IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OKWENGU, AZANGALALA & SICHALE, JJ.A)

CIVIL APPEAL NO. 112 OF 2016

BETWEEN

BRITISH AMERICAN TOBACCO LTD.....APPELLANT

AND

CABINET SECRETARY FOR
THE MINISTRY OF HEALTH.....1ST RESPONDENT
TOBACCO CONTROL BOARD.....2ND RESPONDENT
ATTORNEYGENERAL.....3RD RESPONDENT

AND

KENYA TOBACCO CONTROL
ALLIANCE.....1ST INTERESTED PARTY
CONSUMER INFORMATION
NETWORK.....2ND INTERESTED PARTY
MASTERMIND TOBACCO (K) LIMITED.....AFFECTED PARTY

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mumbi, J.), dated 24th March 2016

in

Petition No. 143 of 2015)
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JUDGMENT OF THE COURT

Introduction

[1] This is an appeal from the judgment and decree of the High Court (Mumbi, J.), delivered on 24th March 2016. The appellant British American Tobacco Ltd who was the Petitioner in the High Court is aggrieved by part of the judgment, and has faulted it on 17 grounds. The respondents to the appeal are; the Cabinet Secretary for the Ministry of Health (1st Respondent), Tobacco Control Board (2nd

Respondent), and the Attorney General (3rd Respondent), while Kenya Tobacco Control Alliance and Consumer Information Network (1st & 2nd interested parties) are interested parties and Mastermind Tobacco (Affected Party) is an affected party.

Background

[2] The litigation giving rise to this appeal was precipitated by the Tobacco Control Regulation 2014 (herein Regulations), that were published on 5th December 2014 by the then Cabinet Secretary for Health, **Mr. James Macharia (C.S. Macharia)**, vide **Legal Notice No.169 of 2014**. The Regulations were made pursuant to **Section 53 of the Tobacco Control Act** (hereinafter referred to as the Tobacco Act). That provision gave powers for making Regulations prescribing or prohibiting anything required by the Tobacco Act to be prohibited, or for the better carrying out of the objects of the Tobacco Act. In a nutshell the object of the Tobacco Act as stated in **Section 3** of that legislation is to provide a legal framework for the control of the production, manufacture, sale, labeling, advertising, promotion, sponsorship and use of tobacco products, including exposure to tobacco smoke. The aim of the control is to protect health of individuals, purchasers and consumers of tobacco and the public generally, and also to provide relevant information.

[3] The appellant is a public limited liability company that carries on the trade of manufacture, sale and export of cigarettes. Upon publication of the Regulations the appellant moved to the High Court by way of a constitutional petition dated

14th April 2015. The appellant challenged the Regulations contending that they were null and void, as the procedure adopted in making the Regulations did not comply with the Constitution or the Statutory Instruments Act, in regard to public participation and consultation that is a mandatory requirement in making laws.

[4] The appellant further identified specific parts of the Regulations and the Tobacco Act that it maintained were unconstitutional. These included: **Section 7(2) (f)** of the Tobacco Act, and **Part VI** of the Regulations (**Regulation 37-38**) that provided for "solatium" compensatory contribution; **Part V** of the Regulations (**Regulation 20 and 36)** that make provisions for interactions between public officers and the Tobacco Industry; **Part II** of the Regulations (**Regulation 3 to 11)** that make provisions for packaging and labeling; **Part IV** of the Regulations (**Regulation 15-19**) that make provisions dealing with second hand tobacco smoke; **Part III** of the Regulations (**Regulations 12-14**) that make provisions for disclosure of information by Tobacco Manufacturers and Importers; and **Regulation 45** that make contravention of the Regulations an offence and provide a general penalty for breach.

[5] The appellant therefore sought an order of certiorari to remove into the High Court and quash the Regulations in its entirety or in the alternative to quash **Regulations 3–39**, and **45.** As an alternative prayer to the orders of *certiorari* the appellant sought declarations that **Regulation 1** that relates to the commencement date of the Regulations is not applicable to **Part II** of the Regulations and a

declaration that **Regulations 3-7, 15b, 20-36, 37, 38** and **45** are void, and finally a declaration that **Section 7(2)(f)** of the Tobacco Act is void.

[6] The respondents opposed the petition through an affidavit sworn by the **C.S. Macharia** on 28th July 2015 and a supplementary affidavit sworn by **Prof. Peter A. Odhiambo** the Chairman of the 2nd respondent. The respondents maintained that the appellant together with all the other stakeholders were duly consulted before the Regulations were made as several public meetings were held with stakeholders in several counties.

[7] On the specific provisions of the Act and Regulations that were alleged to be unconstitutional, the respondents disputed this, asserting that tobacco use in Kenya is among the highest in Sub-Saharan Africa, and the Regulations were necessary control measures to implement health protection as required by the Act; and that the proper implementation of the Regulations will not only ease the burden of diseases and disabilities associated with consumption of tobacco, but also ensure that right to basic health and clean environment is achieved, and therefore the Regulations were not unconstitutional.

[8] During the hearing of the petition the Kenya Tobacco Control Alliance and the Consumer Information Network were joined as 1st and 2nd interested parties respectively. The 1st interested party joined the respondents in opposing the petition maintaining that the Regulations do not in any way contravene the Constitution or any other law. The 2nd interested party also opposed the petition

through an affidavit sworn by **Samuel J. Ochieng**, who also reiterated that the Regulations were proper and in accordance with the global trends as the appellant was in fact complying with similar Regulations in other countries where it was carrying out business.

The High Court Judgment

[9] The High Court having considered the petition and the detailed submissions made by counsel for the respective parties delivered a judgment in which it concluded as follows:

> ***"(i) That there was sufficient public participation and consultation in the formulation of the regulations and the process was therefore in accordance with constitutional requirements on public participation;***
> ***(ii) No violation of the petitioner's rights by the regulations has been demonstrated;***
> ***(iii) Regulation 13(b) of the Tobacco Control Regulation, 2014 is null and void to the extent that it requires tobacco manufacturers and importers to disclose information pertaining to their market share in the tobacco industry in Kenya;***
> ***(iv) Regulation 45 of the Tobacco Control Regulations, 2014 is ultra vires Section 24(5) of the Statutory Instruments Act and is therefore null and void;***
> ***(v) Regulation 1 is in conflict with Section 24 of the Act with respect to the period within which the regulation should come into force. Consequently, it is my direction that the regulation shall come into force within 6 (six) months from the date hereof;***
> ***(vi) With respect to costs, I direct that each party shall bear its own costs of the petition."***

Grounds of Appeal

[10] In brief, the grounds raised by the appellant in challenging the judgment of the High Court include the contention that the learned judge erred: in finding that the harmful effects of tobacco products were relevant in determining the

lawfulness of the process that was followed in enacting the Regulations; in holding that the process of enactment of the Regulations was lawful as there was adequate public participation and consultation in the formulation of the Regulations as required by the Constitution and the Statutory Instruments Act 2013; in failing to find that the enactment of the Regulations was pre-determined as the respondents failed to keep an open mind or to consider the views expressed by the public concerning the Regulations; in failing to find that the appellant was not accorded a meaningful opportunity for public participation or consultation; and in holding that the failure to meet the constitutional requirement for public participation will not invalidate legislation.

