

British American Tobacco / K Willaims & Others / 17013

Ruling of the : ASA Directorate

In the matter between:

MR KENDALL WILLIAMS MS T HART MR AL-AMEEN KAFAAR MR DOUGIE OAKES MR CHARLES T VAN BERGEN MR KEITH REEVES MR IAN WILLIAMS AJAY BOWAN	Complainant(s)/Appellant(s)
--	-----------------------------

British American Tobacco South Africa (Pty) Ltd	Respondent
--	------------

16 May 2011

Consumer complaints were lodged against advertising for British American Tobacco's illicit cigarette campaign. Complaints were lodged against billboard and press advertisements as well as radio commercials.

Billboards and press executions

The first execution features the image of a man pointing a gun at the viewer. The following wording appears:

"WARNING:
THE MONEY YOU SPEND ON ILLEGAL CIGARETTES, HE COULD USE TO BUY GUNS.
Often the person smuggling cigarettes is involved in other criminal activity. If you buy a pack of 20 cigarettes for under R13.50, it may be illegal. Stop your money from helping to pull the trigger.
ILLEGAL CIGARETTES. HOW MUCH DO THEY REALLY COST?"

The second execution features an image of a teaspoon with drugs in it being heating up over a burning candle, a syringe is featured alongside it. The following wording appears next to the image:

"WARNING:
THE MAN SELLING ILLEGAL CIGARETTES TO YOU MAY BE SELLING DRUGS TO YOUR
FAMILY
If you buy a pack of 20 cigarettes for less than R13,50, it may be illegal. The person selling them could be part of a syndicate pushing drugs on the street. Don't fund one criminal activity by supporting another.
ILLEGAL CIGARETTES. HOW MUCH DO THEY REALLY COST?"

The third execution shows an image of a woman being hijacked. The assailant points a firearm at her, and her hands are raised as though she is pleading with him. The wording "GEVAAR: MENSE WAT ONWETTIGE SIGARETTE KOOP, HELP DALK MOTORKAPERS EN ROWERS", which translates to "danger: people who buy illegal cigarettes possibly help hijackers and robbers" appears next to the image

Advertorial

The advertorial complained of is headed "STUB OUT ILLEGAL CIGARETTES", and it also shows a man pointing a firearm at the reader.

The body copy of the advertorial mentions that the business of illegal cigarettes has a significant effect on the local and global tobacco industry and that this trade translates into revenue losses for the government in unpaid taxes, which is why the industry has "launched a campaign against illegal cigarettes". Furthermore, it also makes mention of how to spot an illegal cigarette.

Radio commercials

The first radio commercial commences with a male voice over who says, inter alia, "When I buy illegal cigarettes, I don't say anything." This is then preceded by various male voices saying, inter alia, "When I smuggle illegal cigarettes into the country, I don't say anything.", "When I sell them to buy unlicensed guns, I don't say anything.", "When I buy a gun to hijack a lady's car, I don't say anything."

The last voice heard is that of a lady who says, "When he shoots me, I can't say anything." The closing voice over then says, "If you know someone selling illegal cigarettes, say something. Call 0800 21 47 10 to stop them funding organised crime".

The second radio commercial commences with a female voice over saying, inter alia, "I use my money to buy a pack of illegal cigarettes." This is followed by various male voices saying, "I use her money to help buy unlicensed guns", "I use the money from selling the guns to order a shipment of drugs", and "I use the money selling drugs to pay someone to hijack cars". The closing voice over says, "Prevent a far bigger crime from happening. Stop buying illegal cigarettes and call 0800 21 47 10 if you know someone who's selling them ... Illegal cigarettes, how much do they really cost? Brought to you by B.A.T South Africa".

COMPLAINTS

In essence, the complainants submitted that the respondent's campaign is a deceptive way in which to advertise for tobacco products. The arguments here are essentially that the respondent is using a clever ploy to get around the fact that it is, by law, not allowed to advertise its products in South Africa. However, by 'discouraging' the purchase of illegal cigarettes, it is indirectly and illegally encouraging the purchase of legitimate cigarettes. This concern was expressed by all except the first complainant.

The first complainant effectively disputed the validity of the overall impression that illegal cigarettes are linked to other violent crimes. He submits that "I have googled this phenom[e]non and can find no research or any other evidence to support BAT's theory they are using to falsely bully the public". It should be noted that the second complainant expressed similar doubts over the veracity of such an implication. She commented "What proof do they have that there is a direct causal effect between buying illegal cigarettes and buying guns and other drugs? This is false advertising".

