The Right to Free Commercial Speech in South Africa and its Tension with Public Health Interventions

Petronell Kruger,[1]
Mikateko Mafuyeka,[1]
and Safura Abdool Karim[1]

1. SOUTH AFRICAN MEDICAL RESEARCH COUNCIL/ WITS CENTRE FOR HEALTH ECONOMICS AND DECISION SCIENCE UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG, SOUTH AFRICA

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Abstract: Marketing restrictions to promote public health invoke competing rights, including the right to free commercial speech which for-profit entities use to protect their freedom to market products without undue regulation. The right to free commercial speech in South Africa has been developed through case law since the adoption of the first democratic constitution in South Africa in 1996. This article examines the impact of this recent judgment and the lessons for policy makers to ensure effective regulation of marketing practices in South Africa.

1. Introduction

In 1994, South Africa became a democratic country which moved from a racist apartheid government to a constitutional democracy based on principles of, *inter alia*, equality. This had two major impacts on local markets: a large section of the South African population started to be reintegrated in the formal economy both as consumers and as earning members of the labour force, and trade sanctions were lifted allowing global companies to enter the South African market.[1] Over the past two decades, industries producing unhealthy commodities, including food and beverages, experienced significant changes in commercial practice, including increases in foreign direct investments.[2] Marketing practices adopted by industries producing unhealthy commodities have been linked to changes in consumer behavior and often, poorer health outcomes.[3]

In 2020, the government of South Africa proposed that increased restrictions to the marketing of unhealthy products including alcohol and unhealthy foods and beverages, to children should form part of its communications policy.[4] Previously restrictions on marketing of tobacco products were challenged by the industry as violating the right to freedom of expression. These restrictions are in tension with the right to freedom of expression and more specifically the right to

Petronell Kruger, LL.B., LL.M., Ph.D. Candidate, *is a Senior Researcher at the South African Medical Research Council/ Wits Centre for Health Economics and Decision Science.* **Mikateko Mafuyeka, LL.B., LL.M.,** *is a researcher at the South African Medical Research Council/ Wits Centre for Health Economics and Decision Science.* **Safura Abdool Karim, LL.B., LL.M., Ph.D. Candidate**, *is a Consultant at the South African Medical Research Council/ Wits Centre for Health Economics and Decision Science.*

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free commercial speech.[5] This case study will explore the protection given to commercial speech in South Africa through a chronological exposition of case law in the South African superior courts. It will discuss three cases which note a progression in the understanding of how commercial speech can be limited to protect other rights. Finally, it will discuss a 2021 judgment which is discordant with other case law and risks promoting commercial speech over the protection of the rights of members of the South African public.

2. Relevant Legal Context

The South African Constitution includes a right to free speech in the form of a right to freedom of expression which provides that:

> Everyone has the right to freedom of expression, which includes —
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.[6]

This right has been expanded to include the protection of commercial speech, including advertising.[7] The right to freedom of expression is subject to two types of limitations: an internal limitation contained in section 16 and the general limitations clause in section 36 of the Constitution. Section 16(2) contains an internal limitation which excludes propaganda of war, incitement of imminent violence or hate speech from constitutional protection.[8] This internal limitation does not include or apply to general commercial speech. Speech that is protected under section 16(1) may still be limited through the general limitation clause under section 36 which allows for any rights in the Constitution to be limited if certain criteria are met.[9] These criteria are assessed through the use of a flexible proportionality test, succinctly summarized as follows:

> "[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose."[10]

The purpose behind the limitation of a given right has some bearing on whether the limitation can be justified. In this regard, the impact the limitation may have on the protection or fulfillment of other rights may assist in justifying the limitation. This is where the interaction between commercial speech and these efforts aimed at promoting public health can clash is with the advertisements of unhealthy commodities, such as tobacco, alcohol and unhealthy food and beverages.

In addition to the public health purpose the restrictions serve, the Constitution also protects a number of rights implicated in public health such as the rights to human dignity, life, a safe environment, access to health care services and nutrition, and certain protections extended to children such as the guarantee to access basic nutrition and health care services, and are generally invoked in analyzing the proportionality of a limitation where a public health intervention is at tension with other rights.