[11] In regard to the court's finding on the failure to publish a regulatory impact statement, the appellant faulted the court for holding that the Regulations arise under and are complimentary with the provisions of the Tobacco Act and fall under the exception in **Section 9(g)** of the Statutory Instruments Act, 2013, and therefore that the failure of the respondents to publish a regulatory impact statement did not render the Regulations unlawful. Further, that the learned judge erred in failing to make a finding that the regulatory impact statement prepared by the 1st respondent was inadequate to meet the requirements of the Statutory Instruments Act, thereby rendering the Regulations unlawful.

[12] The learned judge's finding regarding the legal effect and status of the World Health Organization Framework Convention on Tobacco Control (FCTC)

was also called to question, it being maintained that the learned Judged erred: in failing to find that the FCTC guidelines were not binding, and that the power of the 1st respondent to make Regulations under **Section 53** of the Tobacco Act does not authorize the 1st respondent to make Regulations to implement the provisions of the FCTC; and in finding that the implementation of the FCTC or the FCTC guidelines is not in conflict with the Constitution or national legislation on tobacco control.

[13] Further, the appellant took exception to the court's finding on the solatium compensation contending that the learned judge erred: in failing to invalidate **Section 7(2)(f)** of the Tobacco Act, and **Regulations 37-38** on the solatium compensatory contribution; in misdirecting herself as to the intent and purposes of the Tobacco Control Fund established under **Section 7** of the Tobacco Act; in failing to consider the specific complaints raised by the appellant on the solatium compensatory contribution concerning the imposition of a levy on cigarettes by imposition of the solatium compensatory contribution without a lawful determination of wrongdoing on the appellant's part, injury to the State, damages suffered by the State, causation, or the unconstitutionality of the levy; in failing to find that the solatium contribution violates **Articles 10(1), 24** and **47** of the Constitution as it imposes an arbitrary and unjustified burden on appellant without meeting any of the requirements for limitation of rights set out in **Article 24** of the Constitution; and in failing to find that the provision for solatium contribution was

punitive and issued in bad faith to punish tobacco manufacturers and importers for engaging in what is a legal trade in the tobacco industry.

[14] The learned judge's finding on **Part V** of the Regulations was faulted on the grounds that the learned judge erred: in failing to invalidate **Part V** of the Regulations which limit interactions between members of the tobacco industry and public officers; in failing to find that **Part V** is a wrongful and flawed attempt to implement **Article 5.3 of the FCTC** guidelines; and in failing to find that **Part V** of the Regulations is inconsistent with the appellants rights under **Articles 10(2), 27, 37** and **47** of the Constitution on the right to participation, right to equality and freedom from discrimination, and right to fair administrative action.

[15] In addition, the learned judge was faulted for holding that the appellant's complaint that the prescribed images under **Regulation 10** would result in significant pixilation when printed and poor quality images, is not a matter of law or the Constitution but a technical matter that should be resolved between the appellant, other industry players and the respondents; in finding that **Regulation 12** that makes provision for disclosure requirements does not violate the appellant's constitutional right to intellectual property or privacy; in finding that the disclosure requirements under **Part III** of the Regulations do not in any way contravene the Constitution or any other law; in failing to consider and make a determination on the appellant's complaints that the disclosure requirements under the Regulations violate **Article 10(1)** of the Constitution in that the information

that must be disclosed under **Regulation 12** is vague and uncertain; and in failing to find that the provision for information disclosure requirements under the Regulations violate the right to privacy by requiring the appellant to disclose information on affiliated organizations, its agents and persons acting on its behalf.

[16] The penultimate ground was that the learned judge erred in law in failing to consider and make a determination on the appellant's complaint that **Regulation 15(b)** is *ultra vires* the powers and authorities under the Tobacco Act; in finding that a period of six (6) months from the date of the judgment is reasonable for the implementation of the requirements under the Regulations. Finally, the appellant challenged the court's order for each party to bear its own costs.

[17] Following directions given by the court, the parties duly filed written submissions that were highlighted orally during the hearing of the appeal. The appellant was represented by learned counsel Mr. Kiragu Kimani, Walter Amoko and James Tugee, while learned counsel Mr. Mohammed Adow appeared for the three respondents, and learned counsel Mr. Gilbert Nyamweya appeared for the interested parties, while Mr. Omuganda appeared for affected persons.

Appellant's Submissions

[18] In his submissions, the appellant reiterated that it was operating a legal, duly licensed and lawful business in the tobacco industry, that contributes to the national revenue through payment of taxes and levies; that the tobacco industry is currently regulated by the Act that provides an effective regulatory framework for

the industry; that there is no justification for the imposition of regulations that are unconstitutional or inconsistent with the Tobacco Act; that although tobacco has some health effects, this does not justify the imposition of unconstitutional, illegal, disproportionate and discriminatory regulatory framework in the tobacco industry.

[19] The appellant argued that the process leading to the making of the Regulations was unconstitutional and unlawful as there was failure to publish a regulatory impact statement, and failure to conduct appropriate and effective consultations. This was because first, there was no publication in the Kenya Gazette of a regulatory impact statement that is a mandatory requirement provided under **Section 6** to **8** of the Statutory Instruments Act. Secondly, that although a regulatory impact statement was prepared the same did not meet the requirements of **Section 7** of the Statutory Instruments Act.

