

IV. Advertising Standards Authority Ruling



Advertising Standards Authority of South Africa

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RULING OF THE ASA DIRECTORATE

In the matter between:

SOUTH AFRICAN JEWISH BOARD OF DEPUTEES

FIRST COMPLAINANT

M

SECOND COMPLAINANT

and

SOUTH AFRICAN ARTISTS AGAINST APARTHEID

RESPONDENT

5 July 2011

5FM FAITHLESS / SAJBD AND ANOTHER / 17358

Consumer complaints were lodged against a radio commercial for South African Artists Against Apartheid that was broadcast on the radio station 5FM.

The commercial features the voice of Dave Randall, lead singer of the group Faithless. He says,

"Hi, I'm Dave Randall from Faithless. Twenty 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 southafricanartistsagainstapartheid.com."

COMPLAINT

In essence, the first complainant submitted that the commercial is unclear as to the identity of the advertiser. A listener would not know whether Dave Randall or South African Artists against Apartheid is the advertiser. It added that the commercial is untrue, and not supported by any evidence to verify the implied claim that Israel is an apartheid state. Given that there is no finding that Israel is an apartheid state by the International Court of Criminal Justice. The commercial contains a lie which amounts to false propaganda. The advertiser along with the

SABC should apologise for having broadcast the commercial. Comments were also made about why the SABC's decision to publish this commercial may be in contravention of, *inter alia*, the Broadcasting Act.

The second complainant essentially submitted that the band Faithless compares Israel to an apartheid state and that this is factually incorrect and irresponsible. He added that the call to boycott Israel is racist and hateful. Furthermore, that the band and its management should formally apologise to all fans in South Africa.

Subsequent to this, various other consumer complaints were also received.

RELEVANT CLAUSES OF THE CODE OF ADVERTISING PRACTICE

In light of the complaint the following clauses of the Code were taken into account (it should be noted that :

- Section II, Clause 1 - Offensive advertising
- Section I, Clause 1.2 - Responsibility to the consumer
- Section 1, Clause 2.4 - Controversial subjects / Advocacy advertising
- Section II, Clause 3.4 - Discrimination
- Section II, Clause 4.1 - Substantiation
- Section II, Clause 4.2.1 - Misleading claims
- Procedural Guide, Clause 14 - Sanctions.

RESPONSE

Attorneys, Webber Wentzel on behalf of the respondent, *inter alia*, submitted that, the ASA does not have the jurisdiction to entertain a complaint against the respondent, as it is not affiliated with any organisation that is a member of the ASA nor is it a licensee as defined by the Electronic Communications Act. It is therefore not required to adhere to the Code of Advertising Practice.

It is a voluntary collective of artists and volunteers who are committed to furthering human rights initiatives for the Palestinian people. It endorses the international campaign for boycott, divestment and sanctions against Israel. In 2010 the band Faithless declined to perform in Israel, after being called on to support the cultural boycott of Israel by Palestinian civil society, as well as Israelis who support the Palestinian struggle. Randall agreed to assist the respondent to raise public awareness about the cultural boycott through the commercial.

It submitted that the Directorate should take into account the fact that the commercial is a form of political speech which is protected by the right to freedom and expression under section 16 of the Constitution. Political expression is of particular importance in a democratic society because it has a bearing on each citizen's ability to formulate and convey information, ideas and opinions about issues of public importance. International campaigns such as the cultural boycott of Israel have a domestic implication as well, as South African citizens are entitled to express their views on the stance that should be adopted by South Africa in relation to Israel.

The suggestion by the complainant that the commercial does not disclose the identity of the advertiser is without foundation as it is clear that Randall is speaking in support of an association called South African Artists Against Apartheid. Listeners are provided with particulars on how to find out more about the association and the website details are clearly noted as "[\[www.southafricanartistsagainstapartheid.com\]](http://www.southafricanartistsagainstapartheid.com)"

The commercial clearly falls under the Clause 2.4 of the Code as it deals with a subject of controversy, namely the political situation in Israel with respect to the treatment of Palestinian people. Based on this, it cannot be judged on the sections of the Code that relate to misleading claims.

It disputed the complainant's allegation that the reference to Israel being an apartheid state can only be justified by a ruling of an International Court. Clearly, calling for the condemnation of what is happening in a country prior to any official declaration of that kind cannot be held to the requirements of substantiation as set out in the Code. The term "apartheid" is clearly not an exclusively legal term and is recognised as a descriptive term to refer to a situation that exhibits segregation and inequality. It is important to note that the international boycott of South Africa during apartheid and the awareness campaigns initiated were not executed as a result of a determination of an international court, but were efforts by a civil society to raise awareness about the situation in South Africa. The commercial is a similar initiative against the discriminatory policies of Israel, and has the support of Nobel Laureate Archbishop Desmond Tutu.

The commercial does not state that Israel is guilty of the crime of apartheid, but rather draws a comparison between Apartheid South Africa and Israel. At no stage does he expressly allege that Israel is guilty of the crime of apartheid. Mr Randall merely sees similarity in the structural racism, inequality and exclusion that characterised apartheid South Africa and the practices and conditions currently existing in Israel.

