

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 60230/2009

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
19/5/2011	
DATE	
SIGNATURE	

In the matter between

BRITISH AMERICAN TABACCO SOUTH AFRICA
(PTY) LTD

APPLICANT

And

MINISTER OF HEALTH

RESPONDENT

NATIONAL COUNCIL AGAINST SMOKING

AMICUS CURIAE

JUDGMENT

PHATUDI J

INTRODUCTION

Section 3(1) (a) of the Tobacco Products Control Act 83 of 1993 as amended by Tobacco Products Control Amendments Act 63 of 2008 ('the Act') prohibits advertisement or promotion of a tobacco product through any direct or indirect means.

In this application, the Applicant, as the leading manufacturer and distributor of 24 tobacco brands in this country, seeks an order;

"1 Declaring that the prohibition contained in section 3(1) (a) of the Tobacco Products Control Act 83 of 1993 ("the Act") as amended by the Tobacco Products Control Amendment Act 63 of 2008 ("the 2008 Amendment Act") read with the definitions of "advertise" and "promote" in the Act as amended by the 2008 Amendment Act, does not apply to one-to-one communications between tobacco manufacturers, importers, wholesalers and retailers on the one hand and consenting adult tobacco consumers on the other;

2 In the alternative and only in the event that the relief sought in prayer 1 was to be refused:

2.1 Declaring that the prohibition contained in section 3(1) (a) of the Act (as amended by the 2008 Amendment Act) read with the definitions of "advertise" and "promote" in the Act as amended by the 2008 Amendment Act, is inconsistent with

the Constitution and invalid to the extent that it applies to one-on-one communications between tobacco manufacturers, importers, wholesalers and retailers on the one hand and consenting adult tobacco consumers on the other;

2.2 Suspending the order of invalidity in Paragraph 2.1 above for a period of 18 months in order to allow Parliament to enact legislation to cure the unconstitutionality;

2.3 Ordering that the following words are to be read into the Act (as amended by the 2008 Amendment Act) as a new section 1A during the period of suspension referred to in paragraph 2.2 above; *"Nothing in this Act shall be construed so as to prohibit a tobacco manufacturer, importer, wholesaler or retailer from communicating information relating to a tobacco product where such communication is with an individual adult, consenting tobacco user."*

[3] The respondent opposes the application though conceding that the provision of the section (impugned provisions), to a certain extent, prohibits one to one communication. The respondent further avers that the reading of the impugned provisions and the Act is not inconsistent with the Constitution.

[4] The National Council Against Smoking (the council) intervenes as *amicus curiae*. The council is a non governmental organisation duly

¹ Notice of Motion

registered as a non profit making company in terms of Section 21 of Companies Act 61 of 1973 The Council's objective is, among others, encourage and help [existing] smokers to stop smoking and stop using tobacco in all forms" ²

[5] The Council submits that the impugned provision is inconsistent with the constitution. Further thereto, the council supports the statutory attempts at alleviating and preventing the growing incidence of tobacco usage in society The council seeks to persuade this court not to grant the order sought by demonstrating that the impugned provisions is in line with the international standard and best practice that limit any fundamental right(s) justifiable in terms of section 36 of the Constitution

BACKGROUND

[6] As indicated above, the applicant seeks a declaration of rights that the impugned prohibition does not prohibit one-to-one communications between a tobacco manufacturer, importer, wholesaler or retailer on the

one hand and a consenting, adult user of tobacco products on the other hand ³

[7] Section 3 of the Act provides “(1) (a) No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.”