The third complainant raised concerns over a possible exploitation of fear. He stated that "While playing on the stereotyped fears of our society – illegal drugs, hijacking and drug running – BAT is without stating it saying their supposed legal cigarettes should be bought".

The eighth complainant was concerned about the possible effects that the advertising for tobacco may have on children.

RELEVANT CLAUSES OF THE CODE OF ADVERTISING PRACTICE

In light of the complaint the following clauses of the Code were taken into account:

- Section II, Clause 1 - Offensive advertising
- Section II, Clause 3.1 - Fear
- Section II, Clause 3.3 - Legality
- Section II, Clause 14 - Children
- Section II, Clause 4.2.1 - Misleading claims

RESPONSE

Attorneys Webber Wentzel submitted the respondent's comments on the complaints. It submitted that the advertisements complained about were part of a campaign initiated by BATSA to curb the trade in illicit cigarettes. In each execution, the copy refers to a potential link between illicit trade in cigarettes and other criminal activities. It specifically uses words like "may" and "could".

Approximately 15 million cigarettes are sold illegally every day in South Africa with a total excise loss

of more than R2.5 billion annually for government.

The campaign was not designed to promote the sale of tobacco but rather to persuade the public not to purchase illicit cigarettes. The campaign does not mention any brand of cigarette, in fact the mention of British American Tobacco was only included on the insistence of Primedia, who were only prepared to accept the advertising if the respondent's name was included.

It added that it has not set out to instil a sense of fear. It has, however, set out to draw the linkage between what are perceived as lesser forms of crime and more serious forms of crime which do induce a sense of fear for a justifiable reason. Furthermore, it is attempting to stop criminal and illegal activities.

The respondent denied that it has breached the advertising restriction as set out in the Tobacco Products Control Act. It submitted annexures in support of its claim that there is a linkage between illegal cigarettes and other forms of crime.

Certain questions were also raised about the applicability of some of the clauses identified by the Directorate, but these will be dealt with, where relevant, below.

ASA DIRECTORATE RULING

The ASA Directorate considered all the relevant documentation submitted by the respective parties.

Preliminary issues

The respondent contended that certain clauses, as identified by the Directorate in its request for an official response, were irrelevant or inappropriate, based on the complaints at hand.

The clauses it specifically took issue with were those relating to "Offensive advertising" and "Legality".

With regard to the provisions of Clause 1 of Section II (Offensive advertising), the Directorate agrees that none of the complainants raised any concerns that would fall under the provisions of this clause.

Accordingly, Clause 1 of Section II will not be considered for the purposes of this ruling.

However, it is noted that nearly all of the complainants objected on the basis that the advertising at issue is effectively promoting its products indirectly by discouraging the purchase of illegal cigarettes. The complainants appear to be of opinion that this is a contravention of the Tobacco Products Control Act, which prohibits the advertising of tobacco products.

In light of this, the Directorate is satisfied that the provisions of Clause 3.3 of Section II (Legality) were reasonably cited under the provisions of Clause 3.1.3 of the Procedural Guide. The question remains, however, whether or not the respondent's advertising is in contravention of this clause. This will be discussed below under the appropriate heading.

The Directorate also notes from the response submitted that the campaign through the radio and press has been completed and that only the billboard advertisements remain.

The ASA has a long standing principle which holds that where an advertiser provides an unequivocal undertaking to withdraw or amend its advertising in a manner that addresses the concerns raised, the undertaking is accepted without considering the merits of the matter.

Given that the respondent did not expressly and unequivocally confirm that the radio commercials and press advertisements will not be used again in the future, the Directorate is still required to consider all advertising complained off.

Discussion on the merits

Clause 3.3 of Section II reads as follows:

"Advertisements should not contain anything which might lead or lend support to criminal or illegal activities, nor should they appear to condone such activities".

The respondent submitted that the advertising at issue is doing exactly the opposite of the above; it is attempting to put a stop to criminal activities. As such it can hardly be argued that the advertising condones or encourages illegal activities.

In addition, it pointed out that the conduct of smoking, or purchasing legal cigarettes for that matter is also not illegal (see Dunhill / P Ucko / 8978 (5 March 2008) and B & H Kent / K Sheppard / 10101 (28 August 2008) for examples where the Final Appeal Committee also made a similar comment).

