COMPARATIVE ADVERTISING: DO YOUR BATTERIES LAST UP TO 10X LONGER?

Category: Commercial Law,Media and OTT
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Introduction

The Advertising Standards Authority ("ASA") recently ruled that Duracell's claim that its batteries "last up to 10 times longer" than ordinary zinc batteries was misleading to consumers and effectively breached Clause 4.2.1 of Section II of the Code. This decision followed a referral by Eveready (Pty) Ltd which stated that Duracell's advertising campaign breached five codes under the ASA's Advertising Code of Practice ("the Code"). These codes being: honesty, substantiation, misleading claims, disparagement and comparative advertising.

Comparative advertising

Even though the main focus of the judgment was that Duracell's advert was misleading, the matter once again sparked the debate on the concept of comparative advertising. Comparative advertising refers to the practice whereby a trader in extolling the features and/or advantages of its product draws comparisons between such product and the product of another trader. The catch however is that the product is usually well known and held in high regard by consumers. Comparative advertising therefore has the purpose of stimulating demand for a trader's own product, as opposed to the product with which the comparison is being made.

Comparative advertising may or may not be indirect. Indirect advertising refers to instances where reference is made only to one brand of product but indirectly to the characteristics or attributes of a rival or competing product. Direct advertising on the other hand refers to the characteristics or attributes of a product being compared with the characteristics and attributes of a specifically named or easily identifiable competing product.

The Code

Clause 7 of the Code state as follows:

"*7.1 Advertisements in which factual comparisons are made between products and/or services are permitted provided that:*

7.1.1 all legal requirements are adhered to. Attention is drawn to the provision of the Trade Marks Act, No. 194 of 1993;

…

7.1.4 the claims are not misleading or confusing as governed by Section II Clause 4.2 (Misleading Claims Clause);

7.1.5 no infringement of advertising goodwill takes place as governed by Section II Clause 8 (Exploitation of Advertising Goodwill Clause);

*7.1.6 no disparagement takes place as governed by Section II Clause 6 (Disparagement Clause);**[1]***

…

7.4 The guiding principle in all comparisons shall be that products and/or services should be promoted on their own merits and not on the demerits of competitive products.

7.5 In considering matters raised under this clause, cognisance will be taken of the intention of the advertiser."

Conclusion

In conclusion, comparative advertising is used by traders who try to "ride on the back" of a well-known and successful product in order to make use of the repute of that product as a platform to promote the trader's own product. Although South Africa has seen a growing increase in comparative advertisements, these advertisements must be within the constraints of the law. The main principal being that all products that are advertised should be promoted on their own merits and not the demerits of their competitors.

[1] Clause 6 of the Code states *inter alia* that: "*Advertisements should not attack, discredit or disparage other*

products, services, advertisers or advertisements directly or indirectly" and "*In considering complaints under this*

clause, the ASA shall take cognisance of what it considers to be the intention of the advertiser."