

1. Introduction

- 1.1. On 29 September 2022, acting in terms of rule 271 of the Rules of National Assembly, the Minister of Health gave notice of his intention to introduce the Tobacco Products and Electronic Systems Control Bill, 2018 (“the Bill”), “*shortly*”. While Notice R. 2560 (“the notice”) was published together with an explanatory summary of the Bill, the notice did not include an invitation for comment or specify the period for making comments¹. The Bill was presented to Parliament on 31 May 2023.

2. The purpose of the regulations and the approach of SAIPL

- 2.1. As a preliminary matter, the making of the Bill amounts to administrative action in terms of the Promotion of Administrative Justice Act of 2000 (“PAJA”).
- 2.2. This means that the Bill must be lawful, reasonable and procedurally fair, and that in making the Bill the Minister must take into account all relevant considerations; not take into account irrelevant considerations; must not misconstrue his powers and must not go beyond the scope of the empowering provisions in terms of which he acts.² The Bill must also not unjustifiably violate the rights in Chapter 2 of the Constitution.
- 2.3. When the Bill was introduced in the *Government Gazette* notice 46994, the explanatory summary indicated that the Bill would introduce, *inter alia*, plain packaging. The Preamble to the Bill indicates that:

¹ See rule 276(4) of the Rules of the National Assembly.

² See section 6 of PAJA for the applicable grounds of review in this regard.

“CONSIDERING that the extent of the harmful effects of the use of tobacco products on users and persons exposed to tobacco smoke calls for strong action to –

deter people, especially children and youth, from using tobacco products;

encourage existing users to quit; and

protect non-smokers from tobacco smoke exposure;

...

REALISING FURTHER that advertising, promotion and sponsorship create an association between the use of tobacco products, electronic nicotine delivery systems and electronic non-nicotine delivery systems with social prestige and aspirational lifestyle that are especially appealing to children and youth, and have been shown to encourage initiation of use of both products and increase tobacco consumption;”

2.4. In conclusion, the Bill is resolved:

“to align the health system with the democratic values of the Constitution of the Republic of South Africa, 1996, and the World Health Organisation’s Framework Convention on Tobacco Control, and to enhance and protect the fundamental rights of the society by enacting and implementing effective measures to reduce the prevalence of tobacco use and nicotine dependence;”

2.5. From the wording of the Preamble, it is clear that, because of the injurious effect that the use of the relevant products has on human health, a main objective of the Bill is to discourage the use of the relevant products. To achieve this end, the Bill goes on to

empower the Minister, *inter alia*, to make regulations relating to the labelling and marking of the relevant products and introduces plain packaging in respect of tobacco products.

2.6. While the South African Institute for Intellectual Property Law (“SAIIPL”) fully supports the objectives underlying the Bill, it is, however, submitted that those sections embodied in Bill, as published for comment, do not meet these objectives in a lawful, rational, reasonable or constitutional manner. On the contrary, they:

2.6.1. in many instances are not connected to or capable of achieving any legitimate government objective and when they are, they go far beyond what is reasonable and necessary to achieve these objectives and are thus irrational³ and unreasonable⁴;

2.6.2. are impermissibly vague;

2.6.3. are in many instances *ultra vires* the Constitution of the Republic of South Africa, 1996 (“the Constitution”);

2.6.4. involve an arbitrary deprivation of property in violation of section 25(1) of the Constitution;

2.6.5. involve an arbitrary deprivation of a manufacturer’s right to freedom of commercial expression and a consumer’s right to receive information;

³ Administrative action must be rational in the sense that it must be connected to a legitimate government purpose and must be capable of achieving that purpose (PAJA s 6(2)(f)(ii) and *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 85 and 90.

⁴ In order to be reasonable, administration must not only be rational but also proportionate and necessary. This requires a consideration of whether other means could be used to achieve the purpose pursued, that have a less drastic impact on affected parties’ rights or interests (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 45, *Medirite (Pty) Limited v South African Pharmacy Council and Another* (197/2014) [2015] ZASCA 27 (20 March 2015) at para 20).

- 2.6.6. may fail to meet South Africa's ("South Africa") obligations in terms of the World Health Organisation's Framework Convention on Tobacco Control ("the FCTC"), of which South Africa is a signatory;
 - 2.6.7. are inconsistent with article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), of which South Africa is a signatory; and
 - 2.6.8. are inconsistent with article 6*quinquies* of the Paris Convention on the Protection of Intellectual Property, of which South Africa is a signatory.
- 2.7. In all the circumstances, the Bill would be unlawful and unconstitutional if enacted in its present form.
- 2.8. SAIPL, therefore, respectfully proposes that the Bill should be withdrawn and revised in an effort to produce a Bill which properly address the laudable objectives outlined above, but does so in a manner that is lawful, appropriate and constitutional.
- 2.9. Attached, marked Annexure "C1" is the table of comments relating to the relevant provisions that are of concern.

