

## I. COMPLAINTS

COMPLAINT ONE

Complaint one by the *South African Jewish Board of Deputies* to the *Advertising Standards Authority* regarding the *South African Artists Against Apartheid* advert on SABC'S 5fm radio station

## AT THE ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA

SOUTH AFRICAN JEWISH BOARD OF DEPUTIES

COMPLAINANT

DAVE RANDALL

FIRST RESPONDENT

SOUTH AFRICAN BROADCASTING CORPORATION

SECOND RESPONDENT

ADVERTISER (UNKOWN)

THIRD RESPONDENT

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### COMPLAINT

1. The South African Jewish Board of Deputies is a legal persona by virtue of its Constitution.
2. The undersigned is mandated to act on its behalf in this matter. The Board has been advised by Senior Counsel.
3. Dave Randall is the person who states that he is supporting a certain cause in an advertisement which has been broadcast on 5fm, one of the radio stations under the control of the South African Broadcasting Corporation, the Second Respondent. In the absence of the identity of the advertiser, I add his or her or its name as unknown.
4. The South African Broadcasting Corporation, which inter alia acts in terms of the Broadcasting Act 4 of 1999, is the Second Respondent and is a member of the Advertising Standards Authority of South Africa.

5. I am unaware whether an Advertising Firm, as member of the ASA, was involved in the production of the advertisement or who paid for the advertisement. In fact, it is not clear at all who the advertiser is and I will return to this point.
6. I will now concentrate on the broadcast on 5fm and accept that if an order is made by the ASA it would have a bearing on all media where this broadcast is repeated, either vocally in broadcasting or in writing in other media or vocally or in writing on the internet.
7. The words used in the advertisement are the following:
 

“Hi, I’m Dave Randall from Faithless

20 years ago I would not have played in apartheid South Africa

Today I refuse to play in Israel

Be on the right side of history – don’t entertain apartheid

Join the international boycott of Israel

I support South African Artists against apartheid.com”
8. According to clause 4 of the ASA Code Introduction “advertisement” includes an aural communication “which appeals for or promotes the support of any cause”. The above advertisement would, accordingly, fall within the definition of “advertisement.”
9. Clause 2.4 provides that “to the extent that any advertisement
  - Expresses an opinion on a matter which is the subject of controversy; and
  - That controversy involves issues within the areas, broadly defined, of public policy and practice, then that opinion shall not be subject to the provisions of the Code relating to *misleading* claims except that – All advertisements which contain such controversial statements **should**
    - \* be readily recognizable as advertisements;
    - \*~~cause no confusion as to the identity or status of the advertiser;~~
    - \*whenever such information is not readily available state the advertiser’s address and telephone number” (my emphasis)

### First Complaint

10. The first complaint is that the identity of the advertiser does not appear from the advertisement as is required by the Code (see previous paragraph). Is it Dave Randall or possibly the South African Artists against apartheid? This is, as foreshadowed by the ASA Code, indeed confusing. The ASA is entitled, it is submitted, to demand from the SABC who the advertiser is – in fact who paid for the advertisement. “Should”, within the context, means “shall” (see *The Shorter Oxford English Dictionary under “shall” past tense*). It is contended that the advertisement does lead to confusion as to the identity or status of the advertiser. It is submitted that the ASA Code in 2.4 (quoted above) has, accordingly, been contravened. The inclusion of the identity of the advertiser is not merely a technical requirement. It is, in fact, fundamental to the advertisement: the listener must know who is addressing him or her. There is no room for a facade here. Transparency lies at the heart of this kind of advertisement. The omission thereof amounts to a gross violation of the Code. **Furthermore**, any protection which the ASA Code grants to such an advertisement also falls away where the identity is not properly disclosed. The exoneration from the “misleading” rules also falls away. **Of course, there is no exoneration from publishing the truth in terms of the Code. That is a Constitutional duty, in any case.**

11. **Alternatively, if the first ground is not accepted**, jurisdiction of the ASA, which otherwise would have existed, falls away as a result of the confusion as to who the advertiser is. It is no longer, in essence, an advertisement. The matter should, if this is alternatively found to be the case, be referred to the BCCSA for adjudication in terms of the BCCSA Code.

