THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 463/2011
Reportable

In the matter between:

BRITISH AMERICAN TOBACCO SOUTH AFRICA (PTY) LIMITED **APPELLANT**

and

MINISTER OF HEALTH **FIRST RESPONDENT**

NATIONAL COUNCIL AGAINST SMOKING **SECOND RESPONDENT**

Neutral citation: *BATSA v Minister of Health* (463/2011) [2012] ZASCA 107 (20 June 2012)

Coram: Mthiyane DP, Farlam, Malan, Tshiqi JJA and McLaren AJA

Heard: **30 April 2012**
Delivered: **20 June 2012**

Summary: **Proper interpretation of s 3(1)*(a)* of the Tobacco Products Control Act 83 of 1993 as amended, read with the definitions of 'advertise' and 'promotion'.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Phatudi J sitting as court of first instance):

The following order is made:

1 Subject to paragraph 2 hereof the appeal is dismissed.

2 The costs order in the court a quo is set aside and replaced with the following:

'No order is made as to costs.'

JUDGMENT

MTHIYANE DP (FARLAM, MALAN, TSHIQI JJA AND McLAREN AJA CONCURRING)

Introduction

[1] This appeal is concerned with the proper interpretation of s 3(1)*(a)* of the Tobacco Products Control Act 83 of 1993 (the Act) as amended by the Tobacco Products Amendment Act 63 of 2008.

[2] Section 3(1)*(a)* of the Act provides as follows:

'No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.' (My underlining.)

[3] The section contains two principal prohibitions: the first is 'advertising' and the second 'promotion' of a tobacco product. In terms of s 1 of the Act, as amended, 'advertisement' in relation to a tobacco product —

'means any commercial communication or action brought to the attention of any member of the public in any manner with the aim, effect or likely effect of—

(i) promoting the sale or use of any tobacco product, tobacco product brand element or tobacco manufacturer's name in relation to a tobacco product; or . . .

(c) excludes commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and share holders and any communications required by law.' (My underlining.)

The word 'advertise' has a corresponding meaning.

[4] 'Promotion' is defined as 'the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for purposes of selling the tobacco product or encouraging tobacco use, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film, television production, radio production or the internet'. The word 'promote' has a corresponding meaning.

[5] A failure to comply with the impugned prohibition gives rise to a criminal offence, punishable by a fine of up to R1 million.

[6] The appellant, a tobacco manufacturer conducting business as part of the British American Tobacco Group, which has a business presence in 180 countries throughout the world, was concerned about the impact the amendment would have on its ability to communicate one-to-one with

consenting adult consumers of tobacco products, if the impugned provision were interpreted as extending to one-to-one communications between itself on the one hand, and consenting adult consumers of its products, on the other.

[7] The information the appellant wished to impart to consenting adult consumers of its tobacco products includes the following:

(a) packaging changes, which communication will generally be aimed at ensuring that the consumer is aware that the changes to the package are authentic and that an illicit trade package is not being purchased;

(b) brand migrations when a product line is discontinued (ie the brands that are most similar in taste and other characteristics to the discontinued product);

(c) product developments, which may, for example, be driven by legislative requirements (eg reductions in tar or nicotine levels) or may be made in order to ensure that the product is protected against illicit trade;

(d) the launch of new products and new types of products, such as snus;

(e) that a particular tobacco product is less harmful than another tobacco products; and

(f) other distinguishing features of a particular tobacco product.

Background

[8] The appellant, through its attorneys, engaged the government in correspondence seeking clarification on the nature, effect and extent of the Amendment Act. From the correspondence, some of which was directed to the highest office in the Presidency, it appears that the appellant's main concern was with regard to the constitutionality of the definition of 'advertisement' in relation to 'any tobacco product' referred

to in the Amendment Act. The appellant considered the definition of 'advertisement' to be unconstitutional to the extent that it limited its right to freedom of expression, as set out in s 16 of the Constitution. When this exchange with government failed to bear fruit, the appellant approached the North Gauteng High Court for a declarator. It sought an order that the impugned provision did 'not apply to one-to-one communications between tobacco manufacturers, importers, wholesalers and retailers on the one hand and consenting adult tobacco consumers on the other'. In the alternative the appellant sought an order declaring the impugned provision to be unconstitutional, subject to the latter order being suspended for 18 months 'to allow Parliament to enact legislation to cure any unconstitutionality' that may be found to exist in the provision.