[20] In regard to public participation and consultation, it was contended that there was no meaningful or adequate opportunity for public participation in the regulation making process, nor was there genuine consultations with persons likely to be affected by the Regulations. Several cases were cited in support of this proposition. Of note is the South Africa Constitutional Court decision in ***Doctors for Life International vs Speaker of the National Assembly & Others*** ***(CCT/12/05) [2006] ZACC 1; 2006(12) BCLR 1399 (CC)***, where the court stated that:

> ***"The measure and degree of public participation that is reasonable in a given case will depend on a number of factors. These include, the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the***

> ***potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."***

[21] Also significant is the judgment of Odunga J, in ***Samuel Thinguri Waruathe and 2 Others vs Kiambu County Government & 2 Others [2015] eKLR,*** wherein the learned judge states that:

> ***"...public view ought to be considered in the decision making process and as far as possible the product to the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other word the end product ought to be owned by the public."***

[22] In regard to the substantive provisions, the appellants identified specific provisions of the Tobacco Act and the Regulations that it maintains were either unconstitutional or otherwise unlawful. This included **Regulations 20-36** that in their view limited interaction between the tobacco industry and public officers or public authorities. It was pointed out that **Section 53** of the Tobacco Act under which the Regulations were made, only empowered the 1st respondent to make Regulations for prescribing or prohibiting anything required by the Tobacco Act to be prescribed or prohibited or for the better carrying out of the object of the Tobacco Act, and this did not include restrictions of interactions between public officers/authorities and the tobacco industry. Thus, it was submitted that **Regulations 20-36** were *ultra vires* the Tobacco Act as none of the objects of that Act prescribes restriction of interactions between the public authorities and the

tobacco industry, nor is there any power under the Tobacco Act to make Regulations to implement the FCTC or the Guidelines.

[23] In addition, it was argued that **Regulations 22-32** were discriminatory as they imposed restrictions on the tobacco industry alone and also curtailed the tobacco industry's right to fair administrative action provided under the Constitution and also violates rights under **Article 37 and 10** of the Constitution.

[24] **Section 7(2)(f)** of the Tobacco Act and **Regulations 37-38** that relates to the solatium compensatory contribution were also identified as being *ultra vires* the power and authority of the 1st and 2nd respondents under the tobacco industry, as **Section 7(2)** of the Tobacco Act only contemplates a solatium compensatory contribution as determined by the 2nd respondent, and the section does not confer a general power on the 2nd respondent to impose an ongoing levy on cigarette manufacturers which is what **Regulation 37** purported to do.

[25] It was argued that the regulatory provisions regarding solatium compensatory contribution violates **Article 210** of the Constitution by imposing tax that has not been lawfully provided for by legislation, and **Article 40** of the Constitution by deprivation of the appellant's right to property through the imposition of the solatium compensatory contribution without due process of the law. Further, that the Regulations were oppressive, irrational and unreasonable as they imposed an excessive and unjustified burden on the appellant and other manufacturers and importers of tobacco products.

[26] **Regulation 15(b)** was also identified as being *ultra vires* the power of the 1st respondent as provided under the Tobacco Act. It was argued that while **Section 33(1)** of the Tobacco Act prohibited smoking in "public places" defined to mean "***any door, enclosed or partially enclosed area which is open to the public or to which members of the public ordinarily have access and includes a workplace and a public conveyance,***" **Regulation 15(b)** prohibited smoking in "***streets, walkways and verandahs adjacent to public places***."

[27] **Regulations 3-11** dealing with packaging and labeling were also challenged for illegality concerning their provisions for technical and prescribed images, it being contended that the prescribed images may result in significant pixilation and poor quality images when printed. The appellant faulted the court for refusing to exercise its judicial mandate in regard to the inquiry concerning the prescribed quality of the images.

[28] It was further contended that **Regulations 12-14** that require the appellant and other manufacturers and importers of tobacco products to make certain disclosures to the 1st respondent were unconstitutional or otherwise illegal as the information disclosure requirements and the regulations violate the appellant's constitutional rights, and impose an unjustified burden on the appellant and may lead to infringement of intellectual property rights.

[29] Finally, the appellant concluded that the respondents failed to justify the limiting of the appellant's rights to privacy and property, and therefore the learned

judge erred in holding that the Regulations did not violate the rights of the appellant and the other players in the tobacco industry. The Court was urged to annul the Regulations in their entirety or in the alternative to nullify the specific provisions of the Regulations whose unconstitutionality and illegality had been demonstrated.

Respondents' Submissions

[30] The Attorney General filed submissions on behalf of the respondents. Mr. Adow highlighted these submissions during the hearing of the appeal. In brief, the respondents urged the Court to uphold the judgment of the High Court maintaining that the process of making the Regulations was strictly in accordance with the **Statutory Instruments Act 2013.**

[31] On the issue of the Regulations being inconsistent with the Tobacco Act, the Attorney General relying on ***Nature Foundation Limited vs Minister for Information and Communication and Another*** ***([2015] eKLR,*** and ***Maharashtra State Board vs Kurmarsheth & others*** ***[1985] CLR 1083,*** maintained that the Regulations were divided into eight parts and each part was in conformity with relevant sections of the Tobacco Act, and that the Regulations were neither unconstitutional nor *ultra vires* the mandate of the 1st respondent. It was explained that the graphic health warnings contained in the schedule to the Act were meant to educate the members of the public and reduce the ill health caused by tobacco use and consumption.

[32] Regarding the Regulations providing for disclosure, it was stated that the disclosure was reasonable and justifiable in an open and democratic society based on the Bill of Rights, human dignity, equality and freedom, as it was required for counteractive measures to control and mitigate tobacco related health problems. Thus the appellant was not subjected to any extraordinary ill treatment in view of the fact that tobacco use and consumption interferes with all human vital organs leading to disease, disability and even death.

[33] It was argued that Regulations **32-35** (**Part IV**) were not *ultra vires* the powers of the 1st respondent under the Act; that the smoke free regulations provide a range of deterrent penalties that are proportionate to the seriousness of the violation and the degree of responsibility of the appellant and the tobacco industry generally; that **Part V** was in conformity with **Chapter 6** of the Constitution, the Public Officer Ethics Act and the Leadership and Integrity Act and with provisions of **Article 5.3** of the WHO-FCTC; and that the regulations fall under **Section 53** of the Act which authorizes the CS to make regulations.

[34] Further, the Attorney General submitted that Part VI was in conformity with **Section 7(2)** of the Tobacco Act and **Article 6 of WHO-FCTC**; that the fund was not unconstitutional and was just like the Tourism levy fund provided under Section 105 of the Tourism Act, that the solatium payment is for purposes provided under **Section 7(4)** of the Tobacco Act; that the solatium payment is also consistent with **Article 19 of FCTC**; that although the Tobacco Act was enacted in

2007 the appellant never challenged Section 7(2) of that Act that provides for solatium payment until the provision was operationalized by the regulations; and that the Regulations cannot be challenged against the Constitution unless the provisions of the Tobacco Act under which they are made are also challenged.

[35] The Attorney General next submitted that the Petition by the appellants did not meet the threshold as provided in the ***Anarita Karimi*** case as the appellants failed to show even a single provision of its constitutional rights that was violated, or the manner in which its constitutional rights were threatened with violation. Finally the Attorney General urged that whereas there is no hierarchy of rights, the appellant's private rights and interests have to give way to greater public rights and interests.