[8] “Advertisement and Promotion are defined in section 1 of the Act as “Advertisement, in relation to any tobacco product; (a) means any commercial communication or action brought to the attention of any member of the public in any manner with the aim, effect or likely effect of- (i) promoting the sale or use of any tobacco product, brand element or tobacco manufacturer's name in relation to a tobacco product; or (ii) being regarded as a recommendation of a tobacco product; (b) includes product placement; and (c) excludes commercial communication between a tobacco manufacture or importer and its trade partners, business partners, employees and share holders and [any] communications required by law.” and

“Promotions is the practise of fostering awareness of and positive attitude towards a tobacco product, brand element or manufacturer for the purposes of selling the

tobacco product or encouraging tobacco use through various means including direct advertisement, incentives, free distribution, entertainment, organised activities marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film television production, radio production or the internet, and 'promote' has a corresponding meaning;

[9] Non compliance with the impugned provisions is sanctioned by section 7(3) of the Act that provides that "Any person who contravenes or fails to comply with section 3(1), (2) or (3), (6), (7) (a) or (b), 3A, or 4A shall be guilty of an offence and liable on conviction to a fine not exceeding R1000 000 [one million rand]

[10] The kernel of this application is to determine as to whether the impugned prohibitions does or does not prohibit one-to-one communications on the one hand. On the other hand, and only if I find the impugned provisions prohibiting one to one, then, must determine if the said provision to be an infringement of the right to freedom of expression entrenched in terms of section 16(1) of the Constitution

ONE-TO-ONE COMMUNICATION WITH CONSENTING ADULT TOBACCO PRODUCT USER.

[11] It is common cause that South Africa did not regulate tobacco product(s) prior to 1993. Tobacco Product Control Act 83 of 1993 was introduced and promulgated on 1 February 1994 (the Act). The Act has since been amended following a public participation process up to and including The Tobacco Product and Control Amendment Act 63 of 2008 promulgated on 21 August 2009 (the amendment Act). The applicant, probably the Council as well and any interested member of the public, participated in open democratic debates up to the finalisation of the Act. This makes the Act an autochthonous piece of legislation.

[12] The disputes between the parties are with regard to both the interpretation of the impugned prohibition and its constitutionality. The applicant alleges that the provision does not prohibit one-to-one communication. The applicant further alleges that the respondent's interpretation results in a "blanket ban" on the ability of tobacco manufacturers, importers and retailers to communicate on one-to-one with consenting adult consumers of tobacco products.

INTERPRETATION OF IMPUGNED PROVISION.

[13] Analysing the wording of section 3(1) (a) of the Act, it is clear that “no person or any other person” is allowed to advertise or promote a tobacco product. The word “person” includes, in my view, a juristic person. The applicant or an agent appointed by the applicant as a juristic person is prohibited to advertise or promote a tobacco product.

[14] ~~The advertisement~~ or promotion is prohibited through ~~any direct~~ means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method e.g. (Media). This is unambiguously a blanket prohibition of advertising or promoting publicly a tobacco product on one-to-one basis with any member of the public including consenting adult consumer of tobacco product. The respondent’s counsel submission emphasises this point with a proviso authorised in terms of the regulations.

The applicant proposes an amendment to the definition of "Advertisement" by adding the phrase "...and Consumers where such communication is restricted to communicate with existing individual adult consenting Tobacco users" after the word "shareholders". This proposal would amend the definition of advertisement paragraph (c) to read "Advertisement, in relation to any tobacco product, (c) excludes commercial communication between a tobacco manufacture or importer and its trade partners, business partners, employees and share holders and Consumers where such communication is restricted to communicate with existing individual adult, consenting Tobacco users"

The respondent submits that the prohibition is not a blanket ban on ability of tobacco manufacturers, importers and retailers to communicate with consumers about the above information on the basis that the (1) 'sale regulations permits retailers to put up notices which indicates the availability of tobacco products and their prices on signs placed within one metre of the point of sale; (2) 'The packaging changes can as well be creatively managed at sale point'. The respondent correctly submits that section 3 (b) of the Act prohibits the packaging or labelling of a tobacco product in any way that creates the impression that a particular tobacco product is less harmful than another tobacco product. The respondent lastly submits

that there is nothing in the statutes that prevents any communication on price or availability of a tobacco product to a customer or consenting adult tobacco product user.

