

# ALCOHOL ADVERTISING to ban or not to ban? That is the question

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Alcohol is a harmful substance. At least, that's what the Constitutional Court said in the 1997 *S v Lawrence* case. Excessive alcohol consumption is "universally regarded as a social evil" linked to "crime, disturbance of the public order, impairment of road safety, damage to health, and has other deleterious social and economic consequences".

The remark was made in the context of regulating access to and use of alcohol; it is one of the reasons why the Liquor Act was created: to balance the right to trade alcohol through the use of licences, regulating the type of alcohol sold and trading hours for vendors, with the socio-economic harm that may ensue.

After all, that's the purpose of regulation – to balance various rights and obligations.

In *Shoprite Checkers v the MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* the Constitutional Court said that regulating liquor licensing had at least two important and balanced objectives:

"The first is part of a framework which is designed to impose regulation and control over the access to and use of a dangerous substance, with a real potential to cause negative socio-economic consequences as well as having direct and indirect effects on health. On the other scale are the potential economic benefits of trading in liquor for the holders of licences and the State. Liquor licence holders are often powerful and influential companies involved in the supply side of the liquor industry. Maximising their contributions to the economy must be assessed against the negative costs of alcohol use. Regula-

tion in this industry is used to curtail these negative side effects and can directly contribute to improving the society we live in."

Even though the Constitutional Court has yet to deal with the question whether the advertising of alcohol should be banned or more strictly regulated, the principle of balancing socio-economic rights and economic interests is at the centre of regulation.

But these questions have come up a few times elsewhere.

In 2003, the Liquor Act was passed. It made provision for the regulation of alcohol advertising. The object of the Act was to reduce the socio-economic and other costs of alcohol abuse and to promote the development of a responsible and sustainable liquor industry in a manner that preserves entry, diversity and social responsibility. Section 9 of this Act prohibits the advertising of alcohol in a manner that is false, misleading, or intended to target or attract minors.

In 2013 the Cabinet, through a Bill drafted by the Department of Health, approved the Control of Marketing of Alcoholic Beverages Bill for gazetting for public comment. This proposed a complete ban of the advertising of alcohol. But there is no public access to this document and nothing seems to have come of it.

However in 2016 Cabinet approved, for public comment, the Draft Liquor Amendment Bill by the Department of Trade and Industry. This Bill seeks to amend and extend section 9 of the Liquor Act.

But this is no ban. This is a stricter regulation on advertising



and a collision of policies from different departments at similar stages.

Nevertheless, what this Bill does is prohibit advertising in a manner that misrepresents the age of the people in the advertisement, prohibit advertisements intended to target or attract persons under the age of 21, and prohibit content that appeals to persons under the age of 21. It also calls for the prohibition of advertising in public platforms such as, but not limited to, billboards in specified locations, pamphlets and on radio and television outside prescribed times. The Bill also gives the Minister of Trade and Industry power to extend these prohibitions further, with the addition of a punishable offence for anyone who does not follow these guidelines.

While the debate goes on in Parliament, the advertising industry has regulated itself.

The Advertising Standards Authority of South Africa has an advertising code of practice for the advertising of alcohol formulated by the Industry Association for Responsible Alcohol Use (ARA).

The ARA is a 300+ member not-for-profit organisation comprised of retailers, wholesalers and manufacturers in the liquor industry. Its position is clear: the ARA does not believe that advertising impacts on the overall consumption or misuse and abuse of alcohol. It bases this claim on “international research”. However, at the same time, it acknowledges that “excessive or irresponsible consumption of alcohol may result in negative personal, social or health consequences” and “believes it has a role to play in seeking to find and implement solutions to the problems of alcohol misuse and abuse” by setting out an extensive self-regulated guideline on the advertising of alcohol.

And this is all we have: a single provision in national legislation and an industry-regulated guideline.

Why is this a problem? Legislation goes through a rigid constitutional and democratic process with overseeing safeguards such as the Constitutional Court. Self-regulated guidelines do not go through the same process. These guidelines are constructed by members, who are protecting their industry’s interests.

There is no accountability, nor any responsibility to consider interests other than their own. Any complaints or contraventions of these guidelines are adjudicated internally and not through courts, like a contravention of legislation would be. Such guidelines prioritise the industry’s interests, may lack public participation and risks sidelining lobby groups that are a threat to the industry’s interests.

