



## Chips – a hot topic in South Africa

by Gaelyn Scott

We have reported on the demise of the Advertising Standards Authority (“ASA”) in previous articles, but there’s now a new advertising sheriff in town, the Advertising Regulatory Board (“ARB”), a body whose strapline is “Consumer protection through responsible advertising”. Gail Schimmel is the CEO of this new body. A recent ruling of the ARB on adverts for McCain chips gives an interesting insight into the new advertising regulatory regime.

The adverts at issue were billboard and Facebook adverts placed by McCain Foods, the maker of, *inter alia*, McCain Fry Chips. These adverts contained a picture of a single chip split in half, a pack of McCain Fry Chips, and the statement “SA’s No.1\* Chip” (the asterisk referenced the following statement: “Aztec market share data – sales volumes”). For the benefit of readers outside South Africa, we should point out that chips are a complicated business in South Africa. Potato crisps are referred to as chips. Fries (although now often referred to by that name) are also referred to as chips, but in order to distinguish them from crisps, they are sometimes called hot chips or slap chips. Frozen fries tend to be called frozen chips.

Famous Brands, the company behind, *inter alia*, the Steers restaurant and takeaway chain, complained about the McCain adverts. It said that the message being conveyed was that McCain Fry Chips is South Africa’s number one (hot) chip based on sales or alternatively quality, with the quality being represented by the picture of a delicious-looking (hot) chip split in half. But, argued Famous Brands, while McCain might well be the top-selling frozen chip in South Africa, the advert suggests that it is the top-selling (hot) chip, be it frozen or fresh. That, said Famous Brands, is unlikely to be true, because in South Africa, sales of fresh (hot) chips far exceed sales of frozen chips. So, Famous Brands wanted independent verification of the claim. It also challenged McCain to prove that McCain Fry Chips are perceived to be “SA’s Number 1 Chip” based on quality, pointing out that Steers has won the Leisure Options Award for the Best Chips for 16 years running.

Much of the complaint centered around the fact that no distinction had been drawn between frozen chips and fresh (hot) chips, with the result that consumers could mistakenly interpret the adverts to mean that McCain’s frozen chips are superior to Steers’ fresh-cut (hot) chips, either in terms of quality or in terms of sales. McCain argued that the products fall into very different categories, and that there would therefore be no confusion or deception. It said that, because its advertising contains a picture of the product packaging, together with the fact that the two parties’ brands operate in completely different markets, consumers will know that the claim refers to frozen chips only. It submitted a report from a company called Information Resources SA (Pty) Ltd (formerly known as Aztec), as substantiation for the claim that McCain is “SA’s No.1 Chip”, on the basis that McCain frozen chips are the best-selling frozen chips in South Africa.

In its finding, the ARB made reference to clauses of the Code of Advertising Practice, dealing with Substantiation of Claims and Misleading Claims. It also referred to clause 3.2 of section I of the Code, which reads as follows: “In assessing an advertisement’s conformity to the terms of this Code, the primary test applied will be that of the probable impact of the advertisement as a whole upon those that are likely to see or hear it.” The ARB also made reference to a long-standing principle of its predecessor, the ASA, that “a claim should be considered within the context of the advertisement as a whole in order to determine what the hypothetical reasonable

person's take out of the claim would be.”

The ARB found that the advertising was ambiguous. The adverts, said the ARB, “can be interpreted in a number of different ways because the context in which the claim ‘SA’s No.1 Chip’ appears is not consistent throughout the advertising executions.” It said that “the claim on the billboard could be interpreted to refer to consumer preference rather than market share.” It said that “a consumer could reasonably interpret the billboard advertisement to say that McCain’s...is consumers’ most preferred chip in South Africa, which is far from the claim that the Respondent is trying to make, i.e. South Africa’s bestselling frozen chip brand.” It said that “there is a real likelihood that consumers will interpret the claim to mean that McCain’s... is the “No.1” chip in South Africa overall.”

The ARB concluded as follows: “In light of the ambiguities discussed above, the Directorate finds that the claim ‘SA’s No.1 Chip’ as it is currently used by the Respondent, is likely to mislead consumers. The claim therefore contravenes Clause 4.2.1 of Section II”. It therefore ordered McCain to withdraw the advert.

It’s good to see that advertising regulation is back in place. Brand owners will need to ensure that their advertising is compliant.



Gaelyn Scott

**trade mark attorney | director | head of IP department**

cell: +27 83 632 1445



No information provided herein may in any way be construed as legal advice from ENSafrica and/or any of its personnel. Professional advice must be sought from ENSafrica before any action is taken based on the information provided herein, and consent must be obtained from ENSafrica before the information provided herein is reproduced in any way. ENSafrica disclaims any responsibility for positions taken without due consultation and/or information reproduced without due consent, and no person shall have any claim of any nature whatsoever arising out of, or in connection with, the information provided herein against ENSafrica and/or any of its personnel. Any values, such as currency (and their indicators), and/or dates provided herein are indicative and for information purposes only, and ENSafrica does not warrant the correctness, completeness or accuracy of the information provided herein in any way.

info@ENSafrica.com  
level 2 BBBEE rating (South Africa)

