

CONTRABAND POLICING IN SOUTH AFRICA: AN EVALUATIVE STUDY

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ABSTRACT

South Africa forms part of the global village and is not indemnified against the contraband menace. These substandard goods pose physical and health risks to consumers. Despite comprehensive legislation that prohibits the trade in contraband goods, the crime still continues. This study explored ways in which policing of contraband goods is conducted in South Africa and the capacity of law enforcement agencies to police this crime amid other serious crimes ravaging the country. A qualitative research design was adopted in this study. A literature review, interviews and observations were conducted to provide an aerial view of this problem. The interview schedule with open-ended questions was used, which allowed participants to explain their viewpoints on the policing of contraband goods. Data was collected from members of the Specialised Commercial Crime Unit, the South African Police Service's Crime Prevention Unit, the Department of Trade and Industry, brand holders, attorneys and prosecutors who prosecute contraband crimes. The involvement of organised criminals exacerbates the problem as indications are that corruption is rampant in law enforcement agencies and government. Corrupt law enforcement officials and senior government officials allow contraband trade to thrive. A shortage of skilled police members and a lack of training are identified as some of

the problems. The findings of this study can serve as guidelines for preventative and reactive response mechanisms and can suggest ways of improving efficiency and effectiveness in policing contraband goods.

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INTRODUCTION

South Africa is awash with contraband goods. It costs the country a great deal of money to dispose of them safely (South African Institute of Intellectual Property Law, 2015). The streets and shops in the country's biggest cities are inundated with traders who, daily, sell contraband goods to knowing and unsuspecting consumers, despite the fact that trading in contraband goods is an intellectual property crime. Contraband dealing is a crime that, among others, infringes on intellectual property and it is consumer fraud as some of the goods are smuggled into the country in violation of the laws. Some of the goods are registered to be sold only in specific markets and may not be suitable for the other markets into which they were smuggled. Contraband dealing takes place in both branded and generic products (Chorev, 2015: 171)The crime hampers innovation and creativity in all nations (Pascu, Nedea & Milea, 2012: 150). Goods that are protected by intellectual property rights enjoy a domination status conferred by the state to prevent exploitation by unscrupulous people who would want to steal creative and innovative products of others (Staake & Fleisch, 2008:33). By law, only legitimate manufacturers should produce and distribute goods, without having to compete with illegitimate dealers in the market. It is the duty of law enforcement officials in every country to enforce the law and prevent crime. In South Africa, the South African Police Service (SAPS) is responsible for enforcing the law and policing crime that occurs within the borders of the country.

Contraband goods manufacturers are located in countries around the world. Often, the manufacturers of contraband goods and dealers form part of organised criminal groupings and, to make matters worse, they make use of unregulated and hazardous materials in producing such goods. Contraband goods are often an imitation of genuine goods that are smuggled into the country in dubious ways by the criminals without the permission of the owners of original goods (Beauchamp, 1998:278).

Consumer fraud involves the use of falsehood to misrepresent facts to deceive consumers. Production of contraband goods that resemble genuine goods, and the selling of such goods purported to be what they are not, with the ultimate goal of making an exorbitant profit, amounts to consumer fraud (Treadwell, 2011:176). Criminals who reproduce goods that are owned by other people, earn an unlawful income because they had not spent money

on conducting research, developing the goods and procuring quality materials. A study conducted by BASCAP (2009:i) on the dangers and extent of contrabands and pirated goods, revealed the grievous losses that contraband goods cause governments and the lawful owners of genuine goods to suffer. Contraband goods stall economic growth as taxes are not paid to the tax collector, the South African Revenue Services in the case of South Africa. Jobs are lost as criminals do not employ many people, nor do they have research and development teams working in their organisations as opposed to the genuine goods industry. Innovation suffers because contraband products discourage creativity and slow sector or industry expansions, which lead to mass job creation. Consumers across the world may suffer injuries. Finally, the legitimate owners of genuine goods become reluctant to invest in expansion drives and increase their presence in businesses.

Contraband goods have not been tested by authoritative and accredited institutions to determine if the materials used in producing them may be harmful to people and environment. Even the consumers of contraband goods find it difficult, if not impossible, to distinguish between genuine and contraband products without carrying out tests (Bian & Veloutsou, 2007: 212). Owing to this, criminals leverage on this lag and continue to sell these goods on the street and in shops to consumers in many countries, including South Africa.