1st & 2nd Interested Parties Submissions

[36] In opposing the appeal, the 1st and 2nd interested parties submitted that the respondents had sufficiently demonstrated that they carried out public participation and consultation by affording members of the public and stakeholders of the tobacco industry including the appellant an opportunity to participate in the making of the Regulations. Relying on ***Merafong Demarcation Forum V. President of the Republic of South Africa [2008] ZACC 10***, the interested parties pointed out that public participation and consultation does not imply that one's view must necessarily prevail, or that the public participation and consultation must be carried out in a particular style. The 1st and 2nd interested parties asserted that the appellant

like all the other stakeholders were engaged directly in public participation and consultation, and indirectly through representatives in parliament and parliamentary committees.

[37] On the issue of the Regulatory Impact Statement, the 1st & 2nd Interested Parties submitted that there was no need for one, as the Regulations concerned a matter that arises under legislation, and which was substantially uniform or complementary with that legislation, and therefore fell within the exemption provided under **Section 9** of the Statutory Instruments Act.

[38] Regarding the specific Regulations challenged by the appellants the interested parties argued that firstly the regulations provided at **Part V** were anchored on the Constitution and statutes as they flow from **Chapter 6** of the Constitution, the Tobacco Act, the Public Officers Ethics Act, the Leadership and Integrity Act and **Article 5.3 of the WHO Framework Convention** and the guidelines thereto. Secondly, that the Regulations are aimed at achieving the effectiveness of the tobacco control legislation, free from conflict of interest amongst enforcement and administration officers. Thirdly, that the Regulations were not discriminatory and that even if they were, what was important was the importance of the goal to be achieved.

[39] On **Section 7(2)(f) of the Tobacco Act** and **Part VI** that provides for the solatium compensation, the 1st & 2nd Interested Parties urged the Court to consider the legislative intent which as evident from **Section 7(4) of the Tobacco Act,** was

to create a fund to mitigate the negative effects of tobacco. It was argued that the Regulations were not discriminatory as contributions will be paid by all tobacco manufacturers and importers; that contrary to the argument by the appellant that the provision only mandates the 2nd Respondent to levy solatium compensatory contribution and does not confer power to impose ongoing annual levy, the specific modalities of levying the contribution have been left to the discretion of the Respondents.

[40] Further, it was argued that the contribution was not contravening **Article 210 of the Constitution** because it is a charge that exists by legislation and therefore is not an unlawful imposition of tax or fee; that it does not violate **Article 40** on the Right to Property because the contribution has not been imposed against the appellant only; that contribution does not limit any of the appellant's rights and freedoms but promotes public interest in attainment of highest standards of health and a clean and healthful environment; that it is reasonable to levy the charge on the manufacturers and importers of tobacco products who are the source of the tobacco products that pose health hazards; and that the contribution is not arbitrary, unfair or irrational because a specific rate has been determined and a manufacturer or importer will not pay more than the value of the products its manufactures or imports.

[41] On **Regulation 15(b)** the Interested Parties submitted that places that have proximity to public places are for all intent and purposes public places too. On Part

II of the Regulations that provide for Packaging and Labeling these Interested parties argued that the requirements imposed by the Regulations are constitutional as under **Article 46(1)(b) of the Constitution**, consumers have the right to information necessary for them to gain full benefit from the goods and services; that this ground of appeal is spent and overtaken by events as the appellant has already complied with Part II of the Regulations.

[42] In regard to **Part III** of the Regulations which provide for information disclosure, the 1st & 2nd Interested Parties submitted that the requirements do not violate the appellant's Constitutional rights and nor were they uncertain or impossible to comply with; that **Regulation 13** is clear as to the information required to be disclosed; that the requirements does not violate the right to property; that the disclosure of the makeup of tobacco products is justified under **Article 46(1)(c) of the Constitution**; and that even if the disclosure had the effect of infringing the appellant's rights such rights are not absolute but are subject to higher ideals.

Submissions for Affected Party

[43] The affected Party **Mastermind Tobacco (K) Limited** filed submissions in support of the appeal. The submissions are by and large similar to the submissions made by the appellant. Worthy of note is that like the appellant the affected Party caries on the trade of manufacture and sale of cigarettes and therefore their interest

and that of the appellant in this Appeal are more or less similar. It is not therefore necessary to reproduce the submissions made by the affected party.

Issues for Determination

[44] Having considered the record, the respective contending extensive submissions made by learned counsel, and the authorities cited, we find that the issues raised in this appeal are as follows:

(i) Whether the process leading to the making of the Regulations was vitiated by lack of public participation and consultation as to render the Regulations unconstitutional or unlawful.

(ii) Whether the specified provisions of the Tobacco Act and Regulations are unconstitutional, *ultra vires* or otherwise illegal.

(iii) Whether the learned Judge's findings on issue (i) and (ii) were correct.

(iv) Whether the learned judge's views on the health effects of the tobacco products were relevant to the proceedings.

(v) Whether specific Regulations identified by the appellant violated the appellant's rights as alleged.

(vi) Arising from (i) to (v) whether the appeal should be allowed or dismissed.

[45] In addressing this appeal we bear in mind our obligation as an appellate court as recently succinctly restated in ***Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*** *[2016] eKLR*:

> ***"As this is a first appeal, ... we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance Judge but will not hesitate to depart from those findings if the same***

> ***are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned Judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is the more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution.***" (Emphasis added).

Public participation & Consultation

[46] The procedure adopted in making the Regulations has been challenged to the extent that there was no consultation or adequate public participation. In this regard, **Article 10** of the Constitution identifies inclusiveness, transparency, accountability and public participation as key values and principles of governance that bind all State organs, State officers and public officers in the interpretation of the Constitution or enactment or interpretation of any law. **Article 118** of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. In regard to subsidiary legislation, **Section 5** of the Statutory Instruments Act clearly provides that consultation be carried out "with persons who are likely to be affected by the proposed instrument."

[47] It is clear that since the promulgation of the Constitution of Kenya 2010, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates

the Constitution and in accordance with **Article 1(4)** of the Constitution is exercised at both national and county levels. It is thus not surprising that the courts have addressed the concept of Public participation in enactment of legislation, severally since the promulgation of the Constitution of Kenya 2010.

[48] In her judgment, the learned judge appropriately referred to several decisions on public participation and consultation. These included; ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government & 3 Others*** ***[2013] eKLR,*** ***Moses Munyendo & 9 Others vs the Attorney General & Others*** ***Petition No.16 of 2013,*** ***Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya and 2 Others*** ***Petition No.1174 of 2006,*** ***Robert N. Gakuru & Others vs the Governor Kiambu County & 3 Others*** ***Petition No.532 of 2013*** and ***Consumer Federation of Kenya (Cofec) vs Public Commission & Another*** ***Petition No.263 of 2013,*** and ***South African case*** ***Doctors for Life International vs Speakers of the National Assembly & Others*** ***(Supra).***

[49] From these decisions and others that were cited before us by the parties' advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an

opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.