In addition to the public health purpose the restrictions serve, the Constitution also protects a number of rights implicated in public health such as the rights to human dignity,[11] life,[12] a safe environment,[13] access to health care services and nutrition,[14] and certain protections extended to children such as the guarantee to access basic nutrition and health care services, [15] and are generally invoked in analyzing the proportionality of a limitation where a public health intervention is at tension with other rights.[16]

3. Progression of Limitation to Commercial Speech

South Africa contains a range of commodity specific interventions related to marketing restrictions. This measures include limits to the marketing of specific categories of products adopted through legislation

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such as the Liquor Act,[17] Tobacco Products Control Act,[18] and Foodstuffs, Cosmetics and Disinfectant Act.[19] However, the primary content regulator of marketing practices in South Africa is the Advertising Regulatory Board (ARB) which is a voluntary body that administers the Advertising Code of Practice.[20] There has also been litigation concerning the tension between measures restricting commercial speech and the right to freedom of speech.

One of the first post-democracy cases on commercial speech in South Africa was *City of Cape Town v Ad Outpost* where the validity of by-laws which contained a very broad restriction on outdoor advertising to protect the environmental aesthetic of the City of Cape Town was challenged in the Cape High Court.[21] The applicants successfully relied on the protection of commercial speech enshrined under the constitutional right to freedom of speech. The Judge was very critical of submissions by the City of Cape Town that commercial speech requires less protection than other forms of speech, stating that:

> The tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully. So much speech is by its very nature directed towards persuading the listener to act in a particular manner that artificially created divisions between the value of different forms of speech requires critical scrutiny. Whatever the role of such speech within a deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s16(1) of the Constitution. To the extent that its value may count for less than other forms of expressions, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution.[22]

This decision is one of the few to deal expressly with whether there ought to be a distinction between the protections afforded to commercial speech versus general speech.

The next case of significance was *British American Tobacco* case (hereafter "BATSA") when the ban on advertising of tobacco products was introduced in 2008.[23] The tension between public health objectives and limitations on commercial speech was the central issue in both the High Court and the Supreme Court of Appeal (SCA) though we discuss the SCA decision. In BATSA, the SCA was asked to declare sections of local legislation which prohibited the advertisement of tobacco products as a violation of section 16 of the Constitution.[24] The industry contended that that the ban was an unjustifiable limitation of the right to freedom of expression because it was a blanket ban and was overly restrictive in limiting advertising to existing smokers.[25] Though the SCA did not disagree with the statements made on commercial speech in the *Ad Outpost* case, instead the Court tempered the protections afforded to commercial speech where the products caused harm, stating:

> When commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.[26]

The SCA engaged in a proportionality assessment considering whether the public health interests could serve to justify the limitation on commercial speech. The Court concluded that though commercial speech was worthy of protection, this could not be at the cost of public health, stating:

> The right to commercial speech in the context of this case is indeed important. But it is not absolute. When it is weighed up against the public health considerations that must necessarily have been considered when imposing the ban on advertising and promotion of tobacco products it must, I think, give way.[27]

This decision resulted in a strong statement that public health considerations could outweigh the protections afforded to commercial speech, particularly where the products being marketed were harmful.

Thirdly, in *Herbex* — which was ultimately settled out of court — a producer of weight loss products (termed complimentary medicines) was subject to an adverse finding by the Advertising Standards Authority, the precursor to the ARB (ASA) due to breaches of the South African Code of Advertising Practice. The company was not a member of the ARB and therefore challenged the finding in court based on the ASA's lack of jurisdiction over the company as a non-member. There was no reasoned judgment in this matter and instead the settlement between the ASA and the company was made an order of court. The agreement conceded that the ASA may not have direct jurisdiction over non-members but recognized that the ASA may communicate any finding on an advertisement to parties that are members (publishers) regardless of the origin of the advertisement.[28] Consequently, findings against non-members may still result in the restriction of certain advertisements. While this case does not inform the content of how commercial speech is to be interpreted, it provided the basis for more far-

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reaching interference — by a non-state actor — in commercial speech where marketing practices violates norms aimed at protecting certain social values.

4. Regression: The Bliss Case

The *Bliss* case followed *Herbex* and concerned a similar issue following the dissolution of the ASA and the creation of the ARB in its place. A company that was not a member of the ARB, challenged the use of the ARB's ad-alert — a mechanism where it communicates to its members that an advertisement by a non-member violates the Code of Advertising Practice, and therefore should decline to publish the advertisement.

The Court considered the oversight function over non-members of the ARB as an "indirect boycott."[29] The Court therefore relied on the applicants' right to trade rather than on freedom of speech.

