

In proceedings pursuant to the Code of Advertising Standards Practice and Direct Marketing, April 2003 & The Complaints & Dispute Resolution Guide:

Kimberly- Clark (KCSSA) East Africa Limited - **Complainant**

-And-

Proctor & Gamble international Operations Limited - **Respondent**

ASC JUDGMENT
14th October 2016

Before the Advertising Standards Committee comprising:

Moses Kemibaro- Chairman

Carol Wanyama,

Peter Wanjama,

Shanna Mahihu

Legal Secretary of the Committee: Bryan Muindi, MCI Arb.

THE PARTIES

1. The Complainant in this dispute is Kimberly- Clark (KCSSA) East Africa Limited - the manufacturers and owner of Huggies[®] baby diapers, operating in Kenya through a company located at Maasai Road, off Mombasa Road, Behind Libra House. 78378, 00507 (Nairobi) Kenya.
2. The Respondent in this dispute is Proctor & Gamble International Operations (P & G) who are the manufacturers and owners of Pampers[®] operating in Kenya through a company located at Westlands Road, Purshottam Place, 7th Floor Nairobi Kenya. P.O Box 30454-00100. The law firm of Bowman Associates represented the Respondent's Position.

THE COMPLAINT

3. The Complainant lodged three complaints, one dated 25th May 2016, one dated 22nd June 2016 and a third dated 15th July 2016 which are, but for the different dates, for all intents and purposes, carbon copies of each other and shall all be treated as one comprehensive complaint.
4. The Complainant and the Respondent both operate in the baby care products Industry in Kenya. In particular, the complainant operates the Huggies[®] baby diaper brand in Kenya and is a competitor of the Respondent's Pampers[®] baby diaper. The complaint is with respect to Pampers[®] baby dry (*Pampers*) in-store marketing collateral with regards to claims made in respect to *Pampers* baby-dry diapers as "**Kenya's Driest Diaper**" (*the claim*).
5. The Complainant argued that the claim was not only made with respect to the quality of dryness of Pampers diapers but also constituted a superiority claim as compared to the feature and quality of the dryness of competitor brands of diapers in Kenya. The Complainant urged the ASC to find that the claim was strong and absolute which was likely to be interpreted by the consumers to be that no diaper on the Kenyan market was drier than pampers. They further stated that the claim did not

contain a disclaimer or qualifier to narrow down its interpretation thus sending a message that was false, misleading and exploited the credulity of consumers in breach of the following provisions of the Code of Advertising Practice ('the code'):

- a. Clause 6 ("Advertising principles: Basic Principles") Section VI;
 - b. Clause 10 (Truthfulness/ Substantiation) Section VI;
 - c. Clause 10.3 (Misleading Claims) Section VI and
 - d. Clause 12.1 (Comparative advertising) Section VII of the code.
6. The Complainant has therefore requested the ASC to investigate the above claim and that it being an objective claim instruct the Respondent to substantiate pursuant to Clause 10.2 of Section VI of the Code and any form non-compliance to result in withdrawal of the claim from all marketing collateral wherever it appears in Kenya and to desist from using this claim going forward.
7. The Respondent on its part, filed a comprehensive response on the 9th of September 2016 refuting the Complainants claims and attached the following annexures:
- a. Annexure PG 1 Formal letters exchanges between the parties in a 2003 complaint
 - b. Annexure PG 2.1 Confidential evaluation report
 - c. Annexure PG 2.2 Confidential accreditation certificate
 - d. Annexure PG 3.1 Hy-Tec accreditation certificate
 - e. Annexure PG 3.2 Confidential test methodology credibility confirmation letter
 - f. Annexure PG 4 Confidential laboratory photographs
 - g. Annexure PG 5 EDANA Guidelines for testing of baby diapers
 - h. Annexure PG 6.1 Confidential market share data
 - i. Annexure PG 6.2 Confidential Nielsen volume share data
 - j. Annexure PG 7 Confidential evaluation report from Catalyst Research & Strategy
8. The ASC studied and considered all the documents filed by both parties.