Despite a considerable body of literature on the dangers that contraband products and goods piracy pose to people both nationally and internationally, no research study has yet been conducted on the policing of contraband goods in South Africa and on the African continent. It is against this background that the article will highlight the extent of the problem in South Africa from a policing perspective and the issues which complicate the policing of it. Furthermore, this study will suggest guidelines for the policing of such goods in order to suffocate the trade.

Definition of Concepts

- **Counterfeit** is the unlawful and intentional misrepresentation of goods that effectually cause actual or potential prejudice to another (Treadwell, 2011:176). This is the imitation of genuine goods by the counterfeiter without permission of the genuine goods holder and at times passing them on as genuine.
- **Copyright infringement** is characterised by unauthorised duplication of copyrighted content that is passed off as the genuine item. Breaches of trademark and copyright laws overlap and the concepts are used synonymously in some countries' jurisdiction (Staake & Fleisch, 2008:17, WIPO, 2014:2).
- **Contraband** is goods that are against the law of trade and may not be imported or exported. These goods are normally owned but are liable to be seized because they are used in committing an unlawful act and have been acquired illegally (Ferguson & Schneider, 2015:269). They range from goods that are smuggled, stolen,

violating intellectual property regime and/or goods, knowing that participating in their trade is an offence in itself, called fencing.

- **Trademark** is a distinctive sign and/or a mark that identifies the goods that are owned by an enterprise (Ward, 2011:49). It is a symbol or device used to identify and distinguish goods manufactured, owned and registered by different businesses.

THE PURPOSE OF THE RESEARCH

The main purpose of this research is to evaluate the policing of contraband in South Africa due to the increase in dealing in contraband goods and its financial implications on the economic wellbeing of the country. From the onset, it has to be acknowledged that the upsurge in contraband is not only a challenge in South Africa, but a universal challenge, as asserted by Basu and Lee (2015:39); the European Commission (2014:7); and the OECD (1998:4). Since dealing in contraband is a financial crime that is growing significantly all over the world, article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, requires countries to provide for criminal procedure and penalties for dealing in contraband, and recommends that sanctions should include imprisonment or monetary fines that are sufficient to deter perpetrators from infringement.

The extent and magnitude of contraband could also be attributed to its ability to generate huge financial benefits for the dealers. Heinonen and Wilson (2012:273) and Zibas (2012:22) state that it is difficult to resist committing this crime due to its huge annual turnover, and Bikoff, Heasley, Sherman and Stipelman (2015:246) indicate that, in 2015, contraband trade accounted for 10% of the global trade. This explains why some organised crime syndicates embark on the trade because they perceive it as a lucrative business (Rojek, 2016:1). Policing therefore becomes more difficult, largely because of the money involved in the trade that enables dealers to be innovative in smuggling contraband into the country to sell to consumers. Contraband decreases the status of genuine products and undermines the legitimate business of brand holders (Basu & Lee, 2015:40), ultimately affecting consumers' confidence in legitimate goods and damaging the reputation of legitimate companies. It also has a ripple effect in terms of the loss of revenues, increased costs associated with the containment of infringement as well as threatening job security and consumers' health and safety (Whitelaw, Smith & Hansen, 2012:418).

Mackenzie and Hamilton-Smith (2011:20) and Heinonen and Wilson (2012:274) state that the proactive policing of contraband relies more on the positive identification of the goods as being contraband goods. The effectiveness of this approach is negatively affected by concealment of goods' provenance and the high technology used in production which minimises their detectability by law enforcement officers. The CEPOL (2015:14) emphasises the need for and importance of a multi-agency approach and use of intelligence operatives to deal with contraband problems effectively and efficiently. The use of informants and community participation in policing would assist to lessen the crime. According to

Newham and Faull (2011:47), this can also be supplemented by shared policing duties between public, community and private law enforcement agencies in the identification and detection of contraband goods, considering that private investigators are employed by brand holders and do have the resources to test whether the goods are contraband or genuine.

