. Legal fees are recoverable, but successful litigants tend only to recover approximately one-third of their legal costs because costs are calculated according to an outdated tariff.

Costs of preparing an ASA complaint depend entirely on the basis for the complaint and whether any evidence is filed. They also depend on whether or not the matter is defended. The non-refundable official charges are, however, quite high (currently 24,396 rand for a competitor complaint).

14 What appeals are available from the decision of a court or other adjudicating body?

A decision of a High Court judge may be appealed to the Full Bench of the High Court. Subsequent appeals to the Supreme Court of Appeal and, if appropriate, the Constitutional Court, are also possible.

A person aggrieved by the decision of the ASA Directorate may appeal to the Advertising Industry Tribunal, and, if a person is aggrieved by a decision of the Advertising Industry Tribunal, a final appeal is possible to the Final Appeal Committee.

Misleading advertising**15 How is editorial content differentiated from advertising?**

In terms of the ASA Code, advertisements must be clearly distinguishable as such and, in respect of print media, wherever there is any possibility of confusion, the material in question should be headed conspicuously with the words 'ADVERTISEMENT' or 'ADVERTISEMENT SUPPLEMENT', and should be boxed in or otherwise distinguished from surrounding or accompanying editorial matter. It is a requirement that the words be conspicuous, and upper case lettering is, therefore, often used. In electronic media, particular care should be taken to distinguish clearly between programme content and advertising. Where there is a possibility of confusion, advertising should be identified in a manner acceptable to the ASA.

16 How does your law distinguish between 'puffery' and advertising claims that require support?

The ASA Code requires, if called upon, documentary evidence to support all claims that are capable of objective substantiation.

Certain types of claims, such as puffery and hyperbole, are not capable of objective substantiation and are, therefore, not required to comply with the provisions relating to documentary evidence. Puffery, value judgements, matters of opinion or subjective assessments are permitted, provided that it is clear that what is being expressed is an opinion and there is no likelihood of the opinion misleading consumers about any aspect of a product or service that is capable of being objectively assessed in the light of generally accepted standards. Humorous or hyperbolic claims are permissible if it is obvious that they are intended to be humorous or hyperbolic and are not likely to be considered as being literal claims regarding the advertised product.

17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Advertising claims may not, directly or by implication, omission, ambiguity, inaccuracy, exaggeration or otherwise, mislead the consumer. The facts contained in an advertisement must be capable of being proven to be truthful. Conspicuous disclaimers and footnotes are allowed but cannot be used to correct an otherwise misleading claim. They may only clarify a claim.

18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Advertisers must hold documentary evidence in their possession, prior to advertising, to support all objectively determinable claims. The evidence must be from an independent expert in the relevant field.

19 Are there specific requirements for advertising claims based on the results of surveys?

In terms of the ASA Code, advertisements must not 'misuse' research results.

The ASA Code also provides that documentary evidence, whether in the form of survey data or any other documentation, shall be up to date and current, and shall have market relevance.

The ASA Code requires survey data submitted as documentary evidence to conform to the following:

- the survey must emanate from an entity approved by, or acceptable to, the Southern African Market Research Association;
- the accuracy of the claims based on the survey must be confirmed by an entity approved by, or acceptable to, the Southern African Market Research Association; and
- where the survey does not meet the requirements of the ASA Code, the survey shall be evaluated by the Southern African Marketing Research Association to confirm the accuracy of the claims based on the survey. The advertiser shall bear the costs of such evaluation.

In commissioning survey research, it is strongly recommended that Guideline 6 (one of the guidelines included in the ASA Code) be consulted.

More generally, to have any evidentiary value and be genuinely capable of substantiating claims, surveys must have been conducted in such a manner as not to manipulate the outcome of the survey. For example, the persons conducting the survey should not have put leading questions to persons surveyed, nor should a particular answer have been suggested to them.

20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

The ASA Code provides that comparative advertising is permitted provided that:

- all legal requirements are adhered to (specifically, the Trade Marks Act that protects against trademark infringement);
- only facts capable of substantiation are used;
- one or more material, relevant, objectively determinable and verifiable claims must be made;

- the claims are not misleading or confusing;
- it does not infringe the advertising goodwill of another or disparage another;
- the facts or criteria used are fairly chosen;
- products or services compared must have the same or similar characteristics and purposes; and
- the advertiser accepts responsibility for the accuracy of the research and claims.

The guiding principle in all comparisons is that products or services should be promoted on their own merits, and the aim of advertising should not be to disparage competitive products.

