Current Developments – South Africa

Professor Owen Dean

University of Stellenbosch
Correspondent for South Africa

Curtailing the Use of Tobacco Marks

As is well known, the Australian government has decided to ban the use of brands in relation to the marketing of tobacco products. It is as yet unproven that tobacco advertising or tobacco branding on cigarette packs actually causes or encourages smoking. Nevertheless, it has adopted legislation banning advertising of cigarette brands and, even further reaching, preventing brands from being featured on cigarette packs as sold in Australia.

This led to major international tobacco companies bringing litigation before the Australian court to have the legislation declared unconstitutional. The Australian court has now given its decision in this litigation and has dismissed the case brought by the tobacco companies and held that the legislation does not conflict with the Australian Constitution.

The view has been expressed in South Africa that, if the South African government were to pass legislation preventing the use of tobacco trade marks, it too would be acting unconstitutionally as such legislation would contravene s.25 (the so called "Property Clause") of the Bill of Rights contained in the South African Constitution.

The question now arises whether, assuming that the decision of the Australian court stands, it would constitute good authority for the proposition that the South African court should hold against a claim that legislation preventing the use of tobacco trade marks would impinge against the South African Constitution. This is not an idle or academic question because the South African government has now publicly announced its intention of following the Australia lead and will compel tobacco companies to use plain packaging for their tobacco products and to refrain from using any form of branding on those products. In fact, the government proposes to go further and to introduce pictorials which illustrate the alleged health consequences of tobacco products on cigarette packs in lieu of branding.

The High Court of Australia has rendered its decision in the litigation but has not as yet published its reasons for that decision. It is expected that the reasons for the decision will be made available later this year. Accordingly, a proper analysis of the Court's decision is not possible as this stage, but it is probably fair to assume that the Court rejected the arguments advanced by the tobacco companies and upheld the counter-arguments advanced by the Australian government in support of the legislation. The arguments advanced for and against in the litigation will be briefly summarised below.

Section 51 (xxxi) of the Australian Constitution states that the Australian parliament has the powers to make laws with respect to "the acquisition of property on just terms from any state or person for any purpose in respect of which parliament has power to make laws". The tobacco companies argued that depriving them of the use of their trade marks in relation to tobacco products amounts essentially to an acquisition of those trade marks by the state, as a form of property, on terms that were not "just" since no compensation was offered to the tobacco companies for the loss of their property. The Australian government replied to this argument by saying that it does not intend to acquire or expropriate any of the tobacco companies property rights, it is merely curtailing those rights; the ownership of the trade marks is not changing hands. The counter to this on the part of the tobacco companies was that "the Commonwealth and other persons will receive a substantial part of the benefit that inured to the Plaintiffs as the owner of that property, amounting to some identifiable benefit or advantage relating to the ownership or use of property".

The relevant provision of the Australian Constitution is echoed to some extent in the Bill of Rights which is comprised in the South African Constitution. There is, however, a significant difference in the approach and meaning of the South African section.

Section 25 of the South African Constitution provides that no-one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property. Property may be expropriated only in terms of the law of general application, provided that the expropriation is for a public purpose or in the public interest and subject to the payment of compensation, the amount of which must be agreed between the parties or decided or approved by a court. The amount of the compensation must be just and equitable.

Whereas the emphasis in the Australian provision is on the state acquiring property from another party, the South African section deals with the deprivation of property from a party. It may be correct to argue

that the Australian government did not acquire the ownership of the relevant tobacco trade marks by preventing their use, but that is not to say it did not deprive the tobacco companies of that property. The acquisition of property requires a passing of ownership from the erstwhile owner to the state (as was pointed out by the Australian government in their defence) but deprivation of property is a different matter. The state can deprive a trade mark proprietor of their trade marks either by assuming ownership of them or by destroying them. This latter factor marks the difference between the Australian provision and the South African provision. It is a very important and significant difference, especially in the present context.

Registered trade marks that are not used for a period of five years or longer become liable to cancellation on the grounds of non-use and thus can be destroyed or obliterated. The action of the South African government to prevent tobacco trade marks from being used thus sets up and commences a chain of circumstances which will lead to the destruction of the trade marks and to their deprivation from the tobacco companies which own them. It is trite that trade marks can be extremely valuable items of property. Their value is generally directly proportional to the extent that they are used and the repute that they enjoy. Curtailing their use thus inevitably diminishes their repute and value and thus diminishes and ultimately destroys their value as items of property. On this basis too, the action of the South African government will deprive the trade mark owners of their property.

As a consequence, the author's opinion is that the decision of the Australian High Court, even if correct under Australian law, has no persuasive value in South Africa by virtue of the important difference between the corresponding provisions of the Australian Constitution and the South African Constitution. Any challenge to the South African legislation preventing tobacco companies from using their brands in relation to cigarettes will have to be evaluated in terms of the South African Constitution.

In the author's opinion, preventing the use of tobacco trade marks will indeed amount to a deprivation of property owned by the tobacco companies and the Constitution requires that it must be accompanied by just and equitable compensation to the tobacco company. It is therefore necessary for the legislation banning the use of tobacco brands to make provision for the payment of reasonable compensation to the brand owners for it to be constitutionally valid. The value of all the trade marks registered in South Africa in relation to tobacco products will undoubtedly amount to many billions of rand and it will be interesting to see whether the government has the courage of its convictions to ban the use of tobacco trade marks in these circumstances.

With respect, funds of that magnitude can be better spent on the social upliftment of the South African population, particularly previously disadvantaged persons. Indeed, if the government is steadfast in its belief that it is in the public interest that cigarette smoking should be prevented, it should grasp the nettle and make this practice unlawful rather than seek to achieve its goal by indirect methods of questionable effectiveness and propriety.