[9] The essence of the appellant's complaint is that the impugned prohibition limits not only the appellant's right to engage in commercial expression, but also the right to freedom of expression of tobacco consumers who are denied the right to receive information concerning tobacco products. As I will demonstrate the right of consumers to receive information concerning tobacco products has been only limited but not done away with. The right to freedom of expression concerned in these proceedings is 'commercial speech' and stands to be protected in terms of s 16(1) of the Constitution. In *City of Cape Town v Ad Outpost (Pty) Limited & others*[1] Davis J remarked:

'To the extent that [commercial speech] may count for less than other forms of expression, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution.'

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[1] *City of Cape Town v Ad Outpost (Pty) Limited* 2000 (2) SA 733 (C) at 749D-E and see *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd & others* 2002 (2) SA 625 (D) at 633D-E.

This approach is reflected in *British American Tobacco UK Ltd & others v The Secretary of State for Health*:[2]

'The protection of health is a far reaching social policy. The right to commercial free speech, while less fundamental than political or artistic free speech, is protected by the Convention and restrictions must be justified. However, it will be principally for the decision maker to resolve how best the aim can be achieved by restricting promotion of extremely harmful but historically lawful products. While the test of "proportionality" cannot be escaped, the need for advertising restriction on tobacco products is not substantially in issue and we are dealing with a restriction on the very edge of a much wider restriction that is not challenged nor is capable of challenge.'

On appeal

[10] In the appeal before us the appellant approached its case on two broad bases. First, the focus of its attack was on whether the impugned prohibition as it stands was unconstitutional. If not, whether it could be saved from unconstitutionality by reading it down, so as to exclude one-to-one communication between the appellant on the one hand and the consenting adult consumers on the other hand from the blanket prohibition — the so-called constitutionality argument.

[11] Second, the appellant's argument traversed the limitation analysis or justification enquiry. Broadly speaking the appellant submitted that the first respondent (the Minister) had failed to make out a proper case to justify the limitation of its right to freedom of expression as required by s 36(1) of the Constitution. That part of the appellant's argument was discussed with reference to (a) the nature of the communication; (b) the degree to which the limitation impacted on the appellant's freedom of expression; (c) the failure by the Minister to justify the limitation of the

[2] *British American Tobacco UK Ltd & others v The Secretary of State for Health* [2004] EWHC 2493 (Admin) para 37.

right to freedom of expression and (d) the interpretative argument, to see if the impugned provision can be read down so as to allow for one-to-one communication between the appellant on the one hand and the consenting adult consumers of tobacco products on the other.

Discussion

[12] The two lines of argument will be considered in turn. I deal first with the constitutionality point. As to the prohibition of 'advertising' and 'promotion', the appellant argued that the impugned prohibition is overbroad and that if it is interpreted to extend to one-to-one communications, it would not pass constitutional muster. Consequently, the appellant contended that the impugned provision fell to be struck down as unconstitutional, unless it was found to be reasonable and justifiable under s 36(1) of the Constitution. However the dispute as to whether the prohibition on 'advertising' and 'promotion' (which I will also refer to as 'the impugned prohibition') limited the appellant's freedom of speech fell away as an issue. Although counsel for the Minister had initially (in the heads of argument), stood firm that there was no 'blanket ban on the appellant's communication with consumers', he changed tack on appeal and accepted that the impugned prohibition did limit the appellant's right to freedom of speech and the right of the tobacco consumers to receive information on a one-to-one basis, contrary to the free speech guarantees provided for in s 16(1) of the Constitution. The high court also came to the same conclusion but found that the limitation was justified in terms of s 16(1) of the Constitution.

