THE ADVERTISING OF SLIMMING PRODUCTS

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LEGAL BRIEF
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Products that are placed on the market in South Africa and advertised as so-called slimming products are, once again, attracting the attention of the law.

INTRODUCTION

This attention has manifested itself primarily in two areas:

> a recent judgment by the Gauteng Local Division, Johannesburg of the High Court in Herbex (Pty) Ltd v The Advertising Standards Authority [2016] (14/45714/14) (25 April 2016) (ZAGPJHC) (“Herbex”); and

> products soon to be registered as medicines and referred to as "slimming preparations", which registration requirement was effective as of 15 November 2015 in terms of regulation 48C(2)(b)(i) of the amended General Regulations promulgated in terms of the Medicines and Related Substances Act No. 101 of 1965, as amended (“Medicines Act”).

SAYING WHAT YOU FEEL AND THINK TO CONSUMERS

The primary reason, arguably, why the law is turning its focus to so-called "slimming preparations" is about advertising. Slimming preparations have always controversially attracted a great deal of attention from consumers based on a perceived and probable desire by society in general to look healthy in one's physique. In addition, arguments about lifestyle choices, sugar tax, the prevalence of obesity, banting and similar diets, all continue, in one way or another, to focus the consumer's attention on losing weight. Within the context of this weight loss discussion, many claims are made by many products about what they can and will do for the consumer.

Advertising is fundamentally inducing motivation in a consumer to desire a particular product or good or as the term "advertisement" is defined in section 1(1) of the Medicines Act "in relation to any medicine or scheduled substance, means the written, pictorial, visual or other descriptive matter or verbal statement or reference a) appearing in any newspaper, magazine, pamphlet or other publications; b) distributed to members of the public; or c) brought to the notice of members of the public in any manner whatsoever, which is intended to promote the sale of that medicine or scheduled substance; and 'advertise' has a corresponding meaning".

Within the context of slimming preparations, advertising becomes the face of those products to the market place. Therefore, when claims are made about certain slimming preparations that are deemed to be misleading, false or even dangerous, then the law must play its role.

THE HERBEX JUDGEMENT

In the context of the Herbex judgment, the Advertising Standards Authority of South Africa ("the ASA") endeavoured to exercise
jurisdiction over advertising paid for by Herbex in order to prevent the advertising from occurring on the basis that the claims made in the advertising could allegedly not be sustained. The Herbex judgment ultimately held that the ASA could not exercise jurisdiction over the advertising paid for by Herbex on the basis that Herbex was not subject to the ASA’s rules as it was not a member of the ASA.

In the course of the Herbex judgement, the court touches on the components of South African law that deal with, and address matters pertaining to, the advertising of what may potentially be medicinal products in so far as one now accepts that slimming preparations are medicines for purposes of the Medicines Act due to their inclusion in regulation 48C, as stated in the introduction. Therefore, the Herbex judgment is an important collation of what advertisers of medicinal products would need to concern themselves with as well as the suppliers of such products when advertising those products in the South African market place. In this regard, the following legal instruments will need to be considered when planning one’s advertising:

> the ASA rules in so far as the supplier advertising its products is a member of the ASA;
> the Medicines Act, more particularly, sections 19 and 20 of the Medicines Act, which compel all persons to advertise registered medicines responsibly and in accordance with the registration details of such medicines and of which slimming preparations are now a part of. In this regard, the Herbex judgment, at paragraph 46, held as follows:

> “In terms of the Medicines Act the power to regulate the advertisement and sale of medicines, is vested in the Minister of Health, assisted by the Medicines Control Council …, the Director-General and the Registrar of Medicines. Section 18C of the Medicines Act prescribes that the Minister of Health (not the respondent) shall make regulations relating to the marketing of medicines and an enforceable Code of Practice, subsequent to ‘consultation with the pharmaceutical industry and other stakeholders’. Section 20(1) of the Medicines Act is headed ‘publication or distribution of false advertisements concerning medicines’. It prohibits the publication or distribution to the public of ‘any false or misleading advertisement concerning any medicine’;”;

> the Foodstuffs, Cosmetics and Disinfectant Act No. 54 of 1972 which, despite its age, endeavours to impose a discipline on the suppliers of foodstuffs to ensure that the buying public in South Africa is not duped by false and misleading claims about those products;

> the Consumer Protection Act No. 68 of 2008 ("the CPA"), which is arguably one of the most effective legal instruments dealing with a prohibition, amongst others, on the publication of misleading claims or claims designed to encourage consumers to purchase products where those claims are false. The Court, in the Herbex judgment, had this to say about the CPA at paragraph 47:

> “Consumers also have the protection provided to them by the Consumer Protection Act, 68 of 2008 (the CPA). Absent a regulatory scheme imposed in terms of a national statute and duly recognised by the Minister as qualifying for an industry specific exemption, it is the CPA that applies to the regulation of advertising ‘of any goods’ and the regulators appointed (and recognised) by the CPA who are empowered to enforce its scheme of regulation.”; and

> self regulation. Primarily, self regulation is brought about by industries agreeing to adhere to a particular code of practice or a manner of dealing with particular aspects of an industry such as advertising and promotions. However, arguably, with the advent of regulation 48C under the Medicines Act, self regulation in respect of those products dealt with by regulation 48C, may largely become redundant in so far as legislative controls broaden their reach over a greater number of products. The same may be said of the CPA, which, under the Department of Trade and Industry, has published little in the way of exemption for products and industries to the provisions of the CPA. The role of self regulation as an effective means of dealing with advertising and promotions must be examined closely as, stated, the reach of legislation is becoming far greater.

