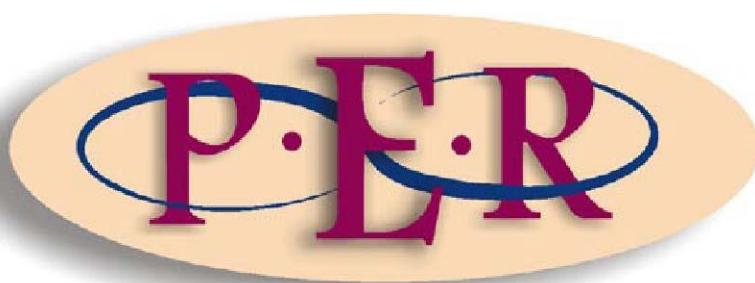


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YOUNG CHILDREN (R 991): A FORMULA FOR THE PROMOTION OF
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THE REGULATIONS RELATING TO FOODSTUFFS FOR INFANTS AND YOUNG CHILDREN (R 991): A FORMULA FOR THE PROMOTION OF BREASTFEEDING OR CENSORSHIP OF COMMERCIAL SPEECH?

L Mills*

1 Introduction

On 6 December 2012 the South African Minister of Health, Dr Aaron Motsoaledi, published regulations¹ in terms of section 15(1) of the *Foodstuffs, Cosmetics and Disinfectants Act*.² In terms of these regulations a number of restrictions are placed on the labelling, advertisement and promotion of infant and follow-up formulae, liquid or powdered milk marketed as being suitable for infants or young children, complementary foods, feeding bottles, teats and feeding cups with spouts, straws or teats. The final version of these regulations followed a previous draft published for public comment in March 2012 and contains somewhat less restrictive provisions than its original predecessor.³

In June of the same year the Supreme Court of Appeal handed down its judgment in the case of *British American Tobacco South Africa (Pty) Limited v Minister of Health*.⁴ In it the SCA held that the prohibition on advertising and promotion of tobacco

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¹ The regulations were published in GN R 991 in GG 35941 of 6 December 2012 (*Regulations Relating to Foodstuffs for Infants and Young Children*).

² *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972, hereafter the *Foodstuffs Act*.

³ The original dates for the coming into operation of regulations R991 (on 6 December 2012, 6 June 2013 and 6 December 2013) were recently extended by means of an extension notice (GN R 433 in GG 36579 of 18 June 2013) so that they now will be operative as follows: 24 months from the date of publication of the Regulations for regs 2, 3, 4, 5 and 6; 12 months from the date of publication of the Regulations for regs 7, 8 and 11; 6 months from the date of publication of the Regulations for regs 9 and 10; and 36 months from the date of publication of the Regulations for transitional measures.

⁴ *British American Tobacco South Africa (Pty) Limited v Minister of Health* 2012 ZASCA 107. Hereafter the *BATSA* decision.

products contained in section 3(1)(a) of the *Tobacco Products Control Act*⁵ was reasonable and justified. The Court consequently dismissed the appeal, finding that the right to freedom of commercial speech could indeed be limited in this particular manner. On appeal to the Constitutional Court, the Court unanimously dismissed the application on the grounds that there were no prospects of its success.⁶

This article seeks to evaluate the restrictions which the new regulations in terms of the *Foodstuffs Act* place upon the right to freedom of speech, specifically in the light of the decision of the SCA in the *BATSA* decision.⁷ Some of the case law pertaining to the relationship between commercial speech and restrictions in the interest of public health from other jurisdictions, including Canada and the United States of America, will be briefly discussed. The article will furthermore provide some background information to regulations R991 and place it in the context of the international standards in this regard. It will then briefly assess the regulations within the framework of constitutional imperatives such as the best interests of the child, her right to the enjoyment of the highest attainable standard of health, and parental responsibilities and rights. Although the test provided by section 36 of the *Constitution of the Republic of South Africa, 1996*⁸ will be used to assess the limitation placed upon section 16 of the *Constitution*, it will not be used also to test the impact which regulations R991 may have on the right to property. This article will, however, briefly refer to the possible restraint which it may place on section 25 of the *Constitution*.⁹ It will argue that, although the Department of Health must be commended for their attempt at improving the development and health of South Africa, some of the provisions of regulations R991 will not be able to withstand constitutional scrutiny. It will be contended that, despite the fact that the promotion

⁵ *Tobacco Products Control Act* 83 of 1993. Hereafter the *Tobacco Control Act*.

⁶ *British American Tobacco South Africa (Pty) Limited v Minister of Health Case* (CC) unreported case number 65/12 order of 6 August 2012.

⁷ The reasoning by the Court in this instance will not be specifically scrutinised but will be accepted as the current South African approach to the regulation of commercial speech in the context of public health. It is nevertheless important that an analysis of this approach must take place, especially in the light of the proposed prohibition of the promotion of alcohol products in this country. See in this regard Paton *Business Day*.

⁸ Hereafter the *Constitution*.

⁹ This argument is fully canvassed by Dean "Deprivation of Trade Marks". See also Dean 2012 *Intellectual Property Forum* 107-108.

of breastfeeding is of vital importance, the introduction of measures which restrict the right to advertise these types of products alone will not necessarily achieve the goal.

2 Historical background and international context to regulations R 991

It has been generally accepted that breastfeeding is the optimal and unparalleled method of feeding and caring for infants.¹⁰ The WHO/UNICEF Global strategy for infant and young child feeding¹¹ explains their position in this regard as follows:

Breastfeeding is an unequalled way of providing ideal food for the healthy growth and development of infants; it is also an integral part of the reproductive process with important implications for the health of mothers. As a global public health recommendation, infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Thereafter, to meet their evolving nutritional requirements, infants should receive nutritionally adequate and safe complementary foods while breastfeeding continues for up to two years of age or beyond.¹²

It is estimated that breastfeeding has the potential to globally prevent 220 000 under-five deaths per year.¹³ Research shows that breastfeeding reduces the risk of dying from illnesses such as diarrhoea and pneumonia.¹⁴

¹⁰ Latham "Breastfeeding" 288; Margulies 1997 *Int'l J Child Rts* 420. See also, for example, the World Health Organisation's research report conducted by Horta *et al* *Evidence on the Long-term Effects of Breastfeeding*. Some of the short-term benefits of breastfeeding quoted by this report include the reduction of child "mortality and morbidity from infectious diseases. A collaborative reanalysis of studies conducted in middle/low-income countries reported a reduced risk of mortality from infectious diseases among breastfed infants, up to the second birthday. Kramer *et al* reviewed the evidence on the effects on child health and growth of exclusive breastfeeding for 6 months. Infants who were exclusively breastfed for 6 months presented lower morbidity from gastrointestinal and allergic diseases, while showing similar growth rates to non-breastfed children." See also WHO 2008 http://www.who.int/nutrition/publications/infantfeeding/Frequently_ask_question_Internationalcode.pdf.

¹¹ WHO and UNICEF 2003 <http://whqlibdoc.who.int/publications/2003/9241562218.pdf>.

¹² WHO 2011 http://apps.who.int/iris/bitstream/10665/85621/1/9789241505987_eng.pdf 2.

¹³ WHO 2011 http://apps.who.int/iris/bitstream/10665/85621/1/9789241505987_eng.pdf. In this report, a source for such an estimate is cited as Bhutta *et al* 2013 *Lancet*.

¹⁴ WHO 2011 http://apps.who.int/iris/bitstream/10665/85621/1/9789241505987_eng.pdf. See also fn 10 above.

In 1974 the twenty-seventh World Health Assembly¹⁵ noted the general decline in breastfeeding in many parts of the world,¹⁶ believed to be caused by sociocultural and other factors. One of these factors was identified to be the promotion of manufactured breast-milk substitutes. As a result, the WHA urged "Member countries to review sales promotion activities on baby foods to introduce appropriate remedial measures, including advertisement codes and legislation where necessary".¹⁷ The issue was discussed again by the Thirty-first WHA in May 1978. In October 1979 some 150 representatives of governments, organisations of the United Nations system and other intergovernmental bodies, nongovernmental organisations, the infant-food industry, and experts in related disciplines convened in Geneva to discuss infant and young child feeding.¹⁸ The discussions were organised around five main themes: 1) the encouragement and support of breastfeeding; 2) the promotion and support of appropriate and timely complementary feeding (weaning) practices with the use of local food resources; 3) the strengthening of education, training and information on infant and young child feeding; 4) the promotion of the health and social status of women in relation to infant and young child health and feeding; and 5) the appropriate marketing and distribution of breast-milk substitutes.¹⁹ Numerous further meetings, consultations and recommendations culminated in the adoption of the *International Code of Marketing of Breast-milk Substitutes* in May 1981.²⁰ The aim of the Code is "to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breastfeeding, and by ensuring the proper use of breast-milk substitutes, when these are necessary, on the basis of *adequate information* and through *appropriate marketing* and distribution."²¹ During the Executive Board's discussion of this item at its sixty-seventh session it was

¹⁵ Hereafter the WHA.