3. Vagueness

- 3.1. Certain sections in the Bill are impermissibly vague and will be unlawful on this ground alone. As the Constitutional Court held in *Affordable Medicines Trust*:⁵

"The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of

⁵ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paragraph 108 (footnotes omitted)

law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”

- 3.2. The Court reaffirmed this position in the more recent *All Pay* judgment, where it held that “[v]agueness and uncertainty are grounds for review under s 6(2)(i) of PAJA. Certainty in legislation and administrative action has been linked to the rule of law.”⁶

4. The enactment of plain packaging legislation

- 4.1. In terms of the FCTC, South Africa is obliged to enact and implement “*strong evidence-based tobacco control interventions*”⁷. Article 11 of the FCTC deals with the labelling and packaging of tobacco products and enjoins member states to adopt national legislation that:

4.1.1. prohibits the promotion of tobacco products in a manner that is false, misleading, deceptive or likely to create an erroneous impression about the product; and

4.1.2. ensures that health warnings appear on the packaging of tobacco products.

- 4.2. The Guideline published by the World Health Organization (“the WHO”) regarding the implementation of article 11 has recommended implementing plain packaging as an effective measure to increase the noticeability and effectiveness of health warnings and prevent misleading and deceptive packaging.

- 4.3. Section 4(2) of the Bill seeks to introduce, *inter alia*, plain packaging in respect of tobacco products in pursuance of article 11 read with the WHO’s guidelines. The introduction of section 4(2) does, however, also result in a deprivation of property in

⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at para 87

⁷ Socio-Economic Impact Assessment on the Control of Tobacco Products and Electronic Delivery Systems Bill: Final Impact Assessment (Phase 2), 22 March 2018, page 2.

respect of a product as well as an infringement of a manufacturer's right to freedom of expression and a consumer's right to receive information.

4.4. Section 25(1) of the Constitution provides:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

4.5. In order to determine the effect of this clause on section 4(2), it is necessary to consider three questions:

4.5.1. first, are the trade marks affected by section 4(2) "*property*" for purposes of section 25(1)?

4.5.2. second, if so, does section 4(2) of the Bill produce a "*deprivation*" of such property?

4.5.3. third, if so, is the deprivation "*arbitrary*"?

4.6. If the response to all three questions is in the affirmative, then the sections are in breach of section 25(1) of the Constitution and would be unconstitutional if enacted in its present form.

Are trade marks "*property*"?

4.7. A trade mark is an intangible right and a form of property, namely intellectual property. This has been confirmed by the Supreme Court of Appeal on more than one occasion, *inter alia*, in *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others*⁸ and *Oilwell (Pty) Ltd v Protec International Ltd and Others*⁹.

⁸ 2010 (6) SA 329 (SCA)

⁹ 2011 (4) SA 394 (SCA)

- 4.8. Moreover, and critically, there can be no doubt at all that trade marks qualify as “*property*” for purposes of section 25(1) of the Constitution. In *National Credit Regulator v Opperman*, the Constitutional Court made it expressly clear that a trade mark constitutes the kind of property protected by section 25(1) of the Constitution.¹⁰
- 4.9. Other incorporeal rights such as the reputation and goodwill vesting in a get-up are also property for purposes of section 25(1) of the Constitution.¹¹
- 4.10. The first question is, therefore, answered in the affirmative.

Is there a deprivation of property by a law of general application?

- 4.11. Section 25(1) of the Constitution provides that a person may only be deprived of property by a law of general application. It is not in dispute that the Bill constitutes a law of general application.
- 4.12. A deprivation of property occurs where there is “*any interference with the use, enjoyment or exploitation of private property.*”¹² In *Mkontwana*, the Constitutional Court restated the test for deprivation as follows:¹³

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation.... [S]ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”

¹⁰ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 61

¹¹ The common law rights protecting a goodwill and reputation are akin to the “*personal rights emanating from contract, delict, or enrichment*” which the Constitutional Court has found to be property (see *National Credit Regulator v Opperman* at para 61).

