

**TOBACCO CONTROL LEGISLATION:
THE CHALLENGES OF ENFORCEMENT MECHANISMS**

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DECLARATION

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is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or any other University.

.....

(Signature)

13/9/2002
Date

DEDICATED TO:

MY GRANDMOTHER, ZISHIYILE (u-MAMSEZANE),

AND

PROF. SAGIE NADASEN, A FRIEND INDEED

IN MEMORY OF

MY LATE FATHER, MUNTUKATHENJWA

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CHAPTER ONE

1 INTERNATIONAL INITIATIVES FOR TOBACCO CONTROL

1.1 INTRODUCTION

The Framework Convention on Tobacco Control is a major step taken by the WHO in an attempt to limit and control the global use of tobacco. According to Brundtland¹ “[t]obacco control cannot succeed solely through the efforts of individual governments, national NGOs and media advocates. We need an international response to an international problem. I believe that response will be well encapsulated in the development of a Framework Convention.”²

However, it is submitted that tobacco control cannot succeed solely through the existence of a Framework Convention on tobacco control. The most important issue will be the implementation of such a Framework Convention at the national level. There must also be a political will among the public sector, just as Obire-Gama³ has submitted that international law, particularly international conventions, is based on the will and consent of sovereign states. It is envisaged that if the treaty is to be implemented successfully, each stakeholder has a crucial role to play in this process. This applies to stakeholders at all levels, whether they are at international, national, or regional level. Such co-operation is especially vital at regional level since national missions cannot be used to challenge public health regulations in other countries. The international community needs to play a vital role to facilitate such regional co-operation. Hence, this study is conducted with the main objective to explore the South African model of tobacco control measures, which emanate from the recommendations of the Convention. Further, the study aims at examining the effectiveness of these legislative measures in protecting public health. Finally and most importantly, the study intends to

¹ Dr Brundtland had just assumed a position as a new Director-General of the WHO.

² WHO (1998) ‘Tobacco Industry Disclosure’ Seminar held in Geneva Switzerland, 20 October 1998.

³ Obire-Gama, J(2000) ‘The Application of International Law into National Law, Policy and Practice’ Paper presented at the WHO International Conference on Global Tobacco Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 7-9 January 2000: 2.

examine whether there are adequate and effective enforcement mechanisms in place to ensure that the legislative objectives are achieved.

According to Rafei, the regional Director of the World Health Organization (WHO), South East-Asia Region, it is estimated that there are 1.2 billion smokers in the world, and 800 million of these live in developing countries.⁴

Recent figures released by the WHO estimate that 4 million deaths are due to tobacco-related diseases such as respiratory diseases and cancers.⁵ It is estimated that East Asia alone accounts for 580 000 of those world death statistics.⁶ This figure is expected to rise to 10 million by the year 2030.⁷ Sadly, 7 million of these will occur in developing countries.⁸ The reasons for this trend vary. They include, *inter alia*, the increase in developing populations, weak knowledge of health hazards, increased smoking prevalence, intensive and ruthless advertisement, poor funding for tobacco control, and lack of political will due to tobacco companies' lobbying of the public sector. No doubt, the use of tobacco affects different individual groups differently. Children and women are the most vulnerable groups. The effects of tobacco use on these two individual groups are dealt with below.

1.1.2 The Most Vulnerable Groups

1.1.2.1 Children

There is strong evidence⁹ that children whose parents smoke during their first years of life, are at a high health risk of suffering from respiratory diseases such as lower respiratory tract illness, asthma, and respiratory symptoms (for example, wheezing, coughing, breathlessness and phlegm) lung infection, and middle ear disease. Studies have also shown that there is a

⁴ WHO International Conference On Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 7-9 January 2000.

⁵ Chaudhry, K (2000) 'Multisectoral and Intersectoral Approach to National Tobacco Control' Paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 7-9 January 2000: 1.

⁶ *Op cit* n4 at 2.

⁷ *Op cit* n5.

⁸ Srivastava, A (2000) 'The Role and Responsibility of Media in Global Tobacco Control' Paper presented at the WHO International Conference on Global Tobacco Control: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 7-9 January 2000: 1.

⁹ WHO (1999) Document for the International Consultation on Environmental Tobacco Smoke (ETS) Children Health, held in Geneva Switzerland, 11-14 January 1999: 6.

link between smoking and sudden infant death syndrome (SIDS). There is also ample evidence that, when compared to the children of non-smokers, children of smokers perform more poorly at school due to the neuro-developmental effects. Active and passive smoking is responsible for cardiovascular diseases due to deleterious effects on oxygen transport, a light density lipoprotein (LDL), cholesterol, and possibly, endothelial function in young adults. Finally, both voluntary and involuntary exposure to tobacco smoke is responsible for childhood cancers.

According to one investigation done by the United States Food and Drug Administration (FDA),¹⁰ in the United States (US) alone, 5 million children alive in US today will die prematurely because of their use of tobacco. This shows that young persons are also at risk from active smoking. The investigation also found that out of any group of 1000 20 year-olds who smoke in the US, 250 of them will die in their middle age from smoking, while another 250 of them will die in old age from smoking.¹¹

1.1.2.2 Women

Women become affected by tobacco, not only by being around people and in environments, which are filled with tobacco smoke, but also by consuming tobacco themselves. The WHO reports¹² that in the world today, there are 200 million women who smoke. This does not include the number of women in South East Asia who practice habits other than cigarette smoking like smoking bidis and chhutas and chewing tobacco with other ingredients, rubbing burnt tobacco on their gums and teeth, and plugging tobacco quid under their tongues or in the cheeks. Although the US has only 5% of the world's population, it accounts for 50% of the world's deaths related to smoking among women. It is women who suffer from numerous diseases that affect them through their life cycle. Lung cancer is fast exceeding breast cancer as the most common malignancy in women in countries where smoking is increasing, such as in

¹⁰ Zeller, M (2000) 'Regulating of Tobacco Products' Paper presented at the WHO International Convention on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 6-9 January 2000: 2

¹¹ *Idem.*

¹² Aghi, MB (2000) 'Women, Children and Tobacco' Paper presented at the WHO International Conference on Global Control Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 7-9 January 2000: 13.

Central and Eastern Europe.¹³ This list also includes countries in Western Europe, and other countries wherever women still smoke.¹⁴ They also suffer, just like men, from bronchitis, emphysema and ischaemic heart disease and other diseases of the vascular system. It is also said that pregnant women are extremely vulnerable to tobacco hazards. A strong connection has been established between tobacco use and low birth weight babies. There have been reports of high incidences of stillbirths and prenatal mortality among female tobacco chewers in India.

1.2 INTERNATIONAL INITIATIVES¹⁵

In 1996, the member states of the WHO adopted the World Health Assembly Resolution, WHA 49.17, in which they decided to initiate the development of a binding international Instrument on tobacco control.¹⁶ In May 1997, the environmental leaders of the so-called 'G-eight' signed the 1997 Declaration on Children's Environmental Health.¹⁷ In 1998, the WHO, recognizing the enormous premature mortality caused by tobacco use, decided to reinvigorate work on tobacco control by creating a new Cabinet-level project entitled 'Tobacco Free Initiative', which proposed the 'Framework Convention' as its cornerstone.¹⁸

Following the 1997 Declaration, the WHO convened an International Consultation on Environmental Tobacco Smoke (ETS) and Child Care in Geneva, Switzerland.¹⁹ The consultation was able to bring together experts from both developed and developing countries to examine the effect of the ETS on child health and to propose recommendations on interventions in an effort to reduce and eliminate children's exposure to the harmful effects of ETS. The WHO has acknowledged that tobacco control is a human rights issue, and the WHO Constitution specifically provides that health is a fundamental human right. The UN and regional conventions, such as the Universal Declaration of Human Rights; the Convention on

¹³ *Ibid* at 11.

¹⁴ *Idem*.

¹⁵ *Idem*.

¹⁶ WHO (1999) Technical Briefing Series for the Framework Convention on Tobacco Control: 15.

¹⁷ *Ibid* at 21.

¹⁸ *Ibid* at 13.

¹⁹ WHO (1998) International Consultation on Environmental Smoke and Child Care, Seminar held in Geneva Switzerland, 11-14 January 1998.

Economic, Social and Cultural Rights; the African Convention on Human and Peoples Rights; and the American Convention on Human Rights all have provisions for the right to health. Other conventions such as the Convention on the Elimination of Discrimination Against Women (CEDAW), and the UN Convention on the Rights of the Child, make provisions for the right to health.²⁰ The UN Convention on the Rights of the Child expressly cites tobacco as a serious problem.²¹ Articles 6 and 24 of this Convention create obligations for signatory governments to guarantee children's right to life by creating an environment that maximizes the survival and development of children, and to implement measures ensuring and recognizing children's right to the highest attainable standard of health.²²

At the beginning of 2000, a conference called the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, was held in New Delhi, India. The main objectives²³ of the conference were highlighted as: -

- to consider the issues that developing countries may encounter in formulating the proposed WHO framework convention on tobacco control;
- to consider particular difficulties that developing countries may encounter in enacting tobacco control measures;
- to propose measures for ensuring that developing countries are able to implement the convention, and build the capacity to participate in global and national activities for tobacco control;
- to mobilize technical and political support for tobacco control in the developing world; and
- to consider mechanisms for stimulating the widest possible collaboration between ministries of health, foreign affairs, trade, finance, environment, justice and education for the development and future implementation of the Convention.

It is worth noting some important aspects that are impliedly raised by these main objectives of the conference. One notes that the tobacco control issue is a global issue. No one country, on

²⁰ UN Convention on the Rights of the Child, G.A. res. 44/25, annex. 44 U.N. GAOR Supp (N49) at 167, U.N. Doc. A/44149 (1989).

²¹ *Idem*.

²² *Op cit* n6 at 5.

²³ WHO (2000) Discussion Paper for the WHO Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, held in New Delhi India, 6-9 January 2000: 1.

its own will be able to control the pandemic of tobacco use. What is needed is international co-operation among multi-nations. It is noteworthy that the widespread use of tobacco calls for the development of strong control measures. Such measures must be co-ordinated at an international level.

Developing countries are the most vulnerable ones, since they are target of many tobacco companies. Thus, it is imperative that they enact their own tobacco control measures that will be effective enough to combat the epidemic of tobacco products and its effects on the health of their populations. Local measures must be able protect the most susceptible groups, that is, children, youth and women. In addition, one notes from these objectives that there is a greater need for the widest possible collaboration between the various ministries, within the governments, in order to develop and to implement the Convention on tobacco control. Tobacco control will not succeed without such inter-ministerial collaboration.

Moreover, that there is a need for technical and political support for tobacco control. In other words, the successful implementation of Convention depends largely on the political will within each country. This is so because of the powerful lobbying by the tobacco companies. Finally, there is recognition that developing countries will encounter numerous difficulties, both in developing and implementing the proposed WHO Framework Convention on Tobacco Control.²⁴ In view of these envisaged difficulties, the conference committed the international communities to support the developing world. To make a success of the above objectives, the Convention proposed a number of recommendations²⁵ that are discussed in 1.3, below. These recommendations were drawn from various expert papers for the framework on tobacco control. The approach is based on three different levels, namely: international, national, and regional levels.

²⁴ *Ibid* at 16.

²⁵ *Idem*.

1.2.1 RECOMMENDATIONS OF THE FRAMEWORK CONVENTION

1.2.1.1 International Level

At the international level, it was recommended, *inter alia*, that there should be an increased collaboration between various multilateral and regional organizations. The Convention also highlighted the need for developing countries and the international community to work with the World Trade Organization (WTO) and its member states in establishing a Committee on Trade and Health. The main duty of the Committee will be to examine any specific matters which have a bearing on trade policy measures. This examination may only be performed upon request by any member state.

In addition, the Convention pointed out the need for the WHO to enhance collaboration with larger international and regional human rights communities such as a joint study by the WHO and the United Nations Children's Education Fund (UNICEF) on tobacco and children's rights and the WHO study on CEDAW. Furthermore, all countries that grow tobacco need to adopt a complete crop shifting within two decades in order to reduce tobacco cultivation. Any development aid should not be used to support increased tobacco productivity.

According to the Convention, the international community should develop a protocol on tobacco advertising and promotion. Such protocol must include a comprehensive ban on all forms of advertising and promotion of tobacco products and brand names via the media. Moreover, the international organization should encourage sports organizations such as the International Olympic Association and the Federation of International Football Associations (FIFA), and the media to ensure that sports and telecasts become tobacco free.

Further, the Convention recommended that there must be co-operation between stakeholders such as NGOs, governments, the judiciary and consumers need to co-operate in an effort to reduce tobacco consumption. Legislation that will help reduce the exposure of women and children to environmental tobacco smoke in key environments such as in homes and workplaces needs to be put in place. Finally, the Convention should be used to commit governments to more gender sensitive policies and legislation on tobacco control.²⁶

²⁶ *Op cit* n23 at 17.

1.2.1.2 National Level

The Convention recommended for the creation of efficient multisectoral interdisciplinary national institutions for tobacco control to serve as a critical mass to influence government to change their priorities in favour of tobacco control. At the same time these institutions undertake awareness campaigns and promote the treaty making process, which will pave the way for a country's ratification and implementation of the Convention.

Moreover, the states should develop specific tobacco control laws in order to effect the obligation in the FCTC. In so doing they should ensure that the provisions of the FCTC and related protocols are reflected in their national health policies. On the other hand developing countries need to issue regulations that will limit the access of youth to cigarettes. To ensure compliance, there needs to be enforcement penalties. In addition, each state will have to withdraw all subsidies for tobacco farming, and to control tobacco farming and manufacturing activities. Meanwhile there should be increased government control over tobacco products, and any investment in tobacco should to be phased out.

Also, each country needs to develop a national policy on tobacco that will include the establishment of an office for tobacco control, formation of a multisectoral advisory committee for tobacco control, and the establishment of health and non-health NGO networks interested in tobacco control. Each government should recognize its responsibility to ensure that media events, sports sponsorship, films and music do not promote tobacco use. At the same time statutory warning labels and signs need to be displayed more prominently on packs and advertisements. This recommendation takes into account the uniqueness of each country's needs. Hence each country has to take its needs and its limitations when designing its model of tobacco control.