The applicant's method of communication with existing consenting individual adult tobacco users set out in his founding affidavit,⁴ does not persuade me to accept that that' will indeed be a one-to-one communication. The applicant alleges that 'the impugned prohibition is overbroad since it goes too far in prohibiting any commercial communication, which would include brand-preference communication (i.e. communication that merely raises awareness as regards to a particular brand of tobacco product) and informational communication (i.e. communication which simply provides information relating to the product.) It amounts to an absolute prohibition on receiving and imparting information by closing down the ability of tobacco manufacturers (and importers, wholesalers and retailers) to communicate with existing tobacco consumers in relation to meaningful information that is of benefit to consumers.

enquired from the applicant's counsel, from what I heard on radio TALK 702 this morning⁵ around 07h00, whether the "advert" or "information" which is said to have been brought by BAT South Africa on

⁴ Para 11.5 at paginated page 22

⁵ 17 March 2011

distribution of a fake tobacco product, or illegal trafficking of tobacco product, is what is meant by a one-to-one communication with existing consenting adult tobacco users; or is the “advert” or “information” broadcast intended to all South African listeners of radio (or any form of media) irrespective of whether such individual is an adult or not and further, irrespective of whether such listeners are tobacco consumers or

He submits not to have been aware of such an “advert” or “information”. He further submits that the applicant, (on his instructions) is not aware of such “advert” or “information.” further enquired, assuming they heard the said advert, if such advert is a one-to-one communication with consenting adult tobacco user intended? It is quiet surprising to me as to how can the applicant not be aware of a radio “advert” broadcasted at their instance and request?

as a follow up question thereto, enquired from the applicant’s counsel to explain to me on how, on a practical basis, this one-to-one communication will be effected Mr Marcus⁶ submits that the agent appointed by the applicant will approach the adult tobacco user at the

⁶ Adv Gilbert Marcus SC

regulated “smoking area” at the restaurants or other public areas where such communication will be effected.

His explanation on how the communication will be effected, in my view, will interrupt and/or spoil a relaxed “date” or a “business meeting between a tobacco product user and non-user held at such regulated areas. This will irritate some sensitive non tobacco user patronizing restaurants and finding themselves within such regulated smoking areas. find it unpalatable, untenable and impractical.

The purpose of the Act, as set out in the preamble, is to ‘encourage existing users of tobacco product to quit. and to enhance and protect the fundamental rights of citizen by discouraging the use, promotion and advertising of tobacco products in order to reduce the incident of tobacco related illness and death.’

The principle of interpretation of statutes formulated by Langa CJ⁷ is that ‘a court must promote the spirit, purports and objects of bill of rights in conformity with the constitution’.⁸

⁷ As he then was.

⁸ Paragraph 21-26

Considering the objectives of the Act set out, I am of the view that the impugned prohibition be interpreted to prohibit one-to-one communication. This will, in my view, promote the spirit, purport and objectives of the Act. Even the applicant concedes that the general purpose of the Act is to encourage consenting adult tobacco users to stop using tobacco products. How will the said objectives be achieved other than to prohibit advertisements or promotions of such tobacco products?

[24] In my final analysis, Section 3(1) (a) of the Act as amended does not need any amendment. All applicant's six intended methods including electronic mail communiqué with consenting adult tobacco users are, indeed and rightly so, prohibited by section 3(1)(a) of the Act.

CONSTITUTIONALITY OF IMPUGNED PROHIBITION:

The applicant challenges, in the alternative, the constitutionality of the impugned prohibition. It is alleged that the prohibition infringes the right to freedom of expression entrenched in section 16(1) of the Constitution of the Republic of South Africa (the Constitution) as it

prohibits one-to-one communications to consenting adult tobacco consumer. Section 16(1) of the Constitution provides that '[e]veryone has the right to freedom of expression, which includes

- (a)
- (b) freedom to receive or impart information or ideas.