¹² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 57

¹³ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 32

- 4.13. In a concurring judgment, O'Regan J recognised that depriving the holder of a real right of that right constitutes a significant deprivation of property:¹⁴

“There can be no doubt that some deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the property in material and non-material terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property. If one of the purposes of s 25(1) is to recognise both the material and non-material value of property to owners, it would defeat that purpose were, ‘deprivation’ to be read narrowly.”

- 4.14. Viewed in this way, there can be no serious doubt that section 4(2) produces a deprivation of property. Prohibiting trade mark proprietors from using their trade marks, as registered, is plainly a substantial interference and limitation of those rights. The prohibition also prevents proprietors from capitalising on the goodwill and reputation that has accrued to the get-ups of their products.

- 4.15. The second requirement is, therefore, also satisfied.

Is the deprivation arbitrary?

- 4.16. The final question then is whether the deprivation is arbitrary. In this regard, the Constitutional Court has explained the test for arbitrariness in section 25(1) as follows:

“[A] deprivation of property is ‘arbitrary’ as meant by s 25 when the ‘law’ referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

¹⁴ At para 89

- (a) *It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.*
- (b) *A complexity of relationships has to be considered.*
- (c) *In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
- (d) *In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
- (e) *Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*
- (f) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
- (g) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.*
- (h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that*

*the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."*¹⁵

4.17. In the circumstances of a particular case, this test may require more than a rational connection between the law and the ends sought to be achieved. It may be required that the deprivation be proportionate to the purpose for which it is effected.¹⁶

4.18. For the reasons that follow, it is submitted that the deprivation is arbitrary.

The Assessment

4.19. The Socio-Economic Impact Assessment System on the Control of Tobacco Products and Electronic Delivery Systems Bill, 2018, Revised (2020): Final Impact Assessment Template – Phase 2 (“the Assessment”), published in support of the Bill, appears to mirror closely the Socio-Economic Impact Assessment on the Control of Tobacco Products and Electronic Delivery Systems Bill: Final Impact Assessment (Phase 2), 22 March 2018 (“the 2018 Assessment”). It is noteworthy that, but for a single reference to the tobacco ban introduced during the Covid-19 Pandemic and to update certain references, very little new data has been included in the Assessment. For the most part, much of the data appears to be based on information that was available up until 2016. It is unclear why the Assessment:

4.19.1. was not updated to consider recent and current statistics and research; and

4.19.2. does not reference any studies that have been conducted analysing the impact of the tobacco ban implemented as a means of curbing the spread of the Covid-19 virus.

4.20. More particularly, the Assessment bears no reference to reports that have been published by various experts during the period 2017 to 2021. It is unclear why there has

¹⁵ *First National Bank* at para 100

¹⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another 2009 (6) SA 391 (CC)* at para 52.

been no analysis of the following reports by the Minister and the Department of Health (“DOH”) prior to publishing the Bill for comment:

- 4.20.1. Expert report of LUISS Business School and Deloitte Financial Advisory, Italy on the impact of Plain Packaging on cigarette consumption in France and the UK, dated 19 July 2021¹⁷;
 - 4.20.2. Expert report of LUISS Business School and Deloitte Financial Advisory, Italy on the impact of Plain Packaging on smoking in Australia, dated 8 November 2021¹⁸;
 - 4.20.3. Expert Report of Professor Viscusi on the effect of Australian plain packaging on smoking prevalence, dated January 2018¹⁹;
 - 4.20.4. Expert Report of Mr Neil Dryden on the effect of Australian plain packaging on cigarette consumption, dated 10 October 2017²⁰.
- 4.21. When referred to collectively, the reports listed at 4.28.1 to 4.28.4 shall be referred to as “the Expert Reports”.
- 4.22. The absence of an analysis of the Expert Reports in the Assessment motivating for the Bill is concerning since the Expert Reports suggest that plain packaging legislation may not have an impact on increasing the effectiveness of health warnings and, therefore, on the incidence of tobacco use in countries where plain packaging legislation is in force. In fact, the reports suggest that in Australia and France, the introduction of plain packaging legislation may be associated with an increase in tobacco consumption.

¹⁷ [Analysis of the impact of Plain Packaging on tobacco consumption in the UK and France | Luiss Business School - School of Management](#)

¹⁸ [Analysis of the impact of plain packaging on smoking prevalence and tobacco consumption in Australia | Luiss Business School - School of Management](#)

¹⁹ This report will be attached, marked Annexure “C2” to this Cover Letter.