There have been numerous international missions that have observed the situation in Israel and the Occupied Palestinian Territories and have concluded that Israel is in contravention of International Law and is an apartheid state.

It further submitted reports by a UN Special Rapporteur on the Occupied Palestinian Territories as well as a copy of the International Court of Justice concerning the wall in Jerusalem. Further to this it submitted copious academic studies, newspaper articles and cartoons concerning Israel. Affidavits from Professor Uri Davis and former Minister Ronnie Kasrils were also attached.

The expression of the view that Israel is an apartheid state in contravention of international law is based on a sound factual matrix and the connection between apartheid South Africa and Israel has been made numerous times in the South African media. The claim is therefore justified and arguably capable of substantiation through this range of documentary sources.

Relating to the complaint lodged by the second complainant it submitted that the message by Randall makes an appeal to listeners to join the international boycott of Israel. The suggestion that the message incites hate is without foundation.

ASA DIRECTORATE RULING

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

Jurisdiction

The Directorate notes that the respondent does not believe that the ASA has the jurisdiction to adjudicate its advertising material.

The ASA's jurisdiction in all matters arises from the contract that it has entered with its members. In terms of this contract, the ASA has a duty to its members to investigate complaints relating to advertising, whether it is advertising that the members have produced or advertising

that the members may carry. (See for example the Appeal Committee decision in National Brands / Kwaliteit Biscuits (Pty) Ltd.)

The ASA wishes to point out that parties against whom complaints have been laid are invited by the ASA to participate in the adjudication of the complaints, by making submissions in regard thereto. The action that is taken by the ASA after making an adverse decision is to advise its members not to accept advertising that is in breach of the Code to which the members subscribe.

The ASA is therefore not only entitled to consider the respondent's advertising, it is in fact obliged to do so in terms of its contract with its members.

Identity of the advertiser

The first complainant submitted that the identity of the advertiser is not apparent in the commercial.

Clause 2.4 of Section I of the Code, states that all advertisements which may contain such controversial statements should cause no confusion as to the identity or status of the advertiser.

It also deserves mention that the Code defines an "advertiser" as the person at whose instance the advertising appears.

The respondent correctly submitted that the commercial conveys that Mr Randall is speaking in support of an association called "South African Artists Against Apartheid". This is clear at the end of the commercial when Mr Randall states, "Join the international boycott of Israel. I support southafricanartistsagainstapartheid.com".

It is therefore apparent Mr Randall is voicing support for a cause known as South African Artists Against Apartheid, and that the advertising appears at the instance of this organisation or cause.

Based on the above, the commercial is not in contravention of Clause 2.4 of Section I of the Code.

Misleading claims

The topic of the Middle East is clearly a highly controversial subject by its nature. given this, the Directorate is guided by the wording of Clause 2.4 of Section I, which states:

“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 recognisable as advertisements;
- cause no confusion as to the identity or status of advertiser;
- Whenever such information is not readily available state the advertiser's address and telephone number.”

This clause creates certain requirements for a claim to amount to a “controversial statement”. Once it has been established that the statement is controversial, the Directorate is barred from considering whether or not the advertising or claim is misleading.

As noted above, the issue canvassed in this commercial is clearly controversial, and accordingly, in terms of Clause 2.4 of Section I cannot be considered in terms of Clause 4.2.1 of Section II (Misleading claims) is concerned.

It is noted, however, that it can still be considered in terms of the remaining clauses of the Code.

Substantiation

Clause 4.1 of Section II states, *inter alia*, that advertisers should hold documentation on hand to substantiate all claims that are capable of objective verification. It further, requires that such substantiation emanate from, or be evaluated by an independent, credible expert in the field to which the claims relate.

The South African Jewish Board of Deputies submitted that the reference to Israel as an apartheid state is unsubstantiated. For a country to be found as an apartheid state, it would have been so as a determination by the International Criminal Court.

The respondent submitted extensive information ranging from a United Nations report to affidavits and various literature claiming that Israel is an apartheid state.

The essential question before the Directorate is whether the implied claim for Israel to be an apartheid state is a substantiable one. The complainants appear to be of the opinion that it is.

The Directorate acknowledges that the ongoing feud between the Palestinians and Israelis is often the subject of international news and that there are two extreme views on the matter. The first thing to keep in mind is that the commercial voices the opinions of the collective artistsagainstapartheid.com who have enlisted the assistance of Dave Randall to further its cause. A hypothetical reasonable listener would not overlook this fact.

The commercial states, *inter alia*, "Hi, I'm Dave Randall of 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 southafricanartistsagainstapartheid.com"

In the matter Nandos World Cup Over / L Walker / 16138 (27 October 2010), the Directorate considered a complaint against a commercial which stated, "I'm so glad I don't have to hear another vuvuzela and thanks to the government, everyone is broke and the crime and the corruption will be back. You know really, this country has gone from bad to..." The complainant objected to the insinuation that all white people were against vuvuzelas. The Directorate dismissed this aspect of the complaint and ruled that the commercial did not state facts about any race and therefore did not require truthful facts or statistics of research done on the issue.