The applicant submits that the impugned prohibition limits the right to freedom of expression of "tobacco consumers"⁹ who are denied the right to receive information on tobacco products. Surprisingly the word "adult" is not used. I enquired from applicant's counsel if the said freedom to receive or impart information is extended to minor children especially below the age of 12? I further enquired in the event of his answer being positive, as to whether section 2(1) (a) (iii) is, as a consequence, as well unconstitutional? By the way the provision stipulates: 'No person may smoke any tobacco product in

- (i)
- (ii).
- (iii) any motor vehicle when a child under the age of 12 years is present in that vehicle

⁹ Para 9 applicants HOA

Seeing that the Act does not provide for a sanction on contravention of the provision, "I threw a stone in the bush" by enquired from the *amicus curiae* and the first respondent's as to what they are doing about that. No answer forth came from either party

The rights in the Bill of Rights are guaranteed. The said rights may, however, be limited only in terms of Law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including but not limited to:

- a) the nature of the right
- b) the importance of the purpose of the limitation
- c) the nature and extent of the limitation¹⁰

In taking into account all relevant factors justifying the limitations of right entrenched in the Bill of Rights, the applicant submits with emphasis that the impugned prohibition is unconstitutional. He relies on the majority decision of the Canadian Supreme Court in RJR-MacDonald Inc v The Attorney General of Canada and quotes "[127] This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed

¹⁰ Section 36(1) of constitution.

upon s1 of the charter. First, to be saved under s1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the Charter is 'reasonable' In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of the inference from evidence of established truths. This is not to deny intuition its role, to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility." ¹¹

[29] The applicant's submission is based on the test followed by McLachlin J who held that the '[s]tate must demonstrate the means by which it seeks to achieve are reasonable and proportionate to the infringement of right.¹² If the State fails to demonstrate the said means, then, according to the applicant, the legislation must fail

¹¹ Judgment by McLachlin J, forming part of the majority

¹² Criteria set out in *Oakes v* as a framework to guide in determining whether a limitation is demonstrably justified in a free and democratic society. The said criteria are;

- a) The objective the limit is designed must be of sufficient importance warranting overriding the constitution protected right of freedom.
- b) the measure chosen must be proportionate to the objective,
- c) proportionality must
 - (i) be rationally connected
 - (ii) impair guaranteed right or freedom.

On perusal of the “minority Judgment” penned by La Forest J, the court held that “ these guidelines should not be interrupted as a substitute for section 1¹³but the courts must, in every application of the provision, strike a delicate balance between individual rights and community needs.¹⁴He further held that section 1 will vary substantially depending upon both the nature of the legislation and the nature of the right infringed.¹⁵

The test to be applied in terms of section 36(1) of the Constitution is whether the limitation of the right to freedom of expression is a reasonable and justifiable one in an open and democratic society taking into account relevant factors think it is an opportune time to deal with that factor.

THE NATURE OF THE RIGHT

The freedom of expression the applicant alleges to be infringed is the right to communicate with consenting adult tobacco users on one-to-one basis

¹³ Limitation clause in Canada Constitution

¹⁴ Para 62 of McDonald case

¹⁵ Para 64

loath to repeat what alluded at the time dealt with the interpretation of the impugned clause with regard to one-to-one communication. I am, however, still of the view that the practicality of one-to-one communication with consenting adult tobacco consumers as set out and submitted¹⁶ by the applicant is far from persuading me to accept their means. It is on that basis I find that the limitation clause is, in my view, reasonable and justifiable, bearing the objective the democratic society seeks to achieve¹⁷ in enacting the Act.

THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION.

[33] The purpose of section 3(1)(a) of the Act is to limit communication of tobacco product on one-to-many including the means the applicant relies on as one-to-one with consenting adult tobacco consumers. It is clear from the wording of the impugned prohibition that the Parliament intends to protect public health by encouraging existing smokers to stop smoking, discouraging non smokers from starting and to educate members of the society on health risks that flow from tobacco consumption.