It stated that the Advertising Code of Practice "being a self-imposed authority to regulate the standards of advertising in the public interest, does not justify the infringement of this foundational right [to trade]."[30] The Court then continues to provide that statutory mechanisms exist to oversee advertising in the absence of the ARB and that its lack of oversight does not lead to a regulatory gap.[31] It cites laws on intellectual property, as well as laws that regulate certain commodities (medicines, foodstuffs, tobacco). It also cited the South African Consumer Protection Act which prohibits misleading statements in marketing practices. The authors submit that the Court is mistaken in its understanding of the scope, content, and efficacy of these statutory measures. Amongst others, the ARB Code is the only mechanism to protect consumers from malpractices on social media such as undisclosed influencer marketing. There also exists no other mechanism to restrict unscrupulous marketing of products, especially unhealthy food and beverages, to children outside of the Food and Beverage Code operated by the ARB.

The Court, however, highlighted some legitimate concerns in relation to the structure of the ARB, the foremost being a concern over its perceived lack of independence. The judge cites a concern with the funding model of the ARB, stating that it is problematic due to members funding the organization where non-members, and therefore non-funders, might be impacted by decisions.[32] This understanding of the ARB's funding model is incorrect or perhaps insufficiently explained in the judgment — there are no membership fees and funding occurs on an ad hoc basis, but the authors submit that the *ad hoc* nature of the funding model is still sufficiently problematic to validate the Court's concern.

Overall, the Court declared operation of the Advertising Code of Practice to be unconstitutional in instances where a non-member company's rights are implicated.[33] The case is pending appeal.

5. Analysis: The Treatment of Commercial Speech and Public Health in South Africa

The *Bliss* case resulted in a regression from the developments that had eroded and lessened freedom given to companies to engage in marketing practices without regulation. For example, in *BATSA*, the court, in reference to McDonald Corp case, went as far as rejecting the idea that a consumer opting into harmful behavior does not require a regulatory intervention to both protect the individual, as well as the society at large.[34] The Court's approach thus rejects an individual responsibility narrative as a work-around for policy intervention, as well as incorporating a more group-level assessment of the harm posed by the marketing activity. The Court's holistic reading of health-related rights and cognizance of the danger possible by commercial speech is very progressive. In contrast to this rights-responsive approach, the Court in *Bliss* narrowly formulated the type of content that requires regulatory oversight and formulates "public interest" as a competition issue (trade) only. The possible implications of limiting the ARBs powers on other rights were not considered at all.

The effect of the *Bliss* judgment is that South Africa has effectively removed the only independently-administered mechanism that can be employed to protect children from harmful marketing in general, and specifically with relation to unhealthy foods and beverages. The Court ignores the editorial freedom of publishing platforms to set standards to protect consumers — It allows for companies that face censure over marketing practices to simply withdraw its membership from the ARB. It raises the question whether or not publishers or broadcasters will be able to employ any form of discretion in choosing to decline commercial content it deems harmful, or if such exercise of discretion will also be deemed an "indirect boycott."

However, the Bliss judgment must also serve as a warning to policy makers to take steps to provide clear legal recognition to the ARB and to intervene to ensure its independence is guaranteed. Voluntary self-regulation does not have sufficient coercive power to be effective and a system of state or co-regulation is desirable to protect South Africans from the harms posed by certain forms of commercial speech.

6. Conclusion

The South African jurisprudence on the protection of commercial speech and its tension with public health

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objections has undergone considerable development over the past two decades. Initial decisions underscored the importance of freedom of speech, irrespective of its commercial status. This was followed by cases which underscored the importance of public health and the need to restrict commercial speech, particularly where health was implicated. Unfortunately, some of this progress has been undone in the more recent decision in the *Bliss* judgment and, as South Africa moves towards restricting marketing of unhealthy products, it is likely that this issue will once again come to the fore in the judicial system.

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6. Section 16 of the Constitution of the Republic of South Africa, 1996.
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8. Section 16(2) which states:
"The right [to freedom of expression] in subsection (1) does not extend to — Chapter 2: Bill of Rights 8 (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."
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12. Section 10.
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22. 749 E-F.
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27. Para 25.
28. As quoted in Bliss, para 78.
29. Para 60.
30. Para 123.
31. Para 125.
32. Paras 114– 119.
33. Para 136.
34. Para 25-26

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