

## Joint open letter to the Cabinet

It has come to our attention that the Department of Health is planning to introduce tobacco legislation that:

- **bans** outdoor smoking in public places;
- **bans** indoor smoking even in specially designated areas;
- **bans** the display of cigarettes;
- **bans** cigarette pack branding via plain packaging.

We the undersigned are very concerned about the impact of existing and proposed government legislation on our members who are small business owners.

We are particularly concerned about laws and proposals coming from the Department of Health.

The Minister of Health's proposals on regulating the tobacco industry is not just seen as a 'war against the poor and the small businesses' in our country, but for what it is, a war against the constitutional values and principles, particularly the Bill of Rights which is the cornerstone of our democracy. It seems as if the spirit that our founding fathers of democracy had has been somehow lost and is no more felt at all. That is why we write this letter as a 'wake up call' to all who stand on higher level of governance.

While the South African government asserts that it is committed to a genuine partnership between civil society and government in efforts to push transparency and openness in the country, our organisations have a different experience of the practice of our government.

Since the year 2012, the Minister of Health, Dr Aaron Motsoaledi, has been embarking on a war against the tobacco industry in our country. His high handed decree was that "...government will soon introduce a total ban on smoking and advertising of tobacco and alcohol in the country"; "The space we gave you to smoke in a restaurant corner and a room in a hospital, we are going to ban it"; "There mustn't be a corner for smoking in South Africa"; "**Nobody can show us one single advantage of smoking except that they will tell us employment as if the whole human life revolves around employment only**". Hearing these decrees, we stood up as civil organisations for our people's rights and freedoms and raised our concern and voice to the Minister in submissions to parliament. To no avail.

We advised the Minister that should he go ahead with the proposed tobacco regulations, they would be unconstitutional as they do not comply with the principle of due process, lack of public consultation, lack of proper law making procedures, etc. We are highly concerned that the Minister, as an executive arm of government, does not have constitutional powers to make these types of far reaching laws, but only parliament or the legislature can make such laws.

It has to be noted, Honourable Ministers, that the rights of millions of South Africans are at stake should these proposed tobacco regulations come into effect. Many people in our country are not okay with the proposed regulations since their rights as guaranteed in the Constitution will be negatively affected, violated and denied. Various individuals and other civil organisations have also raised their concerns. The proposed regulations relating to display of tobacco products at wholesale and retail and other similar regulations will not only destroy township and informal businesses but also our heritage and

township cultures. Tavern owners, hawkers and informal businesses are all concerned and very upset at the proposed regulations by Minister Motsoaledi.

Tavern owners in various townships like Alexandra, Gugulethu, Khayelitsha, Umlazi, Mokopane, and all other historical black townships are raising their voices against the proposed regulations and see them as nothing but a war against the small business and the poor South Africans who rely on small business to survive. There are thousands of licenced shebeen owners in our country and it seems that the increased regulation from national and provincial government is not only cramping shebeen owners' business and the lifestyle associated with them, but also threatening to close them down.

The apartheid government tried to regulate the sale of alcohol and tobacco in many townships through the establishment of officially sanctioned beer halls. Minister Motsoaledi is currently re-introducing what the apartheid government did to many South Africans. Sadly he does so in a democratic constitutional post-apartheid dispensation. What can we call this behaviour?

After many years of attempted engagement with our government, we have seen that the South African government has proved not to be supportive of the rights and liberties of small business owners and the poor particularly. We noted in particular that:

- The proposed anti-smoking laws are violation of the five constitutional clauses, freedom of association, property rights, basic liberty, personal rights, and the founding valued as enshrined in section 1 of the Constitution ie dignity and rule of law.
- Three basic constitutional principles are at stake here – the separation of powers, individual liberties, and the most fundamental human right the right to property.
- Proposed regulations will remove people's right to choose to live their lives as adults. This is a problem found in many nanny states of the world.
- Tobacco regulations will degrade consumers of tobacco products, turning them into third-class citizens in all public spaces.
- Anti-smoking laws are a serious threat to good public policy which requires detailed consultations with those most directly affected by proposed policy, legislation and regulation and taking into account their interests. Currently Minister Motsoaledi is making the law by decree and not through the parliamentary law making process.
- There is no public consultation/opinion as required by our Constitution in section 195, tobacco farmers, manufacturers, retailers, leisure sector and consumers have all been excluded from consultation relating to the formulation of tobacco control policy. Virtually none are aware of what is proposed.
- Restrictions on packaging, display, marketing and advertising are anti-competitive – they protect established white-owned monopolies against small and emerging business.
- The Department of Health says they do this because South Africa is a party to the Framework Convention on Tobacco Control (FCTC) and this forms part of the international best practice. However, this is not so because international law is a law in South Africa only if it does not conflict with the Constitution and the Bill of Rights, otherwise such law cannot be incorporated into our legal system. Also it must be noted that it is up to the South African government to decide how to implement the articles or its guidelines subject to our Constitution, taking into account scientific evidence, best practice, South Africa's key priorities and the national

circumstances (in this case being the high unemployment rate and poverty). In any event the FCTC is not a law or obligation. It is a set of general principles and guidelines.

- Human well-being is not just about physical health, but happiness and psychological health.
- Proposed tobacco regulations do not meet the principles of social justice.
- The World Health Organisation, which Minister Motsoaledi is evidently inspired by, consists of unelected bureaucrats who are in no position to tell sovereign nations what they can and cannot do in their nations. Our country is sovereign under international law, with the laws and a Constitution respected throughout the whole world. So we cannot totally depend on WHO to determine our survival and legal and economic order.
- We noted that removing individual freedoms is not the right way to prevent the diseases associated with unhealthy lifestyle, education should be the best route by which the mature government influences the choices of adults in a democracy and encourages personal responsibility.
- Tobacco and alcohol regulations and laws are unrealistic for townships where properties are so close to each other that the 10 metre requirement for smoking is impossible to implement. In townships like Alexandra, house doors are just two metres away from each other's. Such townships cannot comply with regulations due to impossibility of abiding with the law.
- The Motsoaledian movement to ban smoking may also prevent South Africa from achieving desired socio-economic transformation.
- The tobacco point of sale regulations will hit high on hawkers, and most of those people are the poor who depend on informal trading as a way of survival.
- We are concerned that the unemployment rate is high in South Africa. If anti-smoking laws are passed, then the hawkers and informal traders will be put out of business and their families starve.
- Be it noted, Honourable Ministers, that the major beneficiaries of the display ban will be larger retail stores who have both staff and space to provide designated counters for a far greater variety of brands. The losers and targeted group will be the small retailers, informal traders and hawkers for whom the potential loss of revenue could be enough to put them out of business.
- Imagine the harm, unfairness and injustices those informal traders and hawkers that will suffer in a constitutional and democratic country where the respect to human rights culture is promised.

Honourable Ministers, we humbly write to you to intervene on behalf of the people of South Africa (emerging businesses, consumers and workers) whose rights and liberties are at stake due to the Health Department's proposed anti-smoking laws. Not only the rights of people will be affected, but our democracy, Constitution and dignity as a nation.

We call upon the South African government to demonstrate a commitment to a genuine socio-economic realisation and fight against poverty that also promotes and ensures that the rights of informal businesses are protected in our country; and to urge the Ministry of Health to withdraw the proposed tobacco regulations and anti-tobacco laws or review them entirely.

Yours sincerely

Signed by:

Name \_\_\_\_\_

Title \_\_\_\_\_

Organisation \_\_\_\_\_

Representing (number of members) \_\_\_\_\_

Postal address \_\_\_\_\_

Email \_\_\_\_\_

Tel \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Witness