In South Africa, contraband dealing is a punishable offence and genuine goods holders are empowered by legislation such as the Counterfeit Goods Act 37 of 1997, the Copyright Act 98 of 1978, the Trademarks Act 194 of 1993 and the Merchandise Marks Act 17 of 1941, to institute either civil and/or criminal proceedings in this matter. The advantage of civil proceedings to goods owners is the higher level of compensation they get on successful prosecution of cases of contraband dealing (Thenga, 2018: 108). Added to this is the low level of the burden of proof in civil cases that is based on a balance of probability as opposed to proof beyond reasonable doubt in criminal cases. This study focuses on the policing of contraband in South Africa and analyses the competences and aptitudes of the SAPS and other law enforcement agencies to police it.

MAGNITUDE AND DRIVERS OF CONTRABAND

In 2008, contraband dealing business in the globe stood at around 10% of the world's trade, with the industry estimated to be making about \$600 billion annually (Lewis, 2009:47). The amount involved in contraband has increased dramatically, as can be deduced from Moneyweb (2011:1), who indicates that contraband seizures globally increased by 46% annually from 2011. In the African continent, contrabands medicines cause the death of over 100 000 people annually (Bikoff, Heasley, Sherman & Stipelman, 2015: 246).

Depending on the market and economic conditions in a country, contraband goods are commonly sold to the public at a discounted price, while in some instances, they are sold at the same price as the genuine goods, advertently hiding the fact that goods are contraband in order to hide their true state (Chorev, 2015:163). Contraband dealers turn to target young people due to their gullibility and desire to purchase fashionable goods as well as contraband goods being a lucrative market (Spoor & Fisher, 2013:3), but this target becomes broader due to the variety of goods that are contraband and the demand for such goods. The African continent becomes a target as it has the largest concentration of young people in the world (UN, 2017:1). In addition, South Africa has a lucrative market with a booming business in contraband goods. The good quality of some contraband goods appeals to most people, convincing them that contraband are genuine goods that meet the standards for a market and worth the amount of money they pay (Bian & Veloutsou, 2007:212 & 214).

Technological innovation plays a big role in the spread of contraband by facilitating their distribution and sales, and concealing their status as well as their illicit operations. This is amplified by the use of internet and social media to spread the illicit business all over the world, which also makes it easier to manufacture goods in one geographic location and distribute them

all over the world (The Patent Office, 2006:2). This situation is exacerbated by the significantly low risk of arresting contraband dealers and sellers, given the fact that in many developing countries the police tend not to consider contraband dealing a top-priority crime and the high legal cost incurred by brand owners in the prosecution of contraband dealing. Moreover, the outcomes of court processes are uncertain, and enforcement of court orders is tedious and costly (Deveymaeker, 2015:34). Mohamed and Wahid (2014:252) emphasise that, even though contraband goods have dire consequences for the economic wellbeing of the affected countries, penalties in the majority of countries as taxes were not paid when they were smuggled into the country. Moreover, penalties in most countries are less severe in comparison to other related crimes.

Poor management of ports of entry are facilitators of contrabands (Cabezas, 2010: 181). For instance, in 2008, OR Tambo International Airport was identified as a major destination of inbound contraband goods (SAFACT, 2009:2), resulting in South Africa being rated number 16 out of the 20 countries that lose up to R21 million annually on intellectual property violations (Spoor & Fisher, 2008).

In South Africa, contraband goods are sold in busy streets and transportation hubs. Price-quality inference is another factor that lures consumers into buying contraband goods. This was confirmed by the study conducted in South Africa in 2016 by Chuchu, Chinomona and Pamacheche (2016:328). The higher the price discount, the more consumers are enticed into buying contraband (Penz, Schlehelmilch & Stottinger, 2009:75). Despite the fact that, in some instances, consumers purchase the goods not knowing that they are contraband goods, it still constitutes product fraud, as prescribed by the Consumer Protection Act 68 of 2008.

THE IMPACT OF CONTRABAND

In addition to the fact that dealing in contraband constitutes a crime in South Africa and many other countries, it also impacts negatively on the running of businesses and the tax revenue of the affected countries, and has a severely negative impact on international trade and the global economy (Pascu, Nedeia & Milea, 2012: 148). Businesses lose revenue, which has negative consequences for business sustainability, as it ultimately hampers new product development owing to a lack of money for product research and development. These negative factors lead to disinvestment and/or capital flight (Ampratwum, 2009:74). In a nutshell, contraband dealing causes businesses to lose money due to lost sales, lower profits, less royalties, and loss of trust in the brand. Eventually, businesses reduce the financial loss by cutting jobs and reducing investment, ultimately leading to lower economic growth for a country as there would not be any tax contribution.