Furthermore, there is a need for increased attention to assist materially in child health programmes, and to plan, manage, and evaluate smoking cessation programmes for pregnant smokers. And most importantly, tobacco companies need to undertake to disclose whatever they knew about the harms and addictiveness of tobacco. They need to declare all contributions to political parties and politicians, while at the same time they disclose all payments to lobbyists, consultants and other groups. And they should dissolve all trade

associations of the industry.²⁷ The aim of these recommendations is to ensure that tobacco industry does not hide behind the claim that information is pertaining to tobacco is a trade secret. They also seek to restrict lobbying of politicians by tobacco companies.

In addition tobacco products and marketing the need to be scientifically evaluated to facilitate tobacco regulation. And, finally, the governments should strictly enforce anti-corruption and anti-trust laws. However, the government missions may not be used to challenge public health regulations on tobacco in other countries. The qualification of this recommendation by the above condition may have been intended to encourage voluntary co-operation by different countries, but it is submitted that it might lead to the collapse of tobacco policy of other countries due to smuggling and lack of co-operation.

1.2.1.3 Regional Level

This conference advanced three recommendations pertaining to the regional levels. Namely, that the neighbouring states should establish effective policy co-ordination to ensure efficacy in tobacco control, while at the same time preventing potential fiscal revenue losses. Second, that developing countries harmonize their tobacco control strategies. Finally, the Convention recommended that regional organizations should co-operate in tobacco control activities.²⁸

1.3 CONCLUSION

The Framework Convention has set the ball rolling in the fight against tobacco endemic. It has created a framework for any individual state to follow when enacting a national legislation on tobacco control. It has also set a scene for a co-ordinated effort at different levels, that is, international, national, and regional levels. Each level has to play its role if tobacco control is to succeed. The writer submits that out of the three the national level carries the most responsibility in the fight against the spread of tobacco use. It is the closest level to the people on the grassroots level. It is at national level that the unique needs of each country can be taken care of. At national level policies and legislations are enforced. The international level

²⁷ *Ibid* at 16.

²⁸ *Idem*.

plays the role of being a co-ordinator and a helper to any individual country that needs assistance to make a success of its policy on tobacco control. On the other hand each country has to work in co-operation with the other regional role players at regional level. The following chapter examines the measure that the South African government have put in place in response to the Framework Convention, especially legislation. It looks at the efficacy the South African tobacco legislation.

CHAPTER TWO

2 SOUTH AFRICAN TOBACCO PRODUCTS CONTROL LEGISLATION

2.1 INTRODUCTION

In 1993, the South African government passed a far-reaching piece of legislation, namely, the Tobacco Products Control Act.²⁹ This was done in response to the global outcry on the dangers of tobacco use. Evidence was unfolding, at that time, that tobacco was responsible for millions of deaths annually. In 1994, the legislature enacted regulations that made it compulsory to label cigarette packages with warning signs.³⁰ However, it was not until 1999 that the government took serious measures to control the use or abuse of tobacco products. In that year, the legislature passed the Amendment Act.³¹ The Amendment Act is more detailed than its principal.

The purpose of the 1993 Act, on one hand, was threefold: First, ‘to prohibit or restrict smoking in public places’; Secondly, ‘to regulate the sale and advertising of tobacco products in certain respects and to prescribe what is to be reflected on packages’; and thirdly, ‘to provide for matters connected therewith’. The Long Title to the Amendment Act expands on the purpose of the Principal Act. It provides more details relating to the necessity for such legislation. These are dealt with below.

2.2 TOBACCO CONTROL LEGISLATION

The long title to the Amendment Act reads as follows: ‘to amend the Tobacco Products Control Act, 1993, so as to amend and insert certain definitions; to provide for the prohibition of advertising and promotion of tobacco products; to provide further, for the prohibition of advertising and promotion of tobacco products in relation to sponsored events; to prohibit the free distribution of tobacco products and

²⁹ Tobacco Products Control Act 83 of 1993 (hereinafter the Principal Act)

³⁰ GNR 2063 *GGE* 16111 of 2 December 1994 (hereinafter the 1994 Regulations).

³¹ Tobacco Products Amendment Act 12 of 1999 (hereinafter the Amending Act).

the receipt of gifts or cash prizes in contests, lotteries or games to or by the purchaser of a tobacco product in consideration of such purchase; to provide for the prescription of maximum yields of tar, nicotine and other constituents in tobacco products; to increase fines; and to provide for matters connected therewith.'

Clearly, the 1999 Amendment Act provides more details about the advertising and the promotion of tobacco products. Advertising includes the giving of gifts in cash prizes in contests or in any manner that is commonly used by companies, in general, to promote their products. The Amendment Act prohibits any promotion of tobacco products through the sponsoring of certain events, such as sports, beauty contests and music events. Furthermore, it prescribes the maximum yields of tar, nicotine and other constituents in tobacco products. Finally, and most importantly, it seeks to increase the fines which can be imposed upon offenders.

The preamble to the Amendment Act provides more insight as to why tobacco control measures are necessary. It acknowledges that "**tobacco use is extremely injurious to the health of both smokers and non-smokers and warrants, in the public interest, restrictive legislation.**" The Act also realises the increasing number of children and young people who smoke because of the association of smoking with social success, business advancement and sporting prowess through the use of advertising and promotion. Further, the Act purports to deter people from taking up smoking and encourages existing smokers to give up smoking since the extent of smoking on health "**calls for strong action.**"

Most importantly, the preamble concludes with a firm resolution to '**align the health system**' with the '**democratic values**' of the Constitution, and to enhance and protect the "**fundamental rights of citizens**" by discouraging the use, promotion and advertising of tobacco products in "**order to reduce the incidence of tobacco-related illness and death.**" It is of significance that '**tobacco-related illness and death**' are underlined.

What is evident from the Long Titles of both the Acts³² is that the South African Government aims at controlling tobacco products through a number of measures. These are: the labelling of tobacco packages with warnings and the provision of information; a ban on tobacco

³² The Principal and the Amendment Acts.

advertising; the reduction of tar and nicotine levels of cigarettes; the taxation on tobacco products; and the ban or the reduction of the use of tobacco products. In examining each one of these, one notes the following:

2.2.1 Warnings and Information

2.2.1.1 Packages

The Amendment Act³³ prohibits any person from selling or importing, for subsequent sale, any prescribed tobacco product, unless such product complies with the following conditions:

- such product should be in a package;
- the package in which such tobacco product is sold should bear the prescribed 'warning' concerning the health hazards incidental to the smoking of tobacco products; and
- the quantities of the constituents present in the tobacco product concerned should be stated on the package.

This statutory requirement seeks to ensure that the public is given appropriate warning regarding the dangers of the use of tobacco.

On the other hand, section 6(1)(a) of the Principal Act, which deals with regulations, empowers the Minister of Health to make regulations regarding the manner and form in which information contemplated in the Act,³⁴ is to be reflected on the package of any tobacco product. This will also include the manner or form in which the information is to appear in any advertisement of such product. In pursuance of the above-mentioned provision, the Minister of Health has introduced the following regulations:³⁵

- the description of the different types of tobacco packages;³⁶
- the types of warnings to be contained on a package or advertisement;³⁷ and
- the manner of positioning warnings³⁸ and the area to be covered thereof.³⁹

³³ Section 4 of the Amendment Act.

³⁴ Section 3 of the Amendment Act.

³⁵ *Op cit* n30.

³⁶ *Ibid*, Annexure 1, Column A.

³⁷ *Ibid*, Annexure 2.

³⁸ *Ibid*, Regulation 2(1)(a), (b) and (c).

³⁹ Subregulations (a)(ii), (b)(ii) and (c)(ii) of the 1994 Regulations.

The regulations provide for the manufacturer or retailer of any tobacco product, packed in the package described under Column A of Annexure 1, to choose a health warning from those in Part B of Annexure 2.⁴⁰ In addition to that, the manufacturer or retailer must position the warning in the prescribed manner and fill the area on the package as required by Column C of Annexure 1.⁴¹ To illustrate, a package containing cigarettes, cigars or loose tobacco shall contain the following warning:⁴² **DANGER: SMOKING CAUSES CANCER.** In terms of Column B of Annexure 1,⁴³ the above warning shall be on the front at the top across the full width of the package. In addition, it should cover 15% of the front of the package.

At the back of the package, another prescribed warning, set out in Part B of Annexure 2 should be added on, for example: ‘Nine out of ten patients with lung cancer are smokers. Smoking also causes cancer of the lip, mouth, voice box, food pipe and bladder. Quitting smoking reduces your risk of cancer. For more information call (Tel. No.).’⁴⁴ In terms of Column C of Annexure 1, this shall be on the back at the top across the full width of the package. In addition, this shall cover 25% of the back of the package. This ensures that the warning is clearly visible to users of tobacco products. The effect is that it would make any consumer, especially curious non-smokers, think otherwise before trying smoking. It will also encourage current smokers who would like to quit to seek help by dialling the number provided on the package of any cigarette.

Furthermore, subsection 1(c) refers to the information set out in Annexure 3, which deals with the information relating to tar and nicotine levels to be furnished to the public.⁴⁵ In addition, it provides for such information to be positioned in the manner and to fill the area on the package as required by Column D of Annexure 1. For instance in addition to the warning given above, the package must contain an information stating: 1.2 mgs tar, and 1.5 mgs nicotine. This shall, in terms of Column D Annexure 1, be positioned on one of the long sides of the package. However, this will not apply to packages containing a single cigar.⁴⁶ The provisions of

⁴⁰ Regulation 2(1)(a) of the 1994 Regulations.

⁴¹ Regulation 2(1) (b) of the 1994 Regulations.

⁴² Annexure 2, Parts A and B Warnings of the 1994 Regulations.

⁴³ Regulation 2(c)(i) and (ii) of the 1994 Regulations.

⁴⁴ The telephone number is (011) 720-3145.

⁴⁵ Annexure 3 section 1 of the 1994 Regulations.

⁴⁶ Annexure 1, Columns C and D of the 1994 Regulations (see number 2 and number 3)

subsection (1)(b)⁴⁷ also do not apply to packages containing a single cigar. Both provisions also do not apply to containers or packages for snuff or chewing tobacco.⁴⁸ These shall contain a special warning printed at the top across the full width of such container or package, covering 15% of the lid or the surface area of such container or package. The provisions of Column D only apply to manufactured cigarettes.⁴⁹ However, it must be noted that the information in Annexure 3 section (1) does not relate to the testing or reduction of tar and nicotine per se, but rather, to the information given to the public to make them aware of potential dangers incidental to the product they consume. The testing and reduction of nicotine and tar constituents are dealt with under the regulations as is dealt with later.

2.2.1.2 Written, Pictorial and Visual Advertisements

In the case of a written, pictorial or visual warning Column B of Annexure 1 provides that it must cover 10% of the advertisement and be positioned at the top across the full width of the advertisement. In addition, the information set out in Annexure 3,⁵⁰ which relate to the amount

of tar and nicotine contents should be supplied at the top across the width, covering 2% of the advertisement. These provisions are applicable to all tobacco advertisements in magazines and newspapers. They ensure that tobacco consumers and the general public are well informed of the risks inherent to smoking, and that such warnings are clearly visible.

2.2.1.3 Film, Video and Cinema Advertisements

The same warnings set out in Annexure 2 must be displayed in films, videos or cinema advertisements.⁵¹ Column B gives direction concerning the warnings set out in Part A and B. It provides that such a warning must be shown at the top across the full width of the screen. It further provides for the warning to last at least 10 seconds at the beginning of the advertisement. The warning must be shown again as soon as the tobacco product is shown for

⁴⁷ Section 2 of the 1994 Regulations.

⁴⁸ *Op cit* n46.

⁴⁹ Annexure 1, Column B of the 1994 Regulations.

⁵⁰ Annexure 3, regulation 1 of the 1994 Regulations.

⁵¹ Annexure 1, Columns A to D of the 1994 Regulations.

at least 10 seconds and at the end for at least 15 seconds. Such time requirement affords the viewer adequate time to read the warning.

Furthermore, in terms of sub-regulation 2(1)(b),⁵² which deals with warnings set out in Part B Column C of Annexure 1, any warning with regard to films, video or cinema advertisements, must be at the bottom, across the full width of the screen. It should cover 80% of the screen. It must appear simultaneously with the warning in Part A, for at least 15 seconds. On the other hand, Annexure 1 Column D stipulates that the information relating to tar and nicotine contents must be positioned at the top, under the warning, across the full screen. It should be shown at the end of advertisement, simultaneously with Part A of the warning. It should cover 2% of the screen. It must also be shown for the duration of at least 15 seconds. This statutory requirement in a sense compels tobacco industry to finance the publication of health warnings, since they have to reserve extra time with their advertisements.

2.2.1.4 Verbal Advertisements

Sub-regulation 1 of regulation 2, also applies to radio and spoken advertisements. Part A warnings,⁵³ such as: **DANGER: SMOKING CAUSES CANCER**, as required by sub-regulation 1(a), should be placed at the end of the advertisement after the information relating to tar and nicotine constituents. However, the regulation does not specify any specific length of time for it. It simply states that it should be of sufficient *duration* for the warning to be ‘clearly understood’. The writer submits that the term ‘clearly understood’ refers to the fact that an advert should be couched in simple language without the use of ambiguity. Furthermore, it should be in the same voice and speed as the rest of the advertisement.⁵⁴ This provision is necessary to convince anyone hearing the warning that smoking is indeed dangerous, having heard the same person who asks him to buy a product telling him that the same product is a health hazard.

⁵² *Ibid*, Annexure 1, Column D.

⁵³ Annexure 1 of the 1994 Regulations.

⁵⁴ Regulation 2(2) of the 1994 Regulations.

Finally, Column D of Annexure 1 requires the tar and nicotine information to be mentioned at the end of the advertisement. This information must appear before that of the warning sign and the duration thereof must be sufficient for it to be clearly understood.

2.2.1.5 Language and Other Relevant Information

Sub-regulation 3(1)(a) provides for the warning and information to be in the same language as the one used on the package or as that contained in the advertisements. It goes further to state that such language should be in one of the official languages.