¹⁶ Latham "Breastfeeding" 292 reports that breastfeeding in the United States of America declined in the 1970s to such an extent that fewer than 20% of babies, including new-borns, were being breastfed. Del Ponte 1982 *BC Int'l & Comp L Rev* 380 cites a source which estimates that formula sales rose by \$2billion in 1980, including more than 50% of the sales in developing countries.

¹⁷ *Resolution WHA27.43* (1974) (WHO *Handbook of Resolutions and Decisions* 58).

¹⁸ WHO 1981 http://www.who.int/nutrition/publications/code_english.pdf 4.

¹⁹ WHO 1981 http://www.who.int/nutrition/publications/code_english.pdf 4-5.

²⁰ *Resolution WHA34.22* (1981) (*International Code of Marketing of Breast-milk Substitutes*); hereafter the Code.

²¹ A 2 of the Code (author's own emphasis).

stressed that the Code constituted the minimum acceptable requirements concerning the marketing of breast-milk substitutes. The Code recognises that some mothers may not breastfeed or do so only partially and that in these instances "there is a legitimate market for infant formulae and for suitable ingredients from which to prepare it; that all these products should accordingly be made accessible to those who need them through commercial or non-commercial distribution systems; and that they should not be marketed or distributed in ways that may interfere with the protection and promotion of breast-feeding".²² Breast-milk substitutes should be available when needed but should not be promoted.²³

Several more programmes in support of promoting breastfeeding have been initiated by the World Health Organisation²⁴ and UNICEF. Thus, for example, the 1990 *Innocenti Declaration on the Protection, Promotion, and Support of Breastfeeding*, which calls for world action to promote, protect and support breastfeeding, was endorsed by the WHO in 1992 with the adoption of *WHA Resolution 45.34*. The Baby Friendly Hospital Initiative was launched in 1991 and is another global effort to implement practices that protect, promote and support breastfeeding.²⁵ A further important initiative which endorses exclusive breastfeeding for the first six months of a baby's life is that of the *Global Strategy for Infant and Young Child Feeding*,²⁶ which aims to improve the nutritional status, growth and development, health, and thus the survival of infants and young children. In terms of paragraph 44 "all manufacturers and distributors of products within the scope of the *International Code of Marketing of Breast-milk Substitutes*, including feeding bottles and teats, are responsible for monitoring their marketing practices according to the principles and

²² Preamble to the Code. Since it has always also been recognised that the Code may require clarification and revision, subsequent Resolutions to close some of the loopholes of the original code have been adopted every two years since 1982.

²³ WHO 2008 http://www.who.int/nutrition/publications/infantfeeding/Frequently_ask_question_Internationalcode.pdf 1.

²⁴ Hereafter WHO.

²⁵ WHO 1991 <http://www.who.int/nutrition/topics/bfhi/en/index.html>. This text was further revised and updated in 2009. See WHO 2009 <http://www.who.int/nutrition/publications/infantfeeding/9789241594950/en/index.html>.

²⁶ Adopted by the 55th WHA on 18 May 2002 and on 16 September 2002 by the UNICEF Executive Board. See WHO and UNICEF 2003 <http://whqlibdoc.who.int/publications/2003/9241562218.pdf>.

aim of the Code.²⁷ In 2010 the WHO published Guidelines on HIV and Infant Feeding, recommending that national authorities in each country decide which infant feeding practice, ie breastfeeding with an ARV intervention to reduce transmission, or the avoidance of all breastfeeding, should be promoted and supported by their Maternal and Child Health services. This recommendation differs from previous policies, in which health workers were expected to individually counsel all HIV-infected mothers about the various infant feeding options, and it was then for mothers to decide between them.²⁸

3 Regulations no R 991: Regulations Relating to Foodstuffs for Infants and Young Children

In response to this global call for action, the South African Department of Health published the *Regulations Relating to Foodstuffs for Infants and Young Children* R 991 on 6 December 2012.²⁹ These regulations prohibit promotional practices in respect of infant³⁰ and follow-up formulae,³¹ infant or follow-up formulae for special dietary or medical purposes; liquid milks, powdered milks, modified powdered milks, or powdered drinks marketed or otherwise represented as suitable for infants or young children; feeding bottles, teats and feeding cups with spouts, straws or teats,³² or any other products that the Minister may publish by notice in the Gazette.³³ Despite the fact that regulation 1 provides a definition of what it means to

²⁷ WHO and UNICEF 2003 <http://whqlibdoc.who.int/publications/2003/9241562218.pdf>.

²⁸ WHO *Guidelines on HIV and Infant Feeding*.

²⁹ See also fn 1. There have been a number of attempts at regulating the promotion of these particular products in South Africa. One such example is found in GN R 1328 in GG 25473 of 26 September 2003 (*Regulations Relating to Foodstuffs for Infants and Young Children*).

³⁰ An infant is defined by the Regulations as "a person not more than 12 months of age". "Infant formula" means "a formulated product specially manufactured in accordance with the applicable Codex standard to satisfy, by itself, the nutritional requirements of infants during the first months of life up to the introduction of appropriate complementary feeding".

³¹ Defined by the Regulations as "suitable for an infant from six months on or a young child".

³² It appears from the definition of "teat" that a device which an infant sucks on but which is not used to feed her, also known as a pacifier (colloquially known as a "dummy") is not included in the list of products to which these regulations apply.

³³ Reg 7(1), to come into effect on 6 December 2013.

"promote",³⁴ regulation 7(2) describes the list of prohibited practices to include, *inter alia*:

- (a) sale devices such as rebates, benefits in kind, kickbacks or any other pecuniary advantages, special displays to promote sales, advertisements about the availability of the product at a specific retail outlet and the price of the product, tie-in sales, discounts in any form, competitions with prizes, or any other incentives and gifts;
- (b) direct or indirect contact between company personnel and members of the public in furtherance of or for the purpose of promoting the business of the company with regard to the products referred to in sub-regulation 7(1) and for purposes of these regulations "indirect contact" specifically includes internet sites hosted on behalf of a South African entity or an entity that does business in South Africa, television and radio, telephone or internet help lines and mother and baby clubs but excludes contact in regards to product quality complaints and adverse events;
- (c) the distribution of any information or educational material on the nutrition or feeding of infants and young children, except in accordance with sub-regulation 7(4);³⁵

³⁴ "[P]romote' means to employ any method scheme or design, of encouraging or enticing a person or group of persons, in whatever form, to purchase or use a designated product, and includes but is not limited to, advertising, point-of-sale advertising, the giving of samples, special sales, free supplies, donations, sponsorships, gifts, whether related or unrelated to purchases of designated products, free utensils or other articles, prizes, carrier bags with pack-shots or product logos, prizes or special displays at retail outlets, discount coupons, premiums, loss-leaders, tie-in sales, rebates and other give-aways."

³⁵ Reg 7(4) provides that "[n]o manufacturer, distributor, retailer, importer or person on behalf of the aforementioned shall produce or distribute any educational material on infant and young child feeding that promotes any products referred to in sub-regulation 7(1)." Reg 7(5) proceeds by providing that "[n]o manufacturer, distributor, retailer, importer or person on behalf of the aforementioned shall produced [sic], distribute and present educational information relating to infant and young child nutrition". It is submitted that it is not entirely clear how these provisions are to be read together.

- (d) promotional items such as stationery, T-shirts or other items of clothing, headgear, household utensils, and household linens that refer to products contained in sub-regulation 7(1) of these regulations;
- (e) the brand name of a product referred to in sub-regulation 7(1) when used at any event for the general public;
- (f) advertisements in written publications, television, radio, film, electronic media, email, video, telephone displays, exhibitions and outdoor advertisements such as billboards, posters, signs and electronic signs.

