

In proceedings pursuant to the Code of Advertising Standards Practice and Direct Marketing, April 2003

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The Complaints & Dispute Resolution Guide:

Colgate-Palmolive Sub Saharan Africa

Complainant

and

Reckitt Benckiser South Africa (Proprietary) Limited

Respondent

(Complaint No. 1 of 2016)

ASC JUDGMENT

12th May 2016

Before the Advertising Standards Committee comprising:

Moses Kemibaro– Chairman

Waithera Ng'ang'a

Shanna Mahihu

Ken Kariuki

Legal Secretary of the Committee: Bryan Muindi

THE PARTIES

1. The Complainant in this dispute is Colgate-Palmolive Sub Saharan Africa, a company located at Colgate House, Building No. 7, Maxwell Office Park, Magwa Crescent West, Westerfall City, Juskei View, 2090 and of P. O. Box 213, Bokburg, 1460, in the Republic of South Africa. The firm of Kaplan & Stratton Advocates represented the Complainant's position.
2. The Respondent in this dispute is Reckitt Benckiser South Africa (Proprietary) Limited, a company located at 8 Jet Park Road, Elandsfontein, 1406 in the Republic of South Africa. The firm of Spoor Fisher represented the Respondent's position.

THE COMPLAINT

3. The complaint dated 18th January, 2016 was filed by Kaplan & Stratton Advocates on behalf of the complainant. The complainant sells Protex anti-bacterial soaps in Kenya. Protex is a competitor of Reckitt-Benckiser's Dettol range products in the anti-bacterial soap market in Kenya. The complaint is against two Dettol products being the Dettol Bar Soap and the Dettol Liquid Hand wash Television advertisements and the use of the claims: **"She only Trusts Dettol to Protect her family from up to 100 illness causing germs..."** and **"Only a Dettol mom knows that ordinary soaps are not enough."** The complaint also relates to in-store and online promotion with the claim **"Kills 100 illness causing germs."**
4. The nature of the complaint is that the television advertisement:
 - i. is misleading;

- ii. violates several provisions of the Advertising Practice & Direct Marketing Code;
 - iii. gives the impression that the disclaimers in the advertisement cannot be taken into account as they are too small and only appear for a brief amount of time;
 - iv. it does not meet the typical characteristics of a cosmetic product;
 - v. it has a medicinal tenor;
 - vi. does not disclose whether research was conducted against both the Dettol Bar Soap and the Dettol Liquid Hand wash; and
 - vii. gives the impression that the '*100 illness causing germs*' are found on the skin.
5. The Complainant has therefore requested the ASC to investigate the above concerns, instruct the Respondent to withdraw the advertisement on TV and on social media sites and find that the advertisement is in breach of the Code, specifically:
- a. Clause 2.1.1 of Section IX (Antiseptics, Germicides and Disinfectants),
 - b. Clause 3.9 of Section IX (Cosmetics),
 - c. Clause 10.1 of Section IV,
 - d. Clause 10.2 of Section IV, and
 - e. Clause 10.3 of Section IV.
6. Reckitt Benckiser filed its response on the 6th of April 2016 refuting each of the Complainants claims.

THE ADVERTISING CODE

7. The complainant claims that the wording of the advertisement implies that the product is of a medicinal and not cosmetic nature.
8. A cosmetic product is defined as follows under Clause 3.1 of the Code:
- "any substance or preparation intended to be placed in contact with the various external parts of the human body (epidermis, hair system, nails, lips and external

genital organs) or with the teeth and mucous membranes of the oral cavity with the view exclusively or mainly of cleaning them, perfuming them changing their appearances and/or correcting body odors and/ or protecting them or keeping them in good condition, except where such cleaning, perfuming, protecting, changing, keeping or correcting is wholly for the purpose of treating or preventing diseases.

9. The use of words in a cosmetic context has the following typical characteristics:

- i. Temporary action;
 - Improvement of the appearance of the skin; -To be used regally to maintain the effect; and
 - The effect is aimed at grooming and enhancing the appearance of the skin texture.
- ii. On the other hand, the use of words in a medicinal context has the following typical
- iii. characteristics:
 - a. Permanent or drastic effect after completion of a treatment;
 - b. Healing or curative aspects;
 - c. To be used restrictively because of the potency of the treatment; -The effect is used as treatment of or relieving a disease condition.

