

ADVERTISING REGULATORY BOARD
(ADVERTISING APPEALS COMMITTEE)

In the matter between:

RAIN (PTY) LTD

Appellant/Advertiser

and

SUVASIN MOODLEY

Respondent/Complainant

ADVERTISING APPEALS COMMITTEE DECISION

Introduction

1. Rain (Pty) Ltd (“Rain”) appeals against a decision of the Advertising Regulatory Board’s Directorate, dated 17 July 2020, which found that Rain’s advertisements of its 5G product had breached clauses 4.1 and 4.2.1 of section II of the Code of Advertising Practice (“the Code”).

2. The sanction imposed by the Directorate instructed Rain to remove or amend the advertisements immediately, as deadlines permit, in terms of clause 15.3 of the Procedural Guide. Members of the Advertising Regulatory Board were instructed not to accept advertising from Rain with the claims: “*Average network download speeds over 200Mbps*” and “*Unlimited data 24/7*”.

3. After the decision of the Directorate, Rain lodged an application, in terms of rule 9.12 of the Procedural Guide, for a suspension of the Directorate's decision. On 10 August 2020, the Chairperson of the Advertising Appeals Committee ("AAC") suspended the decision of the Directorate, pending the outcome of the appeal to the AAC.
4. There are two advertisements at issue in the appeal, both dealing with Rain's 5G product. The first advertisement is general and claims that Rain's "5G for home" provides, *inter alia*:
 - "Unlimited data 24/7";
 - "Your choice of network speeds"; and
 - "Your choice of streaming quality".
5. The first advertisement contains a disclaimer that reads as follows: "*For now, rain 5G will only be available in certain areas in Johannesburg and Tshwane. During 2020, coverage will expand to Cape Town, Durban and other major metros.*"
6. The second advertisement is focused on Rain's premium product and claims that "*unlimited home 5G premium*" provides, *inter alia*:
 - 6.1. "*Average network download speeds over 200Mbps*";
 - 6.2. "*High quality video streaming*";
 - 6.3. "*Multiple HD streams*"; and

6.4. “Unlimited 24/7 home wifi”.

7. The complainant, Mr Moodley, submitted evidence to the Directorate showing speed tests (download and upload) that he had conducted at different locations and at different times over the period 16 August 2017 to 20 March 2020. The test results showed huge inconsistency in the speed of the Rain downloads, ranging from over 200Mbps down to zero Mbps, with the download speed often being at or near zero Mbps. The upload speeds appear to have stabilised at or near zero Mbps.
8. Mr Moodley complained that the data is not available “24/7” because the “*line continuously drops*”, and that there is no choice of network speeds or streaming quality because the “*line is very poor*”. Mr Moodley submitted that the network is unstable throughout the day, that its speeds are highly varied, and that it “*drops often*” and “*completely*”, making it “*unusable for streaming or working online*”.
9. In its response to the complaint, Rain stated that its 5G product is truly unlimited, because it does not charge per gig of data. When it comes to choice of network speeds and choice of streaming quality, Rain emphasised that this depends on the type of 5G plan selected by the customer.
10. Rain has two products that deliver 5G. The first is Rain’s “**Unlimited Home 5G Standard**”, with “*Speeds of up to 30Mbps*” and “*HD (720) video streaming*”. The second product is its “**Unlimited Home 5G Premium**”, having “*Average network download speeds (of) 200Mbps*” and “*Full HD streaming quality & multiple HD streams*”.

11. It is apparent from Rain's response to the complaint that Rain failed to adduce evidence to substantiate the claims made in the advertisements. This was also apparent to the Directorate. The Directorate therefore gave Rain an opportunity to augment its response by submitting such evidence. Despite this, Rain elected not to submit any further evidence to the Directorate.

The decision of the Directorate

12. The Directorate identified two core issues for decision: first, whether Rain's 5G product offers average network download speeds over 200Mbps; and second, whether it offers unlimited data 24/7.