The listed products may furthermore also not be promoted by means of the provision of research grants, financial assistance, donations or the distribution of any equipment, or sponsorships unless prior approval has been obtained from the Director-General of the Department of Health.³⁶ Regulation 7(3) also explicitly prohibits the sale, promotion or advertisement of the listed products, as well as that of complementary foods,³⁷ through health care personnel or health establishments. An institutional pharmacy in a private health establishment may, however, sell a designated product but has to refrain from promoting or advertising it.³⁸

Regulation 7(4) prohibits any manufacturer, distributor, retailer, importer or person on behalf of such, from producing or distributing any educational material on infant and young child feeding that promotes any of the identified products. Regulation

³⁶ Reg 7(2)(g)-(j).

³⁷ "[C]omplementary food" is defined by the Regulations as being "any foodstuff, whether in liquid, solid or semi-solid form, given to an infant from the age of six months as part of the transitional process during which an infant learns to eat food appropriate for his or her developmental stage while continuing to breastfeed or be fed with an appropriate formula".

³⁸ In its "Draft Guidance for Industry: the Regulations Relating to Foodstuffs for Infants and Young Children (Department of Health 2013 http://www.health.gov.za/docs/regulation/2013/Revised_Draft_Guidance_Notes.pdf), the Department of Health explains that a health care provider may communicate a range of available products to the client and not only one specific brand because this would be considered promotional. It is, however, submitted by the author of this article that even if a range of available products is mentioned by name to a member of the public, this still constitutes the promotion of all of the products mentioned.

7(5) extends even further by prohibiting any of the above-mentioned persons from producing, distributing or presenting educational information relating to infant and young child nutrition.³⁹

Other strict requirements regarding the labelling and packaging of designated products are found in regulations 2 to 6.⁴⁰ These include the prohibition of any graphic representation, apart from those necessary to show the correct method of preparing and using the product.⁴¹ The company logo and brand name will be permitted, provided that they do not contain a picture of an infant, young child or other humanised figure.⁴² The label of the relevant products may also not refer to, or promote or advertise any other designated product. Any incentive, enticement or invitation of any nature, which might encourage consumers to make contact with the manufacturer or distributor of a designated product, which might result in the sale or the promotion of a designated product for infants or young children, is proscribed from appearing on the label or in the marketing of such a product.⁴³ Apart from other strict instructions relating to the appearance and wording of the labelling, the regulations also contain a mandatory provision that the words "[t]his product shall only be used on the advice of a health professional" shall appear on the front main panel of the label of a designated product.⁴⁴ This is followed by an instruction that a prominent statement printed in bold letters of at least 3mm in height stating "USE UNDER MEDICAL SUPERVISION" shall also appear on the label. Regulation 4(3)(b) prohibits the use of expressions or names that may be understood to identify the product as suitable to feed infants. Such phrases include the terms "first growth", "first food", "from the start" and "best start in life". In terms of regulation 17 all non-compliant products must be removed from the market by 12 December 2015.

³⁹ See, however, also fn 35 above.

⁴⁰ These regulations will now come into operation on 6 December 2014.

⁴¹ Reg 2(2)(a).

⁴² Reg 2(3). In its Draft Guidance for Industry, (fn 36) the Department of Health describes a "humanised figure" as "any inanimate object that is portrayed or endowed with human characteristics or attributes. Examples include: fruits, vegetables, flowers, etc. with arms and legs, an image of the sun with eyes, giving animals human characteristics such as walking on only two legs".

⁴³ Reg 2(14).

⁴⁴ Reg 3(1)(a)(iii)(a).

The penalties applicable to the contravention of any of the regulations are found in section 18 of the *Foodstuffs Act*. It prescribes that

[a]ny person convicted of an offence under this Act shall ... be liable (a) on a first conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; (b) on a second conviction, to a fine or to imprisonment for a period not exceeding twelve months or to both a fine and such imprisonment; (c) on a third or subsequent conviction, to a fine or to imprisonment for a period not exceeding twenty-four months or to both a fine and such imprisonment.

4 The SCA decision in *British American Tobacco South Africa (Pty) Limited v Minister of Health*

The original application submitted by *BATSA* in the North Gauteng High Court was for an order declaring that the prohibition contained in section 3 of the *Tobacco Control Act* does "not apply to one-to-one communications between tobacco manufacturers, importers, wholesalers and retailers on the one hand and consenting adult tobacco consumers on the other."⁴⁵ In the alternative, *BATSA* sought an order declaring section 3 of the Act to be unconstitutional.⁴⁶ Having failed in obtaining such orders,⁴⁷ the SCA was approached to assess the constitutionality of the prohibition contained in section 3.

Section 3(1)(a) of the *Tobacco Control Act* provides the following:

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.

⁴⁵ *British American Tobacco South Africa (Pty) Limited v Minister of Health* (GNP) unreported case number 60230/2009 of 19 May 2011. See also para 8 of the *BATSA* decision.

⁴⁶ In such an event, the order would have been suspended for 18 months "in order to allow Parliament to enact legislation to cure the unconstitutionality". *British American Tobacco South Africa (Pty) Limited v Minister of Health* (GNP) unreported case number 60230/2009 of 19 May 2011. See also para 8 of the *BATSA* decision where the Court provides some contextual background prior to litigation.

⁴⁷ The Gauteng High Court found that the limitation on freedom of speech was justified in terms of s 16(1) of the *Constitution*.

The Act furthermore provides a definition of "advertisement" in relation to a tobacco product to be as follows:⁴⁸

- (a) ... 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
 - (ii) being regarded as a recommendation of a tobacco product;
- (b) includes product placement; and
- (c) excludes commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and shareholders and any communications required by law.

"Advertise" has a corresponding meaning.

"Promotion" in turn is defined by the Act as being

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

On appeal it was conceded by the Minister of Health that section 3 of the Act limited the appellant's right to freedom of speech and the right of tobacco users to receive information on an individual basis, as protected by section 16 of the *Constitution*.⁴⁹ *BATSA* submitted that the Minister of Health, however, failed to show that the limitation could be justified in terms of section 36 of the *Constitution*, bearing in mind-

- (a) the nature of the communication;⁵⁰ (b) the degree to which the limitation impacted on the appellant's freedom of expression; (c) the failure by the Minister to

⁴⁸ S 1 of the *Tobacco Control Act*.

⁴⁹ See para 12 of the *BATSA* decision.

⁵⁰ *BATSA* submitted that the information which it sought to communicate regarding its products was factual and truthful. See para 17 of the *BATSA* decision.

justify the limitation of the 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.⁵¹

The SCA once again underlined the importance of the right of freedom of expression, the right to communicate freedom of information and ideas and the role which these rights play in asserting the moral autonomy of individuals in a democratic society.⁵² Writing for the majority of the Court,⁵³ Mthiyane DP explained how commercial free speech, in the form of 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, '[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.⁵⁴

Like any fundamental right contained in the Bill of Rights, freedom of speech may of course be limited, as was the case in this instance. The question which a court has to answer in such a case is if such a 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, the nature and extent of the limitation⁵⁵ and the effect of the limitation, and that less restrictive means may be available to achieve the same purpose.⁵⁶ This means that a court has to engage in a balancing exercise based on proportionality. In this case in particular the Court had to consider the right of *BATSA* to communicate information about its

⁵¹ Para 11 of the *BATSA* decision.

⁵² Para 13 of the *BATSA* decision.

⁵³ Farlam, Malan, Tshiqi JJA and McLaren AJA concurring. This judgment also contains the order of the Court. Farlam JA also wrote another judgment in which he added some further considerations (Malan, Tshiqi JJA and McLaren AJA concurring) but agreed with the order provided in the judgment of Mthiyane DP.

⁵⁴ Para 13 of the *BATSA* decision, footnotes omitted.

⁵⁵ See para 15 of the *BATSA* decision and the reference to *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 203 included there.

⁵⁶ Para 16 of the *BATSA* decision and the reference to *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 31 included there.

products to consumers, the rights of consumers to receive such information, and the obligation of the government "to take steps to protect its citizens from the hazardous and damaging effects of tobacco use".⁵⁷

Turning to the justification for the limitation, the SCA rejected *BATSA*'s argument that the Minister of Health had failed to provide any justification for the prohibition. It accepted the respondent's explanation that, in accordance with its commitment "to limiting and preventing the spread of tobacco usage among South Africans" a policy was initiated in response to the global concern regarding the "extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke."⁵⁸ The *Tobacco Controls Act* consequently sought

... to stem and prevent the growing incidence of tobacco usage, particularly by youth; ... [s]econd, to reduce the numbers of existing smokers; ... [t]hird, to ensure that those who had stopped smoking, did not begin smoking again; and [f]ourth, to protect non-smokers from being exposed to second hand smoke.⁵⁹

The Act was furthermore also complying with South Africa's obligations in terms of the *WHO Framework Convention on Tobacco Control*,⁶⁰ which provides that parties to the *Framework Convention* undertake "a comprehensive ban of all tobacco advertising, promotion and sponsorship."⁶¹ Mthiyane DP found that the Minister and the legislature were obliged to regard the *Framework Convention* when considering what steps to take to deal with the risks of tobacco use.⁶² Apart from its obligations in terms of international law, the Court also held that it was important to consider the recent jurisprudence on the matter in foreign jurisdictions. So, for example, did

⁵⁷ Para 16 of the *BATSA* decision.