10. It is common ground that the Dettol products forming part of the advertised product regimen are primarily cosmetics. The Complainant's position is that *'under local standards'* the phrase 'illness-causing' makes the advertisement more in consonant with a medicinal product than a cosmetic product. According to the Complainant, in emphasizing the phrase, Dettol protects one from 'up to 100 illness causing germs', the advert communicates to consumers that the product serves as an illness preventing 'medicine.' We note that the Complainant has not stated with any degree of clarity what *'local standards'* it refers to.

11. Clause 3.11 of Section IX of the Code makes it clear that cosmetic products, and particularly soaps, can also make claims implying health-related properties provided that these claims are substantiated. Clause 3.11.1 of Section XI (Cosmetics) states that "Any

claim implying health-related properties must have appropriate substantiation, for example, soaps, moisturizers and barrier creams." On this basis, a product with a primary cosmetic purpose (in this case cleaning) can have a secondary health-related function (in this case germ protection), provided that this is substantiated.

12. The Respondent have produced, as RB-4, a confidential report titled '*An evaluation of the antimicrobial properties of three test products using an in-vitro time-kill procedure*' which relates to the testing of the Dettol Bar soap and a confidential report titled, '*An evaluation of the antimicrobial properties of three test products using an in-vitro time-kill procedure*' which relates to the testing of the Dettol Liquid Hand Wash as RB-5. In addition, they have included the expert report of Mr. Knowlton, which was submitted to the Advertising Standards Authority of South Africa on a complaint by Colgate against a Dettol advertisement virtually identical to the one before us and which concludes that in his expert opinion, "*the claim of 'she only trusts Dettol to protect her family from up to 100 illness-causing germs...'* is adequately substantiated as required by Clause 4.1 of Section II of the ASA Code." Clause 4.1 of Section II of the ASA Code is similar to Clause 10.2 of Section VI of the ASBK Code and we accept that his expert opinion remains the same in this context.

13. We note however, from the confidential reports RB-4, RB-5 and the expert opinion of Mr. Knowlton that the scientific studies conducted by the laboratory that generated the reports demonstrates lower effective antimicrobial activity against a number of illness causing microorganisms in the case of Dettol Bar Soap than in the case of Dettol Liquid Hand Soap. Therefore, it is clear to us that whilst the claim "*up to 100 illness causing germs*" may be true in the case of Dettol Liquid Hand soap, it cannot be said to be true in the case of Dettol Hand Soap. The advert does not suggest to the consumer that s/he should use the Dettol Bar soap and Dettol Liquid Hand soap in combination as opined by Mr. Knowlton in his report.

14. We therefore hold that as far as Dettol Hand Soap is concerned, the "*up to 100*" illness causing germs should be omitted as it cannot be substantiated. If the Respondent wishes

to continue using the same advert for both Dettol Hand Soap and Dettol Liquid Hand soap, then the advert should be re-worded to '**illness causing germs...**' and the claim "up to 100" be deleted.

15. The Dettol advert contains a disclaimer that reads as follows:

"Reference: Data on file. Tested on Dettol Liquid Hand Wash and Dettol Original Bar Soap against 100 illness-causing germs."

16. The Complainant's position is that *"the disclaimers are so tiny and disappear from the screen so quickly that no reasonable viewer even from a close distance will be able to fully read and understand them."* On this premise, it is the Complainant's position that the advertisement misleads the general public unless such claims can be substantiated.

17. The Respondent has, on its part, defended the disclaimers and stated that the disclaimers do not qualify the claims, they merely draw consumers' attention to the fact that tests have been conducted and data is on file to support the claims. The ASC is mindful that the Code, at Clause 2.5 of Appendix 2 states that "Detailed evidence should be held ready to supply to the ASBK in support of any evidence to tests, whether carried out by the advertising or otherwise." The obligation placed by the Code is for an advertiser to readily defend any claim by having detailed evidence on file. The ASC cannot place any additional burden on advertisers that are absent from the Code. We are inclined to agree with the Respondent. There is no requirement in Clause 2.1.1 that evidence must be disclosed at the time or on the face of an advertisement. In fact, having had sight of the confidential scientific reports submitted by the Respondent that runs to over a hundred pages, we are satisfied that requiring a detailed disclaimer would create a real and substantial additional burden for advertisers.

