

Before the Appeals Panel of the Press Council of South Africa

In the matter between:

Case number: 8834/03/2021

Southern African Alcohol

Policy Alliance (SAAPA)

Appellant

and

The Sunday Times

Respondent

FINDINGS

Introduction and background

- 1) At the virtual hearing held on the 11th of October 2021 the appellant was represented by Mr N Ferreira and Ms C Du Toit and the respondent was represented by Mr W de Klerk and Ms T Khunou of Willem de Klerk Attorneys. We are grateful to them for their comprehensive and thoughtful heads of argument and for their oral submissions.
- 2) SAAPA lodged a complaint with the Press Council about a spread of three articles that was published on Page 7 of the Sunday Times on the 14th of February 2021. The headlines read *'How South Africans defied the booze ban'*, *'Alcohol industry counts lockdown losses'*, and *'Sensible drinking is a joint effort.'* The authors of the articles were Amanda Khoza, a journalist employed by the respondent, a staff reporter and by Sibani Mngadi, chair of the South African Liquor Brand Owners Association (SALBA). In essence, SAAPA complained that the respondent breached Clause 2 of

the Press Code by accepting payment from SALBA in exchange for favourable coverage. The appellant further contended that the respondent misleadingly disguised an advertorial piece as reportage.

- 3) The respondent initially took the view that there were sufficient indicators on the Page 7 to alert the reasonable reader that this was an advertorial and sponsored feature. Reference was made to the banner on the page that read '*Editorial Partnership*'; a red blob on the page that stated '*a Partnership between Sunday Times and SALBA*' and a note at the bottom of the page which stated '*This project was paid for by the South African Liquor Brand Owners Association (SALBA) and reported by the Sunday Times*'. This, according to Ms Susan Smuts of the Sunday Times, clearly indicated that the contents of the page were 'sympathetic to the interests of the sponsor and that it should be read with the appropriate caution.'¹
- 4) In the argument before us, Mr De Klerk acknowledged that the contents of Page 7 were uncritical and he described it as puffery. There was clearly no attempt to engage in any meaningful manner with the various complicated policy choices relating to the lockdown of the liquor industry.

The essence of the findings of the Deputy Press Ombud

- 5) The Deputy Press Ombud (DPO), Mr Tyrone August, identified the key issue before him as whether the respondent compromised its editorial independence by accepting payment for the publication and whether this amounted to a conflict of interest. The DPO found that the banner and the red blob were vague and the explanatory note at the bottom of the page was placed in the least conspicuous position on the page and could be interpreted as referring to the article above it and not to the page in its entirety. The DPO went on to find that by 'assigning reporting staff to write two articles and treating these as conventional news stories, it creates the impression that these articles were independently produced news stories.'²

¹ . Para 2.11 of the Findings of the press Ombud

² . Para 4 of the findings of the Ombud.

- 6) As a consequence of this and other factors, the DPO found that Page 7 did not clearly differentiate between paid copy and editorial copy and thus violated Clauses 2.3 and 2.4 of the Press Code. He concluded that as the contents of Page 7 was paid or sponsored copy, he did not have to consider whether the material published was in breach of Clause 2.1 and 2.2 'which apply in the main to editorial content'. The DPO went on to find that these 'transgressions raise doubts about the independence of the newspaper, for which the Sunday Times must apologise to its readers'.

- 7) Judge Ngoepe granted leave to appeal primarily on the basis that it is reasonably possible that Clause 2(1) of the Press Code may apply to content other than editorial content.

Contentions of the Parties

- 8) It needs to be emphasised that the respondent did not challenge any of the findings of the DPO. Further it is clear that the appellant did not challenge the contention that the contents of Page 7 did not violate any provision of the Press Code, other than Clause 2. The appellant appeals against the ruling of the DPO that it was unnecessary to consider whether Clauses 2.1 and 2.2 were breached. It contended that the material published on Page 7 constituted reporting and coverage and that the respondent accepted payment in exchange for the coverage. It further submitted that it is clear from the wording of Clause 2.1 that its scope and ambit was not restricted to reportage but that it included advertorials and sponsored material.