⁵⁸ Para 20 of the *BATSA* decision, quoting from the answering affidavit of the Minister of Health.

⁵⁹ Para 20 of the *BATSA* decision, quoting from the answering affidavit of the Minister of Health.

⁶⁰ Para 20 of the *BATSA* decision, quoting from the answering affidavit of the Minister of Health.

⁶¹ Para 23 of the *BATSA* decision, quoting from A 13 of the *WHO Framework Convention on Tobacco Control* (2003). The *Framework Convention* came into force on 27 February 2005 and South Africa ratified it on 19 November 2005.

⁶² The SCA held that, since the Constitutional Court in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) found that the relevant conventions were binding on the Republic, this Court too had to give weight to the *Framework Convention*. See, however, Bishop and Brickhill 2012 *JQR* 2 and their argument there as to why it is dangerous to merely accept that South African courts are bound by the provisions of a Convention, especially one which limits a constitutional right.

the Canadian Supreme Court in *Canada (Attorney General) v JTI-MacDonald Corp*⁶³ find that, since tobacco "is now irrefutably accepted as highly addictive and as imposing huge personal and social costs, ... that half of smokers will die of tobacco related diseases and that the costs to the public health system are enormous," public health considerations must sometimes outweigh the right to commercial speech:

When commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.⁶⁴

The Court consequently found that the Minister was meeting the government's obligation to protect its citizens from the harm of smoking and established that the prohibition on the advertising and promotion of tobacco products is reasonable and justified.⁶⁵

As to the question of whether or not a less restrictive means was available to address the issue, the SCA was of the view that a blanket ban on advertising and promotion was the only way possible. As was the case in *Prince v President, Cape Law Society*⁶⁶ it was impossible to carve out an exception in respect of consenting adult tobacco users. It could furthermore not agree with the argument by BATSA that the impugned provision should be interpreted in a way that would allow for individual communication to take place. Having regard to the type of information which the appellant wished to communicate to consenting adult customers,⁶⁷ the Court found it to be information which seeks to advertise and promote tobacco

⁶³ *Canada (Attorney General) v JTI-MacDonald Corp* 2007 SCC 30 para 9.

⁶⁴ *Canada (Attorney General) v JTI-MacDonald Corp* 2007 SCC 30 para 47.

⁶⁵ *Canada (Attorney General) v JTI-MacDonald Corp* 2007 SCC 30 para 26.

⁶⁶ *Prince v President, Cape Law Society* 2002 2 SA 794 (CC).

⁶⁷ These are listed in para 7 of the BATSA decision and include 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.

products. Public health considerations and the right to a healthy environment justified the limitation on freedom of speech in these circumstances in a manner required by section 36 of the *Constitution* and no words needed to be read into the provision.⁶⁸ Farlam JA furthermore found that, similar to the legislative provisions in Canada, the UK and Mexico, the prohibition in section 3 of the *Tobacco Controls Act* was against advertising and promotion and not against the manufacturer answering requests for information from the public regarding products.⁶⁹ Since the right to receive information about tobacco products is limited only in respect of information sent on the initiative of *BATSA* and not that which is requested by a person to whom the communication is made, Farlam JA was of the opinion that the requirements for justification in section 36 of the *Constitution* were clearly met.⁷⁰

5 An analysis of regulations R991

5.1 *Introduction*

When assessing the constitutionality of the *Regulations Relating to Foodstuffs for Infants and Young Children* (R 991), the effect that these provisions may have on commercial speech must be analysed. The limitation which the regulations place on the right to freedom of speech has to be evaluated in the light of the test provided by section 36 of the *Constitution*. As was the case in the *BATSA* decision, any court or tribunal which has to decide on the constitutionality of the regulations will have to balance the right of manufacturers or distributors of infant formulae, bottles, teats and certain feeding cups to communicate information about their products to consumers, the rights of consumers to receive such information, and the commitment of the government of South Africa to promote breastfeeding and improve the health of children.

⁶⁸ Para 28 of the *BATSA* decision.

⁶⁹ Paras 35-36 of the *BATSA* decision.

⁷⁰ Paras 39-40 of the *BATSA* decision.

The test of reasonableness and proportionality provided by section 36 of the *Constitution* is comparable to the tests used by the Supreme Courts in both the USA⁷¹ and Canada.⁷² In *S v Makwanyane*⁷³ the South African Constitutional Court provided guidelines to the "two stage approach" to be adopted in such a section 36 test:⁷⁴

⁷¹ It must of course be borne in mind that the USA does not have a general limitation clause comparable to s 1 of the *Canadian Charter* or to s 36 of the SA *Constitution*. In *Central Hudson Gas and Electric Corp v Public Service Commission of New York* 447 US 557 (1980) (hereafter *Central Hudson*) 561 the US Supreme Court formulated a four-prong test to determine if a restriction placed on commercial speech violates the First Amendment to the *Constitution*. In terms of the test, a court will have to establish if 1) the commercial speech concerns lawful activity and is not false or misleading; 2) the asserted governmental interest sought to be achieved, is substantial; 3) the means or restriction identified to advance the governmental interest, does in fact do so; and 4) does so in the least burdensome or restrictive manner. Should the restrictions meet all of the above requirements, there would be no violation of the First Amendment. In this particular instance, the Court found that the government had a substantial interest in conserving energy and that the regulation, which banned promotion or advertising of electricity, directly served that interest. The regulation failed to meet the fourth requirement of the test in that the regulation would also ban advertising which was unrelated to overall energy use and was consequently overly restrictive. Since this decision, the Courts in the United States have struck down laws which banned the advertising of alcoholic beverages (*Rubin v Coors Brewing Company* 514 US 476 (1995)); liquor prices (*44 Liquormart, Inc v Rhode Island* 517 US 484 (1996)); tobacco products (*Lorillard Tobacco Co et al v Reilly, Attorney General of Massachusetts, et al* 533 US 525 (2001)); and most recently proposed legislative amendments which would require cigarette packages to contain graphic health warnings (*RJ Reynolds Tobacco Co v FDA*, 823 F Supp 2d 36 (DC Cir 2011) aff'd 696 F 3d 1205 (DC Cir 2012)); as well as Vermont's Prescription Confidentiality Law, restricting pharmacies from sharing information about doctors' prescribing habits with drug manufacturers without the doctor's consent (*Sorrell v IMS Health Inc* 131 S Ct 2653 (2011)). See also Rauer 2012 *AJLM* 691-692.

⁷² The general test for the constitutional validity of a limitation upon any right contained in the *Canadian Charter of Rights and Freedoms* is found in *R v Oakes* 1986 1 SCR 103, also known as the *Oakes* test. In terms of this test the objective of the limitation must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Furthermore, the means employed must be reasonable and justified. Such an assessment is made by means of a three-part proportionality test, in terms of which: a) the measures employed must be rationally connected to the objective; b) the measures should limit the freedom no more than is necessary to accomplish the objective; c) the effects of the limitation must be proportionate to the objective sought. Applying the above test in the decision of *Irwin Toy v Quebec (Attorney General)* 1989 1 SCR 927, the Canadian Supreme Court found that a statutory provision prohibiting all advertising directed to children under the age of 13 was a reasonable limitation on the right to freedom of speech since such commercial speech was inherently manipulative. The advertisers were not prohibited from targeting adults. In *RJR-MacDonald, Inc v Canada (Attorney General)* 1995 3 SCR 199 the Court held that the ban on the advertisement of tobacco products was rationally connected to the government's interest in reducing tobacco use but concluded that the ban was overbroad. The Court emphasised that consumers had the right to obtain information relevant to their decisions, finding that the ban "deprives those who lawfully choose to smoke of information relating to price, quality, and even health risks associated with different brands". (*RJR-MacDonald, Inc v Canada (Attorney General)* 1995 3 SCR 199 para 170).