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NATURE OF COMPLAINT

9. The nature of the Complaint is that the claim breaches the following provisions of the Code of Advertising Practice ('the code'):
- Clause 6 ("Advertising principles: Basic Principles") Section VI;
 - Clause 10 (Truthfulness/ Substantiation) Section VI;
 - Clause 10.3 (Misleading Claims) Section VI and
 - Clause 12.1 (Comparative advertising) Section VII of the code.

APPLICABLE CLAUSES OF THE CODE

10. Clause 6 of Section VI of the code is a general Clause that states in part *'Advertisements should conform to the four basic principles that all advertisements be legal, decent, honest and truthful.'* Aside from the mentioning Clause 6 in the preamble to the Complaint, the Complainant has not mentioned or at all submitted with any clarity or particulars, how the claim by Pampers has breached this clause of the Code.
11. Clause 10.1 of Section VI of the Code states *'An advertisement shall not mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise.'* Once again, aside from the mention of Clause 10.1 in the preamble to the Complaint, the Complainant has not mentioned or at all submitted with any clarity or particulars, how the claim by Pampers has breached this clause of the Code.
12. Clause 10.3 of Section VI of the Code states, *'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...'* The Complainant has made reference to Clause 10.3 in the body of the complaint which will be considered.

13. Clause 12.1 of Section VII of the Code is on comparative advertising and it provides, *‘Advertisements in which factual comparisons are made between products and/or services are permitted provided that...*

12.1.2 Only facts capable of substantiation are used as governed by this Code;

...

12.14 he claims are not misleading or confusing as governed by this Code;’

14. The Complainant has made reference in the body of the Complaint to Clause 12.1.2 and 12.1.4 which will be considered.

ASSESSMENT

15. Clause 6.5 of the Procedural Guide of the Code requires that complaints provide the specific grounds relied on and the ASC has previously ruled in the **Colgate- Palmolive Sub-Saharan Africa Ltd v Reckitt Benkiser South Africa (Proprietary) Ltd (12th May 2016)** that

‘Although the Committee 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.’

16. Whilst we note that the Complainant was not represented by an Advocate as the Respondent was, nor is it compulsory to seek such representation, it would perhaps have served the Complainant to seek such advice, if for nothing else, to ensure its complaint was drafted concisely and its precise grounds of objection to the claim framed succinctly and supported by all necessary documentation.

17. The Code frowns upon a complainant merely making vague reference to the clauses it takes issue with, without providing sufficient details for the Respondent to formulate a detailed understanding of the case sought to be made out. By narrowing the dispute to precise issues, a properly drafted and appropriately succinct complaint will assist the ASC define and identify the issues to be determined and reduce the expense and delay for the Responding party who must necessarily select the supporting evidence in mounting its defense.

18. The Respondent has urged the ASC to reject the claim in its entirety as it fails to state the grounds on which the complaint is made, is unmotivated, based on flawed assumption and does not have a reasonable prospect of success. However, this being an alternative dispute resolution forum, the ASC is minded to exercise leniency and to determine the discernable complaint raised by the Complainant.

19. As mentioned in the previous section and arising from the above, the only clauses which the complainant has made specific and not general reference to and which the ASC will therefore consider are clauses 10.3, 12.1 (12.1.2 and 12.14).

a. Clause 10.3 of Section VI – Misleading Claims

20. Citing **Clause 10.3 of Section VI**, which deals with claims that by implication, ambiguity or exaggeration are likely to mislead the consumer about the product being claimed, the Complainant submits that ‘the claim’ miscommunicates to consumers that there is no other diaper in Kenya that is as dry as their product. They submit that the claim is not only made with respect to the quality of dryness of Pampers’ diapers but also constitute a superiority claim as compared to the quality of the dryness of other competitor brands in Kenya.