²⁰ This report will be attached, marked Annexure “C3” to this Cover Letter

- 4.23. The absence of a consideration of and, indeed any analysis and critique of the Expert Reports as part of the Assessment, is concerning since the conclusions reached in the Expert Reports suggest that the deprivation of the manufacturer's property may not have any substantial impact on the public health objectives of the Bill and may, in fact, result in increased tobacco consumption. This would not only be contrary to the public health objectives of the Bill but would also render the deprivation of the proprietor's property arbitrary.
- 4.24. While there are judgments in other countries upholding plain packaging legislation, those rulings were handed down prior to the publication of the Expert Reports. It is not inconceivable that a court may reach a different approach in light of the body of research that has emerged in the last 5 to 8 years.
- 4.25. In view of the evidence emanating from jurisdictions where plain packaging legislation is in force (which research is, at this stage, uncontroverted by the DOH), the deprivation of property is arbitrary, and section 4(2) of the Bill violates section 25(1) of the Constitution.

The significance and commercial value of trade marks

- 4.26. Trade marks serve as badges of origin to prevent confusion and/or deception as to the origin of the product. A trade mark is, therefore, a means of communicating the origin of a particular product as well as the fact that the product is authorised (and not illicit or counterfeit). Trade marks also convey messages to the public regarding the merits or quality of the product, the price, availability and consumer experience, to name a few. As a consequence, a trade mark also acquires a consumer expectation component, which expectation is protected through trade mark legislation that guards against consumer confusion. The collective value of these attributes is referred to as the trade mark's reputation.
- 4.27. It is trite that such a reputation forms part of the goodwill of the business and is a vital and very valuable asset to any business. This remains an important consideration bearing in mind that the sale of tobacco products is not unlawful.
- 4.28. Trade mark reputations extend beyond territorial borders and their existence is internationally recognised, not only in several countries' legislation but also in

international treaties and agreements, such as the Paris Convention and TRIPS. International recognition and protection of goodwill and reputation enable manufacturers to do business across national boundaries and also lowers the costs of doing so.

- 4.29. The same factors apply to the reputation and goodwill that accrues to the overall get-up of products.

Regulation of trade marks under the Trade Marks Act

- 4.30. Trade marks are already regulated by the law in various respects. This calls into sharp question as to whether there is any legitimate need for a fresh form of regulation or prohibition under the Bill.

- 4.31. It is trite law in South Africa that trade marks are adopted or acquired by proprietors for use in the course of trade to distinguish their goods from the goods of other traders. To this end, a trade mark must be capable of distinguishing and not be descriptive or deceptive. The very nature of a trade mark is such that it serves the function of informing the consumer of the origin of the goods and that it is in no way deceptive.

- 4.32. Furthermore, in order to be registrable, the Trade Marks Act contains a specific requirement for the trade mark to be distinctive and specifically prohibits a mark which consists exclusively of a sign or indication which may serve to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristic of the goods, or the mode or time of production of the goods. It also prohibits the registration of a mark which is inherently deceptive, contrary to law or *contra bonos mores*.

- 4.33. All trade mark applications in South Africa undergo examination by the Trade Marks Office to determine inherent registrability as well as possible conflict with prior registrations or applications. In the event that an application is accepted, it is advertised in the *Patent Journal* offering any interested third parties an opportunity to object to its registration. In addition, any interested party may at any time apply for the cancellation of a trade mark registration on the same grounds as would have been available to oppose the registration.

- 4.34. Trade marks that are registered have, therefore, passed muster and it is submitted that there is sufficient *ex ante* regulation of trade marks which eliminates the need for their regulation in this manner.

Violation of international treaties - the Paris Convention and the TRIPS Agreement

- 4.35. International treaties are important instruments in international law that ultimately facilitate trade between countries.
- 4.36. South Africa is a signatory to the Paris Convention for the Protection of Industrial Property (“the Paris Convention”) and as such is obliged to give effect to the provisions of the Paris Convention.
- 4.37. Article 6*quinquies* of the Paris Convention provides that:

“A.

(1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B. *Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:*

(i) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;

(ii) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;

(iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10bis.

4.38. Article 6*quinquies* of the Paris Convention places an obligation to ensure that, within certain confines and limitations, registration of a trade mark in a foreign country can also be registered in South Africa.

4.39. In terms of Section 10 of the Trade Marks Act, a trade mark should not be registered if it is, *inter alia*, contrary to law. If the provisions of the Bill, as detailed above, are allowed to stand, then registration of certain trade marks would not be allowed in South Africa.

4.40. Arbitrary and unjustified reasoning why use of a trade mark is not allowed and is contrary to law, would therefore ultimately mean non-compliance with Article 6*quinquies* of the Paris Convention.