¹⁶

¹⁷ Paras [24] *supra*

[34] The *amicus curiae* submit that tobacco consumption is one of the leading causes of lung cancer and even death in our society. It is further submitted that smoking does not only affect its consumers but “passive” ones as well. In the words of La Forest J, a ‘strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effect’.¹⁸

[35] I am of a strong view that protection of “public health interest” is one of the fundamental rights that override the interest of an individual including that of the applicant. The right to freedom of expression is not absolute and cannot override the interest of the democratic society. Advertising of a tobacco product is made solely for the interest of a person with a sole purpose of persuading or enticing members of the public to patronise the product. In fact, the main purpose of advertising tobacco product is to promote the use of the harmful product which often becomes fatal even to the consenting adult tobacco consumers. The tobacco is more harmful to passive smokers especially children who find

¹⁸ RJR Mac Donald case-para 67

themselves, without choice, in motor vehicle(s) in which a smoker is a passenger and smoking. accept that tobacco product(s) is one of the sources that generate enormous revenue for the applicant and the state through taxes.

Considering the reasonable justification of the limitation clause with specific reference to the nature of the right, cannot agree more with the statement by Kriegler J in Mamabolo case as quoted by the respondent counsel in his heads of argument that "what is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."

THE NATURE AND EXTENT OF THE LIMITATION.

The applicant submit that the impugned prohibition constitute a blanket ban on advertising and promotion of the tobacco product. Relying on the words of Mc¹⁹Lachlin J, the applicant further submit that "the impugned prohibition amounts to an absolute prohibition on receiving and importing information by closing down the ability of tobacco manufacturers. to

¹⁹ RJR Mac Donald case

communicate in the most rudimentary fashion with existing tobacco consumers in relation to meaningful information that is of benefit to consumers.²⁰

The respondent submits that the prohibition is not a blanket ban as the point of sale (POS) regulations permits informational advertising within the boundaries set by regulations. He further submits that tobacco consumers can thus obtain information at POS with regard to, among others, package change; launch of new products, etc.

~~I find no blanket ban or absolute prohibition on the ability of tobacco manufacturers, importers or wholesalers to engage in one-to-one~~ communications with consenting adult tobacco products consumers.

agree with the respondent that tobacco consumers can access information at POS with regard to packaging and new product notwithstanding the contrary view of Mac Lachlin's contention as relied upon by the applicant that "Parliament has adopted an incremental solution by prohibiting advertising without. prohibiting the consumption, manufacturer or sale of tobacco In so doing, it has chosen a policy approach that strives to balance the right of tobacco smokers and manufacturers against the legitimate public health concerns arising from tobacco addiction

²⁰ Para 61 applicant's heads of argument

In my final analysis, find the impugned prohibition limiting the right to freedom to receive or import information to consenting adult tobacco consumers on one-to-one communication with manufacturers or wholesalers as reasonable and justifiable.

Section 39(2) of the Constitution provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects the Bill of Rights.'

The principle of interpretation of statutes has since changed with the Constitution as being the starting point and not the legislation itself.

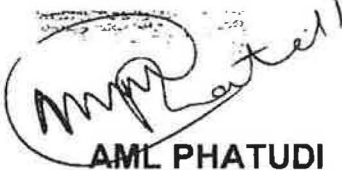
Langa DP (as he then was) in Investigating Directorate: Serious Economic Offences and Other v Hyundai Motor Distributors (Pty) Ltd

held that: "The Constitution requires that judicial officer read legislation, where possible, in ways which given effect to its fundamental values. Consistently with this when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as it is possible, in conformity with the Constitution".²¹

²¹ Para 14

[42] It is trite that costs follow the event. All counsel submit that this matter warrant employment of two counsel. The successes of the respondent and amicus curiae entitle them to the costs. thus make the following order.

APPLICANT'S APPLICATION IS DISMISSED WITH COSTS OF BOTH THE RESPONDENT AND THOSE OF AMICUS CURIAE INCLUDING THE COSTS OF TWO COUNSEL.



AML PHATUDI

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 17 March 2011

For the Applicant: Adv Gilbert Marcus SC

Adv Alfred Cockrell SC

Adv Frank Snyckers

Instructed by: Messrs: Savage Jooste and Adams Inc

For the Respondent: Adv MR Madlanga SC

Adv N Rajab-Budlender

Adv M Sikhakhane

Instructed by: Messrs: State Attorney

Date of Judgment: 19 May 2011