The financial cost to businesses and the country of dealing with contraband is huge, because it ranges from the cost involved in its policing to tax evasion. In terms of policing, the government might have to increase the

deployment of police officers, which, according to Cohen (2000:272), might warrant increasing the policing budget by hiring additional police officers dedicated to dealing with this crime. In terms of revenues, governments also lose revenue that could have been collected from legitimate businesses (BASCAP, 2009:10). Ultimately, contraband trade stifles the sale of the genuine and legitimate goods manufactured in South Africa and those that are legally imported from outside the country (Dlabay & Scott, 2011:200).

Contraband goods damage the brand name of genuine goods, because the dealers deceive the buyers on the status of the goods that they are buying, thus causing them to second-guess the status of that brand every time they consider purchasing it. Ultimately, that affects the relationship that people have with the legal good (De Chermatony, McDonald & Wallace, 2011:397), which is in turn exacerbated by the fact that the expertise and the sophistication with which contraband are produced, enhance their ability to resemble genuine goods, making it difficult if not impossible for people to distinguish between them. Most contraband dealers use sophisticated skills and expertise to make contraband goods look like genuine goods or products (Von Lampe, 2011:158). That places an extra burden on businesses to guard against the risk of being wrongly litigated due to harmful products sold by them that consumers mistake for genuine brands (Heinonen & Wilson, 2012: 273).

Legislative framework and the policing of contrabands

South Africa has several pieces of legislation that criminalise dealing in contraband and intellectual property violations, that are grounded in the Constitution, and which protect private property (South Africa, 1996). Legislation is manifested in various acts, such as the Trademarks Act 194 of 1993 that criminalises trademark infringements; the Tobacco Product Control Act 83 of 1993 that criminalises deceptive or misleading packaging on tobacco products and physical goods that do not meet the stipulated specifications; and the Counterfeit Goods Act 37 of 1997, which criminalises counterfeiting and contraband dealing in South Africa and empowers the police to arrest and facilitate the prosecution of infringers. The Copyright Act 98 of 1978 and Trademarks Act 194 of 1993 punish goods piracy and the Customs and Excise Act 91 of 1964 empowers the customs officers to detain any imported goods into South Africa to ascertain goods that are counterfeit (in terms of section 15 of the Counterfeit Act) and those that infringe on copyright in terms of section 113A of the Copyright Act. In an attempt to protect and enforce intellectual property rights, it provides for both civil and criminal remedies against offenders. Criminal proceedings are preferred in deliberate infringements or infringements for commercial purpose that harm brand holders' products (Thenga, 2018:83). Many of the contraband products bear famous and well-known brand names, which violate both the Trademarks Act and the Counterfeit Goods Act.

Strategies that are designed to deal with contraband goods in South Africa are mostly directed towards arresting the sellers of contraband goods and not necessarily contraband dealers and producers. Therefore, the enforcement does not deter the suppliers of contraband goods (WIPO, 2009:19).

An orthodox policing approach in the policing of contraband goods is not effective due to the complex and multidimensional nature of this crime. The internationalisation of this crime, its magnitude and the sophistication with which it is committed, renders it impossible for any business to address the problem on its own (Blackstone & Hakim, 2013:157). Currently, there are fragmented law enforcement agencies, such as the border police and Specialised Commercial Crime Unit of the South African Police Service, customs and excise officials from the South African Revenue Service, and officials from the Department of Trade and Industry. The Specialised Commercial Crime Unit and the Department of Trade and Industry officials police contraband goods that have already entered the country through the borders and are sold on the open market (Thenga, 2018:84). The Specialised Commercial Crime Unit uses prosecution-guided investigation as opposed to prosecution-led investigation in this regard (South Africa, 2006:112).

Trademarks enable brand holders and producers to distinguish their goods from other competing goods (Welchy, 2010:361), and the police rely on these identifying characteristics to police and investigate infringements. They are then able to track where the goods originate from and locate the owners.

Over the last few decades, sales of contraband goods have increased astronomically in the world, including South Africa (Penz et al., 2009:89). This has stimulated private investigators of the brand owners to conduct surveillance that is succeeded by test purchases, where investigators masquerade as buyers in order to have evidence of contraband goods for court purposes. When they find evidence of violations, they contact the police or other competent law enforcement agencies to investigate.