4.41. South Africa is also a signatory to the TRIPS Agreement.

4.42. Article 20 of the TRIPS Agreement provides that:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement

prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

- 4.43. In light of the commentary under heading 4, the deprivation of intellectual property set forth in the Bill places a limitation on use of a trade mark, which is contrary to Article 20 of the TRIPS Agreement.

The illicit trade

- 4.44. In addition to the absence of any reference to and analysis of the Expert Reports, the Assessment also does not deal, substantively, with the illicit tobacco trade in South Africa or measures that will be introduced to curb the illicit and counterfeit trade in tobacco products in South Africa, which add substantially to the economic cost of tobacco use.
- 4.45. In addition to failing to deal with measures that will be implemented to curb the illicit trade in tobacco products, at heading 1.2 of the Assessment, reference is made, under Column 2 and under the heading “*Socio-economic challenges*” to the cost of tobacco consumption to South African society. It should be noted that these statistics are based on an analysis of data available in 2016 and are the same statistics that were presented in the 2018 Assessment.
- 4.46. The Assessment indicates that the economic burden created by tobacco use was, in 2016, R42.3 billion and that R28 billion of this was due to illness-caused productivity losses and the losses in potential earnings from those who died prematurely and R14 billion was due to direct healthcare costs. Finally, it is claimed that the country only made R12 billion in excise tax in relation to the sale of tobacco products. At face value, these results appear skewed and do not provide a complete picture as it is unclear what percentage of these alleged costs are attributed to use of illicit tobacco products and how much revenue was lost to the country due to the sale of illicit tobacco products in South Africa. Surely such an understanding of the true cost of the illicit trade is imperative in assessing whether or not legitimate and lawful businesses should be deprived of their property, particularly since some of the Expert Reports find that plain

packaging legislation has exacerbated the illicit trade in countries where it has been introduced.

- 4.47. The answer to the third question is, therefore, yes. In conclusion, then, the deprivation of property in terms of section 4(2) of the Bill is arbitrary the deprivation is without sufficient reason.

5. Violation of freedom of expression

- 5.1. Section 16 of the Constitution protects the rights to freedom of expression:

“Everyone has the right to freedom of expression, which includes ... (b) freedom to receive or impart information or ideas”.

- 5.2. It is well established that *“commercial speech”*, such as speech used in the marketing and advertising goods, is protected by section 16 of the Constitution.²¹ This would include how goods are presented in the market and how goods are labelled.
- 5.3. Manufacturers of tobacco products enjoy the right to commercial freedom of expression. While that right may be limited through regulation, such limitation must have sufficient justification under section 36 of the Constitution. This entails a consideration of a range of factors, including whether less restrictive means could be used to achieve the same purpose.²²
- 5.4. Section 4(2), as it currently stands, limits the right of a trade mark proprietor to impart information, as well as the right of a consumer to receive information, and this could lead to consumer confusion as the packaging of tobacco products (the look of the labelling of products) will start to become indistinguishable from one another, without there being any advantage to or protection of the consumer, and will negatively impact on competition, and could make labels more difficult to read and understand.

²¹ *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 at paras 9 and 13.

²² *Mlungwana v S* 2019 (1) BCLR 88 (CC) at para 95.

- 5.5. In addition to the foregoing, section 3(3) read with section 3(4)(e) of the Bill seeks to place restrictions on commercial communication exchanged between the manufacturer and the importer and their trading partners, business partners, employees and shareholders (“the identified chain”). Section 3(3) stipulates that commercial communication exchanged within the identified chain shall contain no information other than factual or scientific information about the product and section 3(4) prohibits commercial communication that is likely to advertise or promote a manufacturer, wholesale distributor or importer. In terms of its construction then, section 3(3) and read with section 3(4), can be interpreted as prohibiting the use of any brand element as part of instruments of communication, for example, as part of e-mail signatures, letterheaded paper and business cards, that are exchanged in the ordinary course of trade. This surely cannot be the intention.
- 5.6. If, however, this is the intention, the provisions are *ultra vires*, irrational and arbitrary as there is not scientific evidence that the use of a letterhead, for example, impacts an employee’s decision to start or to stop smoking the relevant products.
- 5.7. The provisions are, in a sense, both over- and under-inclusive, they also violate sections 16 and 25(1) of the Constitution.

6. Conclusion

- 6.1. As indicated elsewhere, SAIPL supports the objectives underlying the Bill and recognises the importance of the public health objectives. It is, therefore, recommended that the Bill is withdrawn and amended in line with the proposed amendments.