[13] It is clear that under s 16(1)*(b)* of the Constitution the appellant is entitled to the right to freedom of expression, which includes the 'freedom to receive or impart information or ideas', in this case, to

consenting adult consumers of its tobacco products. The appellant is indeed prevented from doing so by the impugned provision, which forbids commercial communication from being passed to consenting adult tobacco consumers which the appellant wishes to reach. The right to freedom of expression guarantees the intrinsic right of persons to communicate information and ideas. It is an indispensable element of a democratic society. It was stated by O'Regan J:[3]

'Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them. (My emphasis.)

Advertising allows the manufacturer, importer and other trader to impart information concerning its product. It also enables the consumer to receive such information and make consequent informed choices. As it was said,[4] '[t]he need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information'. Freedom of commercial expression thus entails not only the right to impart information but also the right to receive it.

Limitation of the right to freedom of speech

[14] Given the stance now adopted by the Minister and the second respondent (the Amicus), the question for decision in this appeal has narrowed itself down to whether the limitation of the appellant's right to communicate information concerning its tobacco products to consenting

[3] *NM Smith & others v Smith & others* 2007 (5) SA 250 (CC) para 145.
[4] *R v Guignard* 2002 SCC 14 para 21.

adult tobacco consumers and the latter group's (the smokers') right to receive information, can be justified in terms of s 36(1) of the Constitution.

[15] It is now settled that any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right, and the nature and extent of the limitation. (See *Glenister v President of the Republic of South Africa & others*).[5]

[16] The test for determining whether a limitation is justified requires an overall assessment that differs from case to case. (See *Christian Education South Africa v Minister of Education.*[6]) But each of these cases has one common denominator and that is that a court is required to engage in a balancing exercise on the basis of proportionality. In the present case we are required to consider the rights of the smokers on the one hand to receive information concerning the tobacco product and the government's obligation to take steps to protect its citizens from the hazardous and damaging effects of tobacco use on the other. In *Christian Education* Sachs J said:

'[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.'[7]

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[5] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 203.
[6] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 31.
[7] *Christian Education South Africa v Minister of Education* para 31.

[17] It is against this background that I turn to consider the argument advanced on the appellant's behalf on the question of limitation. As to (a) the nature of the information the appellant wishes to impart, is fully set out in paragraph 7 above. Counsel submitted that the information that the appellant wished to communicate was factual and truthful concerning its product. He criticised the suggestion by the Amicus that commercial speech should be accorded limited value.

[18] As to (b) the degree to which the limitation impacts on freedom of speech, the appellant's right to impart information to consenting adult tobacco consumers and their right to receive the information is indeed limited by the impugned prohibition.

Justification for the limitation

[19] Counsel for the appellant argued that the Minister failed to discharge the onus resting on him to provide evidence to justify the limitation of the appellant's right to freedom of expression. He submitted that no attempt was made to provide any specific data and that the Minister's case was based solely on generalised justification. The evidence adduced by the deponent to the answering affidavit, Mr Hendrik Andries Kleynhans, a Director in the Department of Health, was severely criticised, it being alleged, amongst other things, that he projected himself as an expert on certain aspects. He was accused of failing to distinguish between the purpose and effect of the limitation and of misunderstanding the onus resting on the Minister regarding the justification of the limitation.