As for the written or visual warnings, regulation 3⁵⁵ states that it must be in ‘Helvetica type’,⁵⁶ in black, red or blue print on a white background on one half of the packages or advertisements.⁵⁷ Furthermore, on a black, red or blue background for the remaining packages or advertisements for each brand, the warning and information should be reflected in white print.⁵⁸ Regulation 2(1)(a) warnings should both be in upper case lettering.⁵⁹ However, as for regulation 2(1)(b) warnings, they must appear in upper case lettering for the ‘first letter’ of a sentence, and in lower case lettering for the remainder of the sentence.⁶⁰ The warning or information should be centered within the area in which it is displayed with the text of the message occupying not less than 60% and not more than 70% of the area in which it is displayed.⁶¹ Moreover, a border which outlines the area in which the message is displayed without encroaching on that area,⁶² should surround the warning and information with the same colour as the text of the message. Regulation 3(1)(i) provides that the warning or information reflected on a package or contained in the advertisement shall be alternated in such a way so as to expose each warning on an equal quantity of advertisement for each brand or unit of packages, with a tolerance of 10% during each 12 months from the commencement of these regulations. In terms of sub-regulation 2, the area occupied by the warning and information, shall not contain any matter but that required by these regulations. The last

⁵⁵ In terms of regulation 2(1)(c) of the 1994 Regulations.

⁵⁶ Regulation 3(1)(b) of the 1994 Regulations.

⁵⁷ Regulation 3(1)(c) of the 1994 Regulations.

⁵⁸ *Idem*.

⁵⁹ Regulations 3(1)(d) and (e) of the 1994 Regulations.

⁶⁰ Regulation 3(1)(f) of the 1994 Regulations.

⁶¹ Regulation 3(1)(g) of the 1994 Regulations.

⁶² Regulation 3(1)(h)(i) to (ii) of the 1994 Regulations.

requirement seeks to ensure that the visibility of the warning is not obscured by any other unrelated information.

Finally, regulation 4(1) prohibits reflection of any warning and information that can be removed from the package or advertisement. Sub-regulation 2 states that such information should be of such a nature that it could not be destroyed or become unreadable upon opening the package in the normal way.

2.2.2 Ban On Tobacco Advertising And Promotions

In the preamble to the Act, the legislature appears to recognise that advertising, which associates smoking with social success, business advancement and sporting prowess, may have the harmful effect of encouraging children and young people to take up smoking. Thus, in an attempt to protect the vulnerable, section 3 of the Amended Act prohibits advertising plainly. It simply states: -

“Advertising, sponsorship, promotion and required information in respect of packages of tobacco products”

3(1) No person shall -

- (a) advertise, including the use of tobacco trade marks, logos, brand names or company names used on tobacco products; or**
- (b) use tobacco trade marks, logos, brand names or company names used on tobacco products for the purposes of advertising any organization, service activity or event....”**

Section 2(a) of the Amended Act defines ‘**advertisement**’ (‘**advertised**’ has a corresponding meaning) in relation to any tobacco product, as meaning “any statement, communication, representation or reference distributed to members of the public or brought to their notice in any manner and which is intended drawn, still or moving picture, sign, symbol, other visual image or message or audible image aimed at the public and designed to promote the sale of such or publicize a tobacco product or encourage the use thereof to promote smoking behaviour and includes the use in any advertisement or promotion aimed at the public of tobacco product manufacturer’s company name, where the name or any part of the name is used as or is included in a tobacco product trade mark.”

“...

(a) any activity or events:-

- (i) which the public attends or participates in;
which is organised for the purposes of entertainment, sport or recreation
or for educational or cultural purposes; and
- (iii) where a tobacco product, or brand name, trade mark or company name in
relation to a tobacco product, is used in the name of or portrayal of the
activity or event ...”

This definition is encompassing a number of activities that the tobacco companies may opt into in an attempt to promote their product. Thus, this definition is couched in such a way that it eliminates any loopholes.

The Amendment Act defines ‘tobacco product’ as “any product manufactured from tobacco and intended to be used by smoking, inhalation, chewing, sniffing or sucking.”⁶⁴ On the other hand, ‘trade mark’ is defined as including “any (i) mark whether registered or registrable for trade purposes or any recognised version thereof that is likely to be taken as, or confused with that trade mark...”⁶⁵ Once again these two definitions are expressed in a manner so wide that the tobacco industry is unable to find many defects to use as an excuse for non-complying with the law.

2.2.3 Reduction Of Tar And Nicotine Levels Of Cigarettes

It is necessary to consider the definition of both ‘tar’ and ‘nicotine’, before discussing what the position is about their reduction. The Principal Act defines ‘tar’ as ‘the anhydrous and nicotine-free condensate of the smoke of a tobacco product.’⁶⁶ ‘Nicotine’ is defined as meaning ‘nicotine alkaloids’.⁶⁷ In order to reduce ‘hazardous constituents’, section 6 of the Principal Act, dealing with the Regulations, empowers the Minister of Health to make regulations regarding “... the manner and method of getting the quantities of hazardous constituents in

⁶⁴ Section 2(k) of the Amendment Act.

⁶⁵ Section 2(l) of the Amendment Act.

⁶⁶ Section 1 of the Principal Act.

⁶⁷ *Idem.*

tobacco products reduced.”⁶⁸ The Minister may also regulate on “the properties of a tobacco product, the claims in respect of such product and representations in respect of the use thereof that may not appear in any advertisement.”⁶⁹

Nicotine is absorbed via the lungs of smokers and reaches brain within seconds.⁷⁰ Nicotine from cigarette is believed to result in the concentration of nicotine in the bloodstream of a smoker. Such concentration is the result of the quantity of nicotine in the smoke and the speed of transfer of that nicotine from the smoke to the blood stream.⁷¹ Nicotine is a potent drug with a variety of physiological effects.⁷² Its addictive nature is the main reason why many smokers maintain their tobacco use, and why ex-smokers resume smoking during times of stress.⁷³

However when reducing nicotine it is also necessary to reduce tar. According to available evidence if habitual smokers choose a lower delivery brand with a higher tar to nicotine ratio than then a high delivery brand, they will increase the amounts of tar and gas phase that they take in, in order to take in the threshold dose of nicotine.⁷⁴ Thus, one should decrease both tar and nicotine in order to reduce the intake of nicotine into the smoker’s blood stream.

Hence it is in view of this hazardous nature of tar and nicotine that both the Acts regulate the amount of these constituents. The Amendment Act inserted section 3A in the Principal Act.⁷⁵ This section deals with the permissible maximum yields of tar, nicotine and other constituents in a tobacco product. Like section 6(1) (b) and (c), section 3A empowers the Minister of Health to declare the maximum permissible levels of tar, nicotine and other constituents, which may be contained in tobacco products. It also deals with the maximum yield of any other substance that may be obtained ‘therefrom’.

⁶⁸ Section 6(1)(b) of the Principal Act.

⁶⁹ Section 6(1)(c) of the Principal Act.

⁷⁰ WHO (1999) ‘Making a Difference’ The World Health Report 1999: 69-70.

⁷¹ Hurt, RD & Robertson CR (1998) ‘Prying Open the Door Tobacco Industry’s Secrets About Nicotine. The Minnesota Tobacco’ *Journal of American Medical Association* 280 (13): 1174.

⁷² *Ibid* at 1175.

⁷³ *Op cit* n71.

⁷⁴ *Op cit* n71 at 1177.

⁷⁵ Section 5 of the Amendment Act.

Exercising the powers conferred by these above sections, the Minister has made regulations on this matter. For example, Government notice number R974⁷⁶ deals with such envisaged reduction. Regulation 1 states as follows: “[t]he tar yield of cigarettes marketed in the Republic of South Africa must not be greater than 15 mg per cigarette, and the nicotine yield not greater than 1,2 per cigarette, as from 1 December 2001.” Regulation 2 states the following: “[t]he tar yield of cigarettes marketed in the Republic of South Africa must not be greater than 12 mg per cigarette, and nicotine yield not greater than 1,2 mg per cigarette, as from 1 June 2006.”

Thus, the implication of these two regulations is that as from 1 December 2001,⁷⁷ the hazardous ‘constituents’⁷⁸ of any cigarette marketed in the Republic of South Africa must be 15 mg per cigarette or less, in so far as tar is concerned. As for nicotine, it must be 1,5 mg per cigarette or less. On the other hand, regulation 2 provides that as from 1 June 2006, these constituent levels should be 12 mg per cigarette and less for tar, and 1,2 mg and less per cigarette for nicotine.

However, whether the manufacturers or retailers will comply with these regulations, or whether they will deem it sufficient to write the words ‘as per government agreed method’ is still debatable. It is important to note that regulation 3 provides that the amount of tar and nicotine in the smoke of a cigarette will be determined according to Annexure 3 of the 1994 regulations, relating to the labelling, advertising and sale of tobacco products. Annexure 3⁷⁹ provides that such tar and nicotine amounts should be determined in accordance with the International Standards Organisation’s (ISO) methods, that is: 4387:1991; 3308:1991; 7210:1983; 3402:1991; 8243:1991; 10315:1991; 3400:1989; 10362-1:1991; 2971:1987; 688:1981; and 6565:1983.⁸⁰

⁷⁶ GNR 974 GGE 21610 of 29 September 2000.

⁷⁷ *Ibid*, regulation 1.

⁷⁸ Section 2(1)(c) of the Amendment Act defines ‘*constituent*’ in relation to any tobacco product, as meaning nicotine, tar and any other constituent of tobacco product, or of tobacco smoke which the Minister [of Health] may, by notice in the Government Gazette, declare to be constituent for the purposes of the Act.

⁷⁹ *Op cit* n76, regulation 2.

⁸⁰ The numbers stand for: ISO - International Standard entitled Cigarettes – Determination of alkaloids in smoke condensates – Spetrometric method ISO 3400:1998(E) second edition published by the International Organisation on 1 July 1989; ISO 4387 International Standard entitled Cigarettes – Determination of total and dry particulate matter using a routine analytical smoking machine – Glass fibre filter Smoke trap method ISO 4387: 18978 (E) first edition published by the International Organisation for Standardisation on 15 April 1987; ISO 8243 means International Standard entitled Cigarettes – Sampling ISO 8243: 1988 (E) first edition published by the International Organisation for Standardisation on 15 February 1988; and any subsequent amendments.

It further provides that the test must be carried out by the South African Bureau of Standards, or at any other laboratory nominated by the Director-General, in all respects, at the manufacturer's or importer's expense.⁸¹ It is submitted that manufacturers and importers are likely to comply, as any non-compliance may result in them suffering economic loss. An important deadline for the last phase of tar and nicotine reduction will be 1 June 2006.⁸² As from the 1st June 2006 onward, the permissible amount of tar will be 12 mg per cigarette or less, and 1,2 mg or less per cigarette for nicotine. British legislation empowers the Secretary for Health to carry out tests of cigarettes in order to establish their tar and nicotine yields, using the same standards as required by South African legislation.⁸³ It is the duty of the producer to furnish the State Secretary with the samples of cigarettes, and to notify him or her of tar and nicotine levels of any new brand to be marketed in the United Kingdom on or before the 1st October of every year.⁸⁴ The permitted maximum tar yield is 12mgs per cigarette.⁸⁵

2.2.4 Prohibition On Sale Of Tobacco Products To Persons Under The Age Of Sixteen Years

Section 4 of the Principal Act deals with the prohibition of the sale of tobacco products to persons under the age of sixteen years. The Act provides that no person shall sell or supply any tobacco product to any person 'under the age of sixteen', even if this is not for personal use.⁸⁶ This means that no parent or any other person shall send a child or anyone under the age of sixteen to buy any tobacco product for that person's use. Should anyone do that, the seller has an obligation not to sell it to him, the failure of which will render such seller guilty of an offence and he or she will be liable to a fine or imprisonment.⁸⁷ It is submitted that according to this provision a cigarette seller or distributor is obliged to ascertain the age of any buyer, especially those who appear to be below the age of sixteen years. British law imposes similar restrictions to tobacco retailers. Legislation makes it an offence to sell cigarettes to

⁸¹ Section 2(d) of the Amendment Act defines the '*Director-General*' as the '*Director-General of National*

Health and Population Development.'

⁸² Regulation 2 of the 2000 Regulations.

⁸³ Regulation 9(1) of the Tobacco Labelling (Safety) Regulations, SI 1991/1530

⁸⁴ *Idem.*

⁸⁵ *Ibid*, regulation 3(1).

⁸⁶ Section 4(1) of the Principal Act.

⁸⁷ Section 7(2) of the Amendment Act.

persons under the age of sixteen years.⁸⁸ Retailers are also required to display notice to the effect that they cannot sell cigarettes to persons under the age of sixteen, and failure to do so amounts to an offence.⁸⁹

2.2.5 Regulating The Point Of Sale

The Amendment Act permits a retailer of tobacco products to post signs at the point of sale indicating the availability of tobacco products and their price, but only in accordance with the regulations passed in relation to this Act.⁹⁰ The relevant regulations⁹¹ stipulate the size and the exact place of the signs.⁹² It provides that signs may not exceed one square metre in size⁹³ and they should be placed within one metre of the point of sale.⁹⁴ Furthermore, it also provides that *all signs* indicating the availability of tobacco products and their prices should contain the message: “**WE CANNOT, BY LAW, SELL TOBACCO PRODUCTS TO ANYONE UNDER THE AGE OF 16 YEARS.**”⁹⁵ These provisions ensure that the tobacco adverts are kept in doors. They aim to do away with billboards. At the same time they aim to protect young children from being encouraged to take-up smoking.

2.2.6 Restrictions On The Use Of Vending Machines

The Act provides that the sale of tobacco products from vending machines must be restricted to places not easily accessible to persons under the age of sixteen years.⁹⁶ It also imposes a responsibility on any person who is responsible for the premises or who has control of such premises in which any vending machine is kept, to ensure that persons under the age of sixteen years do not make use of such machines.⁹⁷ This duty, by necessary implication, will exist so long as the vending machine is still on such premises.⁹⁸

⁸⁸ Section 7 of the Young Persons Act of 1993 (as amending section 1 of the Protection of Children (Tobacco) Act of 1986, and the Children and the Young Persons (Protection from Tobacco) Act of 1991;

⁸⁹ Section 3(3) of the Children and Young Persons (Protection from Tobacco) Act of 1991.

⁹⁰ Section 3(3) of the Amendment Act.

⁹¹ GNR 976 GGE 21610 of 29 September 2000.