- 9) The appellant argued that the contents of Page 7 was specifically composed so as promote the policy positions of the liquor industry. According to the appellant, the respondent's acceptance of payment from SALBA for preparing and publishing the contents of Page 7 created an untenable conflict of interest which undermined the independence and professionalism of the news media. This according to the appellant would cause the public to doubt the independence and professionalism of the news media. The appellant argued that the various sub-clauses of Clause 2

created separate obligations and duties with Clauses 2.1 and 2.2 stipulating process constraints.

10) The respondent submitted that Clauses 2.1 and 2.2 are intended to regulate different types of content from that of paid or sponsored copy. It submitted that paid or sponsored copy is meant to be regulated by Clause 2.3 and 2.4 of the Press Code. It argued that if Clauses 2.1 and 2.2 are made applicable to sponsored content, the consequence would be that sponsored content will by default, be prohibited by the Press Code. This would be contrary to international practice which permits clearly identified advertorials to be published. Further, this interpretation, according to the respondent, would be contrary to the express wording of Clause 2 of the Press Code itself. Hence the respondent's contention that the DPO was correct in concluding that it was not necessary to consider whether Clause 2.1 was breached as he had concluded that the applicable Clauses 2.3 and 2.4 had been breached.

11) In essence the respondent contended that Clauses 2.1 and 2.2 applies exclusively to 'true editorial content' while Clauses 2.3 and 2.4 of the Code applied to advertorial content. As the contents of Page 7 were advertorial content, the respondent concluded that Clauses 2.1 and 2.2 had no application. It went to submit that even if Clause 2.1 and 2.2 applied to advertorial content, the mere fact that payment was made is insufficient to render the copy in breach of Clauses 2.1 and 2.2. For there to be such a breach, the respondents contended that the appellant would have to establish that the contents of Page 7 breached other provisions of the Press Code. Thus, according to the respondent, as the appellant conceded that the contents of Page 7 did not infringe other provisions of the Press Code, it was not open to them to contend that Clauses 2.1 and 2.2 of the Press Code were breached.

Analysis and interpretation of Clause 2 of the Press Code

12) It is apparent that the contents of Page 7 fell materially short of what was required by Clauses 2.3 and 2.4 of the Press Code. Clause 2.4 of the Press Code requires that editorial material be clearly demarcated and kept distinct from sponsored material.

It is the blurring of these lines on the part of the respondent that has caused the appellant to lodge this complaint.

13) The contents of Page 7 clearly advanced the policy positions adopted by SALBA and the respondent was remunerated for this. The respondent acknowledged that it 'reported the content, following the usual news gathering and news writing skills that we use for journalism'.³ There was thus an acknowledgment that there was no separation of the news gathering process from that which was used in the preparation and presentation of Page 7. Adding to the confusion was the labelling of the copy as an 'editorial partnership.' No adequate explanation was provided for describing the contents of Page 7 as an 'editorial partnership' as opposed to 'an advertorial' or 'sponsored content'. The reasonable reader is less likely to be fully familiar with the concept of an editorial partnership than with the description of the contents as 'advertorial' or sponsored content. The red blob on the left of the Page 7 reads 'Partnership between the Sunday Times and SALBA'.

14) The average reader could reasonably interpret this to mean that the content was determined following the normal independent rigour and analysis of the editorial process of the Sunday Times, thus bearing its imprimatur. Further the note at the bottom of Page 7 which states that 'this project was paid for by the South African Liquor Brand Owners Association (SALBA) and reported by the Sunday Times' is tucked away in small print at the bottom of the third article. The placement could confuse readers as to whether it applies only to the third article or to the contents of the entire page. It is also unclear as to what 'project' the reference is being made. Thus a conscious decision was made by the respondent to use these somewhat vague terms as opposed to utilising familiar labels used locally and internationally by the media such as 'supported by'; 'paid content/ Paid for by' 'Advertorial' and Advertiser content'⁴.

³ . para 3.7.3 of the Findings of the Press Ombud.

⁴ . See footnote 2 of the findings of the Press Ombud where reference is made to the practices adopted by the Guardian Newspaper of the UK.