[50] In the instant case, the learned Judge in addressing the affidavit evidence that was before her observed as follows:

> ***"...The material before me indicates that there were various consultative meetings held prior to the promulgation of the impugned Regulations. From the documents annexed to the respondents' affidavit in opposition to the petition sworn by Mr. Macharia, I note that a meeting was held on 18th March, 2014 and 14th August, 2014, at the Kenya School of Government, which was attended by, amongst others, the petitioner and other players in the tobacco sector. I also note that consultative meetings were held with various parliamentary committees on 11th February, 2014, 7th May, 2014 and 21st August, 2014. Meetings were also held in eight counties including Mombasa, Kilifi, Nakuru, machakos, Kiambu, Nairobi, Kisumu and Kakamega to discuss the impugned Regulations.***
>
> ***I also note, in particular, that the Report on the Public Participation forum held on 14th August, 2014 shows that discussions pertaining, specifically, to the pictorial health warnings under the Regulations took place. The minutes of the meeting held on 18th March, 2014 similarly show that discussions were held with respect to the contents of the Regulations. The petitioner has also submitted that it made written submissions on the contents of the proposed Regulations.***
>
> ***In the circumstances, and given the views expressed in the decisions cited above with respect to public participation, I am unable to find that the Tobacco Control Regulations, 2014, were a nullity for lack of public participation. It is clear that the petitioner and other industry players were consulted; their representatives attended various meetings; they made submissions with respect to the Regulations."***

[51] We have on our part examined the record and find that there is sufficient affidavit evidence that there were consultative stakeholder forums/meetings held

on 18th March 2014 and 14th August 2014 in which both the appellant and the affected party participated. There is also evidence of various meetings having been held between the 2nd respondent and the Parliamentary Departmental Committee on Health. Thus there were several meetings held prior to the publication of the said Regulations and there was also exchange of communication that included the appellant and the affected party both of whom were persons upon whom the statutory instrument is likely to have a direct or a substantially indirect effect. This is because the Regulations were made pursuant to the Tobacco Control Act whose aim is to control the production, manufacture, sale, labeling, advertising, promotion and sponsorship of tobacco products, a matter in which the appellant and the affected parties who manufacture and sell tobacco products have an interest.

[52] The appellants have maintained that the consultations and interaction did not provide adequate public participation or consultation. In our view, this submission goes against the weight of the evidence that clearly reveals meetings, discussions and communications regarding the Regulations prior to their publication. What the appellant is really saying is that although they had their say, their views were not adequately considered. However, the fact that the views of the appellant and the interested parties did not carry the day was neither here nor there. All that the learned judge needed to establish was the fact that that step of involving the public and any other affected persons was taken. Given the facts that were before the

learned judge, we have no reason to fault the learned judge for finding that the stakeholder meetings, discussions and communications constituted adequate public participation and consultation.

Regulation Impact Statements

[53] As regards the Regulatory Impact Statement (RI Statement), **Sections 6, 7** and **8** of the Statutory Instrument Act are relevant. Section 6 provides as follows:

> ***"If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument."***

[54] **Section 7** sets out the particulars that the RI Statements must contain and the responsibilities of the CS in regard to the RI Statement, whilst section 8 provides for notification of the RI Statement through the Kenya Gazette. The appellant submitted that contrary to **Section 6** and **8** of the Statutory Instruments Act the respondents failed to prepare and publish the RI Statement; that the RI Statement that was produced by the respondents was wholly inadequate to meet the requirements of **Section 7** of the Statutory Instruments Act. In response it was submitted that the learned judge correctly held that the Regulations fell under the exception provided under **Section 9(g)** of the Statutory Instruments Act and therefore it was not necessary to prepare the RI Statement.

[55] **Section 9(g)** of the Statutory Instruments Act provides thus:

> ***"A regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for-***

.....

(g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;"

[56] It is evident from the record that the 2nd respondent prepared the RI Statement, but did not publish the same as required by section 8 of the Statutory Instruments Act. Nonetheless, the respondents and the interested parties argue that in this instance it was not necessary to prepare the Regulatory Impact Statement as the same fell under the exception provided under **Section 9(g)** of the Statutory Instruments Act. Therefore the issue for determination is whether the Regulations were substantially uniform or complementary with the Tobacco Act as to bring them within the exception in **Section 9(g)** of the Tobacco Act.

[57] The appellant argued that the Regulations were not uniform or complementary with the Act and that indeed some parts do not even arise under the Act. In Black's Law Dictionary ninth edition the word "uniform" is defined as:

"Characterized by lack of variation, identical or consistent"

Complementary is not defined in Black's Law Dictionary but the Concise Oxford Dictionary of Current English Twelfth Edition defines "complementary" as:

"(Of two or different things) combining in such a way as to form a complete whole or enhance each other."

[58] Taking this definition into account the issue is whether the Regulations are consistent with the Tobacco Act and whether they enhance the Tobacco Act in a way that helps achieve the object of that Act so as to bring them within the

exception in **Section 9(g)** of the Statutory Instruments Act. An examination of the two shows that the Regulations derive their existence directly from the Tobacco Act, as they are subsidiary legislation made under powers donated by **Section 53** of that Act. In accordance with that provision, the Regulations provide for the better carrying out of the objects of the Tobacco Act through provisions intended to regulate tobacco manufacture and use in order to protect tobacco users and the general public. Thus the Regulations are complementary to the Tobacco Act in furthering the object of the Tobacco Act as provided in **Section 3** of that Act. In the circumstances, we agree with the learned judge that the Regulations fall under the exception provided in **Section 9(g)** of the Statutory Instruments Act and thus it was not necessary to prepare the Regulatory Impact Statement.

Whether the specific regulations as listed by the Appellant Violated the Appellant's rights as alleged

[59] As already stated, the Regulations are subsidiary legislation made pursuant to powers conferred under **Section 53** of the Tobacco Act. Therefore, it is imperative that the Regulations comply with the principle that the subsidiary legislation must not be *ultra vires* the parent Act. The appellant maintains that the Regulations are not only *ultra vires* the Act but also in some instances *ultra vires* the Constitution. This calls for an examination of the Regulations, the Tobacco Act and the Constitution to ensure that they are not inconsistent or *ultra vires*.

