

Advertising Standards Authority of South Africa

(Association incorporated under Section 21)

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Company Registration Number 1995/00784/08 Non-profit Registration Number 043-694-NPO

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To: Mr Marcus Low
Treatment Action Campaign
Email: Marcus.low@tac.org.za

From: Mr Mokgosi Rampa
Email: mokgosi@asasa.org.za

Date: 6 January 2012


Reference: HIVEX / TAC / 17071

Dear Mr Low

We refer to the above matter and enclose herewith a copy of the ASA Directorate Ruling.

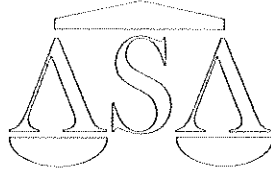
Yours sincerely

THE ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA


MOKGOSI RAMPA
CONSULTANT: APPEALS AND COMPLIANCE
RM

Encl (5 pages)

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RULING OF THE ASA DIRECTORATE

In the matter between:

THE TREATMENT ACTION CAMPAIGN (TAC)

COMPLAINANT

and

HIVEX LIMITED

RESPONDENT

6 January 2012

HIVEX / TAC / 17071

BACKGROUND

In Hivex / TAC / 17071 (14 June 2011) the Directorate accepted the respondent's voluntary undertaking to amend its website to ensure compliance with the Code and to address the complainant's concerns.

The advertising at that time promoted the respondent's treatment as a "... pioneering radical treatment for people with HIV". It explained how the treatment worked and claimed, *inter alia*, that patients on the treatment were 5,7 times less likely to need hospital treatment, antiretroviral drugs, or die. Patient testimonials were also featured on the website.

The ruling also dealt with, and confirmed that the ASA has jurisdiction, and drew specific attention to not only the provisions of Appendix F, but also the general requirements insofar as substantiation and testimonials are concerned.

SUBSEQUENT TO THE RULING

Mr Low, on behalf of TAC, lodged a breach complaint against the respondent's website www.hivex-treatment.org. It was explained that even though some of the wording on the website has changed, it still contravenes the Code for essentially the same reasons as previously identified. Therefore, the essence of that complaint remains unchanged and the advertising is in breach of the ruling and of the Code.

The complainant submitted, *inter alia*, that the following quotes are essentially similar in message and communication to those originally complained of:

- *"The HIVEX Treatment is an electro-magnetic treatment which targets proteins in the HIV virus to disable the virus."*
- *"When we treat a patient with HIV, the HIVEX Treatment only affects the virus -- nothing else. HIVEX equipment is far more complex than anything else produced. The field it creates through the feedback loop is so specific that it is effective at very low intensity. As long as patients are within 7 meters of the equipment, the field is highly effective, so many people can be treated at the same time."*
- *"One of the main ways in which The HIVEX Treatment is effective is by reducing the rate of cell death, or "apoptosis" in an HIV infected person."*
- *"In the past many people were treated by HIVEX and achieved spectacular results and then did not give back to others in any way."*

RELEVANT CLAUSE OF THE CODE OF ADVERTISING PRACTICE

In light of the breach allegation the Directorate considered Clause 15 of the Procedural Guide (Enforcement of rulings) as relevant.

RESPONSE

In its first response, the respondent's representative, Anna McKay, submitted, *inter alia*, that there is somewhat of a "mischaracterisation" in the complainant (and the ruling) which refers to an "undertaking" given to amend advertising. No undertaking was requested, or given, and the changes that were made at that time had been made

prior to the complaint. Having received the complaint it further reviewed the website, and believed that it complied with the Code.

It referred to its confidential clinical data which was submitted to the ASA, and noted that the ASA did not note any concerns in relation thereto. It is also satisfied that the changes made to the website prior to and at the time of the complaint were sufficient. It also went into details as to what changes were made. The point was made that the original complaint related to different sections of the website. If the complainant had additional concerns, it would be appropriate to raise them at the time of complaining, not now.

In addition, it suggested that if it took out reference to current activities in South Africa, the complainant would not have any grounds for objecting and it is prepared to make such further changes.

It also questioned whether or not removing all references to South Africa (other than historical references to the research conducted), and removing any suggestion that South Africans are able to purchase this treatment would effectively remove its website from the ASA's jurisdiction.

Finally, the respondent attempted to engage with the complainant and invited the complainant to visit its facilities in Durban. This invitation was declined by the complainant.

ASA DIRECTORATE RULING

The ASA Directorate considered all the relevant documentation submitted by the respective parties.

At the outset, the Directorate notes that it is not in a position to advise the respondent how to elude its jurisdiction, and it is somewhat disingenuous of the respondent to attempt to discuss this option with the ASA. In addition, the issue of jurisdiction has been dealt with in the previous ruling; and it was determined that the ASA had jurisdiction over the respondent's advertising of its treatment at the time of lodging the complaint. The respondent has not appealed this aspect of the original ruling and is therefore still bound by it.

The only task currently before the Directorate is determining whether or not the respondent's current advertising is in breach of the original ruling.

In Hivex / TAC / 17071 (14 June 2011) the Directorate ruled as follows:

"Undertaking offered

The ASA has a long standing principle which holds that where an advertiser provides an unequivocal undertaking to withdraw or amend its advertising in a manner that addresses the concerns raised, the undertaking can be accepted without considering the merits of the matter.

In its initial response, as well as subsequent correspondence, the respondent indicated that it has suspended the site for review to ensure compliance and to avoid any misunderstanding. Its final correspondence submitted towards the end of April 2011 again emphasised that "... the text which was the subject of TAC's complaint was changed in January ...". Attempts to access the website during this investigation were unsuccessful.

Given this, it appears that the respondent has amended its advertising with the aim of addressing the concerns raised by the complainant. The Directorate is therefore satisfied that this can be accepted as an undertaking to address the concerns, which negates the need for considering the merits of the matter.

This undertaking is therefore accepted on condition that the advertising at issue is amended within the parameters and requirements of the Code".

From this it is clear that the Directorate, in line with its long-standing approach, merely accepted the respondent's actions and undertaking as an adequate resolution without considering the merits. The implication of this is that the Directorate had no need to consider the substantiation provided at the time.

As the issue at hand relates only to a potential breach of this undertaking, the Directorate is not able to consider the substantiation at this time either.

One of the previous claims objected to was; *"The HIVEX Treatment is an electro-magnetic treatment which targets proteins in viruses and bacteria, to render the virus or the bacteria unable to infect other cells ..."*


The amended claim reads, "*The HIVEX Treatment is an electro-magnetic treatment which targets proteins in the HIV virus to disable the virus.*" Clearly the difference between these two claims insofar as the likely, reasonable take-out is concerned is largely semantic.

Similarly, the other claims now identified by the complainant create an overwhelming impression that the respondent's treatment will prove beneficial for carriers of HIV / AIDS. This is exactly the concern previously raised by the complainant, and the impression which the respondent allegedly sought to correct.

Given the above, the Directorate is satisfied that the respondent's current advertisement is in breach of the original ruling and therefore in breach of Clause 15 of the Procedural Guide.

Given that the respondent has, at all times, taken care to take the Directorate into its confidence, as well as the fact that the respondent has no apparent history with the ASA (other than this dispute), the Directorate does not believe sanctions are warranted at this time. However, the respondent is cautioned that the Directorate may well change its approach on this issue, should further justified breach allegations (or new complaints) be received.

The respondent is again instructed to permanently remove any claims that create the same overwhelming impression of being able to treat HIV / AIDS with immediate effect.



ON BEHALF OF THE ASA DIRECTORATE