⁹² *Ibid*, regulation 2.

⁹³ *Ibid*, regulation 2(a).

⁹⁴ *Ibid*, regulation 2(b).

⁹⁵ *Ibid*, regulation 3(a).

⁹⁶ Section 5(1) of the Amendment Act.

⁹⁷ Section 5(2) of the Amendment Act.

⁹⁸ *Idem*.

In Britain the law is similar to that of South Africa in this respect. The owner and the person on whose premises the machine is situated are required to take reasonable precautions and exercise diligence to ensure that young children do not buy cigarettes from the vending machine.⁹⁹ Even if the owner of the machine was not present when the offence took place, he is still liable.¹⁰⁰

2.2.7 Ban On Smoking In Public Places

2.2.7.1 Non-Smoking Areas

Section 3(a) of the Amendment Act, substitutes subsection 1 for subsection 2(1). Subsection 1(a) expressly prohibits the smoking of tobacco products in any public place. It is relevant to ask what exactly is a ‘public place’- does it include a public park or a pavement in the city streets? It is submitted that a public place does not include a public park or pavements of the streets in town as this would render enforcement impossible. The Amendment Act defines a ‘public place’ as ‘any indoor or enclosed area, which is open to the public or any part of the public and includes a workplace and a public conveyance.’¹⁰¹

However, types of ‘public places’ vary considerably according to the services they provide to the public. Examples include the places such as cinemas, bars, restaurants, taverns and shebeens. There are other places which are private in nature, yet are public places. The typical examples include shebeens, and public transport owned by private individuals. These can be referred to as ‘private-public places’. Such places include a private dwelling used for commercial childcare activities or a private dwelling used for schooling purposes. Should smoking in these places be restricted? If indeed yes, how does one ensure compliance with the provisions of the Act? It is submitted that the test should be whether it is reasonable or not to restrict smoking in places frequently visited by smokers.

⁹⁹ *Op cit* n85; and Mousel Bros Ltd v London and North-West Rly Co. [1917]2 KB 836.

¹⁰⁰ St. Hellens Metropolitan Borough Council v Hill (1992) 156 JP 602.

¹⁰¹ Section 2(i) of the Amendment Act.

As far as the issue of ‘private-public’ places is concerned, the Act prohibits smoking of tobacco products in such places.¹⁰² This Act prohibits smoking of tobacco products in the dwelling itself or on its terrain, and defines a “**private dwelling**” as ‘any part of, either, any room or apartment of building or structure which is occupied as a residence, or it may be any building or structure or outdoor living area which is accessory to, and used wholly or principally for residential purposes.’¹⁰³ Thus, it is apparent from the definition that some private dwellings may be deemed public places if they are used for any purpose other than the one for which they are ordinarily used. However, smoking in a ‘private dwelling’ is permitted subject to two conditions: first, such smoking should be in an area of that private dwelling which is specially designated by the employer, owner, tenant or possessor, as a smoking area.¹⁰⁴ Secondly, the smoking area should comply with the prescribed requirements.¹⁰⁵ The Minister of Health has issued a notice declaring certain public places as smoking areas.¹⁰⁶

2.2.7.2 Smoking Areas

Regulation 2 permits smoking of tobacco products in certain areas provided certain conditions are complied with. These areas are the following:

2.2.7.2.1 Smoking Establishments

Smoking is allowed in a ‘smoking establishment’. A smoking establishment is defined as ‘an establishment where the primary business is to sell tobacco products to the general public, and to provide for related business activities.’¹⁰⁷ The sale may be intended for consumption on or off the premises. Examples of smoking establishments would include a tobacconist’s store and cigar clubs.

¹⁰² Section 2(1)(c) of the Principal Act.

¹⁰³ Section 2(h) of the Amendment Act.

¹⁰⁴ *Op cit* n61.

¹⁰⁵ *Idem.*

¹⁰⁶ GNR 975 GGE 21610 of 29 September 2000.

¹⁰⁷ *Ibid*, regulation 1.

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¹⁰² Section 2(1)(c) of the Principal Act.

¹⁰³ Section 2(h) of the Amendment Act.

¹⁰⁴ *Op cit* n61.

¹⁰⁵ *Idem.*

¹⁰⁶ GNR 975 GGE 21610 of 29 September 2000.

¹⁰⁷ *Ibid*, regulation 1.

2.2.7.2.2 Bars, Pubs, Taverns And Other Public Places Selling Alcohol Beverages

Regulation 2 permits the smoking of tobacco products in bars, pubs, taverns or any other place where the primary business is the sale of alcohol beverages. This is subject to Clause 3. However, before dealing with the conditions set out in Clause 3, it is important to deal with the definition of the above words.

The words ‘**pub**’, ‘**bar**’, or ‘**tavern**’ are defined as ‘**a place where the primary business of the place is to sell alcoholic beverages to the general public**’. Moreover, most importantly, alcohol must be intended for consumption on the premises. It is worth noting that a number of conditions are to be complied with. An examination of these conditions reveal that a person in charge or responsible for the public place has to designate a portion of such a public place as a smoking area, and such area must not exceed 25% of the total floor area of such public place.¹⁰⁸ The smoking area should be separated from the rest of the public place by a solid partition.¹⁰⁹ It should also have an entrance door on which the sign "SMOKING AREA" is displayed in black letters on a white background, which are not less than 2 cm in height and 1,5 cm in breadth.¹¹⁰ The purpose of this requirement is two-fold, namely, to make the area visible to all smokers, and to warn non-smokers to avoid the area. However the writer submits that this might be workable since smaller restaurants will not have the space to designate smoking areas. Also, it likely to have a negative effect on business owners since smokers will tend not to frequent establishments without designated smokers.

Additionally, the designated smoking area should have a ventilation that allows for the air from the smoking area to be exhausted directly to the outside.¹¹¹ In addition to this, the air from the smoking area should be such that it is not re-circulated to any other area within the public place.¹¹²

¹⁰⁸ *Ibid*, Clause 3(a).

¹⁰⁹ *Ibid*, Clause 3(b).

¹¹⁰ *Idem*.

¹¹¹ *Ibid*, Clause 3(c).

¹¹² *Idem*.

Yet another condition to be complied with is that a health-warning message should be displayed at the entrance of the designated smoking area, on a white background and in black letters.¹¹³ The message to be displayed is: "**SMOKING OF TOBACCO PRODUCTS IS HARMFUL TO YOUR HEALTH AND TO THE HEALTH OF CHILDREN, PREGNANT OR BREASTFEEDING WOMEN AND NON-SMOKERS. FOR HELP TO QUIT PHONE (011) 7203145.**"¹¹⁴ This message should be at least 2 cm in height and 1,5 cm in breadth, that is the same as the sign designating the smoking area.¹¹⁵ The reason is two-fold. First, to conscientise smokers to the effects of their smoking on non-smokers. Secondly, to encourage those who may want to quit to seek help by calling the helpline number.

Finally, the regulations require that permanent notices and signs indicating smoking areas and non-smoking zones be displayed.¹¹⁶ In addition it stipulates that those signs indicating that smoking is not permitted should carry the warning: "**ANY PERSON WHO FAILS TO COMPLY WITH THIS NOTICE SHALL BE PROSECUTED AND MAY BE LIABLE TO A FINE.**" It appears that this notice is directed to smokers who would want to smoke in a 'No Smoking Zone', and to warn them of the dire consequences thereof.

2.2.7.2.3 Places Of Public Entertainment

The regulations permit the smoking of tobacco products in places such as nightclubs, casinos or any other public place, which primarily deals with the provision of entertainment to the public.¹¹⁷ However, this too, is subject to conditions specified above. It is worth noting that the regulations do not define either nightclubs or casinos. The result could be that the definition can be interpreted as being too wide as it covers many forms of entertainment. For instance one wonders whether or not the sheebin qualifies as a nightclub or it falls under a bars.

¹¹³ *Op cit* n91, regulation 3.

¹¹⁴ *Idem.*

¹¹⁵ *Idem.*

¹¹⁶ *Op cit* n106, Clause 3(e).

¹¹⁷ *Ibid.*, regulation 2(b).

2.2.7.2.4 Restaurants

The smoking of tobacco products is permitted in restaurants, but is also subject to the above-mentioned conditions. A ‘restaurant’ is defined as a public place where the primary business of the place is ‘**the sale of prepared food to the general public**’ for consumption on or off the premises.¹¹⁸ It is submitted that this definition is wide enough to cover any small business, which primarily sells prepared food, so long as it operates within the area. It also does not matter whether it operates in an urban or rural area.

2.2.7.3 Passenger Ships

Regulation 4¹¹⁹ permits the operator of any passenger ship to allocate not more than 25% of the total accommodation as designated smoking areas. A passenger ship must be registered in the Republic of South Africa.¹²⁰ Under this regulation, we note that, other than the registration requirement, no other condition is imposed by the regulation.

Nevertheless, one is more inclined to think that the conditions laid down in Clause 3 do apply here. The reason is that a passenger ship will have both smokers and non-smokers. Non-smokers would have to be protected from the dangers of passive smoke. They would need to be warned to stay clear from smoking zones. On the other hand, current smokers would need constant reminders of their obligation toward non-smokers and the harsh consequences for non-compliance. In addition, current smokers who may want to quit smoking may also need help to enable them to do so.

2.2.7.4 Passenger Trains

Smoking in any passenger train operating in the Republic of South Africa is permitted.¹²¹ However, the operator may only allocate not more than 25% of the entire train as a designated smoking area, if its total number of carriages exceeds ten.¹²² In the case of a train with

¹¹⁸ *Op cit* n31, section 1.

¹¹⁹ *Op cit* 106, Clause 4.

¹²⁰ *Idem.*

¹²¹ *Op cit* 106, Clause 5.

¹²² *Idem.*

carriages not exceeding ten, only one carriage may be designated as a smoking area.¹²³ There are two basic reasons for allocating 25% of the entire train with train with carriages exceeding ten, and only one where carriages do not exceed ten. First, the number of smokers will increase with the number of passengers in the train. Secondly, the idea is to try to dissuade the smoking of tobacco in public transport. The writer submits that it is too early to determine the efficacy of this provision

2.2.7.5 Smoking In Workplaces

In terms of section 2(1) of the Amendment Act, smoking of tobacco products in any public place is prohibited. However, section 2(1)(b) that was substituted by the Amendment Act, empowers the Minister of Health to declare specific public places permissible smoking areas. Hence, acting on this vested authority, the Minister of Health has included the workplace under this category.¹²⁴ Nevertheless, certain conditions have to be complied with.¹²⁵

These are set out in the regulations that have been considered above.¹²⁶ In brief, these are: -

- an employer should designate a smoking area that will, by necessary implication, comply with the conditions set out in Clause 3 of these regulations. It is an employer's obligation to ensure that the smoke from any designated area does not re-circulate to any other area, but the designated one,¹²⁷ and
- employers are required to have a written policy on smoking, which in turn has to be applied within three months from the date of the coming into operation of the Amendment Act.¹²⁸

¹²³ *Idem.*

¹²⁴ *Op cit* n106, regulation 2(h).

¹²⁵ *Idem.*

¹²⁶ *Idem.*

¹²⁷ *Op cit* n106, regulation 6.

¹²⁸ *Ibid*, regulation 7.

The Act came into operation on the 1st January 2001, thus, the policy applies as from the 1ST April 2001. This requirement is intended to ensure consistency in any particular workplace. Consistency will result from the fact that every smoker will be clear as to what is expected of him or her so that there will be no excuse for non-compliance with the statutory requirements.

Moreover, regulation 7 is of fundamental importance. It imposes a duty upon any employer who is in charge of a workplace to ensure the protection of employees who are non-smokers. It requires that the employer should ensure that employees who do not want to be exposed to tobacco smoke are protected from tobacco smoke in that workplace.¹²⁹ In addition, it is the employer's duty to ensure that employees who object to tobacco smoke in the workplace are not victimized in any manner.¹³⁰ An analysis of the requirements set out above reveals the significance of the second obligation. This obligation was imposed to protect those employees who do not want to be exposed to tobacco smoke, from any kind of victimization, whether from the employer or from other employees who are smokers.

Regulation 9 empowers the employer to prohibit smoking totally in the workplace. Hence, what this means is that any employer may decide that his or her workplace is a non-smoking area, notwithstanding the fact that the Minister has permitted smoking in workplace. It is likely that those employers who have small workplaces and those who will not be inclined to construct smoking areas, due to high costs involved, will exercise this option.

Finally, regulation 11 gives anyone the right to apply for exemption for periods of up to six months. Such applications have to be lodged with the Director-General of Health. The applications should set out clear details of the nature and extent of the proposed structural changes.¹³¹ In addition, there should be indicated the exact envisaged time to make the structural changes. It should be noted that this regulation applies not only to employers, but also, to owners, licensees, lessees or persons in control of any public place, to the extent that they need some time to make structural changes in such a public place. What this regulation means is that smoking in any public place will remain prohibited until such a time that a smoking area has been designated. It follows then, that no one may smoke anywhere while

¹²⁹ *Ibid*, regulation 7(a).

¹³⁰ *Ibid*, regulation 7(b).

¹³¹ *Ibid*, regulation 11.

they are awaiting for such structural changes to be effected. The writer submits that since there have been thus far no prosecutions for a failure to observe this provision, the conclusion may be warranted that this provision has been observed to a large extent.

It is interesting to note how South Africa compares to other Countries in this regard. For instance in United States of America (US), the state of Massachusetts expressly prohibits or restricts smoking in a number of public places.¹³² These include housing in public institutions of higher education, polling places, and town meetings. For example, each public institution of higher education that provides accommodation is required to establish rules and regulations to regulate the use of tobacco.¹³³ In addition it must give each student to state his preferred housing type.

Further, the Massachusetts General Law prohibits smoking in polling places and town meetings.¹³⁴ Any who disregards this law is liable to a fine.¹³⁵ Moreover, the use of tobacco in public schools, school buses, nursing homes, jury rooms, and public transportation has been outlawed.¹³⁶

2.2.8 Taxation On Tobacco Products

One means of controlling the use of tobacco products is through imposing higher tax on the products. The aim of this method is two-fold, namely, to reduce smoking and related illness and resultant deaths, and secondly, to provide tax revenue to the government coffers. In turn, this tax revenue may be used to pay for health care services.