15) It was material that journalists and staff reporters were assigned to prepare and write two of the articles and be credited as such. Further the respondent presented and treated these as conventional news stories. The font, layout and presentation of Page 7 mirrors that of a news article. For these reasons, the respondent fell materially and significantly short of complying with its obligations in terms of Clauses 2.3 and 2.4 of the Press Code. Having said that, we are of the view that on the evidence before us we cannot conclude that this was a deliberate attempt to mask sponsored content as a news article and therefore to deceive the readers as some indicators, albeit inadequate, were provided which suggested that this was sponsored content.

16) The crisp issue before us is whether the respondent breached Clauses 2.1 and 2.2 of the Press Code by publishing the contents of Page 7 in a manner that did not comply with Clauses 2.3 and 2.4 of the Press Code and by accepting payment from SALBA to publish it in this manner and style.

17) Much turns on a proper and contextual interpretation of Clause 2 of the Press Code which provides:

2. Independence and Conflict of Interest

The media shall:

2.1 not allow commercial, political, personal, or other non-professional considerations to influence reporting, and avoid conflicts of interest as well as practices that could lead readers to doubt the media's independence and professionalism;

2.2 not accept any benefit which may influence coverage;

2.3 indicate clearly when an outside organisation has contributed to the cost of newsgathering; and

2.4 keep editorial material clearly distinct from advertising and sponsored events.

18) We were informed during argument that this is probably the first occasion that the Appeals Panel had to consider the meaning of the various sub-clauses of Clause 2.

The purpose and objective of Clause 2 is to ensure the independence of the media and prevent conflicts of interest. Clause 2 seeks to give expression to the commitment in the preamble by journalists to maintain credibility and keep the trust of the public. The necessity of the media to maintain its credibility and preserve the trust of the public in a constitutional democracy such as ours was recognised by the Constitutional Court in *Khumalo v Holomisa*⁵ in the following terms:

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primarily agents of the dissemination of information and ideas, they are inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgeling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled.”

Being credible and having the trust of the public is essential if the media is to play the pivotal role of invigorating and strengthening our constitutional democracy and discharging other functions. It is for this reason that Clause 2 seeks to ensure the independence of the media and to prevent conflicts of interests. Any interpretation of Clause 2 must advance and promote this purpose optimally.

19) Further we must factor in the commercial reality that the media requires, particularly in the current challenging economic climate, to access alternative revenue streams to remain viable. Any interpretation must seek to reconcile the various sub-clauses of Clause 2 so that they could harmoniously co-exist. It is clear from a textual reading of Clause 2.3 and 2.4 that advertorial and sponsored content are permitted if the conditions stipulated in the clauses are met. That is implicit in these clauses. The conditions that have to be met are that the publication must indicate **clearly** when an outside organisation has contributed to the cost of

⁵.Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) para 24.

newsgathering and editorial material must be kept **clearly** distinct from advertising and sponsored content (our emphasis). The emphasis on clarity is to ensure that no ambiguity or confusion must exist as to whether the content is editorial on the one hand or advertorial and sponsored content on the other. If there is an unclear and imprecise demarcation and division of editorial content from advertorial content then these conditions would not have been met.

20) We were referred in argument to the ruling of the New Zealand (NZ) Media Council in *Tom Frewen v New Zealand Herald*.⁶ In its ruling it adopted the following definition of native advertising from Wikipedia:

“The very definition of native advertising is that it ‘matches the form and function of the platform upon which it appears’ and is ‘produced by an advertiser with the specific intent to promote a product while matching the form and style which would otherwise be seen in the work on the platform’s editorial staff.’⁷”

As the New Zealand Media Council correctly pointed out the goal of native advertising is for sponsored content to mimic editorial content. Their concern was that if the demarcating line is not clearly drawn readers could easily be confused. Reference is also made in the ruling to the stringent steps taken by organisations like CNN and the Telegraph in distinguishing paid content from editorial content as recommended by the IAB.⁸ Further as quoted by the DPO,⁹ the American Society of Magazine Editors noted ‘that the true value of a media brand lies in its relationship with its readers, in particular on the reader’s trust in the magazine’s editorial integrity and independence.’