**CONTROLLING WHAT YOU FEEL AND THINK TO CONSUMERS**

The role of self regulation is, in effect, to be defined largely where legislation does not deal with a particular aspect of doing business in South Africa such as advertising or promoting of a particular category of products. Arguably, however, even the most responsible self regulation will still be subject to the provisions of the CPA, which would take precedence over any code of practice. To this end, sections 29 and 41 of the CPA are the most instructive in relation to what is or is not allowed in respect of the marketing and advertising of products in South Africa.

1. Section 29 provides as follows: “A producer, importer, distributor, retailer or service provider must not market any goods or services—

   (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or

   (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—

      (i) the nature, properties, advantages or uses of the goods or services;

      (ii) the manner in which those goods or services may be supplied;

      (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor’s price for comparable or similar goods or services;

      (iv) the sponsoring of any event; or

      (v) any other material aspect of the goods or services.”.

2. Section 41, which is far broader arguably than section 29 provides as follows: “(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—

   (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;

   (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or

   (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.

   (2) A person acting on behalf of a supplier of any goods or services must not—

   (a) falsely represent that the person has any sponsorship, approval or affiliation; or

   (b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1).

   (3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—

   (a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;

   (b) any goods or services—

      (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;

      (ii) are of a particular standard, quality, grade, style or model;

      (iii) are new or unused, if they are not or if they are reconditioned or reconditioned, subject to subsection (4);

   (c) have been used for a period to an extent or in a manner that is materially different from the facts;

   (d) have been supplied in accordance with a previous representation; or

   (e) are available or can be delivered or performed within a specified time;

   (f) any land or other immovable property—

      (i) does not have

      (ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable;

   (g) or is or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it;

   (h) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period;

   (i) any service, part, replacement, maintenance or repair is needed or advisable;

   (j) a specific price advantage exists;

   (k) a charge or proposed charge is for a specific purpose;

   (l) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement;

   (m) the transaction affects, or does not affect, any rights, remedies or obligations of a consumer;

   (n) a particular solicitation of, or communication with, the consumer is for a particular purpose; or

   (o) the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer.

   (4) A representation contemplated in subsection (3)(b)(ii) to the effect that any goods are new is not false, misleading or deceptive if those goods have been used only—

   (a) by or on behalf of the producer, importer, distributor or retailer; and

   (b) for the purposes of reasonable testing, service, preparation or delivery.

(5) Section 51 applies to any court proceedings concerning this section.”
Therefore, in light of the provisions of the CPA, self-regulatory codes must be evaluated in respect of the role that they play or are intended to play with reference to the particular rights of members of associations subscribing to a particular self-regulatory code and consumers in general. The interaction of a self-regulatory code and the CPA, especially within the potentially contentious areas of what may or may not be said about, for example, a slimming preparation, will have to be tested into the future. The court in the *Herbex* judgment, reflecting on the ASA’s Code stated at paragraph 70, the following:

“With regard to the respondent’s use of case numbers and referring to its decisions as rulings, the applicant does not point to any prohibition in any law which prohibits the self-regulatory body from using this language. Indeed, it is difficult to see how a system of dispute resolution and adjudication could be established without using such language. Other self-regulatory bodies similarly adjudicate complaints on behalf of its members, and similarly use the language of adjudication in doing so. It can hardly be contended that it acts unlawfully or misrepresents the status of its powers in doing so.”

The court in the *Herbex* judgment does not, front and centre, address the interaction between self-regulatory steps, codes or bodies and existing provisions of South African law such as the CPA. Whether or not self regulation has a useful role to play in the future will have to be examined with reference to the scope and ambit of the provisions of the CPA and, particularly in respect of medicines, the widening reach of the Medicines Act over products never previously called up for registration and of which slimming preparations is simply one category.

**CONCLUSION**

Advertising therefore, especially for medicines and complementary medicines, is to become a far more complex process and arguably more regulated, more carefully scrutinised and potentially more disputed. This is especially with the range of products now qualifying as medicines having been expanded under regulation 48C to include slimming preparations, male sex hormones, female sex hormones, products dealing with sexual stimulation and sexual dysfunction, cardiac medicines, anti-viral agents and products acting on the muscular system and sport supplements.

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