⁷³ *S v Makwanyane* 1995 3 SA 391 (CC).

⁷⁴ Adopted by the Court in *S v Zuma* 1995 2 SA 642 (CC).

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ... Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1)⁷⁵ and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators".⁷⁶

This test has been confirmed by the South African Courts on a number of occasions, including by the SCA in the *BATSA* decision,⁷⁷ as discussed above.

5.2 *The right to commercial speech*

5.2.1 *The nature of the right*

The *Constitution of the Republic of South Africa* protects the right to freedom of expression. Section 16(1) provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. This freedom may specifically be restricted in instances where the speech is used as propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁷⁸ South African courts have on numerous occasions stressed the importance of this right, especially taking the country's historical context into account. Thus, for example, the Constitutional

⁷⁵ Of the *Constitution of the Republic of South Africa Act 200 of 1993*, a provision similar to the one now contained in s 36 of the 1996 *Constitution*.

⁷⁶ *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

⁷⁷ Para 16 of the *BATSA* decision.

⁷⁸ S 16(2) of the *Constitution*.

Court in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* explained that

[f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.⁷⁹

Commercial speech and advertising in particular also fall within the ambit of speech which receives constitutional protection. The South African courts have recognised this fact in a number of decisions,⁸⁰ taking their cue mainly from case law of the United States of America and Canada.⁸¹ The United States Supreme Court defined commercial speech as "speech which proposes a commercial transaction",⁸² or more broadly, as "expression related solely to the economic interests of the speaker and

⁷⁹ *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 3 SA 409 (CC) para 37. See furthermore also *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC) para 27 where Langa DCJ (as he then was) explains that "[n]otwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'". (Quoting from *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26.) Other footnotes omitted.

⁸⁰ *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 2 SA 733 (C) 749; *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 2 SA 625 (D) 633; and *Independent Outdoor Media (Pty) Ltd v City of Cape Town* 2013 ZASCA 46 para 25.

⁸¹ See for example *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 2 SA 733 (C) 748-749 and *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 2 SA 625 (D) 633. See also, however, the decisions of the European Court of Human Rights in *Market Intern v Germany* Series A no 165 (1990) 12 EHRR 161; *Groppera v Switzerland* Series A no 173 (1990) 12 EHRR 321 and *Casado Coca v Spain* Series A no 285 (1994) 18 EHRR 1. For a discussion on some case law in the European Union, see Garde 2010 *CYELS* 225-256; and Garde "Freedom of Commercial Expression" 117-133.

⁸² *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976) 761. This was the first decision in the USA in which the Supreme Court acknowledged that commercial speech is also protected under the First Amendment.

its audience".⁸³ This type of expression deserves to be protected since it "protects listeners as well as speakers [and] plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfilment and personal autonomy".⁸⁴ Commercial expression is important because it informs consumers about products and services, providing them with the information which will allow them to take part in the free market economy.⁸⁵ Both the rights of the speaker and the receiver of the information therefore need protection. The US Supreme Court in *Central Hudson Gas and Electric Corp v Public Service Commission of New York*⁸⁶ rather plainly explained it in the following terms:

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather than to close them."⁸⁷

Although commercial speech has been described as being of "peripheral value",⁸⁸ the notion that this form of speech "bears less constitutional recognition"⁸⁹ has been criticised on a number of occasions.⁹⁰ This idea was originally formulated in *Central Hudson*⁹¹ based on the justification that commercial speech does not "necessarily implicate the political and creative freedom typically thought to be at the core of

⁸³ *Central Hudson* 561.

⁸⁴ *Ford v Quebec (Attorney General)* 1988 2 SCR 712, 767.

⁸⁵ Milo, Penfold and Stein "Freedom of Expression" 164; Garde "Freedom of Commercial Expression" 226, 229.

⁸⁶ *Central Hudson* 561.

⁸⁷ *Central Hudson* 561-562.

⁸⁸ *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 2 SA 625 (D) 634; Milo, Penfold and Stein "Freedom of Expression" 165.

⁸⁹ See for example also Johannessen 1994 *SAJHR* 216 222 who reasons that "[e]xpression that is not political eg. commercial speech will be subject of less protection than political speech." See also *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 2 SA 625 (D) 635 where Kondile J states that "commercial speech occupies a subordinate position in the scale of constitutional rights values".

⁹⁰ See for example *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 2 SA 733 (C) 749 and the authorities cited there by Davis J. See also *RJR-MacDonald, Inc v Canada (Attorney General)* 1995 3 SCR 199 paras 75, 77.

⁹¹ "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson* 563.

First Amendment doctrine."⁹² The argument has recently increasingly been forwarded that the Supreme Court in fact applies a strict scrutiny analysis when evaluating commercial speech regulations related to public health, since these types of regulations, when subjected to the *Central Hudson* test, are almost always invalidated in the USA.⁹³

5.2.2 *The importance of the purpose of the limitation*

Although it is not clearly stated in the regulations, it can be reasonably assumed that the purpose of regulation R991 is to promote breastfeeding amongst South African parents. At the time of the publication of the regulations in December 2012, the Department of Health's Director for Nutrition explained that exclusive breastfeeding rates in South Africa is at an all-time low of 8%⁹⁴ and infant mortality rates stand at 40 per 1 000 live births.⁹⁵ As a result "South Africa needs to put into place a comprehensive legal framework that protects parents and health professionals from aggressive or inappropriate marketing of breast milk substitutes".⁹⁶ It can therefore be assumed that regulation R991 forms part of this "legal framework that protects" consumers.

⁹² Rauer 2012 *AJLM* 692-693.

⁹³ Rauer 2012 *AJLM* 691-692. See in general further fn 71 above.

⁹⁴ However, this percentage should be given context by referring also to the other statistics released by the Medical Research Council regarding the breastfeeding statistics in South Africa. Of the 2 120 children used for the study, 8,3% of children were exclusively breastfed up to the age of 6 months. 18,6% of the just more than 2000 children younger than 6 months were also given water to drink, and were therefore not "exclusively breastfed". 19,1% were also drinking "other milk". 83% of these infants were breastfed within the first day after their birth. Of the children younger than two months 16,9% had not been breastfed at all and this number increased to 39,7% by the time they reached the age of five months. See South African Medical Research Council 2004 <http://www.mrc.ac.za/bod/sadhs.htm>.

⁹⁵ See for example Heymann, Rauba and Earle 2013 *WHO Bulletin* 398: "Since malnutrition contributes to half of all infant deaths, breastfeeding helps to reduce infant mortality. Studies around the world in affluent and poor nations alike have shown a 1.5 to five-fold decrease in mortality among breastfed infants". In contrast, however, see also Ip *et al* *Breastfeeding and Maternal and Infant Health Outcomes* 5 where it is stated: "Because of the limited data in this area, the relationship between breastfeeding and infant mortality in developed countries remains unclear".

⁹⁶ Kahn *Business Day*.

Breastfeeding has been associated with lower rates of chronic diseases such as diabetes and inflammatory bowel disease and with improved neurocognitive development.⁹⁷ Some of the other advantages of breastfeeding have been discussed at 2 above. Furthermore, the unfortunate reality is that in South Africa too many mothers do not have access to clean water or the facilities to hygienically prepare infant formula. In a report released in 2003 it was estimated that access to water piped into a dwelling was 58% for urban residents and 11% for rural residents, 87% of urban residents and 56% of rural residents used electricity for cooking and 74% of urban residents and 5% of rural residents had a flush toilet.⁹⁸ In a further small study it was found that the rate of the contamination of milk bottles at clinics and in the home was high: levels of contamination with faecal bacteria stood at 67% of clinic samples and 81% of home samples. The study also found evidence of poor formula preparation with over-dilution occurring among 28% of clinic samples and 47% of home samples.⁹⁹ In these circumstances it comes as no surprise that breastfed babies have a reduced risk of dying from diarrhoea and pneumonia.

It can therefore be deduced that the aim of the regulations is one of vital importance since it can improve the health of the citizens of this country, and that of its children in particular. In this regard it must be stressed that South African children have, in terms of the *Convention on the Rights of the Child*¹⁰⁰ the right to "the enjoyment of the highest attainable standard of health" and State Parties are to take appropriate measures to "ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents".¹⁰¹ One of the guiding principles of the CRC is that of Article 6,¹⁰² which

⁹⁷ Heymann, Rauba and Earle 2013 *WHO Bulletin* 398.