These private investigators then provide the police with all the available information on the infringement so that a warrant of search may be sought, and prosecution proceedings initiated. If the brand owner believes that the goods may be hidden or destroyed by the suspect, he or she may apply for a preservation order to obtain and preserve evidence of contrabands so that they do not get destroyed and/or hidden away by the infringers. This order enables the police to safekeep the goods, pending the application of a warrant of search and seizure subsequently (Mogase, 2011:65).

Challenges in Policing Contraband Goods

According to Naude (2015:257), the police do not conduct spontaneous raids or sting operations in order to avoid litigations as they must be certain that a search and seizure warrant would have been issued for the raid. This poses a huge challenge to the police as they could be litigated and required

to pay a lot of money. In the 2014/2015 financial year, the pending civil claims against the SAPS stood at over R26 billion (Deveymaeker, 2015:29).

The SAPS has generally lost skilled members who could make a huge difference in reducing the crime rate (Mofokeng, 2012:71). This loss of expertise left the SAPS with few members in the SAPS to police contraband goods. This tends to be exacerbated by the failure of these officers to call the brand holders' experts to test and analyse the goods so that proof of contraband dealing can be produced in court (Thenga, 2018:87).

Many police members are not trained in the policing of contraband goods, except a few who are attached to the Specialised Commercial Crime Unit, some members of the Customs and Excise division and officials of the Department of Trade and Industry (Thenga, 2018:84). According to Nalla and Newham (2013:63), even the training that is offered to police officers is insufficient; moreover, the police are also poorly resourced. This overwhelms the police, and the fact that both the police and custom officials lack sufficient expertise to identify the intellectual property rights infringements, exacerbates the situation. According to Thenga (2018:86), the fact that the buying of contraband goods for personal use is not a crime in South Africa makes policing more challenging, as the police will have to prove that the person is dealing in contraband goods. This would necessitate the use of a multi-agency approach that could use collective resources and expertise to deal with contrabands. Currently, the existing law enforcement strategies do not bring together different parts of government, industry, policymakers, and the police to create a coordinated approach in dealing with contraband goods (The Patent Office, 2006:4). Most of these law enforcement agencies operate in isolation, with each looking to increase confiscation statistics and chasing to meet the target, other than arrest the dealers. That is compounded by the trust deficit between the police and the community where trust levels have seriously deteriorated, which leads to community apathy towards the police (Burger, 2011:13).

The policing of contraband is also made worse by uninformed consumers, modest resources of the country and porous borders between different African countries, which yields easy transit points (Ferguson & Schneider, 2015:270). Steinberg (2005:4) reveals that contraband goods are smuggled over land borders and also by means of light aircraft across neighbouring countries as this activity is not easily suspected by the police. This modus operandi requires high police intelligence for successful policing in this regard. That is why Ratcliffe (2003:2) encourages the use of intelligence as a tool in preventing and fighting crime, especially when one considers that the equipment used in pirating goods produce the exact duplicate of the product being pirated, making it difficult to notice the difference. Criminals also use reverse engineering, whereby they purchase and strip genuine items to study how they could be replicated (Naude, 2015:252). Once it is known how they are made, they replicate them in large quantities and sell them to distributors and consumers.

The situation is compounded by the need for expert testimony for successful adjudication in contraband cases. That should be preceded by the

testing of the contraband product, especially in cases where the accused disputes that the product is a contraband. This is difficult for police, as the police do not have expert testers within the organisation, and getting the services of brand holders' experts is a tedious and expensive process. However, without that expertise, it is difficult for the police to prove the goods are contraband and/or to prefer a charge of contraband dealing on a suspect (Bumatay, 2015:342). The problem of lenient sentences to perpetrators exacerbates the problem (Cabezas, 2010:180).

