

Short notes on:

"IT'S BETTER THAN YOURS!"

Whether it be as a result of ideological changes in consumers, the Covid-19 pandemic, or political strife, the South African goods and services market has had to endure some significant shifts in recent years. In turn, business owners have had to realign sales efforts at every change to stay relevant and ensure that their wares remained ripe for the pickings of the reluctant consumers hoping to satisfy their growing needs with shallower pockets.

With growing fuel prices and escalating load-shedding schedules, how do business owners once again cope with the dwindling consumer base they hope to market their goods and services to?

Do they simply compare their offerings to that of another with the caveat that theirs is just "... better than all the rest..."?

What Is Comparative Advertising?

Comparative advertising refers to when businesses, in marketing the benefits and spec of their goods and services, draw comparisons between their goods and services and that of another. Ordinarily, a business implementing a comparative marketing strategy will draw comparisons to the products of a well-known competitor.¹

Comparative advertising has its advantages; with the strategy usually involving a well-known brand or product, advertisements of this nature are likely to create a certain degree of hype. In addition, the most obvious benefit would be the obtaining of new customers and an increase in sales.

Although bold, comparative advertising strategies can be risky. A business may end up damaging its brand instead of promoting it, with the potential of coming off as disingenuous or "tacky".

¹ P KaddelBach (2003), "The Law Affecting Comparative Advertising In South Africa", [www.https://open.uct.ac.za/handle/11427/11035](https://open.uct.ac.za/handle/11427/11035) Accessed on: 28 June 2022.

Implications of Comparative Advertising

Comparative advertising has the potential of possible trade mark infringement. Should the advertiser utilise another business's name, slogan or logo, the advertisement may fall foul of the Trade Marks Act 194 of 1993 (hereafter "Trade Marks Act").

Section 34 of the Trade Marks Act prohibits the unauthorised use of a registered trade mark. Be that as it may, comparative advertising strategies may not be so direct as to "copy-paste" another business's name, slogan or logo. In that instance, any business claiming infringement would have to prove that the said advertisement is referring to it and/or its products.

In addition, the Advertising Regulatory Board of South Africa (hereafter the "Board"), a voluntary and independent organisation aimed at the self-regulation of the marketing industry in South Africa, has set out the Code of Advertising Practice.

Section: 2, Clause: 7 of the code indicates that advertisements where factual comparisons are made between products and services are permitted subject to certain limitations.²

These limitations include:

- The advertisement must meet the requirements of the Trade Marks Act,
- The facts must be capable of substantiation as per Clause 4.1,
- It must not be misleading or confusing.

Sanctions for infringing the code include the calling to remove an advertisement, to amend an advertisement and to submit future advertisements, at own cost, for review.

Other applicable implications of comparative marketing may be resultant anti-competitive behaviour or passing-off.

² Code of Advertising Practice, Section: II, Clause: 7, Advertising Regulatory Board of South Africa, www.arb.org.za
Accessed on: 28 June 2022.

Conclusion

The line between what is allowable and not allowable comparisons in advertising is easy to blur. The reputational and financial implications of an infringing ad could be crippling to a business. In saying that, innovation, humour and good old competition are welcome under the current economic climate. However, business owners wishing to engage in comparative advertising strategies must seek the necessary legal guidance before implementation.

Contact an attorney at SchoemanLaw Inc for your legal needs!

