

The constitutionality of Section 109 is problematic and in our respectful opinion infringes upon a person's right to a fair trial. Our respectful argument in this regard is as follows:

At the outset we want to emphasize that there is no clear separation of powers from a legal administrative perspective as the section places administrative powers in the hands of the Regulator which are judicial in nature.

This is apparent in section 109 due to the following wording:

In section 109(2) (C) the Regulator may issue a notice wherein a penalty clause is set out as follows:

“Must : specify the amount of the administrative fine payable, which amount may, subject to subsection (10), not exceed R10 million;”

Clearly in this manner the regulator has the power to decide on the punishment that the infringer must be subjected to for the commission of his/her offence. This form of punishment is clearly limited to a fine not exceeding 10 million Rand. The said infringer is given the option to agree with the punishment and elect to pay it and even make arrangements with the Regulator to pay such fine off. In this regard it is of importance to note that the limit of the said fine is numerically high if compared with the judiciary and in particular jurisdiction on sentence between Magistrates, Regional and High Court.

It is further of importance to note the fact that the wording of the section empowering the Regulator is clearly instructive in nature as the word “must” is used. The consequence of this is clearly allowing the Regulator to determine the amount of the punishment which is synonymous with a Judge or Magistrate imposing sentence.

Besides this problem what is unconstitutional in law in our respective opinion is the fact that the notice envisaged in the section 109(2) (d) (iii) also allows the infringer to elect to be tried in a criminal court which will lead according to the legislation, to a criminal prosecution.

elect to be tried in court on a charge of having committed the alleged offence referred to in terms of this Act;

And the anomaly that is now created is that a complaint is to be laid with the South Africa Police Services. Such a complaint has to be assessed by the National Prosecution Authority before the infringer appears in a court within the republic of South Africa.

Now the question that arises is what if the National Prosecution Authority does not agree with the Regulator's sentencing (imposed fine) and an even further anomaly; what if the National Prosecution Authority does not agree with the Regulator that there is an infringement to start with or a prima facie case to initiate prosecution in the first place?

Now do we have a fair trial? This anomaly arises because of the fact that the Regulator by law **must** make a guilty finding and make a finding as to the **sentencing or penalty (fine)**. So when the infringer appears in court he has already been found guilty and sentence has been imposed by the Regulator. Does this not infringe on his right to a fair trial? Furthermore and more anomalous is the fact that a presiding Magistrate now has the dilemma as to whether or not he/she is bound by the Regulator's decision pertaining to the guilty finding and sentence. What if the infringer is not found guilty beyond reasonable doubt or if the Magistrate imposes a different fine (amount)? In this scenario which decision is to take preference the Regulator's or Magistrates? Which decision will be enforceable?

Of further concern is section 109(5) as this give the Regulator the power to make the fine a civil judgment and allow the Regulator merely to go to the clerk of the Civil Court and note the judgment and execute against the infringer's property in order to recover the fine. Now in this scenario does the infringer have the right of appeal as



he would in terms of the Magistrate Court rules? It appears from section 109 that the infringer only has the right to challenge the Regulator's ruling in a criminal court.

The irregular scenario is created that if the infringer decides or elects to have the matter decided in a criminal court in terms of section 109(2) (d) (iii), the Regulator may still go ahead in terms of section 109(5) and obtain a civil judgment against the infringer and execute in order to recover the imposed fine which now becomes a liquid debt. Does this mean that the Regulator can attach goods while criminal proceedings are still underway? This appears to be what the section is implying and if so a gross violation to the infringer's right to a fair trial.

We thank you for this opportunity to bring this to your attention.