[20] The appellant submitted that the Minister failed to provide any justification for the impugned prohibition. I do not think that this attack is

well-founded. In the answering affidavit the Minister has outlined the context in which the impugned prohibitions were enacted. There the following is averred:

'9 The Department has been committed to limiting and preventing the spread of tobacco usage among South Africans since the early 1990's. This policy was initiated in response to growing concerns, not simply in South Africa, but around the world, about the extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke. To this end, the Act was passed in 1993 and began by restricting smoking in public places, and certain forms of tobacco advertising. The Act was amended in 1999, 2007 and 2008 to further restrict tobacco usage and advertising in an attempt to meet government's concerns about the harmful effects of tobacco usage and in particular, to meet the following objectives:

9.1 First, to stem and prevent the growing incidence of tobacco usage, particularly by youth;

9.2 Second, to reduce the numbers of existing smokers;

9.3 Third, to ensure that those who had stopped smoking, did not begin smoking again; and

9.4 Fourth, to protect non-smokers from being exposed to second hand smoke.

10 In addition to these objectives, the Act (as amended by the 2007 Amendment Act and the 2008 Amendment Act) seeks to ensure that South Africa complies with its obligations in terms of the World Health Organisation Framework Convention on Tobacco Control ("the FCTC") which came into force on 27 February 2005. The Act (as amended), also seeks to close loopholes in earlier versions of the Act which allowed for the subverting of provisions of the Act by individuals and tobacco companies. Most importantly, the Act seeks to protect and promote public health in South Africa which is of national concern.

11 These objectives remain the focus of government and must be borne in mind when assessing the validity of the impugned provisions. In order to do so, the information that follows, is relevant.'

[21] It is clear that the Minister's case for justification is not based solely on facts as in a courtroom situation, but also on strong policy considerations informed by the rampaging ill-effects of tobacco use. In assessing the question whether the Minister has discharged the onus resting on him, regard must be paid to the context in which the impugned provisions were enacted. It has been said that the limitation analysis in a case such as this calls for a different enquiry. In *Minister of Home Affairs v Nicro & others*[8] Chaskalson CJ put it thus:

'This [meaning the limitation analysis] calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them.'

[22] In my view this is a classic example of a case in which matters of fact and policy are intertwined. It is heavily steeped in public health considerations which are addressed by the Act and the Framework Convention, to which South Africa is a signatory. These factors make a compelling case for justification. There are therefore powerful public health considerations for a ban on the advertising and promotion of tobacco products. The Amicus reminded us during argument that South Africa also has international law obligations to ban tobacco advertising and promotion, and that this has been the practice in many other open and

[8] *Minister of Home Affairs v Nicro & others* 2005 (3) SA 280 (CC) para 35.

democratic societies. They have accepted the link between advertising and consumption as incontrovertible and have imposed restrictions on the advertising and promotion of tobacco products. Besides, under the Constitution we are obliged to have regard to international law when interpreting the Bill of Rights. (See s 39(1)*(b)* of the Constitution and *Glenister v President of the Republic of South Africa & others.*[9]) In *Glenister* Moseneke DCJ and Cameron J, pointed out that it was the Constitution itself that makes it obligatory for domestic courts to have regard to international law when interpreting the provisions of the Bill of Rights and put it thus:

'[T]he Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.'

[23] South Africa is a signatory to the Framework Convention on Tobacco Control. There are currently 174 parties to the Framework Convention.[10] South Africa ratified the Framework Convention on 19 November 2005. In relation to advertising the Framework Convention imposes clear obligations on State parties. Article 13 of the Framework Convention provides:

'Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.'

I do not think that it was open to the Minister and the legislature to ignore the Framework Convention when considering what steps to take to deal with the risks posed by tobacco use. In respect of international conventions the Constitutional Court, per Moseneke DCJ and Cameron J, clearly indicated the approach to be adopted with regard to conventions that impose obligations on the Republic. In *Glenister* the Constitutional

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[9] *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) para 201.
[10] This Convention came into force on 27 February 2005.

Court dealt with conventions which required State parties to create anti-corruption units that has the necessary independence (see para 189). The majority found that those conventions were binding on the Republic. By parity of reasoning, in determining whether or not to impose a ban on advertising and promotion of tobacco products the Minister would have been obliged to have regard to the Framework Convention. This Court is therefore obliged, under the Constitution, to give weight to it in determining the question of justification or the limitation of the right to freedom of speech.