### Second Complaint: Untruth in advertisement

12. Randall, unequivocally, makes Israel out to be an apartheid state. He does not qualify this claim at all. He bluntly combines Israel with apartheid. Apartheid is a crime against humanity according to the *Statute of Rome*. When anyone or a state is stated to be an apartheid state, that person or state is also made out to be guilty of a crime against humanity. No person or state is guilty of a crime if

that person or state has not been found guilty of such a crime by the International Court of Criminal Justice. Of course, this rule would not limit the right to allege or argue that the situation amounts to apartheid and that the matter should be referred to the International Court of Justice; as the then UN *rapporteur*, prof John Dugard, has done. The approach would also not limit argument in a debate about the matter. However, within the limited context of an advertisement, it may not categorically be stated that a State is an apartheid state. It is as bad as saying that a person is a rapist if he is merely charged of rape; in fact, even worse in this case, since there is not a charge before the International Court of Justice against Israel.

13. It is true that there have been accusations that Israel is guilty of apartheid. I quote from a Google search: "Such accusations have recently been picked up in documents of the United Nations. In a 2007 report, United Nations Special Rapporteur for Palestine John Dugard stated that "elements of the Israeli occupation constitute forms of colonialism and of apartheid, which are contrary to international law" and suggested that the "legal consequences of a prolonged occupation with features of colonialism and apartheid" be put to the International Court of Justice. South Africa's statutory research agency, the Human Sciences Research Council (HSRC) stated in a 2009 report that "the State of Israel exercises control in the [Occupied Palestinian Territories] with the purpose of maintaining a system of domination by Jews over Palestinians and that this system constitutes a breach of the prohibition of apartheid." Based on these findings, Richard Falk, the successor of John Dugard as UN Special *Rapporteur* for Palestine has detailed some of the indicators of apartheid in the occupied territories"

I need not quote further. This is all permissible because it is part of the ongoing debate, which should not be stifled. But when a debate is ignored and a categorical statement of Israel as an apartheid state is made in an *advertisement*, the bounds have, it is submitted with respect, been grossly overstepped. An advertisement is a special instrument and

may not be abused by omitting the truth. If it states or supports an argument for a finding by the International Court of Criminal Justice that apartheid exists, it would probably be acceptable ( of course, the identity of the advertiser would then also have to be stated, otherwise there is no protection for such an advertisement

14. Clause 4.1 of the ASA Code, under "truthful presentation", provides that advertisers shall hold, when an advertisement is published, in their possession documentary evidence to support all claims, whether direct or implied. Such documentary evidence must be capable of objective substantiation. The only body which is, within international law, permitted to make a finding of a crime against humanity is the International Court of Criminal Justice. This has not happened in spite of allegations and arguments that several acts should be brought before the Court. No such documentation of a finding that Israel is an apartheid state has been made by the Court and, it is submitted with confidence, that no documentation does exist which could support that it has made such a finding. **In the absence of supporting documentation of this nature which is available at the time of the broadcast, the SABC has transgressed the Code.**

15. The crime of apartheid is defined by the 2002 *Rome Statute* of the International Criminal Court as inhumane acts of a character similar to other crimes against humanity "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." On 30 November 1973, the United Nations General Assembly opened for signature and ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). It defined the crime of apartheid as "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." (Taken from Google)

16. Clause 12 of the *New Broadcasting Code* does not permit a broadcaster to simply state that Israel is an apartheid state. Such a statement is a controversial issue which places a duty on the broadcaster to broadcast a countering view. The ASA Code does not place such a duty on an advertiser – for understandable reasons. However, given the fact that the ASA Code thus, in effect, provides for an *exemption* to the onerous clause 12 of the Broadcasting Code, the implied exemption in the ASA Code to clause 12 must, it is submitted with respect, be narrowly construed.

17. To simply and categorically connect Israel to apartheid amounts to a gross violation of the truth. It is one thing to say this in a political speech or in a debate, with all its contextual correctives, but to state this in an *advertisement* is a totally different matter. Here the **truth** must be published according to the ASA Code. An advertisement which states that a person who has not been convicted yet is a murderer, amounts to an untruth and would be defamatory in the extreme and amount to a gross violation of the ASA Code. The same principle must apply to Israel, within the present international context. The exemption applying to misleading statements, even if it applies (in spite of the confusion which negates that exemption), does not apply to the absolute requirement of **truth**. The SABC has a Constitutional duty in terms of the Broadcasting Act 4 of 1999 to uphold Constitutional values (see the Preamble to the Act under “Resolving”). One of the Constitutional values is the right of everyone to freedom of expression, which includes the freedom to impart information **and the right to information**. This can only be **truthful** information. An advertisement cannot be judged contextually against other programmes. It must be judged on its own. On its own it contains a lie and thus, as *advertisement*, amounts to impermissible and false propaganda in conflict with the letter and spirit of the ASA Code. Hyperbole cannot save the present advertisement. With respect, the ASA in terms of section 39 of the Constitution of the Republic is also bound by the Constitution to promote the values that underlie an open and democratic society based on human dignity,