18. There is therefore no merit to this aspect of the complaint.

Clause 10.2 of Section VI

19. Clause 10. 2- "Substantiation", stipulates as follows:

"All advertisements should be readily backed with relevant documentation and evidence to establish and substantiate all descriptions, claims and comparisons which relate to matters of objectively ascertainable fact, prior to acceptance for publication or transmission. "

20. The Complaint is against the use of the words '*...to protect her family from up to 100 illness causing germs*' and '*Only a Dettol mom knows that ordinary soaps are not enough.*' The complainant claims that these remarks are likely to mislead the consumer into thinking that:

- The two products were each tested and it was proven that both of them protect against 100 different types of illnesses causing germs;
- The illness-causing germs are actually 100 individual types or species of germs;
- The 100 illness-causing germs are found on the skin and the two products are able to wipe them out completely from the skin; and
- The use of Dettol soap offers more benefits *vis-a-vis* other hygienic soaps.

21. The Complainant has put forward an extremely technical argument focusing on the scientific distinction between "species" and "strains" of microorganisms. The Complainant's position is that a 'species', being a collection of strains, is much broader than a 'strain' and that the reasonable consumer is likely to interpret the advert as protecting from up to 100 illness causing species of germs found on the skin. As the Respondent points out, the definition of a "germ", in the Oxford English Dictionary, is "a micro-organism, esp. one which causes disease". Thus, by definition, germs are disease- or illness-causing. The inclusion of these words therefore does not change the reference to germs from a cosmetic to a medicinal context.

22. As we have previously held in **Colgate- Palmolive East West Africa Region (Pty) Ltd v Reckitt Benkiser South Africa (Pty) Ltd (16 April 2013)**:

'It is trite that advertising should be considered from the viewpoint of the hypothetical reasonable viewer or listener, who is a normal, balanced, right thinking person who is neither hypercritical nor over sensitive.'

23. We are persuaded by the Respondent's argument that, the hypothetical reasonably person, who is not a medical professional, will not distinguish, on a scientific level, between the various "species" or "strains" of influenza. They will simply know that the different illnesses which can be caused by these strains are spread by the transfer of "germs".

24. We further reject the contention by the Complainant that the claim implies that there are 100 illness- causing germs are found on the skin. As the TV advert clearly shows, the washing away of the germs on the child's arms only takes place after she has been rolling and playing around on the grass. Thus, it is not only germs that would naturally be found on the skin that are represented in the advertisement but also the germs transferred to the child's skin after she plays on the grass.

25. The Respondent points out that many *hygiene soaps* make use of claims on germ protection and that if the ASC were to make a ruling to the contrary and find that the Respondent's claims are not made in a context appropriate for "anti-septic soaps" or hygiene soaps, this would have a detrimental effect on the industry as a whole as advertisements for hygiene soaps would not be able to use secondary health claims as provided for in terms of Clause 1.2 of Section IX (Antiseptics, Germicides and Disinfectants) and Appendix 2 to the Code, thereby effectively rendering these sections redundant, and preventing advertisers from communicating factually correct and substantiated statements regarding the efficacy of their hygiene soaps to consumers.

Whilst we agree with the generality of this statement, we are mindful that we have already ruled on the “‘up to 100’ illness causing germs” claim.

26. We find that the claim that the advertised Dettol products protect from "up to 100 illness causing germs", where the broad term "germs" is understood to include different strains of the same species, is not misleading. However, as we have already found, the “up to 100” phrase should be omitted as it has not been substantiated.

Clause 10.3 of Section VI

27. 10.3 Misleading Claims

“An advertisement shall not contain any statement or visual presentation which, directly or by implication, omission, ambiguity or exaggerated claim, is likely to mislead the consumers about the product being advertised, the advertiser or about any other product or advertiser, in particular with regard to:

10.3.1 Characteristics such as nature, composition, method and date of manufacture and expiry, fitness for purpose, range of use, quantity, commercial or geographic origin;”

28. The complainant states that the claim that, *'only a Dettol mum knows that ordinary soaps are not enough...'* is an exclusivity claim that communicates to the consumers that other users of other hygienic soaps such as Protex do not realize that 'ordinary soaps are not enough.' It is their position that this claim is likely to mislead consumers that Dettol offers more protection than other hygienic soaps.