21) Finally, the NZ Media Council recommended the following:

“To achieve the ‘highest professional standards’ in the handling of sponsored content, the sites must be more transparent and earn the trust of their readers. This may include the use of borders, shading and more accurate headlines. It should undoubtedly include a much clearer distinction between

⁶ . <https://www.mediacouncil.org.nz/rulings/tom-frewen-against-new-zealand-herald>. - accessed on the 14th of October 2021

⁷ . Para 28 of the Frewen v NZ Herald Ruling.

⁸ . Para 1 of the Frewen v NZ Herald Ruling

⁹ . Para 3.5 of the Ruling of the Ombud – Page 39 of the Appeal Record

the look of independent news and sponsored content, and a clear and unmistakable statement to readers that this content is paid content.”

It is apparent to us that this is sound advice and should be reflected upon when ensuring compliance with Clauses 2.3 and 2.4 of the Press Code. The closer sponsored content approximates native advertising as defined, the less likely it is to meet the requirements of Section 2.3 and 2.4 of the Press Code.

22) We are of the view that Clause 2.1 of the Press Code comprises three component parts. Firstly, it obliges the media not to allow commercial, political, personal or other non-professional considerations to influence reporting. Secondly, it obliges the media to avoid conflicts of interest and thirdly to avoid practices that could lead readers to doubt the media’s independence and professionalism. It is the third part of the clause that is applicable to ‘sponsored content’. It is apparent that the third part of the clause is not restricted to editorial content or reportage but extends to practices which include the manner in which sponsored content and advertorials are prepared and presented. If the lines between editorial material and sponsored content become entirely blurred through the widespread use of native advertising, this practice could lead readers to doubt the media’s independence and professionalism. The test is whether, assessed objectively, the practice engaged in could lead readers to doubt the media’s independence and professionalism. If it could, then there is an unequivocal duty on the media to avoid such practices. The third part of Clause 2.1 is not restricted to editorial or news reportage as is the first part of the clause. Therefore, the argument that Clause 2.1 applies to pure editorial content only is not accepted.

23) If there is full and proper compliance with the substantive requirements in Clauses 2.3 and 2.4 of the Press Code then in virtually all instances the practice would not be one that could lead readers to doubt the media’s independence and professionalism. However, where there is inadequate or non-compliance with the requirements stipulated in Clauses 2.3 and 2.4 of the Press Code insofar as sponsored content is concerned, then these clauses would be breached.

24) However, it does appear that the structure of the clause requires a further question to be asked. Are the breaches of Clauses 2.3 and 2.4 so serious and significant that it amounts to a practice that could lead readers to doubt the media's independence and professionalism? If it does then it would be a violation of Clause 2.1. which is a more serious infraction of the Press Code. If it does not then it would simply remain a violation of Clauses 2.3 and 2.4.

25) For the purposes of clarity, it is suggested that the following inquiries be conducted when interpreting Clause 2:

- i) As Clause 2 permits sponsored content in defined circumstances, an initial determination has to be made as to whether the publication under consideration is either editorial content or sponsored content/ advertorials.
- ii) If the publication is deemed to be editorial content then Clauses 2.1 and 2.2 are applicable.
- iii) If the publication is sponsored content or advertorials then the issue is whether the requirements that permit these in Clauses 2.3 and 2.4 have been satisfied.
- iv) If the requirements of Clauses 2.3 and 2.4 are fully complied with then in virtually all instances, there will be compliance with Clause 2.
- v) If the requirements of Clauses 2.3 and 2.4 are not fully met, then the publication will be in breach of these clauses.
- vi) The next issue is whether the breaches of Clauses 2.3 and 2.4 are of such a nature and seriousness that the practice could lead readers to doubt the media's independence and professionalism.
- vii) If the breaches are not as contemplated in 6 above, then it would simply amount to a violation of Clauses 2.3 and 2.4.
- viii) If the breaches are serious and significant as contemplated in 6 above and as a consequence the practice could lead readers to doubt the media's independence and professionalism, the publication would, in that instance, infringe the third part of Clause 2.1 of the Press Code.

