

BAT feels return of ASA's power

By [Andrew Papadopoulos](#)

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Despite news reports, the Advertising Standards Authority (ASA) is alive and kicking, with no hint of it going anywhere, as it asserts its power in the British American Tobacco (BAT) case.



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The first supposed blow to the ASA was a May 2016 High Court judgment in the case between Herbex and the ASA. This judgment placed in question the ASA's ability to adjudicate matters over advertisers who are not members of the ASA. This matter is currently on appeal before the Supreme Court of Appeal (SCA) and therefore the High Court decision is suspended, pending the SCA's ruling.

Following this judgment, in the latter part of 2016, the ASA went into voluntary business rescue in an effort to restructure the industry regulating body. Comment out of the ASA on this process was that it was a strategic decision and would not affect the operations of the organisation.

These two events did not instil much hope in the ASA and attracted many questions surrounding the relevance of the ASA as an industry watchdog.

However, it would seem that the ASA had different thoughts.

Ombudsman scheme proposed

A proposed advertising industry code and ombudsman scheme has been published for public comment, in terms of which the ASA is to be recognised and accredited as an ombudsman for alternative dispute resolution of complaints pertaining to advertising. In other words, the ASA has applied for formalisation of its 'Industry Code', in terms of the Consumer Protection Act, which would thereby give the ASA the teeth it has been missing in its current form. This would also remove any question about the ASA's jurisdiction and avoid cases such as the Herbex judgment.

The proposed Industry Code mainly concerns the consumer-centric provisions (for example, those relating to misleading claims and untruthful advertisements) and omits those competitor provisions relating to advertisements, which imitate and take advantage of another's advertising goodwill. Therefore, once the Industry Code is enacted, it is proposed that all provisions, which have been excluded in the Industry Code, will be dealt with in terms of the ASA's current advertising code. It is further proposed that the Industry Code (or some other legislation) will later deal with the competitor protection provisions in the same way.

So change appears to be on the horizon for the ASA... but what is happening in the meantime? Surely would-be advertising infringers do not just pause their unlawful activities while the ASA gets its house in order. Well, following a recent judgment out of the Final Appeal Committee of the ASA, it would appear that the ASA has not missed a step.

Tobacco dispute

Since December 2015, tobacco manufacturers Leonard Dingler (part of the Philip Morris group) and British American Tobacco (BAT) have been embroiled in a bitter battle over the latter's entrant to the pipe tobacco market, Africa Gold. The dispute went through all levels of the ASA (together with numerous interlocutory applications being launched) and has concluded in a ruling handed down on 7 March 2017, with BAT being ordered to immediately cease use of its Africa Gold advertisements and packaging on account because they are too close to Leonard Dingler's famous Boxer pipe tobacco

packaging.



Leonard Dingler's original complaint was because the Africa Gold packaging and get-up is too close to the well-known Boxer pipe tobacco.

The Final Appeal Committee of the ASA agreed with Leonard Dingler and found that BAT's Africa Gold packaging, which was launched in August 2015, imitates and takes advantage of the advertising goodwill subsisting in the Boxer product and packaging design. The ASA held that BAT had intentionally designed the Africa Gold packaging to utilise the same combination of key elements to those of the Boxer packaging, which has been in the South African market for over 95 years, with hardly any changes to the pack design.



An earlier decision by the Advertising Industry Tribunal of the ASA also found that BAT's use of the words 'Original', 'Makoya' and 'No. 1' on the Africa Gold packaging was likely to mislead the relevant consumers and likely to exacerbate the impact of the imitation.

During proceedings, BAT attempted to challenge the ASA's jurisdiction to adjudicate the matter (following the Herbex judgment), but BAT later withdrew this defence because it is a member of the Consumer Goods Council of South Africa (CGCSA), which is a member of the ASA. The CGCSA actively advocates for the ASA, stating on its website, "The regulation of advertising is essential for the country and ASA has been the voluntary regulator... The CGCSA members place consumer protection at the heart of its business, recognizing that consumers have the right to transparency, to fair business practices and to the right of redress amongst others..."

The ASA ruled that BAT's current packaging, which includes all of its point of sale material, must be withdrawn and the process to withdraw the packaging must be actioned with immediate effect. BAT was also ordered to pay Leonard Dingler's costs in the proceedings.

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