- 12.1. On the first issue, the Directorate noted that Rain had failed to provide any evidence in substantiation of its speed and quality claims, or that it actually offers the claimed performance. The Directorate therefore found the claim unsubstantiated and in breach of clause 4.1 of section II of the Code.

- 12.2. On the second issue, the Directorate found that Rain had not addressed the complaint that its product was not available all the time, i.e. "24/7". The Directorate took the view that the claim could be interpreted in two ways: either the data was uncapped all the time, or the data was continuously available, without interruption. This meant that the claim is ambiguous and therefore misleading, in breach of clause 4.2.1 of section II of the Code.

13. We agree with the decision of the Directorate. Rain's advertisements make big promises - they promise the consumer "*unlimited data 24/7*", meaning that data will not be capped and will always be available. It is in this context that consumers

are promised a choice of network speeds and streaming quality and, in the case of 5G Premium, an average download speed over 200Mbps. The only disclaimer is that: “For now, rain 5G will only be available in certain areas in Johannesburg and Tshwane.” However, because Rain adduced no evidence to substantiate its claims, the Directorate had no option but to find Rain in breach of the Code.

Grounds of appeal

14. In its notice of appeal, Rain seeks to adduce evidence in substantiation of the claims in the advertisements. We have held in earlier decisions that the appeal before us is a wide appeal, and that it is therefore open to an appellant to adduce further evidence.
15. However, it must be stressed that this does not entitle an advertiser to ignore requests from the Directorate for evidence, only to provide evidence on appeal. It is undesirable that the AAC be required to deal with evidence as a tribunal of first instance, without having the benefit of the Directorate’s view of the evidence that is tendered. Advertisers are required to have evidence in their possession, before they publish their advertisements, substantiating the claims made in the advertisements. It is that evidence that should be placed before the Directorate when an advertiser is required to respond to a complaint.
16. Rain raises the following two grounds of appeal:
 - 16.1. The Directorate’s finding that Rain cannot substantiate its claims in the advertisements, and that it is therefore in breach of clause 4.1 of section II of the Code, “*is incorrect and/or unreasonable;*” and

16.2. The Directorate's finding that "*unlimited data 24/7*" should be interpreted as meaning "*unlimited data is always available to the consumer without interruption*", and that Rain therefore contravened clause 4.2.1 of section II of the Code, "*is incorrect and/or unreasonable and not in line with [a] reasonable business-like application of its code and/or the law.*"

The Decision of the Advertising Appeals Committee

Clause 4.1

17. Clause 4.1 of section II of the Code deals with "*substantiation*". Clause 4.1.1 provides, *inter alia*: "*Before advertising is published*", advertisers must possess "*documentary evidence ... to support all claims, whether direct or implied, that are capable of objective substantiation*".
18. Clause 4.1.4 provides that such documentary evidence "*must emanate from or be evaluated by a person/entity, which is independent, credible, and an expert in the field to which the claims relate and be acceptable to the ARB. ...*"
19. The evidence sought to be adduced by Rain on appeal consists of three graphs and a statement by a certain Mr Christopher David Geerds, who states that the three graphs "*look relevant and plausible* and that the interpretation contained in the [notice of appeal] is consistent with the data." (Underlining added)
20. In our view, Mr Geerds cannot be regarded as an "*independent, credible expert*" within the meaning of clause 4.1.4. Mr Geerds states that he is employed by a company known as "*Christech (Pty) Ltd*". Nothing is known about this company,

least of all whether it is regarded by others in the telecommunications sector as an independent, credible expert in 5G network analysis. It appears from its name that it might simply be the alter ego of Mr Geerdts.