Though the Tobacco Products Control Act is silent on the matter of taxation, the Customs and Excise Act is dealing with the matter.¹³⁷ This Act regulates the importation of cigarettes and the imposition of excise duty. For example, section 54 contains special provisions regarding

¹³² Boutin, M & Wilson, DJ (1998) ‘Current Massachusetts Laws and Regulations and Federal Regulations Regarding Smoking’ A Compilation for ‘*Clearing The Air*’, a Resource Manual on Environmental Tobacco Smoke for Massachusetts: 218-219.

¹³³ *Ibid*, Chapter 15A, Section 16A of Massachusetts General Law.

¹³⁴ *Op cit* n132, Chapter 54, Section 73 of Massachusetts General Law.

¹³⁵ *Idem*.

¹³⁶ *Op cit* n132, Chapter 71, Section 2A, Chapter 90, Section 7B(10), Chapter 111, Section 72, Chapter 234, Section 34, and Chapter 272, Section 43A, of Massachusetts General Law.

¹³⁷ Act 91 of 1964, as amended by Act 112 of 1977.

the importation of cigarettes. The current tax rate imposed on the retail price stands at 50 percent of the retail price. This has been the position since 1998.

The retail price tax is an effective means of reducing the use of tobacco products. However, it is surprising that the tax rate in South Africa still stands at 50 percent. The Government seems to be adopting a win-win situation. Thus, more needs to be done if this is to be used to optimal benefit, namely the tax rate should be pushed up to rank with that of developed countries. In some developed countries such as Canada, New Zealand, Australia, Sweden, to name a few, it is up to 80 percent per retail price.¹³⁸

2.2.9 Ban On The Use Of Tobacco Products

The drafters of the Act recognised, right from the onset, that it is impossible to ban smoking totally. The preamble, as was discussed above, acknowledges that tobacco use is a widely accepted practice among adults, which 'makes it inappropriate to ban tobacco use completely'.¹³⁹ Hence, in view of this, it is submitted that there is no doubt that the legislature only intends to restrict the use of tobacco products rather than to phase it out completely. The whole purpose of the Act is to deter persons from taking up smoking and to encourage existing smokers to quit smoking. In addition, the Act seeks to reduce the incidences of tobacco-related illnesses and deaths.

2.3 THE IMPACT OF TOBACCO CONTROL ON CERTAIN HUMAN RIGHTS

As one might rightly expect, it is impossible that any restrictions on the use of tobacco products will not, in one way or another, impact on certain fundamental human rights. There is a conflict between the advocates of the right to life,¹⁴⁰ and the advocates of free enterprise.¹⁴¹ The latter will always view any restrictions as a threat to their right to freedom of trade.

¹³⁸ Van der Merwe, R (1998) 'The Economics of Tobacco Control in South Africa' in *The Economics of Tobacco Control: Towards an Optimal Policy Mix* (1998): 259.

¹³⁹ The preamble to the Amendment Act, 1999.

¹⁴⁰ Section 11 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

¹⁴¹ Section 22 of the Constitution.

Furthermore, the advocates of free trade will always claim that any restrictions violate their freedom of expression,¹⁴² and they will advocate the citizens' right to access to information.¹⁴³ They might argue that the citizens have a right to freedom of belief and opinion.¹⁴⁴ However, the environmentalists and human rights activists will argue that everyone has a right to a clean environment.¹⁴⁵ On the other hand, retailers, licence holders and owners of premises will argue that they have a right to property and that the restrictions imposed by the legislation infringe on this right.¹⁴⁶ An outline and the discussion of these conflicting rights will be advanced below.

2.3.1 The Right To Life Verses Freedom Of Trade.

Section 11 of the 1996 Constitution¹⁴⁷ guarantees everyone the right to life. This right is an unqualified right and is a source of all the other personal rights. Section 11 of the South African Bill of Rights emanates from Article 3 of the Universal Declaration of Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Article 6(1) of the ICCPR refers to the right to life as 'the inherent right to life'. The writer submits that the right to life, like any other right enshrined in the South African Bill of Rights, may only be limited by in terms of the general limitation clause.¹⁴⁸ In essence this means that any interference with the right to life will only be constitutional if such interference is reasonable and justifiable in an open and democratic society, as required by section 36 of the Constitution

It is interesting to note the remarks of the Judge President of the South African Constitutional Court, Chaskalson P, in the case of S v Makwanyane¹⁴⁹, South Africa's first case concerning the right to life:

"An individual's right to life has been referred to as 'the most fundamental of all human rights' and was dealt with in the judgments of the Hungarian Constitution Court declaring capital punishment to be unconstitutional. ..."¹⁵⁰ Concurring O'Reagan J, held as follows:

¹⁴² Section 16 of the Constitution.

¹⁴³ Section 32 of the Constitution.

¹⁴⁴ Section 15 of the Constitution.

¹⁴⁵ Section 24 of the Constitution

¹⁴⁶ Section 25 of the Constitution.

¹⁴⁷ *Op cit* n140.

¹⁴⁸ Section 36 of the Constitution.

¹⁴⁹ S v Makwanyane and Another 1995 3 SA 391 (CC).

¹⁵⁰ 429H-30A.

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise other rights or to be the bearer of them. But the right to life was included in the Constitution simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to life as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is the centre of the constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is *recognised* and *treasured*. The right to life is central to such society. The right to life, thus understood, incorporates the right to human dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is the right to be treated as a human being with dignity: without human dignity, life is substantially diminished.

..¹⁵¹
...

From the above judgment, the value placed on human life is quite apparent. The judgment does not only emphasise the value of life, but also human dignity. It is submitted that exposing one's life to harmful and deadly hazards of tobacco smoke can neither be said to be reasonable nor justifiable. It is of paramount importance to note that Article 6(1) of the ICCPR, mentioned above, further provides that the right to life shall be protected by law.

However, section 22¹⁵² guarantees every citizen the right to 'choose their trade ... freely'. The outcry from tobacco companies will be that their right is being curtailed by restrictions imposed by the legislature. The issue is: how does one reconcile these two conflicting rights. The starting point, in this regard, is to recognise that no right is absolute. Section 36(1) of the Constitution imposes automatic restrictions on all rights in the Bill of Rights, through the law of general application. It states that the extent of the limitation should be reasonable and justifiable in an open and democratic society, *based on human dignity, equality and freedom*. In addition, all the relevant factors ought to be taken into consideration. These factors include: “the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.”¹⁵³ The British law imposes limitations on the right to freedom of trading.¹⁵⁴ It appoints a Consumer Protection Advisory Committee and a Director General,

¹⁵¹ 506C-F.

¹⁵² *Op cit* n141.

¹⁵³ Section 36(1)(a) -(c) of the Constitution.

¹⁵⁴ Fair Trading Act of 1973.

who are entrusted with the responsibility of protecting the public from unfair trade. In terms of the Fair Trading Act, unfair trade includes supplying the public with untrue or misleading information. Lord Hailsham submits that trade can be limited for the protection of any legitimate interest that warrants protection such as public health and safety.¹⁵⁵

In view of the foregoing, one may ask: why curtail the right to freedom of trade? Are the restrictions imposed by the Act justifiable? It is submitted that tobacco products are one of products that may kill the consumer when they are used in accordance the manufacturer's instructions. Consumers become addicted to tobacco and kill those around them as well. Both smokers and non-smokers die because of tobacco-related diseases such as cancers and heart diseases. Thus, the right to life is severely affected by the use of tobacco products.

Hence, this kind of trade right adversely affects a person's right to dignity.¹⁵⁶ It undermines human dignity. With so much emphasis placed on the value of human life with dignity, it is submitted that this limitation imposed by the legislation is justifiable. It is further submitted that the use of tobacco products undermines the human right to life, not only that of its users, but also that of passive smokers. Hence, these restrictions are necessary for the protection of smokers, and, more importantly non-smokers. Thus, it is submitted, in resolving the dilemma between the two conflicting rights the above section 36 of the Constitution must play a pivotal role. Further, the value of and dignity place on, human life should be the legitimate interest that warrants protection through imposition of restriction on the freedom of trade. Without this life, none would be able to exercise all the other rights, especially the right to a clean environment and the right to health. However it might be argued in favour of tobacco companies that alcohol is also dangerous to human life, perhaps more dangerous than tobacco. It contributes to liver diseases. Annually, it claims hundreds of lives in our roads. It contributes to family violence. It could also be argued that alcohol it is addictive, it contributes to poverty and it deprives a person of his dignity, and that it should be banned or at least be restricted. These arguments might be valid when considering that the alcohol industry appears to have more customers among low-income earners and teenagers. Whilst there is no denying the merits of the argument that alcohol consumption may be injurious to one's health, that

¹⁵⁵ Lord Hailsham (1994) *Halbury's Laws of England* (UK, Butterworths: 47): 20-21.

¹⁵⁶ Section 10 of the Constitution.

argument does not detract from the fact that tobacco smoking is equally if not more injurious to the health of the smoker.

2.3.2 Freedom Of Expression, The Right Of Access To Information, And The Right To Freedom Of Belief And Opinion

As already mentioned above, section 16 of the Constitution, guarantees everyone the right to freedom of expression.¹⁵⁷ This right includes freedom of the press and other media, and freedom to receive and impart information and ideas.¹⁵⁸ Hence, tobacco companies will always view the ban on advertisement of tobacco products as a major infringement of this right.

Section 32¹⁵⁹ ensures that everyone has the right to access to information held by another person for the exercise of any rights. Accordingly, tobacco dealers, mainly companies, may advocate this right for their own benefit. They may assert that the public needs to hear their adverts to exercise their right to freedom of belief and opinion, as guaranteed by section 15 of the Constitution.¹⁶⁰ It is, therefore, submitted that these restrictions are justified because many people who choose to smoke become a burden to the state's health care system which is already overwrought.

2.3.3 The Right To A Clean Environment

Section 24(1) of the Constitution, in part, states the following: -

“Environment”

24 Everyone has the right-

(a) to an environment that is not harmful to their health or well-being. ...”¹⁶¹

¹⁵⁷ *Op cit* n142.

¹⁵⁸ Section 16(1)(a) and (b) of the Constitution.

¹⁵⁹ *Op cit* n141.

¹⁶⁰ *Op cit* n142.

¹⁶¹ *Op cit* n143.

The environment is ‘the surroundings within which humans exist and that are made up of ...the physical, chemical, aesthetic and cultural conditions ...that influence human health and wellbeing.’¹⁶² This will include the atmosphere of the earth.

The smoking of tobacco products violates this fundamental human right in that “it exposes, not only smokers, but also non-smokers, to harmful tar and nicotine constituents.” This is even worse still in private homes, where young persons are the most vulnerable to the toxic substances in cigarette smoke. In addition, this infringes on the right of choice between being in a smoking or non-smoking environment. Young people, especially children, who live in an environment with adult smokers, do not have the opportunity of exercising this choice.

In considering the conflict between any of these rights it of interest to note that in other countries such as the US, any restriction imposed on a company’s right to advertise its product is regarded as move towards criticising the government.¹⁶³ However, according to Kline¹⁶⁴ freedom of commercial speech is can be constitutionally restricted, provided certain criteria are complied with. First and foremost, any restriction imposed must advance a substantial government interest. Moreover, the restriction must directly and materially advance that government interest. Finally, there must be a reasonable balance between the interest and the chosen method of restriction. Such limitations are comparable to section 36 of the South African constitution, which allows for fundamental rights to be limited by law of general application.¹⁶⁵ Further, the States and local governments are not allowed to regulate commercial speech on the ground of health, but only the Congress.¹⁶⁶ The states and local governments can only regulate commercial speech on the ground that it encourages young children to commit an unlawful act – to buy cigarettes. Any regulation on the ground of health by them will be unconstitutional.¹⁶⁷

¹⁶² Section 1 of the National Environment Management Act, 107 of 1998.

¹⁶³ Daynard, RA (1998) ‘Tobacco Control And public Health Law’ Paper prepared for the International Colloquium on Public Health Law, held in Durban South Africa, 23 November 1998: 4.

¹⁶⁴ Kline, RL (1999) ‘First Amendment Analysis of Tobacco Advertising and the McCain Committee Bill’ An Unpublished paper: 1.

¹⁶⁵ *Op cit* n140.

¹⁶⁶ Correia, EO (1997) ‘State And Local Regulation of Cigarette Advertising’ *Journal Of Legislation* (23) 1:123.

¹⁶⁷ *Ibid.*

In Britain as has been stated above, the Consumer Protection Committee is tasked with the duty of ensuring that advertisements are not fraudulent or misleading the public. And limitations to freedom of trade are permitted as long as the restrictions aim to protect the public, public health and safety. Further, the local authority is entrusted with a duty to conduct a programme of enforcement action at least every twelve months to ensure that statutory provisions relating to tobacco control are complied with.¹⁶⁸ Canada as well, like the US and the UK, has adopted a tough stance on tobacco advertisements with the aim of eliminating children's exposure to tobacco advertising.¹⁶⁹ Other countries such as Australia, New Zealand, Finland, Sweden, Thailand, among others, have replaced voluntary agreements relating to advertisements, with legal bans on tobacco advertisement and promotion.¹⁷⁰

2.4 SOUTH AFRICAN CASE LAW RELATING TO TOBACCO LEGISLATION

Although the tobacco legislation dates back to 1993, it is should be noted that this area of law is still new and evolving in South Africa. Thus, disputes based on the infringement of human rights arising from non-compliance are yet to come before the court. The only matter that has come before the High Court is that of the *Tobacco Institute of Southern Africa v Minister of Health*.¹⁷¹ In this case, the applicants launched an urgent application for an order compelling the Minister of Health to provide them with access to information. The information related to the proposed Tobacco Products Control Bill. Desai, J. noted that the Bill, *inter alia*:

“[c]ontains a severe and extensive set of restrictions on the advertising or promotion of any tobacco product, empowers the (Minister of Health) by notice in the *Gazette* to prohibit the smoking of tobacco products in any indoor or enclosed public place and vests the (Minister of Health) with the power to declare the permissible levels of tar, nicotine and other constituents which tobacco products or tobacco smoke may contain.”¹⁷² The application was dismissed on the ground that the mere introduction of the Bill does not affect any rights – not until it becomes a law.

