

Legal pitfalls of offensive branding - Part 1

By [Kareema Shaik](#)

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Over the past year or so, a surprising number of international brand owners have come under fire for offensive marketing campaigns, products, and brand names.

Many of the incidents relate to blackface, a practice that emerged in the 19th century, where stage actors would don black make-up with exaggerated red lips. The practice was intended to poke fun at African Americans and is today widely considered racially offensive.

Gucci, Katy Perry, and Prada have all withdrawn, with apologies, the products depicted below, which many believe evoke blackface.



Katy Perry



Gucci



Prada

Other examples include H&M's "Coolest Monkey in the Jungle" hoody, which incited riots locally; the recent Gucci fashion show incorporating straitjacket-styled clothing which was believed to make light of mental illness; and (again!) Gucci's sale of Sikh turbans viewed as cultural appropriation.

Perhaps the most unforgettable of the lot was the infamous Kendal Jenner/Pepsi advert, in which the model and reality star was depicted extinguishing tensions at a riot by handing a white police officer a can of Pepsi. The advert was widely criticised, on the one hand, for taking advantage of the Black Lives Matter movement gaining momentum at the time and, on the other hand, for making light of social justice demonstrations.

Advertising is regulated in South Africa by the Advertising Regulatory Board (ARB). The ARB's Code of Advertising Practice prohibits advertising which

“ may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. ”

This provision was recently tested in a complaint filed in respect of Chicken Licken’s *Legend of Big John* reverse colonialism [advert](#). The advert portrays a young and confident African man, Big John, in the year 1650, leaving the continent on a boat “to satisfy his hunger for adventure”. His travels eventually lead him to discover a foreign land, namely Holland, which he decides to call “Europe”.

The consumer complaint was based on the grounds that the advert *“makes a mockery of the struggles of the African people against colonisation by the Europeans in general, and the persecutions suffered at the hands of the Dutch in particular.”*

In defence, Chicken Licken stated that the ad was in no way intended to make a mockery of the struggles of colonisation but rather to show that South Africa *“has all the potential to conquer the world and rewrite history from an African perspective.”* According to the fast-food chain, the underlying purpose of the advert was *“to create a sense of pride and patriotism amongst South Africans.”*

The Directorate of the ARB recognised that the advert was a parody *“crafted with the intentions of being humorous”* but found that the reality of colonisation was not something that can be rewritten or trivialised. The decision was taken on appeal by Chicken Licken.

The ARB’s Final Appeals Committee rejected the appeal, finding that the *“right to use parody in freedom of commercial speech cannot be separated from a duty of care to ensure that the exercise of that right does not offend or cause harm to others.”* The Committee further found that *“one cannot, in constructing parody...distort or misrepresent, particularly where such misrepresentation or distortion is offensive.”* The omission of the adverse effects of colonialism from the advert, presenting it as something harmless, was found to be insensitive and offensive to those who suffered under colonisation.

Part 2 of this article will look at offensive trademarks.

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