[60] It was argued that **Part V (Regulation 20-36)** that seeks to limit interactions between the tobacco industry and public officers/authorities infringed **Article 27** of

the Constitution that guarantees the right to equality and freedom from discrimination. This is because the limitation imposed by these Regulations target only those in the tobacco industry. In her judgment the learned judge found that the differential treatment between the tobacco industry and other industries was permissible under **Article 24** of the Constitution that allows limitation of rights where such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

[61] Looking at the provisions of **Part V** of the Regulations they appear to be discriminatory against the appellant and others in the tobacco industry as the Regulations seek to limit interactions between players in the tobacco industry and public officers/authorities a situation which is not replicated in other commercial industries. Nonetheless, we take note that not all discrimination amounts to unfair discrimination. We find persuasion in this regard in the ***President of the Republic of South Africa & Anor vs. John Philip Hugo 1997(4) SAICC para 41***, wherein it was stated as follows:

> ***"We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is***

unfair in one context may not necessarily be unfair in a different context."

[62] Further, we are in agreement with the position taken in ***Federation of Women Lawyers Fida Kenya & 5 Others Vs. Attorney General & Anor*** ***2011 eKLR*** where it was held that:

"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

[63] We note that although the tobacco industry is a legal commercial business, it is in a peculiar position as its products have been associated with a multitude of serious diseases as well as posing serious health risks to the partakers of the products. The learned judge was urged not to take into account the submissions on the harmful effects of tobacco, as they were not relevant to the inquiry that the court was required to undertake. To this the learned judge responded as follows:

"Having read the pleadings and submissions, as well as the documents relied on to show the effects of tobacco consumption, and having mulled over the intentions of the legislation and the implications of tobacco consumption on public health and the health of the individual, I am unable to agree with the petitioners on this point. The effects of a product on the health rights of others cannot be divorced from the process and need for its regulations. Consequently, in considering the issues that properly fall within the

constitutional jurisdiction of this court regarding the enactment and implementation of the impugned Tobacco Control Regulations which the petitioner raises, I will do so within the context of a public health system and the needs thereof vis a vis the commercial rights and interests of tobacco manufacturers such as the petitioner."

[64] We cannot fault the position taken by the learned judge. The tobacco industry cannot be compared to manufactures of other products. The need for regulation and control is apparent from the Tobacco Act. Players in the tobacco industry cannot expect equal treatment with other industries as due to the harmful effect of tobacco products, the State is under obligation to protect the health of its citizens, both consumers and non-consumers of tobacco products. In light of the side effects, there is a clash of rights that demands a delicate balance. The object of the Tobacco Act as set out in Section 3 of the Act includes protection of health of individuals including smokers and non-smokers against the ill effects of tobacco products. It would have been remiss for the learned judge not to take into account the side effects of the tobacco products and the need for control and regulations as this is relevant in balancing the competing rights and justification for limitation of any rights.

[65] Moreover, the ill effects of the tobacco products cannot be equated with the threat of terrorism. In protecting the rights of terrorism suspects, as was the case in ***Coalition for Reform and Democracy (CORD) & 2 others vs The Republic of Kenya & 10 others*** (supra), the court was considering the right to a fair trial and right to protection against torture, rights that under **Article 25** of the Constitution

cannot be limited. The appellant's petition, required the learned judge to balance the right to a healthy environment against the appellant's right to protection against discrimination and right to intellectual property. These rights can under **Article 24** of the Constitution be limited provided the limited is reasonable and justified. Therefore, the ***Coalition for Reform and Democracy (CORD) & 2 others vs The Republic of Kenya & 10 others*** (supra) is distinguishable as it is dealing with a situation that is different from that of the appellant.

[66] The inequality of treatment in limiting interaction between the public officers/authorities and members of the tobacco industry does not amount to discrimination as it is dictated by the circumstances obtaining. Moreover, the limitation does not target only a specific group of players in the tobacco industry but applies to all players in the tobacco industry. We are satisfied that in ensuring the delicate balance of rights, the limitation of the appellant's rights is justifiable, reasonable and necessary under **Article 24** of the Constitution to ensure the enjoyment of rights and fundamental freedoms by all individuals.

[67] In regard to right to peaceable assembly and to present petitions under **Article 37** of the Constitution, the Regulations have not limited or barred all interactions between the industry and the public officers/authorities. All that it has provided is to limit the interactions in a way that provides for accountability and transparency and this is in accordance with **Article 10** of the Constitution. The limitation of the right as we have already stated, is informed by the need to control

and regulate the tobacco industry. The compromise of the rights under **Article 37** is justified under **Article 24** of the Constitution.

[68] As for the right to fair administrative action under **Article 47** of the Constitution, the appellant contended that **Part V** of the Regulation has violated this right by unjustly and unnecessarily limiting the extent to which the tobacco industry can be consulted in matters affecting it. We note that **Section 4(6)** of the Fair Administrative Action (**Act No.4 of 2015)** provides as follows:

> ***"Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in*** Article 47 ***of the Constitution, the administrator may act in accordance with that different procedure."***

[69] In formulating the Regulations the appellant was empowered to comply with the procedure provided under the Statutory Instrument Act and the Constitution. The procedure provided therein is consistent with the Fair Administrative Actions Act with regard to public participation and consultation. Therefore, the contention that the appellant's rights in regard to Fair Administrative Action was violated by **Regulations 20-36** was rightly rejected.

Solatium Compensatory Contribution:

[70] **Section 7** of the Tobacco Act and **Part VI** of the Regulations that provide for solatium compensatory contribution were challenged as being unconstitutional and an attempt to irregularly apply the World Health Organization Framework Convention on Tobacco Control (FCTC). We note that according to the UN Treaty Collection Depository accessed at treaties.un.org, Kenya signed and ratified this

convention on 25th June, 2004. The ratification of the treaty imposed an obligation on Kenya as a State to implement measures to protect its present and future generations from the devastating social and environmental consequences of tobacco consumption and exposure to tobacco smoke. It follows that the enactment of the Tobacco Act a few years later, in 2007 can only be viewed as an attempt to fulfil this obligation. In addition, the promulgation of the Constitution of Kenya in 2010 brought into effect **Article 2(6)** of the Constitution which provides that: "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Thus, the enactment of the Tobacco Act and the Tobacco Regulations are anchored on the Constitution of Kenya and no inconsistency arises.