Comparative brand advertising has been held to constitute trademark infringement in the past. The current position is less clear since the Supreme Court of Appeal held (in the case of *Verimark v BMW AG*) that, in order to be infringing, the use of the trademark in question must be use 'as a trademark', intended to be used as a badge of origin, and not merely incidental. In circumstances where comparative advertising causes confusion or deception or otherwise jeopardises the essential function of a trademark, it may constitute trademark infringement. Comparative advertising may also constitute other forms of trademark infringement if, for example, the use of the mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trademark. The latter argument may be raised where a competitor is identified by name, and it may, therefore, not be advisable to do so. Currently, advertisers do not engage in comparative brand advertising in South Africa.

21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

The tests and studies referenced must have been conducted independently (ie, not by the advertiser) by experts in the relevant field. The claims must be objectively verifiable. There must be a causal connection between the research and the claims made, to the extent that the research body expressly agrees on the accuracy and scope of the claims.

22 Are there special rules for advertising depicting or demonstrating product performance?

No, but insofar as 'live' product demonstrations are concerned, the Code of Ethics and Standards of Practice of the Direct Marketing Association provides that product demonstrations must be carried out safely by trained personnel. The information provided directly to consumers by the demonstrators may not be misleading and the representatives may not employ unreasonably aggressive sales tactics.

23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

Testimonials must comply with the terms of the ASA Code. They must be genuine and relate to the personal experience of the person giving it. They should not contain any claims as to efficacy that cannot justifiably be attributed to the use of the product, and any specific or measurable results claimed should be fairly presented.

In terms of permission, a person's right to identity, which falls under the umbrella of personality rights, is infringed if an element of that person's identity is used to create the false impression that he or she supports or endorses the advertised product or service. It is good practice to retain evidence of the endorsement or testimonial, should a future dispute arise.

24 Are there special rules for advertising guarantees?

The advertiser is under an obligation to be as clear as possible as to the sense in which it uses the words 'guarantee' and 'warranty'. Advertisements should not contain any reference to 'guarantee' or 'warranty' that take away or diminish any rights that would otherwise be enjoyed by consumers, purport to do so, or may be understood by the consumer as doing so.

Where an advertisement expressly offers, in whatever form, a guarantee or warranty as to the quality, life, composition, origin, duration, etc, of any product, the full terms of that guarantee should be

available in printed form for the consumer to inspect – and, normally, to retain – before he or she is committed to purchase. Where a phrase such as ‘money back guarantee’ is used, it will be assumed that a full refund of the purchase price of the product will be given to dissatisfied consumers, either throughout the reasonably anticipated life of the product or within such period as is clearly stated in the advertisement. There is no objection to the use of ‘guarantee’, etc, in a colloquial sense, provided there is no likelihood of a consumer supposing that the advertiser in using the word to express a willingness to shoulder more than simply its legal obligations.

25 Are there special rules for claims about a product’s impact on the environment?

Advertisements must confirm to the ASA Code, which contains an appendix dealing specifically with environmental claims such as ‘recyclable’, ‘ozone-friendly’ and ‘degradable’. These claims must be accurate and capable of substantiation.

26 Are there special rules for describing something as free and for pricing or savings claims?

‘Free’ goods must, for example, be clearly advertised as only being received subject to purchase, should that be the case.

If there are any costs to the consumer in addition to, for example, the actual cost of any delivery, freight or postage, products may not be described as ‘free’.

Where it is claimed in an advertisement that, if one product is purchased, another product will be provided ‘free’, the advertiser must be able to show that it will not be able immediately and directly to recover the cost of supplying the ‘free’ product, wholly or partially. Furthermore, an advertiser may not recover or attempt to recover the cost of the ‘free’ product by, for example, increasing the usual price of the product with which the ‘free’ product is offered, imposing packaging and handling charges, or inflating actual delivery costs.

27 Are there special rules for claiming a product is new or improved?

The word ‘new’ or words implying ‘new’ may be used in all media, packaging, posters, billboards, etc, for any entirely new product or service marketed or sold during a given 12-month period. It may also be used to advertise any change or improvement to a product, service or package, provided that the change or improvement is material and can be substantiated and defined. The maximum use of the word ‘new’ or words implying ‘new’ in the above-mentioned context shall be confined to a 12-month period calculated from date of proven first usage in an advertisement. In exceptional circumstances, the ASA may agree to an extension of the 12-month period.

Prohibited and controlled advertising

28 What products and services may not be advertised?

All advertising and promotion of tobacco products, including sponsorship, is banned.

Alcohol advertising may not be directed at persons under the age of 18 years.

The regulations promulgated under the Medicines and Related Substances Act provide that prescription medication may not be advertised to the general public. Prescription medication may be advertised only to medical practitioners, dentists, veterinarians and pharmacists.

