

# Formula for plain (bland) packaging

 ByLize Mills

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As of 6 December this year you will no longer see a nurturing mother feeding her happy baby a bottle of formula milk as an advertisement in any newspaper, magazine, on a website or on television. In fact, you will not see the names of any brand or logos of infant formula, follow-up formula or powdered milks, or feeding bottles, teats and feeding cups for infants being promoted anywhere.



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You will still see the names on the products as you are standing in front of the shelf in the supermarket and wondering which product is the best option for your little angel. You will have to try and make sense of it all on your own, however, since you will not be allowed to ask your health care practitioner for advice on your options. The manufacturers of these products will also not be allowed to give you any information or advice on infant nutrition.

On 6 December 2013, regulation 7 of Regulations R991, relating to foodstuffs for infants and young children will come into operation. Still yet to enter into force, however, are regulations 2,3,4,5 and 6 of R991, scheduled to happen on 6 December 2014. After this date, you will no longer see any pictures on any infant and follow-up formula, infant or follow-up formula for special dietary or medical purposes; liquid milks, powdered milks, modified powdered milks, or powdered drinks marketed or otherwise represented as suitable for infants or young children; feeding bottles, teats and feeding cups with spouts, straws or teats or complementary foods (the "designated products"). No smiling faces, no flowers, no trucks, trains or cars, no shining sun. At least there may be a picture of the strawberry on the strawberry juice. And of course a picture of how you are supposed to prepare the porridge/milk/pureed broccoli.

## Sounds familiar?

Where have you heard about something like this before, I hear you ask? Plain packaging for tobacco products of course, and maybe for alcoholic beverages too. You can see the clear link with baby food, can't you?

On 6 December 2012 the South African Minister of Health, Dr Aaron Motsoaledi, published regulations in terms of s15(1) of the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972. In terms of these regulations a number of restrictions are placed on the labelling, advertisement and promotion of the designated products. The final version of these regulations followed a previous draft published for public comment in March 2012 and contains somewhat less restrictive provisions than its original predecessor. The purpose of these regulations, or so it has been explained by the Department of Health, is to promote breastfeeding. At the time of the publication of the regulations in December 2012, the Department of Health's director for nutrition explained that exclusive breastfeeding rates in South Africa is at an all-time low of 8% and infant mortality rates stand at 40 per 1,000 live births. As a result, "South Africa needs to put into place a comprehensive legal framework that protects parents and health professionals from aggressive or inappropriate marketing of breast milk substitutes". It can therefore be assumed that regulations R991 form part of this "legal framework that protects" consumers.

## Dispensing milk of human kindness

Regulation 7 of R991 prohibits promotional practices in respect of infant and follow-up formula, and other powdered milks or powdered drinks marketed or otherwise represented as suitable for infants or young children; feeding bottles, teats and feeding cups with spouts, straws or teats; or any other products that the minister may publish by notice in the Gazette. Despite the fact that regulation 1 provides a definition of what it means to "promote", regulation 7(2) describes the list of prohibited practices to include, inter alia, sale devices such as rebates, benefits in kind, kickbacks or any other pecuniary advantages, special displays to promote sales, advertisements about the availability of the product at a specific retail outlet and the price of the product, tie-in sales, discounts in any form, competitions with prizes, or any other incentives and gifts. The list goes on: no "direct or indirect contact between company personnel and members of the public in furtherance of or for the purpose of promoting the business of the company with regard to the products referred to in sub-regulation 7(1)" and for purposes of these regulations "indirect contact" specifically includes internet sites hosted on behalf of a South African entity or an entity that does business in South Africa, television and radio, telephone or internet help lines and mother and baby clubs but excludes contact in regards to product quality complaints and adverse events; no distribution of any information or educational material on the nutrition or feeding of infants and young children; no promotional items such as stationery, T-shirts or other items of clothing etc that refer to the designated products; no exhibition of the brand name of a designated product when used at any event for the general public; and no advertisements anywhere. Regulation 7(3) also explicitly prohibits the sale, promotion or advertisement of the listed products, as well as that of complementary foods, through health care personnel or health establishments. An institutional pharmacy in a private health establishment may, however, sell a designated product but has to refrain from promoting or advertising it.

Regulation 7(4) prohibits any manufacturer, distributor, retailer, importer or person on behalf of such, from producing or distributing any educational material on infant and young child feeding that promotes any of the identified products. Regulation 7(5) extends even further by prohibiting any of the above-mentioned persons from producing, distributing or presenting educational information relating to infant and young child nutrition.

Other strict requirements regarding the labelling and packaging of the designated products are found in regulations 2 to 6. These include the prohibition of any graphic representation, apart from those necessary to show the correct method of preparing and using the product, and pictures of the ingredient or prepared product. The company logo and brand name will be permitted, provided that they do not contain a picture of an infant, young child or other humanised figure. The label of the relevant products may also not refer to, or promote or advertise any other designated product. Any incentive, enticement or invitation of any nature, which might encourage consumers to make contact with the manufacturer or distributor of a designated product which might result in the sale or the promotion of a designated product for infants or young children, is proscribed from appearing on the label or in the marketing of such a product. Apart from other strict instructions relating to the appearance and wording of the labelling, the regulations also contain a mandatory provision that the words "[t]his product shall only be used on the advice of a health professional" shall appear on the front main panel of the label of a designated product. This is followed by an instruction that a prominent statement printed in bold letters of at least 3mm in height stating "USE UNDER MEDICAL SUPERVISION" shall also appear on the label. Regulation 4(3)(b) prohibits the use of expressions or names that may be understood to identify the product as suitable to feed infants. Such phrases include the terms "first growth", "first food", "from the start" and "best start in life". In terms of regulation 17 all non-compliant products must be removed from the market by 12 December 2015.

