



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF  
APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 14 June 2022

**Status:** Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

***Minister of Cooperative Governance and Another v British American Tobacco South Africa (Pty) Ltd and Others (case no 309/21) [2022] ZASCA 89***

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The Supreme Court of Appeal (SCA) today dismissed an appeal by the Minister of Cooperative Governance and Traditional Affairs (the Minister), against an order of the Western Cape Division of the High Court, Cape Town (high court). The high court made an order declaring that a regulation made during the national state of disaster, which provided that ‘[t]he sale of tobacco, tobacco products, e-cigarettes and related products is prohibited, except for export’ (Regulation 45), was unconstitutional and invalid. The high court, however, did not award the respondents costs, and they cross-appealed against that order.

The respondents are farmers, processors, manufacturers, retailers and consumers, situated at every level of the supply chain for tobacco and vaping products. They successfully challenged Regulation 45 in the high court on the grounds that it was an infringement of the fundamental rights to dignity, privacy, bodily and psychological integrity, freedom of trade and deprivation of property; and on the basis that the Minister had not shown that the regulation was necessary, as contemplated in s 27(3) of the Disaster Management Act 57 of 2002 (the Act).

In the SCA, the Minister contended that the reasons for Regulation 45 were to protect human life and health and reduce the potential strain on the health system, and that the medical evidence at the relevant time showed that the use of tobacco products increased the risk of developing a more severe form of COVID-19. The Minister argued that smokers with COVID-

19 had higher ICU admission rates, a higher need for ventilators and a higher mortality rate than non-smokers. In order to establish this, the SCA held that the Minister was required to show that: (i) smoking led to a more severe COVID-19 disease progression; (ii) that a temporary ban on the sale of tobacco products during lockdown would reverse or lessen that disease progression; (iii) that Regulation 45 was effective in materially reducing the number of smokers; and (iv) that such reduction in smoking would have led to a reduced ICU bed occupancy which would enable the health system to cope with COVID-19 admissions. The SCA concluded that the Minister failed to do so.

The SCA held that the scientific evidence as to whether smoking increased COVID-19 disease progression was mixed and inconclusive. The statements by the World Health Organisation, on which the Minister relied, do not support the Minister's justification for the ban on the sale of cigarettes. There is no evidence that quitting smoking in the short-term, has clinical significance for COVID-19 severity and outcomes. Regulation 45 did not reduce the number of smokers – 90% of them continued to smoke and the claim that number of smokers had been reduced, was based on illegality: a reduction in smoking would have occurred because smokers would not have been able to afford the prices of cigarettes on the black market. The State could have achieved the same outcome by imposing a temporary increase in excise duty on cigarettes. The Minister thus failed to show that smokers have higher ICU admission rates, a higher need for ventilators and a higher mortality rate than non-smokers, which would have increased the strain on the health system.

The claim that smoking increased the behavioural risks associated with COVID-19, because smokers share lit cigarettes and do not observe social distancing measures, was also not established. This concern could have been addressed by measures other than an absolute ban on the sale of cigarettes. Regulation 45 did not prevent smokers from sharing lit cigarettes, since 90% of them continued smoking during the lockdown.

The SCA consequently held that the limitation of the rights to dignity, bodily and psychological integrity, freedom of trade and deprivation of property was not justified in terms of s 36 of the Constitution. Regulation 45 unjustifiably limited the autonomy of persons to regulate their own affairs, and to exercise control of their bodily and psychological integrity. It infringed the right to freedom of trade in that farmers could not sell and nobody could buy their tobacco. Tobacconists were unable to trade. Farmers were unable to use their farms productively and manufacturers, their costly factories and equipment. This was an unlawful infringement of the

right to property. However, there was no infringement of the right to privacy because Regulation 45 did not limit the intimate personal sphere of life of any individual.

Finally, the SCA held that Regulation 45 was not strictly necessary or essential in order to protect the public or to deal with the destructive and other effects of the disaster, as contemplated in s 27(3) of the Act.

In the result, the SCA dismissed the appeal and upheld the respondent's cross-appeal on costs.

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