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## **BATSA CONFIDENT IN COURT CASE BUT ALARMED BY RISE OF CRIMINAL CIGARETTE CARTELS**

BRITISH American Tobacco SA (BATSA) is disappointed, but not surprised, that Minister Nkosazana Dlamini-Zuma has been granted leave to appeal the Western Cape High Court's ruling that the lockdown ban on tobacco sales was unconstitutional and invalid.

“BATSA and our nine co-applicants had a resounding success in December with a strong judgment delivered in our favour,” said Johnny Moloto, the General Manager of BATSA. “Based on the strength of the High Court's findings, we are confident that the Supreme Court of Appeal will uphold the Western Cape's judgment and rule in our favour. “

Importantly, in their judgment regarding leave to appeal, the Western Cape High Court said firmly that the Minister does not have reasonable prospects of success with regard to the applicants' constitutional law arguments. The Court granted leave for reasons which have no bearing on their court order, namely for the Supreme Court of Appeal to determine whether the word "necessary" (a requirement for Disaster Management Act regulations), means strictly necessary (as they said) or reasonably necessary (as the Gauteng High Court said in the FITA judgment). But even if the SCA agrees with the FITA Court, that won't have any impact on the outcome because the very strong constitutional rulings of the Western Cape High Court will still stand. The Western Cape Court ruled that the tobacco ban infringed the rights to privacy, dignity, bodily and psychological integrity, property and freedom to trade, and that those infringements were not reasonable or justified.

“Despite our confidence in the success of our case, we think the government would be wiser allocating its resources to combating the illicit trade in cigarettes, which was fortified by the ban and is now running rampant across South Africa. By confronting the criminal tobacco manufacturers who now dominate the market they would, at least, return many needed billions to the fiscus at a crucial time.”

BATSA said that, instead of taking futile challenges to the Supreme Court, the government should immediately ratify the global Illicit Trade Protocol (ITP) that has

been sitting on its desk for close to a decade and roll out a compliant tobacco track-and-trace system.

“We are even surprised that the Minister has appealed, not only because of her limited prospects of success, but because the case no longer has relevance, given the fact that it's now almost six months since the tobacco ban was lifted,” said Moloto.

In her formal submissions the Minister claimed that the ban's impact on the legitimate and taxpaying industry was heavily mitigated because the vast majority of smokers were still able to purchase tobacco illegally.

“This is an extraordinary contention and illustrates how acutely aware the government is of the actual effect and consequences of the ban,” said Moloto. “This is the Minister admitting that the overriding effect of the ban has been to create what is, by many measures, the world's largest illegal market in untaxed cigarettes.”

Criminal cartels exploited the tobacco ban, further establishing distribution routes and supply lines while, at the same time, South African smokers were, effectively, 'educated' into purchasing illegal and untaxed cigarettes which yield no revenue at all to the government that introduced the ban.

“With the economy in disarray, steps must be taken to stop this illicit trade leeching vital funds,” said Moloto.

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## **EDITORS NOTE:**

The South African Government signed the ITP in 2013, signifying its intention to formally ratify and domesticate the ITP in due course. Under customary international law, signing a treaty creates an obligation on the signatory state not to do any acts which are contrary to the objects of the treaty. The first step should be for the Government to formally ratify the World Health Organisation (WHO) Protocol on Illicit Trade (ITP), which is part of its Framework Convention on Tobacco Control (FCTC) that South Africa signed up to in 2005.

The ITP provides a strict global framework of mandatory guidelines to eliminate the illicit trade in tobacco products.

It is one of the key measures towards a global regime that will track and trace the movement of all tobacco products within a country as well as movements between countries.

BATSA supports the rapid introduction of a track-and-trace system for all tobacco products with interoperable standards, which means that international co-operation is essential.

These standards would be set by the FCTC and protected from vested interests by the FCTC. The mandatory guidelines are very clear.

In the meantime, South Africa already has some important tools available to start dismantling the illicit cigarette trade:

Last year, SARS brought in cigarette production counter rules. This means that the tax agency must be provided with, in close to real time, details of every cigarette produced on each and every machine in South Africa.

This means that SARS can reconcile, and accurately audit, BATSA's production volume, export declarations and excise payments.

This is a first step in the right direction, and it can be a good bridge towards the implementation of the FCTC guidelines-based track-and-trace system.

For it to work, all manufacturers must be made to comply fully with this regulation.

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