⁹⁸ South African Medical Research Council 2004 <http://www.mrc.ac.za/bod/sadhs.htm>. See also Doherty *et al* 2011 *Bulletin of the World Health Organization*.

⁹⁹ Doherty *et al* 2011 *Bulletin of the World Health Organization* citing Andresen *et al* 2007 *J Trop Pediatr* 409-414.

¹⁰⁰ *Convention on the Rights of the Child* (1989), hereafter the CRC.

¹⁰¹ A 24 of the CRC.

¹⁰² As mentioned above.

protects the child's right to life, survival and development.¹⁰³ This provision is given further content by means of Article 27 of the CRC which provides that

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement th[e] right [to development] and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

If regulation R991 can therefore achieve its aim and indeed promote the rates at which South African mothers (exclusively) breastfeed their children, the South African government is in fact meeting its international obligations in this respect. It should therefore be applauded for seeking to promote the best interests of this country's children.¹⁰⁴

5.2.3 *The nature and extent of the limitation*

The extent of the limitation of the right to commercial speech in this instance, however, is comprehensive since the regulations prohibit any promotional practice or advertising of foods which are especially formulated for children under the age of six months as well as foods and feeding bottles used for young children. It effectively also bans the promotion of products which are to be used for children who are no longer, even in terms of the WHO guidelines, to be exclusively breastfed or breastfed at all: the regulations prohibit the promotion of follow-up formulae and milks formulated for children aged from 6 to 36 months.¹⁰⁵ They also prohibit the promotion of products such as feeding bottles, feeding cups and teats,¹⁰⁶ which are

¹⁰³ See also A 5 of the *African Charter on the Rights and Welfare of the Child* (1990), hereafter the ACRWC.

¹⁰⁴ As protected by A 3 of the CRC, A 4 of the ACRWC, s 28 of the South African *Constitution* and ss 7 and 9 of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

¹⁰⁵ "Follow-up formula" is defined as "a product formulated ... and marketed or otherwise represented as suitable for an infant from six months on or a young child" whereas "young child" is defined as a child "older than 12 months but younger than the age of 36 months (three years)".

¹⁰⁶ "Teat" refers to a "device for an infant or young child to suck on and which is used to feed food from a bottle, feeding cup or other feeding device".

used frequently from the ages of one to three years.¹⁰⁷ Another fact which must be borne in mind is that when a (working) mother uses a breast pump¹⁰⁸ to express her milk, this milk has to be placed in some sort of feeding device. A health care worker will not be allowed to offer any advice or preference for a particular product since this will constitute the promotion of such a product. The health care professional may also not advise on the possible benefits which one brand of complementary food¹⁰⁹ may hold over another, or possible allergens which a particular brand may present. All of these products may display only pictures of the correct method of preparation, the company logo,¹¹⁰ and the ingredients of the prepared product.¹¹¹ The manufacturers, distributors, retailers, importers or any persons acting on their behalf are furthermore censored from providing any educational information relating to infant and young child nutrition,¹¹² thus also from giving instructions or guidance on breastfeeding or supplementary feeding. The regulations even prevent them from having a special display of the price of the product.¹¹³

These restrictions furthermore place an extensive limitation on consumers' rights to information about products which are not prohibited. In the decision of *Greater New Orleans Broadcasting Association Inc v United States*¹¹⁴ the Supreme Court of the USA invalidated a federal ban on radio and television advertisements of casino gambling. It ruled that in states where casino gambling is legal, it is an infringement of free speech to prohibit anyone from advertising it. Put differently, "if you can buy

¹⁰⁷ In this respect it is useful to note that in the United Kingdom the restrictions regarding the advertisement of infant formulae do not apply to follow-up formulae. The advertisement of infant formulae is in any event still permitted in certain circumstances but "shall contain only information of a scientific and factual nature". See *Infant Formula and Follow-On Formula Regulations* 77 of 1995 <http://www.legislation.gov.uk/uksi/1995/77/contents/made>.

¹⁰⁸ The promotion of which is not prohibited.

¹⁰⁹ "Complementary food" means "any foodstuff, whether in liquid, solid or semi-solid form, given to an infant from the age of six months as part of the transitional process during which an infant learns to eat food appropriate for his or her developmental stage while continuing to breastfeed or be fed with an appropriate formula".

¹¹⁰ Which may not contain a picture of an infant, young child or other humanised figure - reg 2(3).

¹¹¹ Reg 2(2).

¹¹² Reg 7(5).

¹¹³ Reg 7(2)(a).

¹¹⁴ *Greater New Orleans Broadcasting Association Inc v United States* 149 F 3d 334 (5th Cir 1998), as cited by Nel 2004 *CILSA* 69.

it, you can advertise it."¹¹⁵ In *44 Liquormart, Inc v Rhode Island*¹¹⁶ the court ruled that Rhode Island could not ban truthful, non-misleading advertising of the price of alcohol beverages,¹¹⁷ seemingly implying that promotional activities may be restricted only to ensure that they are not misleading and not necessarily that the product may not be the best alternative.¹¹⁸ In the Canadian decision of *RJR-MacDonald, Inc v Canada (Attorney General)*¹¹⁹ the Court found the following in the context of tobacco advertising:

[The ban] extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands - all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

Turning to the right of consumers to receive information which will enable them to make informed choices it must be pointed out that these consumers are the same citizens who are trusted to receive messages in the form of political, religious and artistic speech,¹²⁰ considered to be able to distinguish between right and wrong, and liable for their actions. Without advertising, consumers are being prevented from knowing what is available at what price and where. Regulation R991 prevents parents from accessing many different types of information regarding the products on offer which they may feed or use to feed their children. In this respect it must furthermore also be borne in mind that not all parents would necessarily be the women who gave birth to their children. Adoptive parents, commissioning parents in the case of surrogacy agreements, or foster-care parents will not always have access to a milk-bank or a wet-nurse. Parents in these situations must be able to rely on as much information as possible and in particular must be able to ask their health care professionals questions regarding the differences in products or brands. In a society

¹¹⁵ Nel 2004 *CILSA* 69.

¹¹⁶ *44 Liquormart, Inc v Rhode Island* 517 US 484 (1996).

¹¹⁷ Nel 2004 *CILSA* 69.

¹¹⁸ Nel 2004 *CILSA* 70.

¹¹⁹ *RJR-MacDonald, Inc v Canada (Attorney General)* 1995 3 SCR 199 para 162.

¹²⁰ Nel 2004 *CILSA* 74.

where many parents may not be able to read, let alone understand the nutritional information provided on the label of a product, simple and clear guidance is crucial. Young teenage mothers, who may, for a variety of reasons and social pressures, not be able to breastfeed, must be given practical assistance at their health care facilities. Nurses and other medical workers must not be prevented from giving their honest and professional advice because they are worried that they may be contravening a piece of legislation. The fear which HIV-positive mothers have of transmitting the disease to their lactating babies is a real concern which must be respected, even if some studies show that mothers who receive effective ARVs also appear to be at low risk of HIV transmission.¹²¹ Even at the lowest end of the scale studies still report transmission rates of around 5% at 12 months postpartum for babies who are breastfed.¹²²

Another lived reality in the South African socio-economic climate is that many mothers do not have the luxury of paid maternity leave, and even when they do have some time off work, the practical demands of breastfeeding while returning to (full-time) employment make it nearly impossible to not make use of bottles, feeding cups, infant formulae and follow-up formulae. In most instances when a woman returns to work, and especially in conditions where breastfeeding breaks are not available, quality infant care near her workplace is inaccessible or unaffordable and if she does not have access to facilities to pump or store her milk, a woman's ability to exclusively breastfeed is virtually destroyed.¹²³

5.2.4 The relation between the limitation and its purpose

In this part of the analysis the question is whether or not the prohibition of the promotion of infant and follow-up formulae, milks, bottles, feeding cups and teats will have the effect that more mothers will choose to breastfeed. In the case of the *BATSA* decision, the SCA found that it was not necessary for the government to

¹²¹ Doherty et al 2011 *Bulletin of the World Health Organization*.

¹²² Doherty et al 2011 *Bulletin of the World Health Organization*.