equality and freedom. One of these values is to publish the truth. Public interest, with respect, demands that the truth be broadcast. If a message is conveyed to the public which is untrue, that right has been violated.

18. Thus: the SABC, as a member of the ASA should be found to have contravened the ASA Code by permitting the unidentified as to advertiser and untruthful advertisement to be broadcast. Any advertising agency which has been involved in the production and which is a member of the ASA, should similarly be found to have contravened the Code.

19. Given the fact that the International Court has not decided on the matter against Israel, it would be impossible to comply with the requirement of the ASA Code that documentary evidence, of a high standard, as set out in clause 4 of the ASA Code, must be made available. "Objective substantiation" can only be a finding against Israel by that Court. It is not within the jurisdiction of the ASA to decide the issue as to whether Israel is an apartheid state; that is a matter for the International Court of Criminal Justice, which also binds South Africa in International Law.

Had the advertisement made it clear that it merely supports a view it might have passed muster. In the present matter this is academic. This could only have been the case if the fundamental requirement of identity of the advertiser had been complied with. In any case, this alternative argument is not applicable to the facts before the ASA: the advertisement grossly violates the Code in two respects: it does not identify the advertiser and blatantly creates the impression ( falsely) that Israel is guilty of apartheid, whilst this has not been found to be so by the International Court of Criminal Justice.

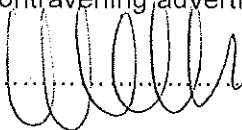
Proposed finding on the merits:

1. That clause 2.4 has been contravened; and

2. That clause 4 has been contravened in that the advertisement is not truthful and was not, at the time of the broadcast, substantiated by documentary evidence.
3. Alternatively, that one or both of the preceding clauses were contravened.

### PROPOSED SANCTION

1. That the advertisement immediately be stopped by the SABC and all other members of the ASA, either on the first ground or both grounds.
2. That the name of the advertiser who paid for the advertisement be published by the SABC just before the English news on 5fm between 18:00 and 20:00, within three days of the issuing of this order, unless the Directorate permits more time.
3. That the SABC, in the same notice, apologizes for having broadcast the contravening advertisement, duly identifying the advertisement.

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WENDY KAHN

National Director

SAJBD

14 February 2011

COMPLAINT TWO

Complaint two by M to the *Advertising Standards Authority* regarding the *South African Artists Against Apartheid* advert on SABC'S 5fm radio station

## Reception

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**From:**  
**Sent:** 05 February 2011 05:34 PM  
**To:** complaint@asasa.org.za  
**Subject:** Complaint : regard to Hate speech : Radio 5FM playing hateful content

To whom it may concern:

I would like to submit in writing my formal complaint against, the following parties;

- 1) SABC
- 2) RADIO 5FM
- 3) The band Faithless

The Reason i would like to submit a formal complaint of inciting hate, is due the Radio adverts that have been flighted on radio 5FM ( first appearing on the 4th of February 2011 - Just before 7:00pm), In which the Band faithless compares Israel to the Apartheid regime. Not only is this factually incorrect. It is also Libel and as such is negligent, irresponsible and amounts to a public attack on a "victim" that does not have the opportunity to either hear nor defend these acusations.

The call to boycott Israel, is not one ion which either of the fore mentioned parties, may have any motive other than to say that it is Racist, hateful and propaganda that is likley to create conflict and discourse amongst those that hear the message.

I would therefore implore the BCCSA to submit that the SABC should apologise to the public for allowing the hateful advert to be broadcast. They should allow for the true fact of the situation to be broadcast to the public and should request that the Band Faithless or the management of the band submit a formal apology to all fans in South africa.

The Band should also be fined a substantial amount.

This is a very serious matter and i sincerely hope that the BCCSA treat the complaint accordingly.

Kind regards

M