21. Contrary to the assertion by the complainant that, *‘This claim does not contain a disclaimer or qualifier which may clarify or narrow the interpretation of such claims by a consumer’* the picture of shelf picture of the Pampers product reveals an asterisk next to the word driest*. As pointed out by the Respondent, the disclaimer actually reads as follows:

a. **Claim:** “Kenya’s driest* diaper with stretchy sides”

b. **Disclaimer:** “* vs. competitive diapers”

22. There is therefore no ambiguity or exaggeration likely to mislead a consumer, rather, a comparative claim is made. Although huggies is not named specifically in the disclaimer, the ASC finds that the average consumer of baby diapers would readily identify Huggies as a competitive diaper.

23. Clause 12 of the Code allows for comparative advertising so long as it is not disparaging and the products compared have similar characteristics. The question that flows from this is whether the claim makes factual comparisons and whether those can be substantiated.

24. The Complainant is correct that such a claim is factual and capable of objective testing and therefore, to fulfil the verifiability requirements of the Code, the Respondent is required to substantiate the claim.

25. It is important to highlight that the Code does not require an advertiser to provide competitors or the market at large with any substantiation for claims made, rather, to provide to this body, upon request of such substantiation. In this regard, Clause 10.2 of the Code provides:

“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.”

And at 10.2.3

“Subject to what is stated in below, advertisers will be required to provide substantiation which emanates from a credible independent research entity acceptable to the ASBK. In the event that substantiation is provided it will be necessary to satisfy to the ASC, unless the committee on its own volition accepts as credible, the credentials of the source.”

26. To this end, the Respondents have provided the ASC with a confidential report marked Annexure PG 2.1 which is a diaper performance Assessment Lab Test carried out by SGS Institut Frensenius in Germany.

27. The Complainant provided a table showing internal average rewet data after the 3rd gush and stated in their Complaint that *‘to demonstrate the key feature of dryness of a diaper, Kimberly-Clark conducted laboratory tests (“Rewet results”) of various competitive brands across various diapers on the market in Kenya...in this context, the quicker the absorption rate and the less fluid flows back through the diaper, the better, as this will ensure the user of the diaper (here, a baby) stays drier...The purpose of this test is to determine how quickly the fluid is absorbed into the product and how much fluid passes back through the liner after pressure is applied. This method uses a cradle technique- not putting the product on a flat surface- to simulate realistic use.’* (Emphasis ours)

28. The Respondent on its part submitted a detailed explanation of the rewet method as measuring: *“the ability of the diaper to lock away liquid over extended periods of time. During this process, the diaper being tested is loaded under pressure with several gushes of a saline solution, each followed by an equilibrium time to stimulate a baby’s urination in-use. Following this, the collagen layers are pressed on top of the diaper core (again under pressure) which stimulates a baby’s weight on the diaper...the amount of liquid absorbed by the collagen material is then weighed and reported as a rewet value. A lower rewet value means that a diaper releases liquid to the diaper surface under pressure and thus denotes a superior ability of the diaper to lock inside the core and help keep the baby’s skin dry.”* (Emphasis ours)
29. Annexure PG 2.1 being the scientific report on diaper dryness performance test using the so-called rewet test affirmed the explanation provided by the Respondent on the workings and importance of a lower re-wet value. SGS Institut Frensenius conducted multiple analysis for each test product and the data collected showed that Pampers Baby Dry rewet value was significantly lower than Huggies Gold, Huggies Dry Comfort and other named diapers in the study and provided a statistical confidence level for the claim of Pampers Baby-Dry Superiority of 95%. The study shows that when assessing the rewet measurements of the competitive diapers, the higher the index value, the less dry the product so that if a diaper’s competitive rewet value is 180, that means that the diaper is 1.8 times wetter than that of Pampers Baby-dry.
30. The rewet test by SGS Institut Frensenius was also verified by Hygiene Technology GmbH (Hy-Tec), an accredited, independent external laboratory and testing institute specializing *inter alia*, in diaper performance testing and the methodologies thereto. The Hy-Tec data report also endorses their comparative claims and therefore substantiate their claims.
31. The EDANA industry guidelines for the testing of baby diapers, version 2.0- April 2016 were developed by a group of leading manufacturers of baby diapers and leading test institutes in testing baby diapers. Both the Complainant and the Respondent are member companies whilst SGS Institut Frensenius and Hy-Tec are both member testing institutes to Edana. The guidelines provide minimum standards and contents of technical and performance at para 10 of the guidelines.
32. The ASC having considered the full Annexures PG 2 and PG 3 both of which are confidential as well as the EDANA industry guidelines, accepts the SGS Institut Frensenius, a body accredited by