¹⁶⁸ Section 7 of the Young Persons Act of 1993.

¹⁶⁹ WHO (2001) [<http://www.who.int/inf-pr-2001/en/pr2001-47.html>] (accessed on 9/12/02)

¹⁷⁰ *Ibid.*

¹⁷¹ 1998 1 BCLR 83 (C).

¹⁷² Nadasen, S (2000) ‘Public Health Law in South Africa: An Introduction’ (Durban, Butterworths): 96.

This case illustrates that tobacco companies will not bow down easily to any attempt to restrict their operations, by the government. They are likely to resort to other tactful ways to protect their interests. However, it remains to be seen whether we will see an influx of litigation, not only from tobacco companies, but also from private individuals, and the government, directed against tobacco companies and retailers.

Commenting on this case, Nadasen and Reddy¹⁷³ have submitted the following:-

“ ...The Bill must also not be viewed as an isolated attempt but rather as part of a global movement not only to affirm the dignity of each individual but also to make real the ideal of health for all. It is true that balancing competing rights is not easy and if the tobacco industry asserts the importance of specific rights to support their contentions, it is worth remembering that their contentions must be mediated by and tempered with the view that freedom to pike is death for the minnows....”

The two authors do not see the Act as a deliberate attempt by the legislature to restrict any rights. Rather they view it as a mechanism to realise the constitutional intent to “improve the quality of life of all citizens and to free the potential of each person.” They suggest that the main issue is how a Court of law will balance “the right to health with the sectoral interests of the tobacco industry.” The writer agrees with this submission by the learned authors as the primary purpose of the legislation is not to curtail the rights of the industry but to protect the health of South Africans and thus fulfil the international obligations of the South African state.

2.5 CONCLUSION

This chapter has examined the measures that have been taken by the South African government, in an attempt to restrict the use of tobacco products. This has been through compulsory statutory warnings and the provision of information on tobacco packages, the ban on tobacco advertising, the reduction of tar and nicotine levels, the prohibition of the sale of tobacco products to persons under the age of sixteen, regulating the point of sale, restricting

¹⁷³Nadasen, S &Reddy, P (1999) ‘Public Health Legislation: Towards Health For All In South Africa – Tobacco Control Legislation’ *Stellenbosch Law Review* 10 (3): 464-466.

the use of vending machines, imposing high tax on tobacco products, and the ban on smoking in public places.

However, the question arises: Are these measures workable? In other words, is there compliance with the statute? If indeed yes, how effective are these measures in achieving the objectives of the legislature, as set out in the preamble? The third chapter will examine these issues in more detail.

CHAPTER THREE

3 THE EFFECTIVENESS OF TOBACCO CONTROL MECHANISMS

3.1 INTRODUCTION

Whether the objectives of the government in controlling the use of tobacco products are being accomplished or not can be looked at from two distinct angles. In the first instance this can be determined through an examination of the impact of the restrictions on the consumers of tobacco products. In other words, are the consumers feeling the impact of the statutory restrictions? This will need thorough research and a comparison of samples of two time periods, that is, the period prior to the introduction of the tobacco legislation, and the period after the introduction. The second barometer will be to determine whether manufacturing companies and retailers comply with the statutory requirements.

The latter instance is only concerned with the immediate success that is achieved by the government through the restrictions. This seeks to establish whether there is any compliance with the regulations, and whether the government is able to monitor compliance. This chapter will focus on this aspect. In doing that, a revision of all the measures for tobacco control imposed by the legislation will be advanced, and a discussion of some noteworthy observations on the issue will be done.

Research to determine whether public places comply with the statutory provisions has been conducted in some of the above-mentioned places, for the purposes of this study. Places that were studied included restaurants, taverns, bars and workplaces that operate around the city of Durban. This study also includes an analysis of recent newspaper articles that have been monitoring the effectiveness of the new legislation. The questionnaires were administered at the public places identified above. (See Annexure 1 for a copy of questionnaire). The questionnaires sought to establish the following: whether the place permits smoking, and if it does, whether it has a designated smoking area, and, if it did not have any designated smoking

area, whether the holder had applied for an exemption to make the necessary structural changes.

The study was aimed at establishing: (1) whether people comply with the anti-smoking policies in places where public place owners did not permit smoking; (2) whether licence holders have any mechanism to ensure compliance with the statutory requirements; and, (3) whether they have any policy to discipline offenders. The study also aimed at obtaining the views of licence holders on the necessity of the anti-smoking legislation. Finally, it was directed at obtaining views regarding the enforceability of the regulation.

3.2 THE OBJECTIVES OF TOBACCO CONTROL MECHANISMS

The objectives of this Act, which were discussed in chapter two, include the following:

- to enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death;¹⁷⁴
- to deter people from taking up smoking and encourage existing smokers to give up smoking;¹⁷⁵ and
- to dissuade the harmful effect of encouraging children and young people to take up smoking.¹⁷⁶

It is submitted that the first step towards the realisation of these objectives of the Act, is to ensure that there is minimal compliance and co-operation on the part of manufacturers and retailers. In other words, law enforcers must ensure that manufacturers and retailers do what is expected of them. Furthermore, there must be monitoring on the part of the government. The latter will be dealt with later in chapter four.

¹⁷⁴ *Op cit* n31.

¹⁷⁵ *Idem.*

¹⁷⁶ *Idem.*

3.2.1 The Issuing Of Warnings, And The Provision Of Information

3.2.1.1 Tobacco Packages

In terms of the Act, it is an offence for any person to sell or import any tobacco product which is not contained in a package.¹⁷⁷ In turn, such package should bear the prescribed warning concerning the health hazards incidental to smoking.¹⁷⁸ The quantities of the constituents must also be stated on the cigarette package.¹⁷⁹

There has been an over-whelming compliance with the provisions of this section. A number of packages of tobacco brands have been examined for the purpose of this study. Among these are brands such as Rothmans King Size, and the other brands that are relatively ‘new’ in the country.¹⁸⁰ These include: Yes King Size Filter, Princeton King Size, Royal, Camel Filters, among others. They contain these health messages as stipulated in Annexure 2 of the regulations.¹⁸¹ They are provided in accordance with the manner stipulated in regulation 2 of the 1994 Regulations.¹⁸²

However, it has been observed that a few that do not comply with the statutory requirements. These are: Marlboro Lights, Marlboro Filter Cigarettes, 555 State, Express, and the Royal, which is a Netherland’s brand, and Madison Filters, which is a Zimbabwean brand. All these brands have a health message written in very small letters on the one side where the ‘local brands’ provide the information relating to the quantity of the constituents. These warnings are hardly visible.

3.2.1.2 Written, Pictoral And Advertisements

Regulation 1, Annexures 1 and 3 of the 1994 Regulations, requires that health warnings be provided in the prescribed manner.¹⁸³ An observation of some of South Africa’s popular sports magazines, such as ‘Kick-off,’ ‘Soccer’, ‘Sports Illustrated’, and other popular

¹⁷⁷ Section 3 (4) (a) of the Amendment Act.

¹⁷⁸ Section 3 (4) (b) of the Amendment Act.

¹⁷⁹ Section 3 (4) (c) of the Amendment Act.

¹⁸⁰ By new brands is meant brands that flooded South African markets after the year 1989.

¹⁸¹ *Op cit* n30.

¹⁸² *Idem*.

¹⁸³ See chapter 2 paragraph 2.2.1.2.

magazines such as ‘You’, and ‘True Love’, reveals that they do comply with the statutory provisions. In most cases, their second or last page contains tobacco adverts. These advertisements are accompanied by the health warnings as required by the legislation. It is submitted that these warnings on the advertisements have the effect of both educating and informing the readership of the dangers of smoking.

3.2.1.3 Film, Video And Cinema Advertisements

Annexure 1 of the regulations,¹⁸⁴ which has been discussed in chapter two above, requires film, video and cinemas to display prescribed health warnings and to disclose information on constituents’ levels. An observation was conducted in several cinemas around the city of Durban, for the purpose of the study. There were no tobacco advertisements that were observed. It was however observed that health warnings were displayed where cigarettes were being sold. These health warnings were displayed in accordance with the statutory requirements. Therefore, it would appear that generally, cinemas in South Africa do comply with the requirements stipulated in the legislation.

3.2.1.4 Verbal Advertisements

Sub-regulation 2(1)¹⁸⁵ requires that health warning messages be read at the end of the advertisement. It is no longer necessary to consider whether radio and television advertisements comply with this regulation since the Amendment Act prohibits any advertising of tobacco products on national radio or television stations.

3.2.2 Ban On Tobacco Advertisements And Promotions

Section 2(1) of the Amendment Act¹⁸⁶ makes it unlawful for any person to advertise any events, through the use of any tobacco trademark, logo, brand name, and company name that may be used on tobacco products. The prohibition includes the advertising of any organisation using such trademarks, logos, brand names or company names. This provision is intended to

¹⁸⁴ *Op cit* n30.

¹⁸⁵ *Idem.*

¹⁸⁶ *Op cit* n31.

prohibit any indirect advertising of tobacco products. Seemingly, there is compliance with this statutory provision because there are no products or companies, within the Republic, that are called by any tobacco brand names.

Additionally, section 3(2) prohibits any person, that is, the manufacturers, importers, distributors or retailers of tobacco products, from promoting or organising any ‘organised activity’ to take place in the Republic of South Africa, in whole or in part.¹⁸⁷ In addition, this section makes it illegal for any person to make financial contributions to such organised activity, even if such activity had already taken place.¹⁸⁸ This prohibition only applies where the whole organised activity or part of it takes place or has taken place in the South African Republic.¹⁸⁹

This will include, by necessary implication, sports activities, cultural activities, beauty contests, and music festivals. The provisions of the Act came into effect on the 1st January 2001. The statutory provisions in this area have been effective in that it has been noted that the sponsorship of popular sporting events by tobacco companies has ceased. The Rothmans Cup, a soccer event, was played for the last time in 2000. The same is true of the Rothmans July, a horse racing competition. The Gunston 500, a surfing competition, and the John Rolfe Sea Rescue Services, both taking place in the beaches of Durban have also ceased, but the competitions themselves still continue under different names.

Subsection 2 (1)(c)¹⁹⁰ prohibits any financial contribution to any person to organise to promote any organised activity in the Republic. Therefore, tobacco brands may not sponsor any person to organise any sports event, music festival, or cultural activity within the Republic of South Africa. On the other hand, paragraph (ii) of this section makes it unlawful to give any financial support to any person to participate in any organised activity to take place in whole or in part, in the Republic of South Africa. Thus, a tobacco company may not sponsor an athlete, for example, to take part in the Comrades Marathon. The provisions of this paragraph seem to be effective in that there are currently no sports personalities who wear sports gear bearing brand

¹⁸⁷ Section 2(1)(a) of the Amendment Act.

¹⁸⁸ Section 2(1)(c) of the Amendment Act.

¹⁸⁹ *Idem*.

¹⁹⁰ Of section 2(1) of the Amendment Act.

high tar levels although their nicotine levels are below the stipulated 1,5 mg per cigarette. These are shown in table 3.2 below. It is hoped that by December 2001 these and others will be aligned with the regulations, as required by regulation 1.¹⁹⁸

TABLE 3.1

CIGARETTE BRANDS CONTAINING PERMISSIBLE CONSTITUENTS LEVELS

Cigarette Brands	Tar Levels	Nicotine Levels
Rothmans King Size	12 mg	1,1 mg
Courtleigh	14 mg	1,3 mg
Benson and Hedges Special Mild	10 mg	1,0 mg
Camel Lights	8 mg	0,7 mg

TABLE 3.2

CIGARETTE BRANDS THAT CONTAIN HIGH CONSTITUENTS LEVELS

Cigarette Brands	Tar Levels	Nicotine Levels
Gunston Filter	17 mg	1,5 mg
Consolate	16 mg	1,3 mg
Yes King Size Filter	16 mg	1,0 mg

However, there are some foreign brands that are a matter of concern. The packages for these brands do not display the health massages in the manner prescribed by the South African regulations. Among these are the Marlboro brands which only comply with the United States' health massages. These are almost invisible. They also do not disclose the information regarding the constituents' quantities. Other examples are the 555 Filter Kings of the United Kingdom, and the Royale of the Netherlands. The 555 Filter Kings has a health message but not according to that required by the South African legislation. However, no statistics for constituents are advanced on the packages of these cigarette brands. The existence of these

¹⁹⁸*Op cit* n77.

brands in the South African market may suggest that there is serious smuggling going on. This means that the government will have to tighten its control measures on its borders.

The most important determining factor in the success of the government in reducing the levels of nicotine and tar of cigarettes will depend on a few things, especially the co-operation of the manufacturers and the retailers. The success of the government will also depend on its ability to administer the testing of such cigarettes' constituents as required by the regulations.¹⁹⁹ This will depend on the effectiveness of testing standards that are laid down by these regulations.²⁰⁰

It seems that this provision is enforceable. There are at least two reasons for this assertion. First, the fact that all the costs for the testing of tar and nicotine levels are borne by the manufacturer or the importer makes the enforcement of this statutory provision easier.²⁰¹ In addition, the fact that such testing is to be done by the South African Bureau of Standards or at any other laboratory nominated by the Director -General for Health²⁰² gives the government total control over the whole testing process. Thus, this makes these provisions enforceable.

3.2.4 Prohibition On The Sale Of Tobacco Products To Persons Under The Age Of Sixteen Years

Section 4 of the Act,²⁰³ which was dealt with above in paragraph 2.2.2.4 of chapter two, prohibits the sale or supply of tobacco products to persons under the age of sixteen years. This applies whether the supply is for personal use or not.

The Act does not provide that identity documents (ID) be produced when purchasing any tobacco products, especially, by those of tender years. Many of the so-called street children around the streets of Durban may be seen smoking cigarettes. In addition, other children may be observed selling loose cigarettes in the streets of Durban. Therefore, it is unlikely that this provision of the Act will be enforceable. Moreover, older people in many areas, have always

¹⁹⁹ Annexure 3 regulation 2 of the 1994 Regulations.

²⁰⁰ *Idem.* Regulation 2 stipulates that the amount tar and nicotine in the smoke of cigarette be determined in accordance with the International Standards Organisation's methods , such as ISO 4387:1991; 3308: 1991; 10362-2: 1994.