[24] As to the public health considerations that appeared to have informed the ban on advertising, it is also necessary to have regard to how the problem has been dealt with in other jurisdictions. One of the latest cases to which our attention was drawn by counsel for the Minister is a Canadian case of *Canada* (*Attorney General, v JTI-MacDonald Corp* 2007 SCC 30 para 9. The remarks of McLachlin CJ are apposite:

'[T]obacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.'

[25] I have already indicated that any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the relevant factors, including the nature of the right, the importance of the limitation and its nature and extent. The right to commercial speech in the context of this case is indeed important. But it is not absolute. When it is weighed

up against the public health considerations that must necessarily have been considered when imposing the ban on advertising and promotion of tobacco products it must, I think, give way. The seriousness of the hazards of smoking far out weigh the interests of the smokers as a group. As was said in *Canada (Attorney-General) v JTI-MacDonald Corp*:[11]

'When commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.'

The remarks of McLachlin CJ in the *JTI-MacDonald* case quoted above suggest that the smokers are not a monogenous group. Amongst them there are those that are trapped in the habit and wish to get out of it. There are also those who have given up and would not like to relapse into the old habit of smoking again. The impugned prohibition is aimed at discouraging all tobacco users, without exception, in the interest of public health.

The purpose, importance, and effect of the limitation and the availability of less restricted measures

[26] The Minister has in my view established that the prohibition on advertising and promotion of tobacco products is reasonable and justified. There can be no question that government has an obligation to protect its citizens from the ravages of tobacco use. Smoking is undoubtedly hazardous and has an adverse effect on health care. In terms of s 27(1) of the Constitution everyone has the right to have access to health care services which the State is obliged to provide and to carry the costs of, if necessary. All of these facts highlight the purpose, the importance and the effect of the limitation. The impugned prohibition is targeted at any member of the public, amongst whom are consenting adult smokers. As I have already pointed out, there are also those that are trapped in the habit

[11] See para 47.

of smoking and wish to rid themselves of it and those that have given up and do not wish to go back to old habits. Although I do not consider that there are less restrictive means available to enforce the impugned provisions, it is not possible to carve out an exception from the prohibition of the use of tobacco. In the case of *Prince v President, Cape Law Society & others*[12] the Constitution Court found it impossible to carve out an exception in respect of the use and possession of cannabis. Similarly, in the present matter it will be impossible to carve out an exception in respect of consenting adult tobacco users (or smokers). In the circumstances a blanket ban on advertising and promotion is, to my mind, the only way to address the issue — an objective the impugned prohibition seeks to achieve. The Constitutional Court in the *Prince* case endorsed this approach.[13]

Interpretative argument

[27] The appellant submitted that the impugned provision should be interpreted in a way that would allow for one-on-one communication to take place. He further submitted that under s 39(2) of the Constitution a provision in the Bill of Rights should be interpreted in a way that would promote the spirit, purport and objects of the Bill of Rights. However, reading in does not always offer a solution as Moseneke J points out in *Daniels v Campbell NO & others*[14] where he said:

'However, this affirmative duty to "read" legislation in order to bring it within constitutional confines is not without bounds. An impugned statute may be read to survive constitutional invalidity only if it is reasonably capable of such compliant meaning. To be permissible, the interpretation must not be fanciful or far-fetched but

[12] *Prince v President, Cape Law Society & others* 2002 (2) SA 794 (CC).
[13] See para 142.
[14] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) para 83.

one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language. This is so because statutes are:
". . . products of conscious and planned law-making by demonstrable and authorised law making authors and are therefore meant to be of effect. By replacing them as final authority, the Constitution has not deprived statutes of their worth or force, but has given them new direction."' (My underlining).