In considering this clause, the Directorate has to pay attention to the wording. It is noted that the clause effectively seeks to prevent advertising from having content that depicts, condones, or encourages illegal acts. In other words, the aim here is to prevent, for example, advertising showing a situation where a vendor sells cigarettes to children (thus depicting an illegal situation). The clause does not, however, contain any wording that says or implies that tobacco products may not be advertised as such.

While the Directorate is mindful of the fact that there are laws in place that contain such restrictions, these laws and regulations are not administered by the ASA. Clause 13 of the Preface to the Code also specifically point out that the Code seeks to complement rather than replace legislation, and it would be nonsensical for the ASA to attempt to enforce or administer legislation that already falls within the jurisdiction of the appropriate regulatory authorities.

The Code does contain a provision requiring advertising to be “LEGAL, decent, honest and truthful” (our emphasis). However, as noted in the Final Appeal Committee ruling under the reference Dunhill / P Ucko / 8978 (5 March 2008), this provision appears in the Preamble to the Code, and can only be said to have been contravened IF one of the substantive clauses contained in the Code (refer Sections II through V) and/or the appendices to the Code have been contravened. This again suggests that the ASA is not able to pronounce on the legality of the respondent’s advertising, as there is no provision contained in these sections of the Code that prohibits the advertising of tobacco.

Finally, in Aquila Private Game Reserve / Fairy Glen Private Game Reserve / 10323 (25 April 2008), the Directorate had to deal with an allegation that the advertiser (Aquila) was promoting and advertising animals on its reserve without having the requisite permits for keeping such animals. The Directorate ruled as follows:

“The question of whether or not the respondent has the necessary permits to keep certain animals ‘in captivity’ is not an advertising issue. The complainant did not submit that the respondent’s advertising communicates, for example, that one can/must keep wild or endangered animals ‘in captivity’ without authorisation.

Accordingly, the complainant’s objection regarding the Western Cape Nature Conservation Laws Amendment Act falls outside the ASA’s jurisdiction and will therefore not be considered”.

Considering all the above, the Directorate is satisfied that it is not in a position to declare the respondent’s campaign illegal by virtue of the complaints at hand. any such allegation should be levelled at the regulatory authority responsible for administering the Tobacco Products Control Act.

The advertising at issue therefore does not contravene Clause 3.3 of Section II of the Code.

Clause 3.1 of Section II of the Code states, “advertisements should not without justifiable reason play on fear.” It must be noted at this time that this clause does not prohibit the use of fear in general, but does require any such use to be “justifiable”.

The first and second complainants both expressed doubt over the alleged link between illegal cigarettes and the types of violent or dangerous crimes depicted in the advertising. In addition to this, the third complainant noted that the respondent is “... playing on the stereotyped fears of our society – illegal drugs, hijacking and drug running ...”.

The respondent submitted that the societal fears regarding issues like hijacking, drug running and illegal drugs can hardly be termed “stereotyped”. They are real fears because they relate to real and prevalent crimes. It added that it has not set out to instil a sense of fear but rather to draw the linkage

between lesser forms of crimes (such as buying illegal cigarettes) and more serious forms of crime which do induce a sense of fear. Certainly such linkage is justifiable.

It submitted many newspaper articles relating to the trade of illegal cigarettes, and added that those involved in the investigations of illicit cigarettes frequently find evidence of other serious crimes. It also relied on the ruling under reference Cellfind / E Breytenbach / 1402 (5 September 2005), in which the Directorate dismissed a complaint on a commercial utilising a hijacking scene to illustrate the purpose of its device.

In this ruling, the Directorate noted, inter alia, "...that there is a prevalent and pre-existing fear in South Africa in relation to personal safety when being hijacked. This particular crime features prominently in the lives and minds of many South African citizens". Given this, given that the Directorate was satisfied that the scenario used served to illustrate the use of the product, and given that the product was not punted as a "must have or risk being vulnerable", the Directorate dismissed the complaints. According to the respondent, a similar line of reasoning applies here.

Having considered this ruling, the Directorate also points out that the hijacking scene featured in that commercial lasted approximately ten seconds, after which Ruda Landman explained the advertised service to the viewer. The commercial in its entirety lasted a full minute. Given this, the Directorate expressly noted that a hypothetical reasonable person would immediately realise that the "hijacking" situation was merely an acted out scenario, after which the focus was shifted entirely to Ruda Landman explaining the intricacies of the advertised service.