29 Are certain advertising methods prohibited?

Although not specifically prohibited, subliminal messaging is unlikely to be found to be in accordance with the ASA Code as advertisements are required to be ‘clearly distinguishable as such’. Shock tactics, depending on the content of the advertisement, may similarly not be permissible given the Code’s prohibition of, for example, unreasonably playing on fear or causing offence.

There are specific provisions in the ASA Code regulating direct marketing advertising. The Code contains a fairly lengthy appendix that sets out the guidelines and principles governing all forms of direct marketing, including marketing practices such as direct mail or catalogue marketing; direct response broadcasting; telephone marketing; cell phone and text message marketing; and email marketing.

Update and trends

Section 82 of the Consumer Protection Act allows the Minister of Trade and Industry to accredit industry-specific ombudsman schemes and to prescribe accompanying industry codes. The ASA has approached the National Consumer Commission with a proposed industry code in respect of the advertising industry and has also requested accreditation as an ombudsman scheme in terms of the Consumer Protection Act. The aim of the industry code is to protect consumers against improper trade practices, as well as misleading, unfair or fraudulent conduct in the advertising and marketing industry. If the code is accepted, all advertising and marketing ‘participants or subscribers’ will be required to register with the ASA and contribute to its funding, comply with the code and inform consumers, by way of online notices and signage at their business premises, for example, that they are bound by the industry code. ‘Participants and subscribers’ is broadly defined and would include advertising agencies, media owners and their agents, media buyers and all other advertisers and marketers of goods and services in South Africa. The proposed industry code overlaps to a great extent with the provisions of the ASA Code, but seems to have a greater emphasis on consumer rights, although it does provide for dispute resolution between industry participants. Interested parties had until 20 October 2016 to submit comments in respect of the industry code. The National Consumer Commission will now consider these comments and consult with relevant industry participants, whereafter it may make amendments to the code before making recommendations to the Minister of Trade and Industry regarding the adoption of the code and accreditation of the ASA as an ombudsman scheme.

The Wireless Application Service Providers’ Association (WASPA) has a Code of Conduct that entitles consumers receiving unwanted SMS marketing messages (where they have not directly supplied their numbers to the marketer) to report the spammer to WASPA. This regulation is based on consumer protection principles, particularly the consumer’s right to privacy. Consumers must be given the option to ‘opt out’ of spam messages.

30 What are the rules for advertising as regards minors and their protection?

The ASA Code contains a number of provisions relating to advertising directed at children. The general principle is that advertisements addressed to, or likely to influence, children should not contain any statement or visual presentation that might result in harming them, mentally, morally, physically or emotionally. Children should not be portrayed in advertisements as being sexually appealing, provocative or in any other manner that involves any form of sexual innuendo. Advertisements should also not take advantage of children’s lack of experience. The advertising of certain foodstuffs to children is also specifically regulated.

31 Are there special rules for advertising credit or financial products?

The National Credit Act of 2005 is applicable to a provider of credit, or a seller of any goods or services that are being advertised for purchase on credit, and sets out how such credit may be advertised. Credit may not be advertised in a misleading manner, nor may an unlawful form of credit (as set out in the Act) be advertised.

32 Are there special rules for claims made about therapeutic goods and services?

The ASA Code of Practice for the Marketing of Health Products regulates, inter alia, the advertising of prescription medications to the healthcare profession and self-medication to the public.

33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Foodstuffs, Cosmetics and Disinfectants Act of 1972 prohibits false or misleading advertisements or descriptions of foodstuffs, cosmetics or disinfectants and has detailed regulations governing the labelling of such products. The ASA Code also has an appendix dealing with health, nutrition and weight control-related claims.

34 What are the rules for advertising alcoholic beverages?

The Liquor Act of 2003 restricts false and misleading advertising of alcoholic beverages, as well as advertising that is meant to target minors. The ASA Code also has an appendix dealing with the advertisement of alcoholic products in detail.

35 What are the rules for advertising tobacco products?

The Tobacco Products Control Act 83 of 1993 sets out various control laws in respect of tobacco products. For example, the advertising, promotion and sponsorship of tobacco are banned and warnings must appear on the packaging of tobacco products.

36 Are there special rules for advertising gambling?

In terms of the National Gambling Act of 2004, a person must not advertise or promote:

- any gambling activity:
 - in a false or misleading manner; or
 - that is unlawful in terms of the Act or applicable provincial law; or
- a gambling activity, other than an amusement game, in a manner intended to target or attract minors.