RESEARCH METHODOLOGY

Although this article deals with the policing of contraband goods in South Africa as a whole, the provinces Gauteng, Western Cape, Mpumalanga and KwaZulu-Natal were especially selected for this empirical research because they have task teams that are responsible for policing contraband and are attached to the Specialised Commercial Crime Units. Secondly, these four provinces have a higher incidence of contrabands in the country. The succeeding three research methods were used to collect data:

Purposive sampling – Purposive sampling was used to identify and interview investigators who investigate contraband. Gauteng had six investigators, all of whom were interviewed; Mpumalanga had three, all of whom were interviewed; KwaZulu-Natal had six, all of whom were interviewed; and the Western Cape had five, all of whom were interviewed. These investigators were selected for interviews based on their intimate knowledge and experience in the policing of contraband goods. Purposive sampling was also used to identify and interview prosecutors who prosecute counterfeit crimes. The interviewed prosecutors were as follows: two in the Western Cape, three in Mpumalanga, three in KwaZulu-Natal, and six in Gauteng.

Snowball sampling - Crime Prevention Unit members working at cluster police stations next to Specialised Commercial Crime Units who police contraband goods by arresting vendors trading in such goods and confiscating suspicious contraband goods, were selected through snowball sampling, and interviewed. The numbers interviewed are as follows: Gauteng 125, Mpumalanga 84, KwaZulu-Natal 68, and Western Cape 55.

Brand holders were identified through snowball sampling, as follows: seven in Gauteng, one in KwaZulu-Natal, and two in the Western Cape. Brand holders that were interviewed in these provinces also service other provinces in South Africa. Members of the Department of Trade and Industry who deal with contraband goods were interviewed as follows: four in Gauteng, one in Mpumalanga, two in KwaZulu-Natal and two in the Western Cape. Attorneys who, in most cases, legally represent accused in contraband dealing cases and others who are employed by brand owners or represent them in court cases, were interviewed as follows: ten in Gauteng, two in Mpumalanga, five in KwaZulu-Natal, and four in the Western Cape.

Observation - Observations were conducted on how participants (police officers and the Department of Trade and Industry officials) conduct themselves during the raids, and notes were taken. Permission was granted by the responsible employers that observation be conducted without those being observed knowing that they were being observed. This would ensure that they did not modify their practice due to being observed, as this could have led to inaccurate findings.

The research focused on the policing of contraband goods from 01 April 1998 to 31 March 2018, a period of 20 years. This period is significant as a result of its association with the start of the democratic dispensation in South Africa. It is characterised by increased trade with the international community and augmented migrant intake, as the country had opened its doors to the world.

FINDINGS

The literature, supported by most participants from the Specialised Commercial Crime Units, Crime Prevention Units and prosecutors, indicate that dealing in contraband is extremely lucrative for perpetrators. That is why there is constant innovation and increasing sophistication to selling contraband into South Africa. According to several participants, some of the illegal and prohibited goods are transported to and from neighbouring countries and cities with private jets, which law enforcement would not suspect. Other contraband goods are brought from various countries in different batches without identifiable marks, and once they are in the country, marks are affixed to the goods and they are sold by the victims in the markets.

Literature reveals that successful policing of prohibited goods requires a collaborative approach between the police and the private investigators hired by brand owners who test disputed contraband goods. Since private investigators working for brand owners are located in big and economically thriving cities such as Johannesburg, Pretoria, Durban, Bloemfontein, Mbombela, Polokwane, Kimberly, East London, Mahikeng, and Cape Town, they are not readily available in most areas to assist in the fight against prohibited goods. Even though brand owners explain that such a location is based on sound financial considerations for their business, it does hamper the effective and efficient policing of their goods.

Members of the Specialised Commercial Crime Units and Crime Prevention Units indicated that corruption is another factor that stifles an effective fight against contraband, because some police officials demand bribes and abdicate their responsibility of confiscating illegal goods and arresting the perpetrators. Members of the Specialised Commercial Crime Units stated that the effective policing of contraband is further hampered by the fact that not all owners of legitimate goods are available to confirm if alleged contraband goods are legitimate or not.

Members from Specialised Commercial Crime Units, Crime Prevention Units, the Department of Trade and Industry, Department of

Home Affairs and brand owners stated that arrested contraband goods sellers are represented by reputable lawyers and, if convicted, they mostly do not go to prison because they are given the option of paying a fine. This was emphasised by one member of the Crime Prevention Unit who stated that *“even the presiding officers do not impose sentences that are proportional to crimes committed”*.

