

## Courts push back against the might of Big Tobacco

For some years I have been following the progress of tobacco control court challenges across Africa. Two things have struck me. First, each new law or regulation aimed at forcing smokers to understand the damage they are doing to their health is met by aggressive litigation from Big Tobacco. Second, the courts are becoming more confident in dismissing efforts to roll back these controls.

The latest example of both trends is on display via a unanimous decision by five judges of Uganda's Constitutional Court. British American Tobacco (BAT), described by the court as 'a renowned company dealing in tobacco products', operating in Uganda for more than 30 years and listed on the Uganda Securities Exchange, had brought a petition challenging the Tobacco Control Act that came into force in May 2016.

According to BAT's petition, at least 24 sections or sub-sections of the 2016 law are inconsistent with the Constitution. BAT's MD, Dadson Mwaura, argued that despite increasingly strict controls, many people continued to smoke. Against that reality, he warned that tougher laws could lead to unintended consequences, such as the risk of an untaxed and illegal trade in cigarettes.

Mwaura said there needed to be a 'fair balance' between promoting public health by curbing smoking and the 'legitimate constitutional and economic interests' of tobacco companies, dealing in a 'legal product', that contributed in many ways to the economy of Uganda.

He complained bitterly that increasing the warning coverage on packaging from 30 to 65% was unreasonably restricting on producers, with only a third of the pack left for trademarks even though, since it was engaged in a 'lawful trade', it was 'entitled' to enjoy its intellectual property rights.

Mwaura also complained about prohibitions on smoking in public places, including hotels, bars and restaurants, at work and on public transport. This 'blanket prohibition' was unreasonable and curtailed BAT's 'right' to practice a 'lawful trade'. He was also concerned about provisions that made officials of a company 'personally liable' for certain offences committed under sections of the new law. In his view it would be unconstitutional to make him responsible (as an official of BAT) for criminal acts under the law. This amounted to 'disguised statutory disincentive' to anyone considering whether to serve on the board of tobacco companies or to accept management positions. Government officials who replied to the lengthy petition said it should be dismissed for being 'frivolous and vexatious'.

The court's decision has been a long time coming: after its first hearing in May 2017, judgment was reserved and several members of the panel 'ceased to be Justices of this court' before judgment could be delivered. With a new group of judges empanelled, the petition was re-heard. In his decision, Justice Kenneth Kakuru, writing for a unanimous court, listed some 14 issues for determination.

He went into some detail in dealing with the first two issues and concluded that the limitations imposed on BAT were justifiable in a free and democratic society and were thus not unconstitutional. He added that if he had to resolve the remaining issues as set out for determination in the petition he would 'fall into a trap of having to repeat

myself over and over’.

All the issues raised by BAT in the petition had been dealt with in a number of other countries including Uganda, the UK, the USA, Kenya, SA, India, Pakistan, the Philippines and Peru. These and other cases were now ‘collectively known as Tobacco Litigation Suits’ with tobacco companies advancing arguments similar to those in this case. One report, admitted as part of this case, was called, ‘How tobacco companies fight tobacco control’, and the report was not challenged by BAT in any way. It lists a number of strategies used by tobacco companies including BAT, to influence policy and ‘thwart effective legal and policy framework world-wide’.

Kakuru said he had carefully studied the BAT petition and the arguments of counsel, and found nothing in the petition that needed constitutional interpretation apart from the issues he had already dealt with. The other claims in the petition were ‘diversionary’ and did not require constitutional interpretation.

He said he had no doubt that the petition was ‘part of a global strategy’ by BAT and others involved in tobacco to ‘undermine legislation’ and expand their trade and increase their profits whatever the health costs might be to humanity. BAT admitted that even when used as instructed, their products caused serious health problems to users and others, and that the products they manufacture and sell ‘cause death’.

All the limits imposed by the new law were justified in a free and democratic country, the judge said. ‘I find no merit whatsoever in this petition, which appears clearly to have been misconceived or worse still, brought in bad faith’ as part of Big Tobacco’s global strategy to fight controls.

[Judgment](#)

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