[28] If one has regard to the information that the appellant wishes to communicate to consenting adult consumers it is one that seeks to advertise and promote the tobacco product. As counsel for the Amicus correctly contended, all the communications[15] which the appellant wishes to make are designed, in some way or another, to promote the sale of its product and thus to maintain in place the mischief which the Act is designed to combat. The public health considerations and the countervailing right to a healthy environment make a strong case for the limitation of the right which the appellant seeks to enforce. I am accordingly satisfied that the limitation is reasonable and justified as required by s 36(1) of the Constitution and that it is accordingly unnecessary to read in any words so as to render it constitutional.

[29] It follows from what I have said that, subject to what is said in the next paragraph, the appeal must fail.

[30] As far as costs are concerned, although the appellant was seeking to advance its own commercial interest in bringing the application, its challenge to the constitutionality of the section cannot be described as frivolous or in any other way inappropriate. Following the approach in *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232

[15] See paragraph 7 above.

(CC), especially at paras 23-24, I am of the view that no order as to cost should have been made in favour of the respondent in the court a quo, nor should such an order be made in this Court. The Amicus made it clear that it did not seek costs and abandoned the order for costs in its favour, which order it did not seek in the court a quo.

[31] In the result the following order is made:

1 Subject to paragraph 2 hereof the appeal is dismissed.

2 The costs order in the court a quo is set aside and replaced with the following:

'No order is made as to costs.'

K K MTHIYANE
DEPUTY PRESIDENT

FARLAM JA (MALAN, TSHIQI JJA AND McLAREN AJA CONCURRING)

[32] I agree with the judgment and order of my colleague Mthiyane DP but wish to add additional considerations in support of his conclusions. In my view it is clear that the definition of 'advertisement' constitutes a limitation on the right to receive or impart information or ideas which is entrenched in s 16(1)*(b)* of the Constitution. This is so because it prohibits commercial communications to members of the public.

[33] To determine whether the limitation can be justified under s 36 it is necessary to be clear as to what exactly is prohibited, which means in turn that it is necessary to know what the correct interpretation of the section is. Three phrases in particular have to be considered, that is, 'commercial communication'; 'brought to the attention'; and 'member of the public'.

[34] According to the *Concise Oxford English Dictionary* [16] 'commercial' means: (1) 'concerned with or engaged in commerce' and (2) 'making or intended to make a profit', while 'commerce' is defined as 'the activity of buying and selling, especially on a large scale'. A 'commercial communication' is thus one which is concerned with the buying and selling, in this case, of tobacco products.

[35] The expression 'brought to the attention of' seems to mean that the activity prohibited is the taking of the initiative in making the communication, otherwise the section would just have spoken of a communication 'to' any member of the public. Thus, if a member of the public specifically requests information about a tobacco product and the manufacturer replies, even though the communication may be a 'commercial' one (because it is related to a possible sale of the product), the prohibition is not disobeyed. This conclusion is supported by the words of s 3(1)(*a*) that no person 'shall advertise or promote, or cause any other person to advertise or promote'. The prohibition is against advertising and promotion not against answering requests.

[36] By way of comparison reference may be made to s 4 of the United Kingdom Tobacco Advertising and Promotion Act 2002 which contains exclusions from the general prohibition on tobacco advertising. Section

[16] *Concise Oxford English Dictionary* 12 ed (2011).

4(1)(b) provides that no offence in relation to a tobacco advertisement is committed 'if it is, or is contained in, the communication made in reply to a particular request by an individual for information about a tobacco product'. Section 22(2)*(a)* of the Canadian Tobacco Act of 1997 similarly allows the advertisement of a tobacco product by means of information or brand-preference advertising that is in 'publication that is provided by mail and addressed to an adult who is identified by name'. Article 23 of Chapter II of Title Three of the Mexican General Law on Tobacco Control allows publicity and promotion of tobacco products only when aimed 'at adults through adult magazines, personal communication by mail or within establishments exclusively for adult access'. The suggested interpretation of the South African provisions, like those in the United Kingdom, Canada and Mexico recognises the need of adult tobacco smokers to engage in communication about the products.