Members of the Specialised Commercial Crime Units, prosecutors and attorneys of the owners of legitimate goods indicated the difficulty of identifying and arresting leaders of organised crime trading in prohibited goods because they live all over the world. This is coupled with the difficulty of producing sufficient evidence that directly links them to dealing in prohibited goods that are found elsewhere so that they could be successfully convicted, because they make use of other people to sell their consignments in various countries. They also mentioned the tedious process of extraditing those who are arrested for prosecution in South Africa, because not all countries have extradition treaties with South Africa.

In South Africa, most prohibited goods are sold from unmarked stalls and undemarcated areas and, according to members of the Specialised Commercial Crime Units, prosecutors, some members of the Crime Prevention Units and brand owners, this makes it difficult for the police to obtain a warrant of search and seizure, as the fixed physical address is a prerequisite for granting such a warrant. Pinpointing unmarked stalls could lead to search and seizure at the wrong place and expose the police to litigation.

According to some members of the Crime Prevention Units, Specialised Commercial Crime Units, Department of Trade and Industry, attorneys for brand owners and prosecutors, most prohibited goods sellers in South Africa are desperate economic migrants, who eventually become contraband vendors without renting a selling space. Instead, they sell in areas such as taxi ranks, bus ranks, open streets, streets opposite shops, and in trains and train stations to make a living. Members from the Specialised Commercial Crime Units, Crime Prevention Units, Department of Trade and Industry and brand owners are of the view that there is no synergy amongst the departments that are dealing in contraband in South Africa. Consequently, the major departments that deal with contraband, which are the Department of Trade and Industry, Customs and Excise and the SAPS, do not have a single system for statistics on contraband, piracy, counterfeiting and pirates. Moreover, these departments are characterised by the absence or poor use of information and communications technology, which severely hampers the fight against prohibited goods, because some contraband dealers use sophisticated information and communications technology to communicate and transact. Proper use of synergised information and communications technology by these departments is critical in the effective and efficient policing of contraband goods.

According to members of Crime Prevention Units and Specialised Commercial Crime Units, ordinary police officers at police stations are not trained in contraband goods policing. As a result, they do not know how to

police contraband goods or to properly process the reported cases of contraband goods. Some crime prevention members indicated that when confronted with this challenge, they opt not to vigorously pursue perpetrators of these crimes in order to avoid unnecessary litigation, should their actions be incorrect. They indicate that, in most instances, the police confiscate the contrabands from vendors and keep them at police stations and if they are not claimed back after a certain period, they are destroyed.

The researcher, supported by members of Crime Prevention Units and some members of Specialised Commercial Crime Units, observed that there are no guidelines on how to process contraband cases at police stations. This is exacerbated by the absence of a support structure, such as the contact details of members of the Specialised Commercial Crime Units, who should be contacted should the police station receive cases of dealing in contraband goods. Some members of the Specialised Commercial Crime Units and Crime Prevention Units attribute these challenges to the centralisation and compartmentalisation of the policing of contrabands.

Members of the Specialised Commercial Crime Units, Crime Prevention Units, the Department of Trade and Industry officials, brand holders, prosecutors and attorneys are of the view that corruption in the policing of contraband goods fuels criminality even at the ports of entry, where Customs and Excise officials and the police allow contraband goods to enter the country. That is then often sold by victims of human trafficking in the streets, shops, at flea markets and transport terminals. In some cases, unscrupulous police officials do not confiscate the contrabands but allow vendors to sell them and extort money from them regularly. If the goods were confiscated by other members, the dishonest members would resell back the goods to the contraband goods dealers and/or vendors at a lower price so that they can continue with business. According to members of the Crime Prevention Units, this puts the lives of committed, dedicated and honest police officers at risk as they constantly receive death threats from criminals who mastermind these sales and are suspected to be in cahoots with corrupt police officials. One of them emphasised this by stating that *“many police officials are themselves criminals”*. Corruption in this regard was further emphasised by members of the Specialised Commercial Crime Units, Crime Prevention Units, the Department of Trade and Industry officials, brand owners and their attorneys, who stated that some police officers tip off criminals regarding impending police operations, such as search and seizure of contraband goods. Moreover, sometimes, police members at ports of entry are instructed by senior officers of the police and Customs and Excise not to search specific consignments that are entering the country, which raises suspicion that some crime syndicates have links with senior officers and pay them bribes in exchange for protection so that their illegal businesses can be continued.