Application of the law to the facts

26) Mr Ferreira, for the appellant, argued that the respondent had conceded that the copy on Page 7 constituted 'reporting' and 'coverage' as contemplated in Clauses 2.1 and 2.2 of the Press Code and as it had accepted payment, there was a violation of these clauses. While Ms Smuts, for the respondent, may have on occasion, used imprecise language when describing the contents of Page 7, it is clear, if her response is evaluated holistically, that the respondent regarded this as sponsored content. In parts of her response, she stated categorially 'that this was a form of advertorial which has increasingly been seen in newspapers in South Africa and abroad.'¹⁰ From the general tenor of the response, we are satisfied that the respondent intended and regarded the contents of Page 7 to be sponsored content or advertorials. The contention that it constituted 'reporting' and 'coverage' is therefore rejected.

27) It was accepted by all the parties that contents of Page 7 failed to meet the requirements set out in Clauses 2.3 and 2.4 of the Code. We are of the view that the next question to be answered is whether the non-compliance was so material and significant that it could lead readers to doubt the media's independence and professionalism. It was common cause that payment was accepted by the respondent for publishing the contents of Page 7. The three devices that the respondent relied upon to convey that it was sponsored content was inadequate, unclear and ambiguous. The DPO was correct that words such as 'editorial partnership' do not convey clearly that this is sponsored content. The wording of the red blob indicating a partnership between the Sunday Times and SALBA is similarly vague and unclear. The suggestion of a partnership would appear to suggest a coalescing of views and opinions. Tucked at the bottom of the third article is the acknowledgment that 'this project was paid for by the SALBA ...' This information ought to have been more prominently and unambiguously stated. Further the respondent assigned its journalist to write two of the articles. The font and style used were the same used in the editorial body of the paper. The following comment

¹⁰ . Para 6 of Ms Smut's response on Page 9 of the record.

from Ms Smuts which was referred to by the Ombud adds credence to the perception that the contents of Page 7 was styled as news reportage:

We reported the content, following the usual news gathering and news writing skills that we use for journalism.¹¹

28) Rather than keeping editorial content clearly distinct from advertising or sponsored events, there appeared to be an unacceptable blurring of the lines in this instance. This was a significant and material non-compliance with the requirements of Clauses 2.3 and 2.4 of the Press Code. We are of the view that as a consequence of this, the reasonable reader could be confused as to whether this was an advertorial or an editorial piece as Page 7 was strikingly similar to the form and style of work produced by the respondent's editorial staff. This could lead reasonable readers to conclude that Page 7 bears the imprimatur of the respondent. We are of the view that this practice could lead readers to doubt the media's independence and professionalism. For these reasons we are of the view that the contents of Page 7 breached the third part of Clause 2.1 in that it could lead readers to doubt the independence and professionalism of the media. It is apparent from the reasoning of the DPO that he was also concerned that this practice could raise doubts about the independence of the media. Further we support the proposal of the DPO that clause 2 be reconsidered in the light of the prevailing circumstances.

29) In determining an appropriate order, we took into account that the respondent afforded the appellant an opportunity to respond to the contents of Page 7.

In the circumstances the following order is made.

Order:

- 1) The appeal succeeds in part as the respondent is found to have breached the third part of Clause 2.1 of the Press Code in that it engaged in practices that could lead readers to doubt the media's independence and professionalism.**
- 2) The respondent is directed to issue an apology for this breach of the Press Code.**

¹¹ . Para 3.7.3 of the Ombud's findings – Page 39 of the Appeal Record.

- 3) In drawing up the apology the respondent is to have regard to the comments made in our decision.**
- 4) The respondent must, within 5 days of the receipt of this Order, email a copy of the draft apology to the appellant and to the Director of the Press Council.**
- 5) Within 3 days of the receipt of the draft apology, the appellant must submit its comments if any, to the respondent and to the Director of the Press Council.**
- 6) Within 5 days after the 3 days referred to in paragraph 5 above, the director will, in the event the parties do not agree thereon, immediately determine the final version of the apology to be published and inform the parties accordingly.**

Dated on the 1st of November 2021

Professor K Govender (Appeals Panel)

Ms Heather Robertson (Media Representative)

Mr Mpho Chaka (Public Representative)