[71] **Section 7** of the Tobacco Act provides for the establishment of a Tobacco Control Fund (Fund), that is under **Section 7(2)(f)** composed of *inter alia* "a solatium compensatory contribution payable by any licensed cigarette manufacturers or importers." The question is whether the solatium compensatory contribution is a tax. In ***Black's Law Dictionary 9th Edition*** tax is defined as:

> ***"A charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises. Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money."*** (Emphasis added)

[72] The solatium compensatory contribution is not a payment that goes towards the national revenue. Under **Section 7(4)** of the Tobacco Act, the purposes for which the fund is to be used is specific as follows:

> ***"(a) Research, documentation and dissemination of information on tobacco and tobacco products.***
> ***(b) Promoting national cessation and rehabilitation programs.***
> ***(c) Any other matter incidental to the matter stated in paragraphs (a) and (b)."***

[73] It is apparent that the Fund is to be expended for purposes intended to advance the object of the Act by mitigating the negative effects of tobacco products. The establishment of this Fund must be examined in light of the acknowledgment and appreciation of the parties both in the superior court and in this Court of the dangerous side effects associated with tobacco products. It is not a tax or fee that is levied by the national government or county government for the purposes of national or county revenue. Therefore, there is no violation of **Article 210** of the Constitution through the imposition of this contributory payment.

[74] The Regulations by the CS providing for the payment of solatium contribution is in accordance with **Section 7** of the Tobacco Act and the action of the CS was therefore not *ultra vires*. The Act gave powers to the 2nd respondent to determine the solatium compensatory contribution payable. This has been effected through **Regulation 37**. **Section 7(4)** has not restricted the compensatory contribution to a one-off payment but has given the 2nd respondent the authority to determine such payments. It appears that the 2nd respondent in implementing this

Section of the Act determined that the cigarette manufacturers ought to contribute an annual figure of **2%** of the value of the tobacco products manufactured or imported by the manufacturer or importer every financial year. This was mere exercise of the discretion provided under **Section 7(4)** of the Tobacco Act.

[75] In the Indian case of **Maharashtra State Board -VS- Kurmarsheth & Others [1985] CLR 1083**, it was stated as follows:

> ***"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations....."***

[76] In our view, **Regulation 37** has a rational nexus with the object and purpose of the Act. Further the Act gives the 2nd respondent powers to determine the solatium compensatory contribution payable by the manufacturers and importers. We therefore come to the conclusion that in the imposition of an annual levy was not inconsistent with the Tobacco Act, nor did the 2nd respondent act outside its authority.

[77] The appellant contended that the solatium compensatory contribution violated its right to property that is protected by **Article 40** of the Constitution. We fail to understand this argument. The solatium compensatory contribution is a levy that is provided for in accordance with the Tobacco Act for the purpose of mitigating the side effects of tobacco products. The Regulation has been enacted

following a consultative process including persons affected such as the appellant and the affected persons. The imposition of the solatium compensatory contribution cannot amount to deprivation of the appellant's property. Nor can the argument that the solatium compensatory contribution is oppressive, irrational, unreasonable, or made in bad faith because the tobacco industry is subject to many other taxes hold.

[78] The solatium compensatory contribution does not amount to a tax imposition. Moreover, the contribution of 2% of the value of the tobacco products manufactured or imported, does not appear to be too high in the circumstances. It is indeed a small price that the appellant and those in the industry have to pay to mitigate the adverse effects of tobacco products. It is consistent with the State's obligation under **Article 43(1)(a)** of the Constitution to provide the highest attainable standard of health.

Packaging and Labeling

[79] **Part II** of the Regulations (**Regulations 3-11**) which the appellant also took issue with, provide for packaging and labeling. In this regard, the learned judge rendered herself as follows:

> ***"A reading of the Regulations demonstrates that what the respondents were doing at Part II (Regulations 3-11) of the impugned Regulations was to put into effect the provisions of Section 21 of the Act. To illustrate, Regulation 3 provides that:***
>
> ***(i) A person who manufactures, sells, distributes or imports a tobacco product shall ensure that every package containing the tobacco product bears warning***

labels and information required under section 21 of the Act and specified in the Schedule to the Act and the corresponding pictures and pictograms set out in the First Schedule.

(ii) The manufacturer, seller, distributor or importer of tobacco product shall ensure that the health warning and message including a pictogram or picture required under paragraph (1) is not distorted or likely to be damaged, concealed, obliterated, removed or rendered permanently unreadable when the package on which it is printed is opened in the normal way.

(iii) A picture and pictogram required under paragraph (1) shall be in full colour with contrasting colours for the background in a manner that maximizes noticeability and legibility or elements of health warnings and messages in the approved layout and design.

It is evident that the legislative intention behind the above Regulations was to regulate advertising of tobacco products and to ensure that consumers were fully aware of the nature and content of the tobacco products that they consumed. The Regulations in this part are therefore in accord with the parent legislation and the Constitution.

With regard to the date by which the petitioner and others in the tobacco industry are to comply with the regulations in respect of the health warnings, it is correct that there is a conflict between the time given in the Act and that set in the Regulations. Section 21(4) requires compliance within nine months from the date of publication of such Regulations pertaining to the pictorial warning specifications, while the Regulations provide a timeline of 6 months. This court stayed the coming into force of the Regulations in June, 2015. Having found that there is no violation of the Constitution or Statute in Part II of the Regulation and bearing in mind the time that has elapsed since the orders suspending the operation of the Regulation was granted, it is my view that a period of 6 months from the date hereof is reasonable for the implementation of the pictorial warnings.

The petitioner had also complained that it had not been given the technical repository and digital storage device under Regulation 10, and was therefore not able to implement the Regulation. However,

> ***it confirmed that it was given such technical information on 29th July, 2015. It has complained, however, that the prescribed images would result in significant pixilation of the health warnings when printed and result in poor quality images. This, however, in my view, is not a matter of law or the Constitution but a technical matter that should be resolved between the petitioner and other industry players and the respondents, and I decline to enter into an inquiry in respect thereto."***

[80] It is clear that the purpose of the Regulations in prescribing health warnings through packaging and labeling of tobacco products was to achieve the object of the Tobacco Act by providing information and cautioning consumers and non-consumers of the side effects of tobacco products. We cannot fault the learned judge for finding that the Regulations were in accord with the parent legislation as this is evident from the above quoted extract. As regards the appellant's complaint concerning the learned judge's finding that the issue of technical repository and digital storage device under Regulation 10 was not a matter of law or the Regulation but a matter to be resolved between the appellant and other industry players, we concur with the quotation from the supreme court of Malaysia in ***Public Prosecutor vs Dato Peng [1988] LRC*** that judicial authority is the power to examine questions submitted for determination with a view to pronouncement of an authoritative decision as to rights and liabilities of one or more parties. However, we take note of **Article 159(2)** of the Constitution that enjoins the court in exercising judicial authority to be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted. In this case, the learned judge

pronounced herself authoritatively on the justification for the health warnings. In directing that the appellant, the respondents and the industry players resolve the technical issues relating to the picture and pictogram, the learned judge did not abdicate her judicial responsibility but merely provided a channel for the parties to address the technical issues using the technical expertise. Therefore, nothing turns on this ground.

