THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPL. NO. 27/2003

(ARISING FROM MISC. APPL. NO.70/2002)

BRITISH AMERICAN TOBACCO LIMITED=================APPLICANT

VERSUS

THE ENVIRONMENTAL ACTION NETWORK LTD===========RESPONDENT

BEFORE: <u>HON. THE PRINCIPAL JUDGE, MR. JUSTICE J.H. NTABGOBA</u>

Environmental Law enforcement:		*whether court can order for warning labels On cigarette packets and commercials*
Constitutional law	:	*Enforcement of rights under Article 22*
Constitutional Law	:	*Public Interest cases under Article 50(2)*
Constitutional Law	:	*Whether Article 50(2) allows class actions – as forum for representative action*
Constitutional law	:	*Whether Article 50 excuses compliance with procedural requirements under civil procedure.*

An application was brought by notice of motion. The appellant is M/s Environmental Action Network, Ltd. (TEAN). The application was filed under Article 50(2) of the Constitution of Uganda 1995 and rule 3 of the Fundamental Rights and Freedoms (enforcement Procedure) Rules – Statutory Instrument No. 26 of 1992. The application seeks the following 3 orders of the Court, which in this instance will be summed up in one ground or conclusive complaint which is;

The respondent as a manufacturer of a dangerous product is under a legal duty to fully and adequately warn consumers of its product of the full extend of the risks associated therewith.

<u>Held;</u>

a) Failure to make full disclosure of the dangers or risks of smoking cigarettes to the consumers, is too remote taking away of the life of such consumers.
b) The Constitution of Uganda does recognize the existence of the needy and oppressed persons and therefore it allows actions of public interest group to be brought on their behalf. Order 1 rule 8 of the Civil Procedure Rule should apply to such needy persons, but Order 1 Rule 8 is concerned with "persons having the same interest in

one suit", but the lacuna can be filled by laws to conform with the Constitution. Therefore it is clear that the action can base on Article 22(1) of the Constitution.

c) On whether Article 50(2) of the Constitution authorizes the filing of class action as a form of representative action ,can be governed by the procedure under Order 1 rule 8 of the Civil Procedure . The procedure Rules cannot govern them simply because they do not share the concerns of violating their rights with those who bring actions on there behalf.

d) The court cannot determine fully and sufficiently the kind of information to be included in the desired labels and publications it simply has no expertise to do so.
The application is unclear and embarrassingly ambiguous and could not pass the test. Needless to add that such consideration would not fall under the preview of application number 27 of 2003. It would have been a consideration during the hearing of application number 70 of 2002 which in any event, is struck out with costs to the applicant in the present application.

J.H.NTABGOBA
PRINCIPAL JUDGE
16/04/2003

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RULING

An application was made by notice of motion. The applicant is M/s Environmental Action Network, Ltd. (TEAN in short). The application was filed under Article 50(2) of the Constitution of Uganda 1995 and rule 3 of the Fundamental Rights and Freedoms (enforcement Procedure) Rules-Statutory Instrument No. 26 of 1992. The application seeks the following 3 orders of the court, namely,

- A declaration that the respondent's (M/s British American Tobacco, Uganda Ltd.) failed to warn the consumers and potential consumers of its cigarettes of the health risks associated with smoking of the said products.

- A declaration that the respondent's failure to warn consumers and potential consumers of its cigarettes of the health risks associated with their smoking constitutes a violation of or a threat to such persons' right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.

- An order that the respondent place on packets of its cigarettes, its adverting and marketing materials, and at all its advertising and marketing events, warning labels or signage, with such wording, graphics, size and placement as in the court's determination, are sufficient to fully and adequately inform consumers of its cigarettes of the full risks to their health.

The application was supported by the affidavit of Mr. Philip Karugaba the representative of TEAN. The affidavit sets forth a number of grounds for the application. The grounds are very many and varied. The conclusive complaint is contained in ground (1), which is that "the respondent as a manufacturer of a dangerous product is under a legal duty to fully and adequately warn consumers of its product of full extent of risks associated therewith.

So far the background I have given to Miscellaneous Application No.70 of 2002 suffices for a ruling on miscellaneous application No. 27 of 2003, which challenges the said Application No. 70 of 2002.

Application No. 27 of 203 was brought by notice of motion under order 6 rule 29 and order 48 rule 1 of the Civil Procedure Rules. It was filed by British American Tobacco Uganda Limited (BAT), the respondent in Application No.70 of 2002. BAT relies on a number of questions, which are as follows:

"(a) Whether Article 22 of the Constitution, which prohibits the "intentional" taking of life, can be interpreted to apply to an alleged failure of a manufacturer of a commercial product to warn consumers or potential consumers of possible health risks associated with the use of the product."