29. The Respondent on the other hand points out that the advert clearly depicts 3 kinds of mums, *'the paranoid mum'*, *'the cautious mum'* and *'the Dettol mum'*. When referring to the "Dettol Mom" the voice over states that "Only a Dettol Mom knows that ordinary soaps are not enough. She only trusts Dettol to protect her family from up to 100 illness-causing germs." The word "only", which features in the claim "Only a Dettol Mom knows

that ordinary soaps are not enough...", in the context of the commercial, is indicating that out the three kinds of mom discussed, it is only the "Dettol Mom" (rather than the "Paranoid Mom" or "Cautious Mom") who knows that ordinary soaps (i.e. soaps that do not offer a secondary germ protection) are not enough and that a hygiene soap, such as the advertised products, should be used. The Respondent submits that the hypothetical reasonable consumer, when considering the claim in the context of the commercial, would never interpret it to mean that the advertised Dettol products have more benefits than other hygiene soaps. Rather, the claim would be interpreted to mean that ordinary soaps do not offer protection against illness-causing germs and that moms using the Dettol product regimen (i.e. "Dettol Moms") trust it to protect their families from up to 100 illness-causing germs.

30. In our view, the reasonable consumer is able to distinguish between ordinary soaps and hygienic soaps and upon hearing that "only a Dettol mum knows that *ordinary soaps* are not enough" is unlikely to expand its meaning to mean that Dettol is superior to all other *hygienic* soaps, Protex included. However, we agree that the term '*only*' is likely to mislead the consumer and should be omitted to simply read, 'A Dettol mum knows...' so as to be clear that the claim is restricted to the three mum's depicted in the advert. Once this is done, the next claim, 'she only trusts Dettol' will be properly contextualized.

31. We therefore hold that the phrase '*Only*' is likely to mislead the consumer as set out above and ought to be removed from the sentence '**Only** a Dettol mum knows that *ordinary soaps are not enough*'

ADDITIONAL MATTERS

32. The Complaint also objected to in- store and online promotion containing the claim, "**Kills 100 illness causing germs.**" However, the ASC notes that the in- store and online promotion are completely different commercials from the Television advert. The phrase

“Kills 100 illness causing germs” does not appear anywhere in the television advert and in any event, the Complainant has not addressed itself with sufficient clarity on the claim “Kills 100 illness causing germs,” save for mentioning it in paragraph 4 and 27 of the Complaint. As such, there is insufficient information before us to investigate additional advertisements. In this regard, we are persuaded by the ruling of the Advertising Authority of South Africa in the matter of **Vanish/Unilever 2014-694F (13 May 2014)** where it quoted with approval its previous decision in **Promato/HPA/9668 (2 Jun 2008)** in which it was decided *inter alia*:

‘Although the Directorate attempts to investigate any complaint where the grounds for objecting are obvious, it cannot investigate a complaint that does not set out clearly a basis for the objection, as this would prejudice either party. The Directorate must abide by the audi alteram partem.’

33. We also note with concern that the parties had previously attempted to settle this matter amicably and exchanged confidential correspondence to this end. The Complainants have disclosed privileged information contained in a ‘*Without Prejudice*’ letter from the Respondent to the Complainant. It is trite law that ‘without prejudice’ communication is privileged and cannot be disclosed or relied upon by one party, to the detriment of the other in litigious settings unless the other party so consents to its disclosure. We accordingly formally admonish the Complainant’s advocates for disclosing the said letter and will not address any of its contents or effects.


CONCLUSION

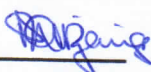
34. The upshot to the above is that the Advertisement should be reworded to either remove the ‘*up to 100*’ claim from the ‘illness causing germs’ sentence or else to distinguish that the claim only relates to Dettol Hand Wash and not Dettol Hand Soap. In the alternative, the advertisement may make it clear that the consumer is to use the Dettol bar soap and Dettol Liquid Hand Soap in combination in order to achieve protection from ‘up to 100


illness causing germs'. We also rule that the term 'Only' should be removed from the 'A Dettol mum knows...' claim in order not to mislead the consumer.

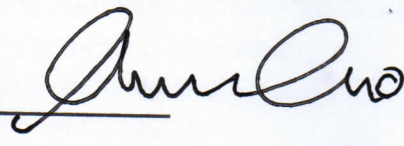
35. The Respondent is hereby directed to stop running the TV advert in its current format within 20 days of this ruling and to amend it/ ensure all future advertisements conform to the terms outlined above.
36. The rest of the Complaints are dismissed as set out herein.
37. Each party shall bear its costs.
38. Both parties are at liberty to appeal to the Standards Appeal Council on points of Law within 30 days of receipt of this ruling.

DELIVERED IN NAIROBI THIS 12TH DAY OF MAY 2016

Signed MOSES KEMIGARO 

Signed WATHORA NANCY 

Signed KEN KARIUKI 

Signed Brian Mundi 

Signed SHANNA MATHHY 