In addition, any advertisement of a gambling machine or device, a gambling activity, or licensed premises at which gambling activities are available must, in terms of the Act, include a statement, in the prescribed manner and form, warning against the dangers of addictive and compulsive gambling.

The ASA Code also regulates advertisements for betting tipsters.

37 What are the rules for advertising lotteries?

The regulations of the National Lotteries Board of South Africa regulate the advertising of lotteries. The National Lottery is governed by its Advertising and Public Relations Code of Practice in terms of which all advertising must be legal, decent, honest and truthful, must not suggest that winning the games in question is anything other than a matter of chance, nor must the odds of winning be misrepresented. Advertising should not be directed at minors, nor should advertisements feature or contain any characters, real or fictitious, cartoon figures, symbols, role models or celebrity or entertainer endorsers, who are likely for any reason to appeal to or influence people under the age of 18 years.

38 What are the requirements for advertising and offering promotional contests?

The ASA Code does regulate the advertisement of competitions. The ASA may, in respect of any advertisement for a competition, require that substantiation, in the form of acceptable legal advice that the competition is legal, be furnished.

39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

There is a separate Sponsorship Code that sets out the guidelines for good practice and fairness in sponsorship. Sponsorship and all related communications must be accurate and clear to all persons and organisations involved in a sponsorship covering any rights or privileges granted to a sponsor. However, there is no specific requirement that the advertising in question identify the sponsor, or indeed the advertiser. Generally, a product or logo that is not directly associated with the sponsor of the event, activity, team, individual or organisation may not be visibly used or displayed during the event.

Product placement as a means of advertising is subject to the ASA Code. In terms of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations under the Independent Broadcasting Authority Act of 1993 (which has since been repealed, although the Regulations remain in force), no broadcaster shall permit any product placement in any news or current affairs programme transmitted by it, and product placement in programming other than news and current affairs shall be subordinate to the content of the programme material. In terms of the ASA Code, advertisements should be clearly distinguishable as such whatever their form and whatever the medium used. Product placement should therefore be so designed, produced and presented that it will be readily recognised as an advertisement.

40 Briefly give details of any other notable special advertising regimes.

South Africa is a constitutional democracy and it is therefore important to note that all legal issues, including those related to advertising, will be viewed through the prism of the Constitution. In terms of advertising, constitutional issues, such as the right to equality (relevant in regard to possibly discriminatory advertising) and freedom of expression, can be relevant. In terms of cultural considerations and public morals, South Africa, being a very diverse country, has widely varying cultural and moral norms, depending on, for example, race, socio-economic factors, language, gender and religion.

Social media**41 Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?**

Currently, South Africa has no legislation that relates specifically to or regulates social media. Guidelines for advertising and marketing through social media must be drawn from a variety of peripheral sources. The Consumer Protection Act contains a number of provisions relating to marketing, including a number of general standards for marketing of goods or services. The ASA Code and the Code of Ethics and Standards of Practice of the Direct Marketing Association of South Africa serve as self-regulatory mechanisms for advertising and marketing practices. These provisions of these codes would also apply to marketing and advertising on social media platforms.



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The Electronic Communications and Transactions Act, 2002 (ECTA) applies to all forms of electronic communication. Given that advertising via social media platforms clearly constitutes a form of electronic communication, advertisers must give due consideration to, and comply with, the relevant provisions of the ECTA.

42 Have there been notable instances of advertisers being criticised for their use of social media?

Yes, there have been a few instances. For example, to celebrate National Women's Day in August 2015, Bic South Africa posted an advertisement on Facebook inviting consumers to 'Look like a girl, act like a lady, think like a man, work like a boss', which led to widespread criticism from individuals and women's rights organisations both locally and internationally. In general, there has also been a steady rise in the number of defamation (libel) cases emanating from social media platforms, such as the case of *H v W*, which covers a wide range of issues. South Africa's courts have clearly recognised that defamation can take place via social

media and have proved willing to grant orders to restrain persons from using social media to defame others. There have also been a number of social media-related cases in an employment context. In most of those instances, employees were dismissed because they wrote defamatory comments about their employers on social media sites. Those dismissals were held to be lawful.

43 Are there regulations governing privacy concerns when using social media?

South Africa recently adopted data protection legislation, although it is not yet in force. The Protection of Personal Information Act is expected to come into force by the end of 2017 or early 2018, and it provides for stricter data-protection regulation in South Africa. The Bill of Rights also protects the individual's right to privacy, and there is no reason why conduct engaged in through social media platforms could not, in theory, infringe that fundamental right and result in litigation on that basis.

Getting the Deal Through

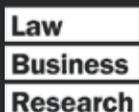
Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
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