(b) "Whether Article 22 of the Constitution is capable of being violated by private conduct in the circumstances of this case, namely, an alleged failure of a manufacturer to warn consumers of potential health risks associated with the use of its product."

(c) "Whether Article 50(2) of the Constitution authorizes the filling of constitutional actions on grounds of "public interest" by private persons or it is confined to the bringing of ordinary representative actions to stop actual violations of human rights of specific persons or groups."

(d) " Whether Article 50(2) of the Constitution authorizes the filling of "Class actions" as a forum of representative action or is confined only to representation of specific and identifiable persons or groups."

(e) "Whether Article 50(2) of the Constitution, which permits any person or organization to bring an action as representative of other persons or groups for violation of their human rights can be interpreted to excuse compliance with the procedural requirements applicable to representative actions generally, such as the necessity to leave of court prior to filling the action."

It seems to me that the above 5 questions are straightforward and therefore they require straightforward answers. I will therefore deal with them in the order they have been put.

Clearly, Article 22(11) of the Constitution prohibits deprivation intentionally of a person's life. It follows therefore that whoever wants to bring an action under this provision must first have his right either been violated or being violated or about to be violated, and such violation must be intentional; in which case the action brought must allege violation, past, present or imminent. He must also allege the intention to violate. He must pursuant to order 6 rule 2 of the Civil Procedure Rules, plead the particulars of the violation as well as of the intention to violate. That is, in other words, he must specially plead the two with the view to specifically prove them.

In the application No. 70 of 2002, the applicant (TEAN) alleges failure of the respondent (British American Tobacco Uganda Limited - BATUL) to adequately inform the smokers of their product i.e. tobacco of the dangers of smoking. In fact the application is brought by TEAN as a public interest litigator bringing the action on behalf of consumers and potential consumers of the cigarettes manufactured by BATU, the respondent. The question is whether TEAN'S action was appropriately brought under Article 50(2) of the Constitution or whether it is not a proper action in tort, which should have been brought, or negligence.

I now come to the import of the first question, which challenges the validity of bringing Application No.70 of 2002 under Articles 22(1) and 50(2) of the Constitution. That the application should allege, (specially plead, with particulars) the intention to deprive the life of the litigant is central to the question. Failure to make full disclosure of the dangers or risks of smoking cigarettes to the consumers of the cigarettes seems to be too remote to taking away of the life of such consumers. It seems to me that failure to disclose such dangers may have alternative intentions, such as not to demote the business of selling cigarettes; to attribute intention to kill such failure would call for strict, if not impossible proof. I think that Application No.70 of 2003 should be a tortious action. I would also hold that to the extent that it alleges failure to disclose information about the dangers of smoking and remoteness of such failure to the taking away of the life of the litigants as well as failure to specially plead the intention to take away such life, I do strike the application out as showing no cause of action.

A lot of argument was made to state that Article 50(2) of the Constitution cannot have envisaged public interest litigation to be brought by bodies or groups such as TEAN. In fact it was argued that the Article differs from section 38 of the South African Constitution. Mr. Byenkya for BATU vehemently argued that whereas the South African Constitution caters for the interest group litigation under sub-section (d) of the section 38, namely "any one acting in the public interest", no such provision can be read into Article 50(2) of our Constitution. He argued that to read such provision into the words of Article 50(2) of our Constitution "any person or organization" and "person's group of person's" would amount to interpreting the Constitution. He went as far as asking this court to refer to the matter to the Constitutional Court under Article 137 of the constitution because, he argued, it would be the Constitutional Court to have the competence to interpret the Constitution. With due respect, I find nothing in the interpretation of the words "person or organization" and "person's or group of persons" which this court cannot interpret and which must be referred to the Constitutional Court.