the German Accreditation Body in the area of diaper testing and EDANA, as a credible independent research entity and therefore accepts the results of Annexure PG 2.1 as outlined in paragraph 28.

33. The Respondents further have also submitted a confidential market report marked Annexure PG 6.1 that outlines the diaper market share in Kenya and confirms that the brands tested represent almost 80% of the entire diaper market in Kenya, the rest being minor competitors with no stable presence in the market and with low market penetration. The ASC accepts that the selection of competitive diaper brands that are ordinarily on shelves in stores across the country as a sufficient sampling of the market and a fair representation of competitive baby diaper brands.

34. Whilst the Complainant refers to its own internal analysis using its internal Rewet test- it has not produced this report before the ASC for examination by the committee or otherwise. The internal test rewet formed the part of the substance of this claim and the complainants should have availed the full report in confidence or otherwise. Further, clause 10.2.4 of the Code provides that:

“Advertisers should ensure that in-house research or other documentation emanating from within the advertiser’s company closely associated companies and submitted as substantiation is evaluated and confirmed by a credible independent research entity acceptable to ASBK.”

35. We further note that the Complainant had asked the Respondents on previous occasion to give it details of the methodology used for its study’s and its results as well as results from consumer preference studies. In fact, the complainant had filed a similar complaint in 2013 with the Association of Practitioners in Advertising which complaint touched on Pampers® TV and point of sale advert, which complaint stated, *‘we request, in terms of Section VI, clause 10.2, that Pampers provide substantiation (which emanates from a credible research entity) on the following claims...’* but withdrew it upon being provided with a limited rewet report. The Respondents have made heavy water of this at paragraph 11 of their Response and whilst *prima facie* there are similarities between the 2013 complaint and the current complaint, that is common in comparative advertising complaints as the ASC is well aware. If, however, the Complainant did in fact institute this complaint with the intent of accessing and acquiring confidential testing methodology or data, then the ASC would castigate such an attempt and refuse to have its processes misused for ulterior

motives. It goes without saying that the ASC shall not disclose any of the confidential material provided by the Respondent or unduly reveal too much of the finer details in any confidential report as per Clause 6.7 of Section VI of the Code and Clause 13 of the Procedural Guide.

DECISION

The ASC would like to thank both parties for their submissions, commitment to upholding the utmost professional standards in advertising and for their patience in having this complaint determined.

The upshot of the foregoing deliberations is that the ASC issues the following ruling and directions:

- i. The complaint by the KCSSA East Africa in respect of Pampers Baby Dry is dismissed. The ASC holds that P & G has adequately substantiated the claim that their product is “Kenya’s driest diaper.”
- ii. The claim by P & G in its marketing collateral in Kenya can continue to run in its current form.
- iii. Each party shall bear its costs.
- iv. Both parties are at liberty to appeal this ruling to the Standards Appeal Council within 30 days of receipt of this ruling and with no further reference to the Advertising Standards Committee.

Delivered in Nairobi on this 14th day of October 2016

And

Signed by the Chair of the Advertising Standards Committee


