

Tobacco Control Bill revived in seventh Parliament

Background

The Tobacco and Electronic Delivery Systems Bill was first published for comment on 21 June 2023. Amongst other provisions the Bill proposes to do away with designated smoking areas in public places, place a complete ban on the display of tobacco products and bring in plain packaging requirements. Wide-ranging powers are also afforded to the Minister of Health to regulate all aspects of the advertising, promotion, packaging and labelling and sale of tobacco products.

The Bill lapsed because it was not finalised by the previous Parliament but it has been revived by the seventh Parliament.

What is concerning is that the Bill never went through a proper line-by-line engagement at NEDLAC. This has been flagged with the previous portfolio committee. The Bill may have a number of unintended consequences and really needs to be subjected to proper scrutiny by the social partners in NEDLAC. Whilst the health concerns are acknowledged, the tobacco industry contributes significantly to employment, the economy and the tax revenue of the country.

Debates in the Portfolio committee on health

On 4 September 2024 the Portfolio Committee on Health was briefed by the Department of Health on the provisions of the Bill. In his opening statements the chairperson of the portfolio committee, Dr Dhlomo remark that there is abundant evidence of the harm that tobacco causes and that South Africa has made significant progress in discouraging smoking and protecting non-smokers. However he was of the view that the country has been losing ground in terms of the number of smokers increasing again in recent years. He said that the Bill was intended to regain lost ground and to reinforce further control over tobacco use.

The Director-General and senior officials from the Department presented on the aims and contents of the Bill. They pointed out that the Bill was intended to align South African legislation with the World Health Organisation Framework Convention on Tobacco Control. Also, the current Act did not keep up with developments such as e-cigarettes and these new methods of tobacco use also needed to be regulated. They stated that the Bill did not constitute a ban on tobacco and that it was guided by research and was an evidence based legal instrument. Their point of departure was so some extent based on an article in the WHO

Framework that states that there is a fundamental and irreconcilable conflict between the public health mandate for tobacco control and the tobacco industry.

The five main policy change proposed by the Bill are:

- The regulation of e-smoking devices;
- The requirement for plain packaging,
- The total ban on the display of tobacco products at the point of sale,
- 100% smoke-free indoor areas,
- The banning of vending machines.

Members raised concerns about the regulation of illicit tobacco sales, which constitute 70% of the market. Some members argued for a more pragmatic approach and made the point that the state should not take away peoples' freedom of informed choice. There were questions regarding how the Bill will prevent harm. The inconsistency of legalising cannabis on the one hand, but dramatically increasing the regulation on tobacco on the other was also raised.

A number of members raised the point that there was no engagement in NEDLAC on the Bill and one member quoted from the 2023 NEDLAC report which stated: "Regrettably, there were also areas where social dialogue did not work or, more accurately, was not given an opportunity to perform. The Department of Health's (DoH's) tabling in Parliament of the Control of Tobacco Products and Electronic Systems Delivery Bill, before it was discussed by the Nedlac Constituencies, was unfortunate. Bypassing Nedlac in a Bill process, where there are potential economic and labour market implications, is unlawful and undermines trust between government and its social partners. Indeed, it undermines the very objective of Nedlac's existence. I trust that this omission is not the beginning of an undesirable trend, and that Nedlac's legitimate space will be respected." According to the Deputy-Minister the Department only refused to get involved in a line-by-line engagement of the Bill. Effective engagement can however only happen line-by-line and this is the normal process that legislation follows in NEDLAC.

Members also commented on the excessive penalties provided for in the section dealing with offenses.

Legislating for public health choices

There are a number of approaches that can be followed to promote healthy lifestyle choices. This is in the interest of the state, because an unhealthy population places a financial burden on the public health services. South Africa already has a Tobacco Control Bill which has been on the statute books since 1993. This legislation already prohibits or restrict smoking in public places; regulates the sale and advertising of tobacco products in certain respects and prescribes what is to be reflected on packages.

The Bill takes the regulation a few steps further by bringing in a 100% smoke-free indoor policy as well as prohibiting smoking in certain outdoor areas; banning the sale of cigarettes through vending machines, prohibiting the display of tobacco and electronic delivery systems at the point of sale, regulating e-cigarettes

and requiring plain packages with graphic health warnings. The Bill also affords the Minister wide-ranging powers to prescribe regulations.

The question can be posed to what extent should health choices be legislated? If the public is properly informed about the potential health risks of any product, should they not be free to exercise their right to choose whether or not to utilise such product? Are public awareness campaigns not the answer, rather than more regulation? Some regulation may be warranted, but the measure of regulation being proposed in this Bill seems to be disproportionate and does not seem to strike a fair balance between freedom of choice and regulating the conduct of citizens and an industry, nor between health concerns and other legitimate interests.

This principle applies not only to tobacco products, but more and more, there seems to be a tendency for the state to strictly regulate certain products which are perceived to cause potential negative health outcomes. This regulation can take many forms such as taxation, bans or restrictions on advertising, warning labels on packaging etc.

Agbiz fully recognises the right of the state to regulate and to take appropriate steps to protect the public, especially children and vulnerable groups, where necessary. It is however important to follow due process and to balance all the affected interests and consider alternative measures such as public awareness campaigns.

By Annelize Crosby

Legal Intelligence Manager