It is elementary that "persons", "organizations" and "groups of persons" can be read in article 50(2) of the Constitution to include "public interest litigants", as well as all the litigants listed down in (a) to (e) of Section 38 of the South African Constitution. In fact, the only difference between the South African provision (i.e.Section 38) and our provision (under Article 50(2) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent

them i.e. those persons or groups of persons acting in the public interest. To say that our constitution does not recognize the existence of needy and oppressed persons and therefore it cannot allow actions of public interest groups be brought on their behalf is to demean the Constitution. It has been argued that Order 1 rule 8 of the Civil Procedure Rule should apply to such needy persons, but Order 1 rule8 is concerned with" persons having the same interest in one suit". The needy persons and the public interest group persons would have not the same interest in one suit. Then there is rule 7 of statutory Instrument 26 of 1992 which commands that the procedure under actions brought under Article 50 (2) of the Constitution should show the ordinary rules of procedure. Since actions in representative suits under Order 1 rule 8 of the Civil Procedure Rules cannot be brought by public interest groups, then there is a lacuna which can be filled by recourse to Article 273 of the Constitution which provides that:

"(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this constitution shall not be affected by the coming into force of this Constitution but the existing laws shall be construed with such modifications adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."
(Underlining added by me for emphasis).

I think it is pertinent also to quote Article 273(2) which gives the definition of "Existing law" to include Statutory Instrument No.26 of 1992 and Order 1 rule 8 of the Civil Procedure Rules. It states that:
"For the purposes of this Article, the expression 'existing law' means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or Statutory instrument enacted or made before that date which is to come into force on or after that date."
Having thus held, can it reasonably be argued that only the litigants in (a), (b),(c) and (e) of section 38 of the South African Constitution are catered for in our Constitution, Article 50(2). To hold thus would, in my considered opinion, be tantamount to the argument that our provision does ignore the type of persons or groups who cannot bring an action in their own right. Such persons or groups include children, the illiterate and disabled, who cannot access courts to contest violations of their rights and these are the persons who need the assistance of public litigation groups, and who, in any case, fall within Article 50(2) of the Constitution as I have held
.
In this regard, I do not agree at all with Counsel Byenkya's argument that no distinction can be drawn between these groups of persons and the group of persons and the group of persons represented or purported to be represented by Dr. Rwanyarare & Others in Constitutional Petition No.11 of 1997 (***Dr. James Rwanyarare & Anor –vs.- Attorney General***).
The distinction is quite obvious. Dr. Rwanyarare and another were representing the group described in the application as "specific and identifiable existing persons or groups". Such group is the one referred to as the Uganda Peoples Congress. With due respect, the Constitutional court at pp.21 and 22 of the judgement in the Rwanyarare, case cannot

have been talking about the type of persons or groups of persons I have referred to above namely, the children, the disable and the illiterates. These are persons who cannot be served under oreder1 rule 8 of the Civil Procedure Rules; the reasons being that they are not easily identifiable; they cannot be served as they would have no capacity to respond with a view to requesting to be joined in the action and they no similar interest with those who represent them. They only need the interest groups to represent them. To say that either these people are lumped together with the members of Rwanyarare's interest or that they do not fall under the Constitution in Article 50(2) of the Constitution is to belittle the foresight of the framers of the constitution.

In my view of the legal issues raised by Mr. Byenkya's submission will still discuss the rest of the questions put. I think, however, that I have already discussed question number 2, namely, that the action as brought in application No. 70 of 2002 cannot be based on Article 22(1) of the constitution. The answer to question, (b) is in the negative.
Question (c) is " whether Article 50(2) of the Constitution authorizes the filling of Constitutional actions on grounds of "public interest" by private persons or is confined to the bringing of ordinary representative actions to stop actual violations of the human rights of specific persons or groups.

I would be repeating myself if I stated again that representative actions are not restricted to actions brought by persons or groups who have similar interest in the actions i.e." numerous persons having the same interest in one suit" (order 1 rule 8): There are representative actions which can be filed by public interest litigation persons or group of persons such as TEAN. These are the persons mentioned in (d) of section 38 of the South African Constitution (and Article 50(2) of our Constitution), as "any one acting in the public interest".

I have already stated that Article 50(2) of the Constitution cannot be said not to envisage the persons and groups of persons mentioned in subsection (d) of section 38 of the South African Constitution and therefore (d) can read in our Article 50(2) of the Constitution. I have given the example of the beneficiaries of (d) of the South African Constitution and said that as long as they exist in Uganda, they cannot be said to be ignored by our Constitution. I see such beneficiaries as the silent sufferers of violation of human rights. They are deprived, incapable who require volunteer public interest litigating groups. The question of who would pay the costs raised by the Constitutional Court in the Rwanyarare petition does not arise because of the reasons I have given in support of their inability and inaccessibility to answer summons were such summons served in the manner provided by Order 1 rule 8 of the Civil Procedure Rules. The litigating public interest persons or groups would meet the costs and the litigating public interest persons or groups would meet other expenses of actions on their behalf. I would go further and say that Article 50(2) of the Constitution authorized both public interest litigation by private persons, as it does authorize litigation through ordinary representative actions to stop actual violations of the human rights of specific persons and groups. If for instance an individual subjects a person to torture, cruel, inhuman or degrading treatment or punishment, such persons would have recourse to court under Article 50(2) of the constitution.