A similar aspect can be applied to the matter at hand.

It is clear from the commercial that it is the opinion of Dave Randall. He says, *inter alia*, "I would not have played...", "Today I refuse...." and "I support..." While he may very well be drawing a possible analogy between Apartheid South Africa and Israel, he is clearly doing so in his capacity and as the face for the artistsagainstapartheid cause.

The commercial therefore communicates an opinion, not a fact, and as such should not be held to the same criteria for substantiation as general, efficacy or otherwise claims that are communicated as facts.

The Directorate therefore rejects the complainants' assertion that the implied claim that Israel is an apartheid state is one capable of being substantiated.

Clause 4.1 of Section II of the Code is therefore not applicable in this instance.

Discrimination

Clause 3.4 of Section II states that advertising shall not discriminate unless such discrimination is reasonable and justifiable in an open and democratic society.

Clause 4.17 of Section I defines discrimination as, *inter alia*, any act or omission that directly or indirectly imposes a burden or obligation, or withholds a benefit or opportunity from any persons based on, *inter alia*, ethnic or social origin, belief or culture. The aim of this clause is to prevent advertising that, for example, offers a special price on a specific item to men only. Such advertising may well be viewed as discriminatory on the basis of gender.

The commercial at issue, however, does not impose any burden or withhold any benefit from any ethnicity, belief or culture. It is a call to all listeners irrespective of their circumstances, race, gender and the like, to support the cause promoted. If anything, it is condemning the actions and events in Israel, rather than victimising or castigating people of Israeli origin. Put differently, it is condemning oppressive actions, not implying that all Israeli people are committing crimes against humanity by virtue of their social origin.

In light of the above, the commercial does not contravene Clause 3.4 of Section II of the Code.

Offensive advertising

Clause 1 of Section II states, *inter alia*, that advertising should not contain anything that is likely to cause serious or wide-spread or sectoral offence. The fact that a particular product, service or advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection to an advertisement for that product or service. It further specifically requires the Directorate to consider, *inter alia*, the context, medium, public interest and social concern.

The Directorate therefore needs to objectively determine the impact of the commercial on the hypothetical reasonable person who is neither hypercritical nor hypersensitive.

In this regard, it cannot be ignored that the commercial is clearly expressing a personal view shared not only by Mr Randall, but also by South African Artists Against Apartheid. It goes without saying that the call for support is aimed at likeminded people, who share this view. This

is significant in that the commercial is clearly aimed at generating discussion amid the controversy.

With this in mind, it stands to reason that the people who are likely to be offended by this commercial are likely to hold the view that the current situation and action in Israel is justifiable.

In Blue Ribbon Bread / JJ van Zyl & Another / 8618 (19 April 2007), where the respondent took a recognisable figure and used it to promote its product, the Directorate concluded that the commercial commented on the economic policies of Zimbabwe, which is a frequently publicised topic, featured in plays, heard in jokes and highlighted in political cartoons. The Directorate stated that the hypothetical reasonable consumer would not interpret the commercial as promoting or encouraging crime.

A similar aspect can be applied to the matter at hand.

It is not for the Directorate to proclaim as to which political ideals or actions are justifiable, or to base this decision on whether or not the actions in Israel are legitimate would be a fallacy.

However, when one considers that the commercial clearly expresses an opinion, which listeners are able to contextualise (perhaps after visiting the relevant website) and interpret in a manner they see fit, one cannot reach a conclusion that this commercial was intended to offend. There are no calls for violence, no derogatory comments flung about, and no implication that all Israelis should be condemned.

The commercial states the artists' reason for not performing in Israel, and invites people to join in the cause promoted. To use an analogy, it is not much different to an owner of a strip club creating an advertisement stating that he enjoys visiting strip clubs, and inviting others to visit his club too. Any hypothetically reasonable person, would interpret this commercial in this manner, and make up his or her own mind about the situation. The fact that some might not hold the same opinion does not mean that the advertising is in contravention of the requirements of the Code.

The Directorate acknowledges that the existence of the cause (South African Artists Against Apartheid) may cause discomfort with certain people. It must be remembered, however, that the likely listener would realise that the commercial voices the views of the group, and would therefore not be offended by it.

Given the above, the commercial is not in contravention of Clause 1 of Section II.

Clause 1.2 of Section I of the Code states that advertising should be prepared with a sense of responsibility to the consumer.

Given that the Directorate has dismissed all of the issues raised above, it cannot be argued that the commercial was prepared in an irresponsible manner.

In light of the above, the commercial does not contravene Clause 1.2 of Section I of the Code.

Sanctions

Clearly, it would not be reasonable to sanction the respondent when the objections were not accepted.

The request for sanctions is therefore dismissed.

The complaints are dismissed.



ON BEHALF OF THE ASA DIRECTORATE