[37] Case law make it clear that the expression 'member of the public' does not mean 'any person': see, eg, *S v Rossouw* 1969 (4) SA 504 (NC) at 508F-H. The same case (at 509G-H) is also authority for the proposition that the meaning of the phrase has in every case to be ascertained with reference to all the circumstances. I do not think that the case relied on by the appellants, *Gold Fields Ltd & another v Harmony Gold Mining Co Ltd & others* 2005 (2) SA 506 (SCA) is of much assistance. It concerned the meaning of the expression 'an offer to the public', in the context of the statutory prohibition in s 145 of the Companies Act 61 of 1973, of the making of an offer to the public for the subscription of shares which was not accompanied by a prospectus. Shares were offered by Harmony to shareholders in Gold Fields. This Court held that there was no offer to the public or even to a section of the public. It was held (at 511A-C) that the offer was made to the 'owner of

specified limited property', ie to a person 'in the peculiar capacity — not shared by the public at large', who alone was capable of accepting it. Different considerations apply here and the case is therefore not of much assistance. The appellants, relying on the *Gold Fields* case, contend that consenting adult users of tobacco products are in a category not shared by the public at large. They submit that there is a 'rational connection' (to use a phrase employed in two Australian cases cited in the *Gold Fields* case) between the communications they say they should be allowed to make and the common characteristic of the persons to whom they wish to make them, ie adult smokers. What is of importance in this regard is that the purpose of the legislation is to discourage the use of tobacco products because of the serious health hazards they bring in their train. It is clear that all the communications the appellants wish to make are aimed, in some way or another, at promoting the use of their products. I do not think in the circumstances that parliament intended the category of persons who are not members of the public to be so wide that the purpose of the Act would be undermined.

[38] In my view the key to understanding what the legislature had in mind when it used the expression 'any member of the public' is to be found in subpara (*c*) of the definition of 'advertisement', that is the 'trade partners, business partners, employees and shareholders' of the manufacturer or importer concerned. See also s 3(1)(*b*) of the Act which confirms the point just made. This is an example of a provision inserted by the legislature in order to make plain what it intended the ambit of the prohibition to be.

[39] It follows from what I have said that the prohibition against advertising tobacco products is to be interpreted as preventing a person in

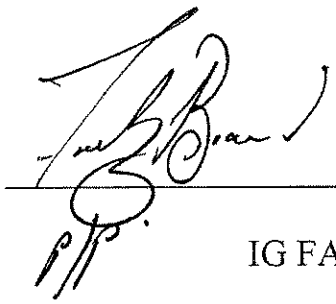
the position of the appellant from making a commercial communication about a tobacco product on its own initiative to any person other than those listed in paragraph (*c*) of the definition of 'advertisement' and s 3(1)(*b*), but permitting such a communication to persons other than those listed where the information contained in the communication is specifically requested by the person to whom the communication is to be made.

[40] I now proceed to consider whether the limitation of the rights to receive or impart information contained in the section can be justified under s 36 of the Constitution. As has been seen, the right to receive information about tobacco products is only limited in respect of such information sent on the initiative of the communicator and not requested by the person who receives it. In my view this limitation clearly passes the tests for justification set out in s 36. I say this because the public health considerations addressed by the Act and set out in the Framework Convention and the right to an environment that is not harmful to the health and wellbeing of all in this country, which is entrenched in s 24 of the Constitution, clearly constitute powerful reasons for upholding the limitation.

[41] As far as the right to impart information is concerned, the right which the appellant seeks to exercise, it is clear in my view that as the Amicus correctly contended, all the communications which the appellant wishes to make are designed, in some way or other, to promote the sale of their products and thus to maintain in place the mischief which the Act is designed to combat. The public health considerations and the countervailing right to a healthy environment to which I referred in considering the limitation on the right to receive information also apply

here. I am accordingly satisfied that the limitation set out in the section is not unconstitutional.

[42] It follows from what I have said that the appeal must fail. I agree with the order made by Mthiyane DP.



IG FARLAM
JUDGE OF APPEAL

APPEARANCES

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