¹²³ Heymann, Rauba and Earle 2013 *WHO Bulletin* 398.

provide empirical research on how effective the ban of tobacco products would be on the use thereof since the Minister's justification was based on "strong policy considerations informed by the rampaging ill-effects of tobacco use."¹²⁴ Bishop and Brickhill argue that this approach by the Court is "exceptionally dangerous".¹²⁵ Since the SCA relied quite strongly on the *Framework Convention on Tobacco Control* in which it is seemingly accepted that the "link between advertising and consumption ... [is] incontrovertible"¹²⁶ it can be accepted that there must be "easily accessible empirical studies that demonstrate why the international community has adopted that position".¹²⁷ This should also be the case when considering the ban which regulation R991 places on the advertisement of the list of designated products. It is submitted that one of the major reasons why South African mothers do not (continue to) breastfeed is because of the practical difficulties they face when having to return to work.¹²⁸ Prohibiting working mothers from accessing truthful information regarding available infant formulae and milk, bottles and other alternatives will not increase the chances that they will still (exclusively) breastfeed their babies. Practical experience needs to be realistically assessed. It is therefore not entirely certain how or if legislation of this nature alone will serve the purpose of promoting breastfeeding. It is furthermore submitted that a comprehensive framework of legislative provisions which instead supports breastfeeding - in public places and especially in places of employment - should be adopted. This includes a longer period of maternity leave, which should be paid leave,¹²⁹ the provision of breastfeeding breaks and child care facilities for young babies at work, and allowing women to breastfeed their babies in public places such as restaurants.

¹²⁴ *BATSA* decision para 21.

¹²⁵ Bishop and Brickhill 2012 *JQR* 2.

¹²⁶ *BATSA* decision para 22.

¹²⁷ Bishop and Brickhill 2012 *JQR* 2. See also Nel 2004 *CILSA* 78-80; 81-82 and the authorities cited there. The author, *inter alia*, states that "evidence that advertising bans reduce consumption of cigarette products, is inconclusive".

¹²⁸ Heymann, Rauba and Earle 2013 *WHO Bulletin* 398 and the authorities cited there.

¹²⁹ Whereas s 25 of the *Basic Conditions of Employment Act* 75 of 1997 in South Africa provides that an employee is entitled to four consecutive months maternity leave (none of which the employer is liable to pay), a parent in Sweden is entitled to stay at home to take care of his or her child for 480 days. A parental benefit, with three different compensation levels, is paid to the parent for this period. See Försäkringskassen 2012 http://www.forsakringskassan.se/wps/wcm/connect/28f32b72-c3fd-43a9-9c33-038fdad53c00/F%C3%B6r%C3%A4ldrapenning_FK_4070+Fa_enGB.PDF?MOD=AJPERES.

Finally, when assessing the limitation which regulation R991 places on the freedom of speech in the light of the reasoning of the Supreme Court of Appeal in the *BATSA* decision, the possible harm which the list of products may cause has to be scrutinised. In the case of tobacco products it was accepted by the courts that the "extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke" justified the prohibition of the promotion thereof.¹³⁰ The Canadian Supreme Court considered the limitation on the right to freedom of speech to be justifiable since the promotion of tobacco products would induce "people to engage in harmful and addictive behaviour".¹³¹ It is submitted that the possible harm which infant formulae and the other designated products may have cannot be equated to that of tobacco products. Infant formulae, complementary foods, bottles and teats are not addictive substances. If used appropriately, ie with clean water and in hygienic circumstances, they do not directly cause diseases, cancer or death. The possible effects which some of these products may have cannot justify such an extreme manifestation of censorship as is proposed by regulation R991. This becomes even more apparent when considering the harm possibly caused by complementary foods such as pureed broccoli and carrots. If there is a real and considerable risk of harm, consumers should be warned about it by including such messages on the product labels. They should then be left to make rational decisions for themselves. To this end consumers need truthful information and as much of it as possible.¹³² Prohibiting manufacturers from providing parents with the material which they would need to make an informed choice will not stop parents from using the products but in all probability will instead limit competition and decrease the chances of a new product entering the market.

¹³⁰ See the discussion at 4 above, *BATSA* decision para 20. See also para 26 where the Court stated that "[s]moking is undoubtedly hazardous and has an adverse effect on health care".

¹³¹ *Canada (Attorney General) v JTI-MacDonald Corp* 2007 SCC 30 para 47, as discussed above.

¹³² See also Nel 2004 *CILSA* 82.

5.2.5 Other less restrictive means

As a result, it is submitted that regulation R991 is overbroad and a blanket ban on the promotion of infant and follow-up formulae, bottles, teats and feeding cups is not the "only way to address the issue".¹³³ Breastfeeding may be promoted by various other means, including baby-friendly hospital initiatives, the promotion and support of appropriate and timely complementary feeding practices, the strengthening of education, training and information on infant and young child feeding, and the promotion of the health and social status of women in relation to infant and young child health and feeding¹³⁴ - especially in the workplace. There is a legitimate need for the list of designated products, and these products should be allowed to be marketed appropriately in a manner that is truthful and not misleading. It is acknowledged that the provision of free gifts or samples at health establishments and sponsorships may, in some instances, be inappropriate. The claims and information provided on the labels of these products must be truthful, and they cannot claim to be on an equal footing to breastfeeding. The "practice of fostering awareness of and positive attitudes towards"¹³⁵ some of these products may also be misleading but it is submitted that the Canadian example in relation to the advertisement of tobacco products could be useful here. The *Tobacco Act* of 1997 included a broad prohibition on tobacco advertising but created an exception for "information advertising or brand preference advertising".¹³⁶ The Act specifically prohibited "lifestyle advertising", defined as "advertising that associates a product with ... a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring".¹³⁷ As Berman explains, "tobacco companies could advertise only the 'cold, hard, facts' about their products - and only to adult consumers".¹³⁸

¹³³ Para 26 of the *BATSA* decision.

¹³⁴ See also the five themes of discussion by the WHA in 1979, as discussed above at 2.

¹³⁵ Cf the definition of "promotion" as provided by the *Tobacco Control Act*, as discussed above at 3.

¹³⁶ *Tobacco Act* SC 1997 c 13 §22(2). See also Berman 2013 *AJLM* 229. "Information advertising" was defined to mean advertising about a product's availability and/or price, while "brand-preference advertising" was defined to be advertising about a product's brand characteristics.

¹³⁷ Berman 2013 *AJLM* 229.

¹³⁸ Berman 2013 *AJLM* 229.

5.3 *Intellectual property*

Another factor which has to be considered is the effect that regulation R991 has on the trademarks held by the manufacturers of the designated products.¹³⁹ The regulations, for example, prohibit a brand name or company logo from including a picture of an infant, a young child or a humanised figure on the packaging of the designated products.¹⁴⁰ Products such as "First Growth Milk®"¹⁴¹ may no longer use this name for their brand of milk in South Africa since regulation 4(3)(b) prohibits the use of expressions or names that may be understood to identify the product as suitable to feed infants.¹⁴²

Dean makes a compelling argument that the proposed ban of the use of brand logos on cigarette packaging, thus only allowing brand names or product names to be depicted in a plain manner, constitutes the deprivation of property.¹⁴³ Section 25(1) of the *Constitution* provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Expropriation of property is allowed in terms of section 25(2) but only in terms of law of general application and only if that expropriation is for a public purpose or in the public interest; and furthermore, only if compensation has been paid, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. Dean argues that the deprivation of trademarks will take place if the state assumes ownership of them or destroys them.¹⁴⁴ This includes any "interference with the use, enjoyment or exploitation of private property".¹⁴⁵ When registered trademarks are not used for a period of five years or longer, they become liable to cancellation on

¹³⁹ Although definitely a factor to consider, it must once again (see fn 9) be stressed that the full argument cannot be considered here. The implications for intellectual property must also be fully explored elsewhere.

¹⁴⁰ This means that a company such as Gerber, the producer of a number of baby food products, may not in South Africa use their logo portraying the picture of a baby's face.

¹⁴¹ A trademark registered to Parmalat SPA since 1998: see [trade.mar.cx 1998 http://trade.mar.cx/AU779602/](http://trade.mar.cx/1998http://trade.mar.cx/AU779602/).

¹⁴² As discussed above at 3.

¹⁴³ Dean "Deprivation of Trade Marks". See also Dean 2012 *Intellectual Property Forum* 107-108.

¹⁴⁴ Dean 2012 *Intellectual Property Forum* 108.