It is clear from the wording of the clause that the purpose of Clause 3.1 of Section II is to prevent advertisers from exerting undue influence upon consumers through the exploitation of fear. This was best illustrated in *Cientelee Life Assurance / T Byrne and others / 7612* where the Advertising Standards Committee (the ASC) ruled as follows:

"...by virtue of its graphic nature and its overall execution, the commercial is likely to induce shock, fear and distress in the average viewer, regardless of age, with the aim of inducing persons who might not otherwise be inclined to do so, to take out life assurance cover. In so doing, we are of the view that the commercial without justifiable reason plays on the fear of the average consumer".

In another matter *Talk4U / A Grobler and another / 13001* (15 April 2009), the Directorate considered complaints against a television commercial that featured a young girl lying unconscious on a street corner. The voice-over stated, "Talk 4U it speaks for you when you're unable to..." The complainants submitted that the image of a dead girl was scary and disturbing. The Directorate upheld the complaints on the basis that the commercial aroused fear in the viewer, suggests that the same scenario is likely to affect their lives at some point, and that they should ensure that they have the advertised service.

Without getting into the argument of whether or not the respondent has any intention to gain commercially from this campaign, the Directorate notes that the campaign seeks to draw an analogy between the purchasing of counterfeit cigarettes and illegal items. The essential premise, which was also argued as such by the respondent, is that illegal cigarettes are intrinsically linked to these crimes. Given the nature of the complaints raised, the Directorate has to determine whether or not this message is "justifiable". The first question that therefore arises is whether this alleged link is true. In this regard, the provisions of Clause 4.2.1 of Section II are relevant. They state:

"Advertisements should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer".

In support of its argument, the respondent relied on newspaper clippings dealing with incidents where illegal cigarettes were seized, and in some instances where the perpetrators were apprehended.

There is only one mention of a criminal act similar to those depicted in the campaign; that of the murder of Mr Johan Nortje, a senior customs investigator. The article mentions that Mr Nortje was working on a case involving an international crime syndicate dealing in counterfeit goods of cigarettes and clothing.

In this article headed, "Murder of customs official 'was a hit'.", mention is made that customs officials in Durban are being targeted by smuggling gangs. There is no specific mention that the officials are being targeted by drug and/or car syndicates. The other articles make mention of cigarette smugglers attempting to bribe police officials, and that the counterfeit cigarette trade costs government R2.6bn a year. Nothing contained in this material, however, appears to show an intrinsic link, or even suggest that the money made from selling illegal cigarettes is used (as claimed in the advertising) to fund crimes such as drug trafficking, hijacking and the potential murder associated with this crime (see for example the claim "Stop your money from helping to pull the trigger").

While it is true that South Africa does have a history of hijacking and drug activities, the linking of illegal cigarettes directly to these activities does not appear to be justifiable in as much as the respondent has not submitted any evidence of this.

The violent imagery and wording employed in this campaign is therefore, based on the material at hand, used without "justifiable" reason.

Furthermore, the campaign seeks to persuade the public not to purchase illegal cigarettes. In communicating this it uses strong imagery such as drug taking, hijackings and guns to suggest that they are linked to the illegal cigarette trade. Similarly the radio advertising suggests that buying illegal cigarettes perpetuates such violent crimes (one execution contains a statement "When he shoots me, I can't say anything").

The depiction of guns and/or drugs in the advertising material also adds to the element of fear as the weapons are pointed directly at the viewer in some instances, or at someone as shown in others.

A viewer would be startled by the wording used which suggests that by buying illegal cigarettes one is directly contributing to the funding of these crimes. If this is indeed true, the respondent has not shown it to be.

In light of the above, the advertising message conveyed is based on an unproven, and by inference, misleading premise (the alleged linkage between illegal cigarettes and serious and/or violent crime), which is in contravention of Clause 4.2.1 of Section II of the Code. This in turn is likely to cause unjustified fear and distress to viewers and is therefore in contravention of Clause 3.1 of Section II of the Code.

Based on the above, the respondent is required to:

- ☐ Withdraw the advertising campaign in its entirety;
- ☐ Action the withdrawal of the advertising with immediate effect upon receipt of this ruling;
- ☐ Ensure that the advertising is withdrawn within the deadlines stipulated in Clause 15.3 of the Procedural Guide; and
- ☐ Not use the advertising in the current format again in the future.

The complaints are partially upheld.