²⁰¹ *Op cit* n30, regulation 3.

²⁰² *Idem.*

²⁰³ *Op cit* n31.

used children whenever they wanted to purchase items, including cigarettes. Children may be observed in areas surrounding the city of Durban returning from the shop, with a pack of cigarettes in their hand. Many of these children are even younger than seven years of age. Thus, in view of this the enforcement of this provision is likely to fail. It is submitted that the only way to enforce this statutory provision would be to have a number of police inspectors patrolling around. These inspectors should be charged with clamping down on offenders.

Another obstacle is that there are isolated rural and peri-urban areas that are not frequently visited by police officers for months. Hence, if the provisions of this section are to become enforceable, more monitoring is essential. Such monitoring should be done on an ongoing basis.

3.2.5 Regulating The Point Of Sale Of Tobacco Products

In as much as section 3 of the Principal Act allows any retailer of tobacco products to post signs indicating the availability of tobacco products, at any point of sale, it imposes certain conditions that must be complied with.²⁰⁴

These are spelled out clearly in the regulations,²⁰⁵ as already discussed in chapter two. For example, section 2 (a) and (b) states that the sign should not exceed one metre in size and should be placed within one metre of the point of sale. The enforceability of this provision is possible, since it does not require much monitoring, as only one inspection is sufficient. In addition, it does not cost retailers anything to comply with these statutory provisions. However, from what has been observed, it was noted that retailers tend to place their signs inside their shops and on the shelves. Thus, as long as their signs are posted indoors they cannot transgress these statutory provisions. Of paramount importance is the requirement by Annexure A of the regulations²⁰⁶ that all signs need to contain a health message.²⁰⁷ It has been noted that most restaurants and cafes that sell tobacco products do comply with this statutory requirement.

²⁰⁴ Section 3 (3) of the Amendment Act.

²⁰⁵ *Op cit* n91.

²⁰⁶ Annexure A health messages were discussed in chapter 2 in paragraph 2.2.5.

²⁰⁷ *Ibid*, regulation 3(b).



Furthermore, regulation 3 (a) requires that retailers should display another message indicating that they are not allowed to sell tobacco products to anyone under the age of sixteen years. This health message has to be in letters of at least 2 cm high, and 1.5 cm wide. These can be seen in many tobacco-selling cafes around the Republic. Retailers must be commended for their co-operation in this area. Nevertheless, there is much to be done to ensure that retailers operating in the rural areas, and private or informal shops comply with this statutory requirement. In these sectors there is minimal, if any, compliance with these provisions.

3.2.6 Restrictions On The Use Of Vending Machines

Section 5 of the Principal Act²⁰⁸ provides that vending machines should be placed in a manner that makes them inaccessible to persons under the age of sixteen years.²⁰⁹ It is the responsibility of any person on whose premises the machine is situated to ensure that persons under the age of sixteen years do not make use of such machine.²¹⁰

3.2.7 Taxation On Tobacco Products

Tobacco tax is one of the most effective methods of reducing the number of smokers. It is said that if prices are increased, then the rate of smoking declines.²¹¹ Chaudhry states that the smoking rate tends to increase with a decrease in the price of cigarettes in comparison with the inflationary trends.²¹² Hence, he argues, a sustained increase in price, which is more than the inflation rate is necessary for the optimum effect of this measure.²¹³

According to Chaudhry, low-income groups tend to smoke more and are the first to reduce their smoking in response to tax increases.²¹⁴ This group mainly consists of women and teenagers. However, there are negative implications for increasing the tax on tobacco products. For example, it increases cigarettes smuggling.²¹⁵

²⁰⁸ *Op cit* n31.

²⁰⁹ *Ibid*, section 5(1).

²¹⁰ *Ibid*, section 5(2).

²¹¹ *Op cit* n5 at 14.

²¹² *Idem*.

²¹³ *Idem*.

²¹⁴ *Idem*.

²¹⁵ *Op cit* n209.

The prevalence of brands that do not comply with the requirements of the regulations, such as the Marlboro brands, suggests that smuggling is rife on the borders of the South African Republic. These brands do not contain statutory-prescribed health messages. Chaudhry suggests that the police and border security forces would need to develop strategic plans to deal with the increased tobacco smuggling in the wake of increased taxation on tobacco products.²¹⁶

The above signifies that there is a great need for co-operation between the Ministry of Health, on one hand, and other Ministries, such as the Ministry of Defence, and the Ministry of Safety and Security, on the other, to counter-act smuggling. Nevertheless, the prevalence of the smuggling of tobacco products may suggest that manufacturers are feeling the impact of increased taxation on their products.

3.2.8 The Ban On Smoking In Public Places

The legislature has imposed smoking restrictions in a number of public places. In some public places, the legislature has permitted the smoking of tobacco products under certain conditions. These places include, *inter alia*, the following places:²¹⁷

- Smoking establishments, bars pubs taverns, nightclubs, casinos, restaurants, hotels, guesthouses, and airports, subject to clause 3 that was dealt with in chapter two above.
- passenger ships registered in the Republic of South Africa, subject to clause 4.
- passenger trains operating in the South African Republic, only subject to clause 5.
- workplaces, subject to clauses 3, 6, 7, and 8.

Below are the findings of the study that was conducted in workplaces, taverns, restaurants, and bars regarding the compliance of retailers with these statutory provisions.

²¹⁶ *Idem*.

²¹⁷ *Op cit* n106, Clause 2.

TABLE 3.3**A STUDY ON ANTI-SMOKING POLICY IN PUBLIC PLACES**

	Restaurants	Taverns	Bars	Workplaces
Respondents that permitted smoking in their public places	60%	67%	47%	0%
Respondents that did not permit smoking in their public places	40%	33%	53%	100%
Total	100%	100%	100%	100%

TABLE 3.4**A STUDY ON SMOKING ESTABLISHMENTS AND POLICY**

	Restaurants	Taverns	Bars
Respondents with a designated Smoking area	67%	50%	37%
Respondents without a designated Smoking area	33%	50%	63%
TOTAL	100 %	100%	100%

DEDUCTIONS

A total number of twenty-five (25) restaurants, fifteen (15) taverns, forty-nine (49) bars, and thirty (30) workplaces responded to the questionnaires. In response to the question whether smoking was permitted or not, 60 per cent of the restaurants, 67 percent of the taverns, 47 percent of the bars, did permit smoking, while none of the workplaces permitted smoking. On the question of designated smoking areas, 67 percent restaurants have such a designated area, 50 percent taverns, and only 33 percent of the bars comply with the requirement that they should have a designated smoking area. Responding to the question of whether they had applied for exemption while they are still making structural changes, all of the three above-mentioned public places had applied for an extension date.

During the survey it was observed that most of the bars, restaurants, and some taverns are too small to partition a smoking establishment. This may be a possible cause why some licence holders do not have designated smoking areas.

Those respondents who stated that smoking was not permitted in their premises, with the exception of the bars, appear to be successful in enforcing the anti-smoking policy. For example, only 50 percent of the restaurant licence holders stated that smokers do not comply with the regulation. On the other hand, all the workplaces surveyed reported 100 percent success rate, while all taverns that do not permit smoking reported a 100 percent compliance rate. However, only 25 percent of the bars in this category, reported compliance. It is noteworthy that all these bars reported that they do not have any policy for enforcing compliance and for disciplining offenders. This may account for their failure to ensure compliance. On the part of the restaurants only 50 percent had a policy to enforce compliance. Many of the places visited have a 'no smoking' sign at the door, yet ashtrays were clearly visible on many of their tables. This may suggest that owners of these places have no intention of enforcing the non-smoking policy in their business places.

With regard to the necessity of this anti-smoking regulation, most of the persons interviewed felt that the regulation was necessary and good for the improvement of public health. Only a few bar owners, 29 percent, felt that it was unreasonable and unnecessary and that it hampers economic development. As far as enforceability is concerned, most respondents felt that the

regulation is very hard to enforce. The only group that stated that the regulation was unenforceable is the same group that felt that it was unreasonable and unnecessary. This view may be a reflection of their negative attitude towards the regulation.

Newspaper analysis, on the other hand, reveals that there is a negative response, as far as the enforcement of the anti-smoking regulation in public places is concerned. The Mercury for example reported that many pubs were ignoring the new smoking ban.²¹⁸ This article also quoted the spokesman for the South African Police Services (SAPS), Mr. Bala Naidoo, as saying that there is no way that the police can be expected to enforce the smoking laws on a full-time basis. According to this article, the SAPS have limited manpower, and they have much more serious crimes to deal with. The spokesman also went as far as stating that smoking law complaints will be given the lowest priority, since priority will be given to serious crimes such as murder and robbery. However, on a positive note, this article reported that most restaurants surveyed seemed to be abiding by the rules.

The Mercury²¹⁹ also reported that the department of health was adopting what it called a *get tough policy* over the new anti-smoking laws. This policy was primarily aimed at those businesses that deliberately misinterpreted the law by applying for exemptions while they allowed smoking to continue on their businesses. This article quoted the chief environmental officer for the Durban area, Mr Umar Singh, as saying that they were responding to complaints by visiting businesses to speak to their management to get them to comply. However, Mr Singh stated that the main focus of his department was education and that they saw prosecution as the last resort. The writer submits that there is merit in the suggestion that the focus should be on education rather than on prosecution. Such a pro-active rather than a reactive stance will have a long-term benefit in changing attitudes towards smoking.

During the period between 1 January 2001 and 30 June 2001, there has been evidence of complaints raised by non-smokers in some work places, due to smoking in work place. For example, the Mercury²²⁰ reported the case of a disgruntled Revonia woman. The Newspaper quoted her as saying:

²¹⁸ ‘Many Pubs Ignore New Smoking Ban’ in *The Natal Mercury*, 02 January 2001.

²¹⁹ ‘Get Tough’ Anti-Smoking Policy’ in *The Natal Mercury*, 01 February 2001.

²²⁰ ‘Smoked Out While Puffers Flout the Law’ in *The Natal Mercury*, 21 May 2001.

‘... I feel so bad. I just want to pack my bags and walk out. ...’

According to the article, she had drawn up a memorandum that had been signed by 15 of the 24 staff members of her company. In the memorandum, she implored her management to enforce the smoking laws. The article added that her boss told her that she would have to tolerate smoking in the printing and binding rooms, until he was ready to take action. According to this article, it was revealed that the health department received a number of calls every day from non-smokers who find it impossible to work in smoky environments. It further reported that the National Council Against Smoking (the Council) received about ten complaint calls a day. The acting director of the Council, Mr Peter Ucko, stated that complaints received by the health department are followed up by visits to the culprits.

However, at the expiration of the six months exemption period for erecting establishments, the Mercury reported some positive news regarding the will to enforce the regulations on the part of the police.²²¹ In the article about the arrest of a pub smoker, this newspaper reported that authorities were clamping down on establishments that are contravening the anti-smoking regulation. The article stated that the police responded to a complaint from two patrons at an inn, in Durban North, who claimed that some customers were smoking in the non-smoking area despite there being a designated smoking area.

It is evident from the above reports that the rules are indeed enforceable. However, it is apparent that their enforcement depends to a large extent on the co-ordination between law enforcers, who must respond immediately to complaints, and the concerned individuals who send complaints to the relevant department. This requires that there should be a direct number for lodging complaints. From the above emanates the need to place more responsibility on business owners to report those who deliberately flout the law. Further, the above study reveals that the health department has a huge task in bars to ensure that they comply with the anti-smoking laws. It has to find a way to crack down on those who do not abide by the rules, whether it is licence holders or their customers. Simply relying on the complaints of concerned individuals is not sufficient. It is evident that much more needs to be done to ensure that there is compliance with the statutory requirements.

²²¹ ‘Pub Smoker Arrested As New Regulations Are Enforced’ in *The Natal Mercury*, 02 July 2001.

3.3 CONCLUSION

It must be mentioned that this study was not conclusive. It only focussed on the public places that have been discussed above. It must be noted that the regulations specifically singled out certain trains, and passenger ships as smoking places.²²² However, these places have to observe certain conditions. Hence, this means that smoking is totally prohibited in all public-transporting vehicles that are not expressly mentioned in the regulations. However, an observation that has been done for the purpose of this study has revealed that it is mainly the municipality buses that have anti-smoking signs. Their passengers are strictly prohibited from smoking in these buses. On the other hand, in buses owned by private individuals smoking continues to be the norm. This is the case even in those buses with ‘no smoking’ signs. Faced with all these challenges, the question that arises is whether the tobacco legislation is adequately equipped to achieve its objectives. What are its shortcomings? The following chapter will discuss these issues and offer some recommendations.

²²² *Op cit* n106, Clauses 4 and 5.

CHAPTER FOUR

4. A CRITIQUE OF THE LEGISLATIVE FRAMEWORK

4.1 INTRODUCTION

Attaining the objectives of the legislature is dependant upon the successful implementation of the measures created for the control of the use of tobacco products. However, these measures must be comprehensive enough. The legislature should be commended for its attempts at addressing the harmful effects of the use of the tobacco products on many people, both smokers and non-smokers. This is even more appropriate in view of the complexity of tobacco control and the sensitive nature of the whole issue of tobacco control. It is further submitted that there was always a likelihood that any measures aimed at restricting the use of tobacco products were going to spark opposition from the tobacco manufacturers.²²³

4.2 A CRITICAL ANALYSIS OF THE NEW LEGISLATION

The introduction of the new Act²²⁴ has achieved enormous success. All tobacco products advertisements on all national broadcasting corporations, both on television and on radio stations, have ceased. The exposure of the young to tobacco products by the manufacturers and retailers through their advertisements has been curtailed. It must be noted that compared to the Amendment Act, the Principal Act²²⁵ was somewhat generous in its tobacco control measures. It merely imposed restrictive conditions to be complied with when advertising tobacco products. However, the Amendment Act is more radical in its approach. It has banned all forms of tobacco advertising through all public mediums.²²⁶

²²³ Tobacco Institute of Southern Africa v Minister of Health 1999 1 BCLR 83 (C).

²²⁴ *Op cit* n31.

²²⁵ *Op cit* n29.

²²⁶ Section 3(1) of the Amendment Act.