21. Mr Geerdts further states that he obtained an MSc in Electrical Engineering from the University of Cape Town and that he has worked for a number of companies in the telecommunications sector. It is similarly not known whether he is accepted by all, or some, of these companies, or by any other companies in the sector, as an independent, credible expert in 5G network analysis.
22. In any event, Mr Geerdts does not confirm the accuracy or reliability of the data. He simply says that the graphs “*look relevant and plausible*”. Even on its own, this is not an endorsing evaluation of Rain’s evidence.
23. To make matters worse, the data on which Mr Geerdts bases his view was not generated by Mr Geerdts himself. A Legal Technology Strategist employed by Rain, Mr R Fortune, told the Committee at the hearing that the data reflected in the graphs was collected by employees of Rain.
24. Turning to the graphs themselves, they purportedly cover the periods 1 May 2020 to 26 July 2020 (graph 1), 28 June 2020 to 28 July 2020 (graph 2), and January 2020 to July 2020 (graph 3). It is clear that the data shown in the graphs was not held by Rain before the advertisements were first published.
25. The underlying data, in our view, is not sufficiently comprehensive. Graph 2, for example, does not contain data points for multiple locations at different times per day. Only one location is used throughout, reflecting only one point in time per

day. This data does not substantiate Rain's claim that its 5G network is available throughout the day, every day.

26. Mr Fortune acknowledged that some customers have complained about poor network availability. He said that Rain's technicians have advised customers to move their router around their homes so as to find the location that provides the best network connection. Mr Moodley confirmed at the hearing that this was also his experience with Rain's technicians. He stated that he has tested his router at various locations in Johannesburg, Sandton, Randburg and Midrand, all without success. He even had difficulties in maintaining a continuous connection in the Sandton CBD. It seems that these difficulties are not limited to Mr Moodley and his router.
27. In our view, the disclaimer, that "*rain 5G will only be available in certain areas in Johannesburg and Tshwane*", does not assist Rain. It cannot mean that 5G is only available in certain parts of a customer's home, or that it is only available in remote areas of Johannesburg and Tshwane.
28. In addition, Rain's claim for its 5G Premium network is that it provides an average download speed in excess of 200Mbps. That means that, between its highs and lows, the network averages out at a download speed of 200Mbps or more. There is no independent, credible evidence before us that this is so.
29. We therefore find that Rain has not substantiated its advertised claims that its 5G network provides "*unlimited data 24/7*", and that it has an average download speed of over 200Mbps. We agree with the Directorate that Rain is therefore in breach of clause 4.1 of section II of the Code.

Clause 4.2.1

30. Clause 4.2.1 of section II of the Code provides that: “*Advertisements should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer.*” (Underlining added)
31. As discussed above, the Directorate found that the claim that Rain’s 5G network provides “*unlimited data 24/7*” is ambiguous and therefore misleading because it is capable of two different meanings.
32. Rain contends that a reasonable and business-like application of the Code and the law should result in a finding that “*unlimited data 24/7*” does not mean that “*unlimited data is always available to the consumer without interruption*”, being one of the meanings attributed to the claim by the Directorate.
33. In our view, the hypothetical reasonable consumer does expect a network, that advertises a product that is available “24/7”, to remain operational at all times of the day and on every day of the week, i.e. without interruption. There is nothing unreasonable or not business-like about such an expectation. Rain has also not referred us to any provision of the Code or the law that contradicts this, nor are we aware of any.
34. Rain contends that the claim “*unlimited data 24/7*” means only that its 5G network only provides data that is uncapped, i.e. there is no time in the day or week that the customer is charged per gig. On this interpretation, there is no claim that the data will be available at all times of the day and on all days of the week. In our

view, this is not what the hypothetical reasonable consumer would expect, nor is such an interpretation reasonable or business-like.

35. We find that the claim of “*unlimited data 24/7*” is ambiguous and exaggerated to such an extent that it is likely to mislead the consumer. We therefore agree with the Directorate that the claim contravenes clause 4.2.1 of section II of the Code.

Sanction

36. It follows that the appeal must be dismissed.

37. The sanction imposed by the Directorate is therefore no longer suspended. It is now of full force and effect.

Daniel Berger SC

Chairperson: Advertising Appeals Committee

Jarred Cinman

Member: Advertising Appeals Committee

Sadika Fakir

Member: Advertising Appeals Committee

Lesiba Sethoga

Member: Advertising Appeals Committee

28 September 2020