## Super trademarks

It is apparent that in the estimation of the Department of Health trademarks are a mighty force, and a malevolent one at that. They have immense powers. They can cause people to smoke and drink and bring about cancer and alcoholism. They can even wean babies off mother's milk. Regulation R991 amounts to a declaration of war against baby food trademarks.

Apart from the restrictions which these regulations place on the freedom of commercial speech and consumers' rights, R991 prohibit a brand name or company logo from including a picture of an infant, young child or a humanised figure on the packaging of the designated products. This means that a company such as Gerber, producer of a number of baby food products, may not use their logo portraying the picture of a baby's face, in South Africa. Products such as First Growth Milk may no longer use this name for their brand of milk in South Africa since regulation 4(3)(b) prohibits the use of expressions or names that may be understood to identify the product as suitable to feed infants.

Professor Owen Dean in his paper entitled, "Deprivation of trade marks through state interference in their usage" and his article on the IPStell blog entitled "Brand genocide" makes a compelling argument that the proposed ban of the use of brand logos on cigarette packaging, thus only allowing brand names or product names to be depicted in a plain manner, constitutes the deprivation of property. Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Expropriation of property is allowed in terms of s 25(2) but only in terms of law of general application and only if that expropriation is for a public purpose or in the public interest; and furthermore, only if compensation has been paid, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. Dean argues that deprivation of trademarks will take place if the state prevents their use and thereby destroys them. This includes any "interference with the use, enjoyment or exploitation of private property." When registered trademarks are not used for a period of five years or longer, they become liable to cancellation on the grounds of non-use and thus can be destroyed or obliterated. This then, ultimately, leads to the deprivation of the intellectual property held by the owners of the trademarks or brand names. Legislation to this effect offends against the Constitution.

The same argument can also be made in respect of regulations R991: these provisions too deprive the owners of registered trademarks such as Parmalat of their property since they may no longer use First Growth as one of their brands in this country. It is submitted that this arbitrary deprivation of property cannot be allowed. Should the Department of Health choose to expropriate the trademarks held by the manufacturers of infant and follow-up formula, complementary food and liquid or powdered milks marketed as suitable for infants or young children, it will have to prove that it is in the public interest to do so and compensate the owners accordingly. This will, in effect, mean that the Department of Health will have to prove that the use of pictures of children or other humanised figures, and the use of phrases such as "first food" or "good start" directly contributes to these products supplanting breastfeeding. Will they be able to show that trademarks weave their evil magic in this regard?

## Conclusion

The promotion of breastfeeding is, for a variety of reasons, a vital and laudable goal to pursue. The practice of this very natural and basic method of nursing holds health benefits for both mother and child. Consequently, the minister and the Department of Health are indeed attempting to improve public health in South Africa. Nonetheless, the attempt to do so by means of regulations R991 can be criticised for a number of reasons, some of which have been explained above.

The right to freedom of speech, which includes the right to receive and impart information, cannot simply be disregarded in the name of the promotion of healthier choices. The prohibition of all forms of advertising, including the publication of the price of the list of designated products, and especially products which are used for children older than six months, is an overbroad and disproportionate method to promote breastfeeding. So too is the prohibition which is placed on the manufacturers of these products to, in fact, promote breastfeeding by prohibiting them from providing educational information relating to infant and young child nutrition.

The effect which these prohibitions will have on the consumers' right to information regarding products which most parents

will have to make use of at some point during their children's lives is excessive and unwarranted. These products should be appropriately marketed and distributed in ways that do not interfere with breastfeeding. Not everyone can breastfeed. Not everyone may choose to breastfeed. In some instances it will even be in the best interests of a child if she is not breastfed. If consumers are provided with as much information as possible regarding the benefits of breastfeeding and if they are not misled by dishonest claims by marketers of the designated products, consumers should be trusted to make informed decisions. It is submitted that providing women with the opportunities and facilities to breastfeed, also in public and especially when she returns to employment, will be a more positive and effective way to promote breastfeeding.

A brazen disregard of the right to freedom of choice, the right to commercial speech and the right to intellectual property cannot be accepted in a democratic and free society. Finding an appropriate balance between the best interests of the child, her health and these freedoms is by no means an easy task and it is not suggested that regulations R991 should be dismissed in its entirety either. The underlying intention of the regulations must be pursued but it must be done in such a way that the means meets the requirements set by s 36 of the Constitution. The means to the end must be reasonable and proportionate. To place extensive advertising bans on consumer products, especially ones which are not inherently harmful, is not reasonable or proportionate and philosophically in conflict with the notion of a rational public which forms the foundation of respect for freedom of expression.

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