As a result of this radical approach, all advertisements of tobacco products through television and the radio have been replaced by health warning messages (sponsored by the provincial departments of health). Most of these messages are directed towards encouraging the existing smokers to quit smoking. Prior to the introduction of the Amendment Act, there used to be a number of billboards advertising certain brands of tobacco. Such forms of tobacco advertisement have since ceased. Further, the sponsorship of major sporting events by cigarette brands have also ceased.

The other area in which there has been success, is on the compulsory labelling of cigarette packages with health warning messages and information relating to nicotine and tar amounts. It is submitted that by making it compulsory to furnish consumers with nicotine and tar information the legislature has been able to secure the consumer's constitutional right of access to information, as guaranteed in the Bill of Rights.²²⁷ It is further submitted that the consumers have a right to know the risks they are exposed to when using any product. This will enable current smokers to make an informed choice whether to continue smoking or not. It will also enable those who still want to embrace smoking to make an informed decision before they commence smoking.

Nevertheless, the language of the warnings is a matter of concern. The legislature simply provides that "**the warning and information ...should be in the same language as [the one] used on the package or in the advertisement.**" Although this provision provides that the warning and information should be '**in one of the official languages of South Africa**',²²⁸ it does not promote the spread of warning messages across the wide spectrum of the South African society. Most tobacco brands bear health warning messages in English. This will inherently discriminate against the other official languages. There is yet to be a package in any of the African languages. It is submitted that this is in a way discriminatory against the disadvantaged communities who consume tobacco products. This is a matter of concern since most low-income people who tend to be the loyal customers of tobacco manufacturers come from among these communities.²²⁹

²²⁷ Section 32(1) of the Constitution.

²²⁸ *Op cit* n30, regulation 3(1)(a).

²²⁹ *Op cit* n138.

As far as the reduction of the quantity of tar and nicotine is concerned, it appears that its enforcement is more technical since it requires laboratory testing. Nevertheless, it seems that the government has the process under control. This part of the statutory provisions does not only prescribe the permissible levels of tar and nicotine, but also provides that all the expenses of the testing of tar and nicotine levels should be borne by the manufacturer or retailer.²³⁰ All the government has to do is to ensure that human resources and laboratories are available for the testing of cigarette constituents, as prescribed by this regulation.

Notwithstanding the ban on advertising of any sort, including the sponsorship of any organised activity, section 3(3) of the Amendment Act permits manufacturers and retailers to post signs as they please. These signs must be used for indicating the availability of tobacco products and the price. Most importantly, such signs should be posted in accordance with the regulations. The relevant regulation stipulates that they may not exceed one square metre in size, and that they should be within one metre of the point of sale.²³¹ Over and above, the signs should contain a message indicating that they are not allowed to sell tobacco products to anyone under the age of sixteen years.²³² This provision appears to be a consolation to tobacco manufacturers and retailers for the loss of their right to advertise their products, rather than being a control measure for restricting the use of tobacco products. This is a welcomed move by the legislature. It has managed to balance the two conflicting interests, that is, the interests of the manufacturers and retailers on one hand, and that of the public on the other hand. The legislature has permitted the manufacturers and the retailers to advertise their product on a very limited scale. It achieved this without compromising its intention to restrict the use of tobacco products, and to warn the public of the dangers posed by the use of such products.

Moreover the prescribed conditions enable the legislature to maintain control over the manufacturers and retailers. Further, it is submitted that the conditions relating to the size and the proximity of the signs were intended to prohibit the use of billboards for advertising tobacco products. This may account for the reason why tobacco billboards have since ceased.

²³⁰ *Op cit* n.30, regulation 3 of Annexure 3.

²³¹ *Op cit* n.91, regulation 2(a) and (b).

²³² *Ibid*, regulation 3(a) and (b).

Further, the fact that the sale of tobacco products through the use of vending machines is not widespread in the Republic does not render this statutory provision irrelevant. Tobacco retailers may in the future resort to the use of vending machines to market their products. Thus, it is submitted that this provision serves an important purpose in anticipation of what may occur in the future. Therefore, by having such a statutory provision in place, the legislature intended to close any loopholes that tobacco retailers may want to exploit.

The prohibition of the sale of tobacco products to persons under the age of sixteen is one measure used by the legislature to combat the spread of the tobacco pandemic. This prohibition is also mentioned under the prerequisites to be complied with when placing signs indicating the availability of tobacco products and their price. This tobacco control measure is appropriate in view of the fact that children are most vulnerable to health hazards posed by the smoking of tobacco, both as active smokers and as passive smokers.²³³ However, the success of this provision depends on the existence of a strict surveillance system. Thus, more manpower will be needed to enforce this provision. Traps ought to be used to ensure that offenders are reprimanded.

Furthermore, taxation imposed on tobacco products is probably one of the more effective means of reducing the use of tobacco products. Taxation is effective since it increases the excise duty and the retail price to such an extent that the purchase of cigarettes becomes burdensome, especially on low-income groups and younger persons. However, the Tobacco Products Control Act does not regulate the taxation of tobacco products, rather it is regulated under the Customs and Excise Duty Act.²³⁴ In recent years, there has been increase on taxes imposed on tobacco products, annually. However, the government of the Republic has adopted a win-win approach when it comes to tax imposed on excise duty. The duty imposed on tobacco products remains at 50%.²³⁵ It is noteworthy that many developed countries impose a duty of up to 80%²³⁶ on cigarettes compared to 50% imposed by South Africa.

Finally, the legislature imposed a ban on smoking in public places. The scope of a public place is very wide, notwithstanding the fact that the Act has tried to narrow it down by drawing a

²³³ See chapter 1 in paragraph 1.1.2.1.

²³⁴ See chapter 2 in paragraph 2.2.9.

²³⁵ *Op cit* n138.

²³⁶ *Idem.*

whole list of public places. The regulations²³⁷ cover a number of public places wherein smoking is permitted, but only under certain conditions. These places include bars, pubs, night clubs, restaurants, hotels, guest houses, passenger ships registered in the Republic, passenger trains operating in the Republic, work places, and airports. However, these places must comply with the regulations laid down.²³⁸ Of utmost importance is the requirement that they must have a designated smoking establishment, which is what is required in terms of the regulations. Unless any public place complies with the stipulated conditions, it is a non-smoking public place. These statutory restrictions apply even if private individuals or companies own the vehicle. It is further submitted that any public place not expressly mentioned in the above list of public places wherein smoking is allowed, remains a non-smoking area. Thus, it may not even establish a smoking apartment. Public places that are not included in the list discussed above include buses, taxis, and all other vehicles that are used to convey the public.

It is necessary to control the use of tobacco products in these public vehicles. However, it is very challenging for the State to ensure compliance with the anti-smoking laws in public transport. As has been discussed in the preceding chapter passengers, drivers and their conductors, alike, continue to flout this anti-smoking law. Hence, they continue to undermine the other passengers' right to an environment that is not harmful to their well-being. This in turn infringes negatively on the right to life of other passengers.

Another shortcoming of the legislation is that it relies primarily on complaints to enforce compliance. Without complaints, there is little initiative that is being taken to enforce the law in public places. It is noteworthy that neither the Principal Act nor the Amendment Act, nor the regulations designate any specific individual as being responsible for administering the Act. It appears that the National Council Against Smoking is the responsible body at a national level, while the environmental health officers are the responsible individuals at a provincial or local level. No mention is made of the enforcement of the rules. All that both the Acts deal with in detail are the powers of the Minister of Health.

²³⁷ *Idem.*

²³⁸ *Op cit* n106, Clauses 3,6,7 and 8.

Moreover, the legislation is inadequate in that it assumes that the supply of tobacco products will be reduced through decreasing the demand for cigarettes. It is submitted that to reduce the supply of cigarettes through the decreasing of its demand will take many years. Rather, the right approach is to decrease the supply of cigarettes, and make access to cigarettes much more difficult. This will have the impact of increasing the retail price and further decreasing the demand.

Furthermore, the Amendment Act has acknowledged that it is inappropriate to ban tobacco completely. It states that this is due to the fact that tobacco use is a widely accepted practice among adults. The evidence shows that children and women are the most vulnerable. However, it is submitted that the legislation has done very little to protect babies and children from the harmful effects of tobacco. All that it does is to warn against smoking near children, and smoking while pregnant or breastfeeding. It is submitted that this places the health of infants and children at the hand of addictive parents. Monitoring compliance with these warnings in private homes is hardly possible. The only thing that will provide total protection to children and babies is to ban the use of tobacco products completely.

Finally, the legislature did not make any contingency measures in anticipation of any smuggling of cigarettes, within the borders of the South African Republic that might be sparked by these statutory control measures. It should for example have catered for inter-departmental co-operation, between the health department, and other departments. However, there is nothing in the legislation or in the regulations that deals with corroboration between the departments of health and other departments such as the South African National Defence Force and the South African Police Service.

4.3 RECOMMENDATIONS

In order to improve the legislation and meet the challenges that are facing tobacco control measures in South Africa more needs to be done. The Act must designate an officer responsible for the implementation of its objectives. It must outline in detail the powers and the duties of such an officer. The legislature must also consider establishing the co-ordinating centres at local level. These centres must receive complaints directly from the public and

instruct the police to make follow-ups. In turn, they must report to the National Council Against Smoking. Further, the legislature should consider establishing a National Fund to be administered by the Health department to be called National Fund Against Smoking (the Fund). This Fund must be financed by levies imposed on tobacco products and by fines paid by offenders. The funds should be used to enforce the legislation and to fight tobacco-related diseases.

The legislature should progressively increase all tax levies imposed on all tobacco products. Such levies should be increased from the current region of 50 percent to the region of 80 percent. All the revenue collected should go to the National Fund Against Smoking to be used for anti-smoking campaigns and for fighting all tobacco-related diseases. Moreover, the legislature should make provisions for increasing the number of health inspectors. These must be remunerated from the National Fund Against Smoking. Furthermore, a toll-free number that is accessible to all communities for lodging complaints against offenders has to be established. This toll-free number must be funded by the National Fund Against Smoking.

Most importantly, there should be extensive education programmes to educate and mobilise communities against the dangers of smoking, and to encourage them to report offenders. Offenders must be reported directly to local co-ordinating centres through the toll-free number. At the same time the legislature should make it hard to obtain tobacco products by introducing compulsory licensing for tobacco retailers and revoke licences for law flouters. Such a move will eliminate the vending of cigarettes on the streets. In addition, this will make it easier to enforce the legislation because law enforcers will require the vendor to produce a licence. In addition to that regulations should require the warning information to be provided on each cigarette. This will help convey the information to those who buy a single cigarette. Over and above it should be made compulsory to include graphic photographs on cigarette packages, illustrating the consequences of smoking.

The legislature should also consider giving unconditional smoking exemption to bars. The necessity for this move arises from the fact that many of the bars are too small to designate a smoking area. It may also help to make it compulsory for young individuals to produce a positive identity document to the seller when purchasing cigarettes, in order to verify their age. Any retailer who is found selling cigarettes to any minor in violation of this provision

should be prosecuted. This may help protect children from being exposed to tobacco products.

The Act should expressly make it compulsory to write warning messages in other African languages. Where this is not practicable, tobacco manufacturers should be compelled to sponsor health messages broadcasted on national radio stations, televisions and other public media. On the other hand the legislature should deal specifically with smuggling. It should provide for heavy penalties for companies whose cigarettes are found to have been smuggled, and those who are found in possession of such cigarettes. At the same time all imported cigarettes are to be furnished with the details of the country of origin and be marked that they are intended for South Africa.

It is also necessary to take special measures to protect babies and young children against smoking adults who continue to undermine their right to a clean environment. This requires more than warning against smoking near children or smoking while breastfeeding. Furthermore, the use of tobacco products restricted with the intent of eventually banning tobacco use completely. This goal can be achieved through the increase of retail price and by imposing high taxation, which will inadvertently force tobacco companies out of business. Restricting it without any intention to uproot it may render the legislation ineffective in the long run. Finally, the Act should encourage corroboration between the National Council Against Smoking, and various other human rights organisations, such as the National Commission for Human Rights. This will ensure a holistic approach toward tobacco control since tobacco control and human rights cannot be separated.

4.4 CONCLUSION

The legislature must be commended for the success that has been achieved thus far in combating the spread of the tobacco pandemic, especially the initiation of the young children and teenagers to smoking. It is submitted that if the enforcement of the anti-smoking legislation is to be successfully implemented, the time to act decisively is now. Any implementation delays might render the tobacco legislation unenforceable. This study has outlined the challenges that face the implementation of the Tobacco Control Legislation. In

addition, the study has shown that not all the challenges are insurmountable. The recommendations, in particular, have shown how some of these challenges may be successfully overcome. Challenges posed by the shortage of inspectors to monitor the implementation of the statutory provisions can be met through the creation of the National Fund Against Smoking. So too are the challenges of education programmes aimed at creating community awareness to the dangers of tobacco smoking. Awareness campaigns will mobilise the communities and encourage them to report any violations of the anti-smoking laws. Finally, a toll-free number will help the individuals to lodge their complaints, and encourage co-operation between communities and the local co-ordinating centres.

APPENDIX 1
QUESTIONNAIRE

QUESTIONNAIRE ON SMOKING IN PUBLIC PLACES.

Cross (X) YES or NO or choose the right alternative (A, B, C or D) or write where appropriate.

1. Type of a public place. Specify. e.g.: bar, tavern, etc.

public place	
Public Members (put an X and leave out 2, 3 and 4 below)	

2. Is smoking permitted in your work place?

YES		NO	
-----	--	----	--

- 3(a) If YES, do you have a **designated smoking area**?

YES		NO	
-----	--	----	--

- (b) If NO, do people obey your 'Non Smoking' policy?

YES		NO	
-----	--	----	--

- 4(a) If your answer to 3 (a) above is NO, have you applied to the Director-General for **Exemption** to make necessary structural changes?

YES		NO	
-----	--	----	--

(b) **(Only if you have answered 3 (b) above.)**

- (i) How do you ensure compliance with your 'non-smoke' policy, as required by regulations? _____

- (ii) Do you have a policy in place to discipline offenders? Specify.

YES	
NO	

5. How do you feel about this government regulation?

A	it is good and necessary
B	it is unreasonable and unnecessary
C	it will improve the health of the public
D	it hampers economic development

6. Do you think this regulation is enforceable?

YES	
YES but very hard	
NO	

7. How do you think this regulation may be improved? _____

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