One such group is the public health sector, which not only monitors the effect and burden alcohol has on the health system, but also builds a case for the banning of alcohol advertising.

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Matthijs

### An alcohol advertising ban could improve public healthcare

Let’s look at some numbers. In the South African Medical Journal (SAMJ), Charles Parry, director of the Alcohol, Tobacco and Other Drug Research Unit of the Medical Research Council, stated that in 2009 alcohol-related events – such as road accidents, alcohol induced assaults, liver disease and sexually transmitted diseases – cost the national Department of Health an estimated R 6.1 billion and provincial departments approximately R 0.5 billion. In 2012 the approximate amount the alcohol industry spent on advertising was R 2 billion.

Another SAMJ study by Matzouplous says that “combined total tangible and intangible costs of alcohol harm to the economy were estimated at 10 – 12% of the 2009 gross domestic product (GDP). The tangible financial cost of harmful alcohol use alone was estimated at R37.9 billion, or 1.6% of the 2009 GDP.”

So the economic harm alcohol usage has on the public health system is significant. But what does this have to do with advertising and its effect on alcohol consumption?

Companies have the freedom to express themselves commercially. (Yes, a company has rights too.) And in this instance, the right to express themselves must be exercised consistently with the values of the Constitution. This was shown in the Supreme Court of Appeal in *BATSA v Minister of Health*. Although this case looked at the banning of the advertising of tobacco





products, it made a salient point that laid the foundation for this discussion. The right to commercial expression was held not to be absolute, and when pitted against the public health considerations of tobacco consumption, the right to commercial expression had to give way.

This means that when giving consent to the right that alcohol industries have to express themselves commercially, the Constitution expects this right to be understood through the balancing of other rights in the public interest – rights such as access to healthcare services, freedom of association, conscience and belief, among others.

Significantly, if alcohol advertising has some form of impact on alcohol consumption, then banning alcohol may reduce consumption and lessen the burden on the public health system, which would give the government more budgetary leeway to fulfil its constitutional obligations in the public health sector.

All of this, however, rides on one very contested point: that alcohol advertising influences the consumption of alcohol. As mentioned above, the ARA, relying on “international research”, does not believe that advertising impacts on the overall consumption or misuse and abuse of alcohol. Understandably so, as it would be odd to have a self-regulated industry openly question the very essence of its regulations.

But are inherent biases and interests the only reason we should be skeptical of the industry’s view? No.

Investigations into alcohol marketing in five European countries concluded that self-regulation of alcohol advertising and promotion did not protect young people against exposure to alcohol commercials. More than the objective of advertising being to influence brand choice and brand identity, alcohol advertising influenced young people’s behaviour, normalised drinking, brought about positive beliefs about drinking and encouraged young people to drink sooner and in greater quantities.

But let’s look locally. Recently the Soul City Institute for Social Justice released a policy brief which made the following key research findings:

Rural and urban youth are “heavily exposed to persuasive and appealing alcohol advertising in their home environment”;

The “use of colour, images and creative slogans make alcohol advertising attractive to youth”;

Advertisements showing young people having fun encourage them to try different brands and beverages, while access to taverns is facilitated by promotional events and pricing.

Basically, alcohol advertisements do more than sell you a product. They sell you a lifestyle and attach that much-needed aspiration to the advertised brand or product. They emotionally connect with you in a way that creates a need and therefore creates a chink in your behavioural armour through the use of colour, images and creative slogans. If advertising did not have a positive effect on consumption and sale, then why would anyone advertise?

The Public Health Association of South Africa agrees. It argues that exposure to alcohol advertising is viewed as an important contributing factor to the use and misuse of alcohol, and relies on evidence that increased exposure correlates with increased consumption.

While banning is not the sole key to fixing an overburdened healthcare system, it is an important factor. The alcohol industry argues that there are other measures that may be put in place to lift this burden, such as pricing regulation (which would meet the same intense resistance) and taxation, restrictions on the availability of alcohol, direct interventions, community mobilisation and education. This is all in exchange for protecting the industry’s commercial expression.

But, as the Supreme Court of Appeal indicated: commercial expression is not absolute. It can be justifiably limited. The interest of the public, public health considerations and rights at large must be considered in order to assess whether such commercial expression may be limited. And it should be limited, because the public health sector makes a strong case for the banning of alcohol advertising.

Sending smoke signals: lessons from the ban on advertising tobacco products

In 1999, the Tobacco Products Control Act (Tobacco Control Act) was amended to prohibit the advertising and promotion of cigarette products in relation to sponsored events.