[81] **Regulation 15(b)** provides that no person shall smoke in streets, walkways or verandas adjacent to a public place. The Regulation seeks to give effect to **Section 32** of the Tobacco Act that provides for the right to a smoke free environment as follows:

> ***"(i) Every person has a right to clean and healthy environment and right to be protected from exposure to second hand smoke.***
> ***(ii) Every person has duty to observe measures to safeguard the health of non-smokers.***
> ***(iii) Every head of the family including a parent or guardian is responsible for ensuring that the children are free from second-hand smoke."***

[82] **Section 33(1)** of the Tobacco Act provides that no person shall smoke in a public place. The appellant has argued that streets, walkways and verandas adjacent to a public place referred to in **Regulation 15(b)** are not public places as defined by the Act. The tobacco Act defines public place in Section 2 as follows:

> ***"...means any indoor, enclosed or partially enclosed area which is open to the public or any part of the public or to which members of the public ordinarily have access and includes a workplace and a public conveyance."***

[83] Ostensibly, the above definition excludes "streets, walkways or verandas adjacent to a public place". Nonetheless, the definition in **Section 2** of the Tobacco Act has to be read together with **Section 32** and **33** of the Tobacco Act that imposes an obligation to protect other individuals from second-hand smoke. It is in this spirit that **Regulation 15(b)** has gone further to prohibit smoking in "streets, walkways or verandas adjacent to a public place." Although these places are not directly defined as public places in the Tobacco Act, they are places that members of the public have access to and likely to be exposed to second-hand smoke. The side effects of second-hand smoke are well documented and it is evident that the purpose of this Regulation is to protect those who do not smoke particularly children from inhalation of second-hand smoke. Thus, **Regulation 15(b)** is not *ultra vires* the Tobacco Act but seeks to give effect to **Section 32** of the Tobacco Act.

Disclosure of Information Regulation 12-14

[84] In regard to **Part III** of the Regulations (**Regulations 12-14**) that makes provision for information required to be disclosed by manufacturers and importers of tobacco products, the appellant objected to this, maintaining that the Regulations were unconstitutional because they infringe on their right to privacy. It was argued that the disclosures required by these Regulations include trade secrets, manufacturing processes and other intellectual property rights and this was contrary to **Article 40(5)** of the Constitution that obligates the State to support,

promote and protect intellectual property rights. Further that the Regulations imposed rules that were vague, unclear and uncertain.

[85] The contrary arguments posited by the interested parties were: that there is no uncertainty or impossibility in compliance with the information disclosure requirements; that the Regulations do not violate the appellant's right to property; and that even if the Regulations infringed on the appellant's intellectual property rights, such rights were not absolute.

[86] The learned judge made a finding that **Regulation 13(b)** was null and void to the extent that it requires tobacco manufacturers and importers to disclose their market share in the tobacco industry in Kenya. This finding has not been challenged. **Regulations 13(a), (c), (d),** and **(e)** requires disclosures of the quantitiy of tobacco produced, sales made and revenues earned, quantities exported and affiliated organizations or agents acting on behalf of a manufacturer. These disclosures are relevant in light of **Regulation 37** that requires the payment of the solatium compensatory contribution at **2%** of the value of the tobacco manufactured or imported by the manufacturer or importer in that financial year. As regards **Regulation 12** that deals with product disclosure, the learned judge ruled that it did not violate the appellant's constitutional right to intellectual property or to privacy as the disclosure was aimed at identifying the products and ingredients used by manufacturers of tobacco product to ensure that the public health authorities have full information about the ingredients in tobacco products

and the health effects thereof. She noted that there was a need for balancing public health interest and rights of the public against commercial interests, and that public interest had to prevail.

[87] We have considered the findings of the learned judge and the contending arguments in regard to **Regulations 12** and **14**. Our reading of **Regulation 12** reveals that they relate to product disclosures. The product disclosures relate to ingredients that are used in the products and such disclosure may to some extent expose or compromise the interests of the appellant and other players in the tobacco industry by infringing on their intellectual property rights. The issue is whether the disclosure requirement under **Regulation 12-14** are justified and reasonable.

[88] The appellants have not denied that tobacco products have negative side health effects not only to the consumers but even other innocent persons who become passive smokers by inhaling second-hand smoke. Therefore, there are public health needs that have to be balanced against the intellectual property rights of the appellant and other tobacco industry players, in order to determine whether limitation of the appellant's intellectual property rights is justified. This requires demonstration that the societal need for the limitation of the intellectual property rights outweighs the individual right to enjoy the rights to intellectual property.

[89] In ***S vs Makwanyane and Another*** ***CCT 3/94(1995) 2A CC3; Coalition for Reform and Democracy (CORD) & 2 Others vs The Republic and Others***

Petition No. 628 of 2014; and ***British American Tobacco & others vs Secretary of State for Health [2016] EWHC 1169 (Admin)***. The issue of limitation of right was considered at length. The following quote from the latter case is instructive and persuasive.

> ***"It is plain from the above that intellectual property rights are not absolute and must be balanced against other competing public interests. In particular the right to sue a trademark can, under national law, yield to limitations imposed in the pursuit of superior public policy considerations. There is no canonical list of the public interest that may or may not be resorted to on the part of contracting states to limit intellectual property rights and a good deal of discretion is accorded to the signatories. What is however clear is that intellectual property rights can be derogated from in the name of public health since this is one of the few public interests which is explicitly identified."***

[90] We take the view that although **Regulations 12** limits the intellectual property rights of the tobacco industry players, that limitation is reasonable and justifiable under **Article 24** of the Constitution as they are meant for counteractive measures to control and mitigate tobacco related health problems. The disclosure requirements are therefore, neither unconstitutional nor *ultra vires* nor unlawful.

[91] The sum total of the above is that the learned judge did not err or make wrong findings as contended in the grounds of appeal. The meetings, consultations and communication prior to the Regulations satisfied the requirements of the Constitution and Statutory Instruments Act with regard to public participation.

[92] We find that except for **Regulations 1, 13(b)** and **45** that the learned judge found to be void and or ultra vires the Tobacco Control Act and in regard to which

finding there has been no appeal, the Regulations and the Tobacco Act provisions are neither unconstitutional nor unlawful nor do they unlawfully violate any rights of the appellant, the affected party or the tobacco industry players; that in cases where the Regulations or the Act limits the rights of the industry players the same is reasonable and justified in accordance with **Article 24** of the Constitution.

[93] In conclusion, we find no merit in this appeal and do therefore dismiss it in its entirety. We direct that each party shall bear their own costs. Orders accordingly.

Dated and Delivered at Nairobi this 17th day of February, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/jkc