The 4th question is whether Article 50(2) of the Constitution authorizes the filling of 'Class action' as a form of representative action or is confined only to representation of specific and identifiable existing persons or groups." I know I would be repeating myself. Suffice it to say that as long as that class of specific and identifiable existing persons or groups does not contain the group of children, illiterates, the poor and the deprived, then my answer would be that the question is unfair and inconsiderate. It all depends therefore on what one means by specific and identifiable existing persons or groups'. I should again quote order 1 rule 8 of the civil Procedure Rules to drive home my argument.

The rule provides that:
" *Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct."*

There are crucial expressions in this order, which determine answers to the question put. Such expressions are:

- Numerous persons having the same interest

- May sue or be sued or may defend in such suit.

- Personal service or by public advertisement.

It is inevitable that I refer once again to the petition of ***Dr. James Rwanyarare & another –vs.-Attorney General*** (Petition No.11 of 1997). Dr. Rwanyarare & another in that petition had similar interest with fellow U.P.C. members. They could therefore sue on behalf of the fellow members of UPC, and naturally and logically order 1 rule 8 should apply. The same should apply, say to members of a football club, of a golf club or of a trade union. But the question is can the rule apply to groups of people who, because of inability or incapability, engendered by say, ignorance, poverty, illiteracy, infancy etc., cannot sue or be sued or defend a suit for the simple reasons that apart from being indigent, they cannot even identify their rights or their violations. These are the groups who badly need the services of the "public interest groups" like TEAN to bring action on their behalf under what paragraph 38 (d) of the South African Constitution is referred to as "public interest persons," but who have no similar interest in the action with those they represent.

It cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the Constitution does not expressly mention them and therefore they must be excluded from the Constitutional provision regarding recourse to remedies when their rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal address nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; yet they exist and can be identified only as a group or groups. The constitution cannot escape from authorizing representative action, without interest

sharing with those who represent them. That is why article 273 of the Constitution becomes handy because the rules of procedure are, in this respect, rendered in operable by the Constitution.

Needless to say that it would be illogical to argue that actions brought by such persons or groups of persons for the redress of the violation of their inalienable rights should be governed by the procedure under order 1 rule8 of the Civil Procedure Rules. The procedure cannot govern them simply because they do not share the concerns of violating their rights with those who bring action on their behalf. The 5th question which is:
"Whether Article 50(2) of the Constitution, which permits any person or organization to bring an action as the representative of other persons or groups for violation of their human rights can be interpreted to excuse compliance with the procedural requirements applicable to representative actions generally, such as the necessity to seek leave of court prior to filling the action."

This question must have been motivated by the illusions that representative actions must be brought only be persons and groups of persons who share the same interest in the action (i.e. suit) with the persons and the groups they represent in the action. Once it is clear, and I hope now it is, that there exists that group of persons who need not necessarily have the same interests with those who institute actions on their behalf, then question number 5 of this application does not arise.
Before I take leave of this application I feel obliged to comment on some of the applicant's sought after relief in Application No.70 of 2002. Prayer number 3, for instance, seeks "An order that the Respondent place on packets of cigarettes, its advertising and marketing events, warning labels and signage, with such wording, graphics, size and replacement as in the court's determination, are sufficient to fully and adequately inform consumers of its cigarettes of the full risks to their health."

With due respect, this prayer is asking too much from the court. The court cannot determine fully and sufficiently the kind of information to be included in the desired labels and publication. It simply does not have the expertise to do so; and in fact, the way the prayer is couched, it imposes on the court a duty it cannot discharge. It was up to the applicant to present the court with the information it required for the court to consider. The application is unclear and embarrassingly ambiguous and could not pass the test. But I hasten to add such consideration would not fall under the preview of application number 27 of 2003. It would have been a consideration during the hearing of application number 70 of 2002 which I have, in any event, struck out with costs to the applicant in the present application.

J.H.NTABGOBA
PRINCIPAL JUDGE
16/04/2003
The ruling is read in presence of Mr. Karugaba and Mr. Byenkya. Also present is Mr. Richard Wejuri, Company Secretary of BAT and Mr. Edward Kangaho, Court Clerk.