In 2005, South Africa ratified the World Health Organisation (WHO) Framework Control on Tobacco Control (FCTC) which placed obligations on state parties to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.

Three years later, the Tobacco Control Act was amended to align itself with the FCTC to include a complete ban on the advertising and promotion of tobacco products through direct and indirect means. This included television, radio, newspaper



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and sponsorships. To tighten the noose, anyone daring to cross the advertising line would face a R1 million fine.

The purpose of the Tobacco Control Act was to reduce the extent of the harmful effects of tobacco on smokers and non-smokers. It resolved to enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death.

Significantly, the preamble of the Act also expressly realises and concedes:

“... that the association of the use of tobacco products with social success, business advancement and sporting prowess through advertising and promotion may have the particularly harmful effect of encouraging children and young people to use tobacco products.”

As noted above, the Supreme Court of Appeal in *BATSA v Minister of Health* ruled that such a ban was consistent with the principles of the Constitution and noted that this ban was aimed at discouraging tobacco users in the interest of promoting public health. The underlying premise was that there was a correlation between advertising and tobacco use, and that such use had a negative effect on public health.

The underlying purpose of the ban on alcohol advertising aims to achieve the same result. So let's make a comparison between smoking and alcohol. This comparison looks at consumption from a greater harm point of view. Everyone knows alcohol and smoking are clinically bad for you, but what direct and indirect harms do both of these habit-inducing substances have on people?

Cigarettes have a direct effect on the health of the smoker but also affect passive smokers around the smoker. Smoking-related diseases such as heart and lung disease have a direct impact on the healthcare system and also affect the dependants and loved ones of the smoker, should anything critical or terminal occur as a result of their smoking. However, smoking tobacco products does not inhibit a person like alcohol can.

Alcohol-related harm has a much broader impact: it com-

promises your decision-making ability. This too has both direct and indirect effects on the health system. Excessive alcohol use leads to liver-related diseases, but also to all sorts of social turbulence and trauma including road accidents, alcohol-induced assaults – particularly gender-based and sexual violence – and risky sexual behaviour that increases the odds of contracting sexually transmitted diseases. And inevitably, these incidents weigh heavily on public health resources and practitioners.

The harms of alcohol advertising are far more concerning when one considers that there are no measures to ban alcohol advertising. After all, the tobacco industry has acknowledged the link between advertising and the perceptions of children and young people that smoking leads to “social success, business advancement and sporting prowess”.

It would be flawed to argue that this finding is specific to tobacco usage, as the tobacco industry acknowledges that a fundamental function of advertising is the ability to urge product usage in the consumer or potential consumer.

Since the alcohol industry (or any other industry) uses advertising to urge product usage (among other functions) for a product that has primary similarities, there is little room for debate that alcohol advertising has the same or similar effect on the perceptions of consumers and potential consumers.

So what effect has smoking regulation, which includes excise tax and advertising bans, had on the usage of tobacco? The World Health Organisation did a study on South Africa in 2013:

Table from World Health Organisation Africa's case study: Successful Tobacco Legislation in South Africa

Between 1993 and 2010, there was a significant drop in smoking prevalence as a result of international and governmental intervention. Banning tobacco advertising was a major part of this intervention. Also notable is that the lower the monthly income bracket of a person, the higher the chance of reducing the number of cigarettes they smoke. This speaks to the important role excise tax – sometimes known as ‘sin tax’ – plays in consumer choices and must be considered as part of the strategy for lobbying groups when promoting a ban on alcohol advertising.

But the data also show a significant decrease in smoking for people between the ages of 16 and 24 in 2003. This was after the first set of cigarette advertising bans were put in place, but before the more comprehensive ban after the onset of the FCTC. This drastic drop speaks to why the amended Tobacco Control Act acknowledges the role advertising plays in influencing the ideas of young people.

We can learn a few things by reflecting on the ban on advertising tobacco products. First, a ban works. Second, the fight is long and hard and requires both scientific and economic research to battle the industry. Third, government, Parliament and the courts acknowledge the role public health plays in considering the commercial expressions of these industries. It is just a matter of advocating and lobbying towards it. And finally, alcohol advertising may not be the silver bullet for curbing the use of alcohol, but it certainly is the Achilles heel of the industry, as it challenges the basis of the industry's interaction with society. This is where the harm lies. And this is why advertising alcohol should be banned.

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