¹⁴⁵ Dean "Deprivation of Trade Marks" 14.

the grounds of non-use and thus can be destroyed or obliterated. This then ultimately leads to the deprivation of the intellectual property held by the owners of the trademarks or brand names.¹⁴⁶

The same argument can also be made in respect of regulation R991: these provisions too deprive the owners of registered trademarks such as Parmalat of their property, since they may no longer use "First Growth" as one of their brands in this country. It is submitted that this arbitrary deprivation¹⁴⁷ of property cannot be allowed. Should the Department of Health choose to expropriate the trade marks held by the manufacturers of infant and follow-up formulae, complementary food and liquid or powdered milks marketed as suitable for infants or young children, it will have to prove that it is in the public interest to do so and will have to compensate the owners accordingly. This will, in effect, mean that the Department of Health will have to prove that the use of pictures of children or other humanised figures, and the use of phrases such as "first food" or "good start," directly contribute to the use of these products instead of mothers' milk.

6 Conclusion

Ultimately the reasonableness and proportionality test of section 36 requires that there be a compelling reason for restricting such an important right as the freedom of speech. The rights of the child, in particular her right to the enjoyment of the highest attainable standard of health, and her best interests can certainly contribute to such a compelling reason. It is, after all, an undeniable principle that in all matters affecting the child her best interests must be of primary consideration.¹⁴⁸ Article 18 of the CRC recognises that parents, or in some instances legal guardians, have the primary responsibility for the upbringing and development of the child. The best

¹⁴⁶ Dean 2012 *Intellectual Property Forum* 108.

¹⁴⁷ Dean "Deprivation of Trade Marks" 14 argues that deprivation is arbitrary when "the law that effects it does not provide sufficient reason for the particular deprivation".

¹⁴⁸ See also A 3 of the CRC, A 4 of the ACRWC, s 28 of the South African *Constitution* and ss 7 and 9 of the *Children's Act* as referred to above.

interests of the child will, however, remain their basic concern, as the promotion of those interests is their most basic parental responsibility.

It may also be true that not all parents may necessarily know what are in their children's best interests and a new mother may especially be confused by the new experience and an excessive amount of conflicting information. Acting in someone's best interests implies that one is doing something for that person which will be good for her, which will be enhancing her welfare. Parents need as much possible assistance in order for them to be able to care for their children and to act in their best interests. This means that their access to information cannot be restricted. Some parents may not realise what exactly it is that they are feeding their children. Some may not realise that there is a healthier (and cheaper) option, while others may know but, for a number of practical reasons, choose not to make use of it. Parents could be held accountable for this, since in the end what really matters are the rights of the child and not the parents' rights to freedom of choice. Parents must be taught that their so-called parental rights cannot be relied upon without also implementing their accompanying responsibilities.¹⁴⁹

The promotion of breastfeeding is, as a result and for a variety of reasons, a vital and laudable goal to pursue. The practice of this very natural and basic method of nursing holds health benefits for both mother and child.¹⁵⁰ Consequently the Minister and the Department of Health are indeed attempting to improve public health in South Africa. Nonetheless, the attempt to do so by means of regulation R991 can be criticised for a number of reasons, as has been explained above. Some of the provisions of these regulations are not constitutionally sound and cannot be allowed to come into operation. The right to freedom of speech, which includes the right to receive and impart information, cannot simply be disregarded in the name of the promotion of healthier choices. The prohibition of all forms of advertising, including the publication of the price of the list of designated products, and especially products which are used for children older than six months, is an overbroad and

¹⁴⁹ See also Mills 2012 *Int'l J Child Rts* 624-644.

¹⁵⁰ Ip *et al* *Breastfeeding and Maternal and Infant Health Outcomes*.

disproportionate method of promoting breastfeeding.¹⁵¹ So too is the attempt to promote breastfeeding by prohibiting manufacturers from providing educational information relating to infant and young child nutrition.¹⁵² The effect which these prohibitions will have on the consumers' right to information regarding products which most parents will have to make use of at some point during their children's lives is excessive and unwarranted.

Since it was not the purpose of this article to comment on the reasoning by the SCA in the *BATSA* decision, regulation R991 was analysed only in the light of the findings of the Court and the section 36 test, which was used in this instance. Where in the *BATSA* matter the SCA relied quite strongly on the World Health Organisation *Framework Convention on Tobacco Control* and the fact that it urges members to "in accordance with its constitution or constitutional principles undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship",¹⁵³ it must be borne in mind that in relation to regulations R991 the *International Code of Marketing of Breast-milk Substitutes* is not of binding force. The Code provides mere guidelines in this respect and it must once again be stressed that even this code acknowledges that there is a legitimate market for infant formulae and other baby foods. These products should be appropriately marketed and distributed in ways that do not interfere with breastfeeding. Not everyone can breastfeed. Not everyone may choose to breastfeed. In some instances it would even be in the best interests of a child if she were not breastfed. If consumers are provided with as much information as possible regarding the benefits of breastfeeding and if they are not misled by dishonest claims by marketers of the designated products, they should be trusted to make informed decisions. It is submitted that providing women with the opportunities and facilities to breastfeed, including in public and especially when

¹⁵¹ As proposed by reg 7. Compare, for example, Clause 1.3.1 of Appendix E of the Code of Conduct of the Advertising Standards Authority of South Africa: "Advertisements promoting the use or benefits of breast milk substitutes will not be permitted. This will not preclude the advertising of the availability and price, without further sales phraseology, of such products." (ASA date unknown http://www.asasa.org.za/Default.aspx?mnu_id=109)

¹⁵² Reg 7(5).

¹⁵³ Bishop and Brickhill 2012 *JQR* are of the view that the SCA's reliance on A 13 of the *Framework Convention* alone is "unconvincing" since this provision requires South Africa to act "in accordance with its constitution or constitutional principles".

they return to employment, would be a more positive and effective way to promote breastfeeding.

A brazen disregard of the right to freedom of choice and the right to commercial speech cannot be accepted in a democratic and free society. Finding an appropriate balance between the best interests of the child, her health and these freedoms is by no means an easy task and it is not suggested that regulation R991 should be dismissed in its entirety either. The underlying intention of the regulations must be pursued but this must be done in such a way that the means meet the requirements set by section 36 of the *Constitution*. The means to the desired end must be reasonable and proportionate. To place extensive advertising bans on consumer products, especially on products which are not inherently harmful, is not reasonable or proportionate, and is logically in conflict with the notion of the rationality of the public, which notion forms the foundation of the constitutional respect for the freedom of expression.¹⁵⁴

¹⁵⁴ Nel 2004 *CILSA* 82.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AJLM	American Journal of Law and Medicine
ASA	Advertising Standards Authority of South Africa
BC Int'l & Comp L Rev	Boston College International and Comparative Law Review
CILSA	Comparative and International Law Journal of South Africa
CRC	Convention on the Rights of the Child
CYELS	Cambridge Yearbook of European Legal Studies
Int'l J Child Rts	International Journal of Children's Rights
J Trop Pediatr	Journal of Tropical Pediatrics
JQR	Juta Quarterly Review
SAJHR	South African Journal on Human Rights
UNICEF	United Nations Children's Fund
WHA	World Health Assembly
WHO	World Health Organization

THE REGULATIONS RELATING TO FOODSTUFFS FOR INFANTS AND YOUNG CHILDREN (R 991): A FORMULA FOR THE PROMOTION OF BREASTFEEDING OR CENSORSHIP OF COMMERCIAL SPEECH?

L Mills*

SUMMARY

The regulation of commercial speech in the interests of public health is an issue which recently has become the topic of numerous debates. Two examples of such governmental regulation are the subjects of discussion in this article, namely the prohibition on the advertising and promotion of tobacco products, as well as the proposed prohibition on the advertising and promotion of infant formulae and other foods and products marketed as being suitable for infants or young children. The article seek to evaluate the recently proposed regulations published in terms of the Foodstuffs, Cosmetics and Disinfectants Act in the light of the reasoning by the Supreme Court of Appeal in the *British American Tobacco South Africa (Pty) Limited v Minister of Health* 463/2011) [2012] ZASCA 107 (20 June 2012) decision, and in particular in terms of the section 36 test of reasonableness and proportionality found in the Constitution of the Republic of South Africa, 1996. It argues that, although the South African Department of Health must be applauded for its attempt at improving public health in the country, some of the provisions of the proposed regulations are not constitutionally sound. It will be contended that, despite the fact that the promotion of breastfeeding is a laudable goal, the introduction only of measures which restrict the right to advertise these types of products will not necessarily achieve this objective.

KEYWORDS: Freedom of speech; commercial speech; advertising and promotion; public health; best interests of the child; regulation of public health policy;

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deprivation of intellectual property; trademarks; tobacco products; infant formula; breastfeeding.