Members of Specialised Commercial Crime Units, some members of Crime Prevention Units and officials from the Department of Trade and Industry stated that some contraband goods highly resemble the legitimate goods due to using high-quality manufacturing equipment, thus making

identification by the police difficult if not impossible. Since the confiscated goods need to be tested, and some legitimate producers live in foreign countries, it is very expensive for them to avail their testers and equipment to conduct analysis and tests in South Africa. One Crime Prevention Unit member emphasised this by stating that “*a naked eye cannot see what contrabands are and what are not*”.

RECOMMENDATIONS

An effective and efficient contraband policing strategy needs to be backed up by an effective anti-corruption drive for the law enforcement agencies, including suppressing the desire to accept bribes. A dedicated Anti-Corruption Unit comprising police officials, Department of Home Affairs, Metro Police Departments and Municipality Police, Department of Trade and Industry officials as well as officials from Customs and Excise should be established at the ports of entry. Such units will conduct observations, surveillance monitoring and entrapments at these points of entry to increase the potential offender’s perceptions of being caught and punished. This could enhance the security at the ports of entry and ultimately minimise the inflow of contraband into the country.

This reactive measure should be supported by compulsory vetting and regular lifestyle audits of the officials of these departments who work at the ports of entry, to ensure that they are not contaminated. Regular lifestyle audits would deter the members from being susceptible to corrupt practices.

There is a need to deal with the current fragmented and uncoordinated approach among the Department of Trade and Industry, Customs and Excise and the SAPS in policing contraband through effective and efficient collaboration that should extend to the interface in their information and communications technology to capture and share the captured information on contraband and contrabands dealers. This should be augmented by joint operations conducted by the SAPS and Metropolitan and Municipality Police Departments and supported by expertise from brand holders to get rid of the contraband that are sold on many street corners. This will enable all entities to achieve their organisational objectives, as the SAPS will be reducing contraband, the Metropolitan and Municipality Police Departments will be effectively enforcing the municipal by-laws, and the brand holders will be protecting their businesses and brand reputation.

Policing contraband needs a specialised skills set and a dedicated Anti-Contraband Unit to deal with it in major cities in the country, namely Johannesburg, Pretoria, Durban, Bloemfontein, Mbombela, Polokwane, Kimberly, East London, Mahikeng, and Cape Town. This will deal with the source and feeder of contraband, because it is relatively easy to establish a legitimate business that could be used as a front to disguise the production of such goods in big cities due to the density of the population and industries. This will be difficult to achieve in small towns with few industrial areas and a strong societal bond. Focusing on big cities could go a long way in stabilising this rampant crime and gradually reducing it until it is eradicated.

The focus on big cities will not negatively affect the prevention, detection, investigation and prosecution of this crime in small towns, villages, informal settlements and rural areas because the SAPS operate nationally. However, they should develop standard operating procedures and guidelines on how the Anti-Contraband Unit should work with police stations in their respective provinces to deal with contraband. Having a specialised unit in big cities will also enable it to work with brand owners and other agencies such as the Department of Trade and Industry, Department of Home Affairs and Customs and Excise, who are largely found in big cities, as the capacity and expertise of brand owners are critical for dealing effectively with contraband. The proposed Anti-Contraband Unit should have members who specialise in online intelligence to monitor online advertisements and sales. This would enable this unit to detect and shut down such websites and arrest the alleged dealers, which is essential, as the contraband business modality is moving online where sellers order and purchase the goods.

Based on the variety and quantity of contraband goods in circulation, it will be unrealistic to expect the brand owners to have all the equipment and experts to test disputed goods at all times in all instances. The magnitude, harmfulness and the financial value of the contraband could be used as criteria to prioritise the goods that should be focused on.

This should not be construed as placing less value on other types of contraband, but should be understood as acknowledging the magnitude and complexity of what must be done and the capacity to do it thoroughly, procedurally and systematically to outwit the intelligence and sophistication used by criminals in contraband trade.

The selling of contraband from unmarked stalls in various cities and towns makes it difficult for the police to obtain a warrant of search and seizure, because the fixed physical address is a prerequisite for granting such a warrant. To obviate this, there will be a need for a collaborative approach between the proposed Anti-Contraband Unit, brand holders and the municipalities to deal with the challenges of unmarked stalls by ensuring that the municipalities mark stalls and enforce the by-laws. This will ensure that vendors operate from the designated areas and marked stalls, particularly for the prioritised goods of that time period. Adherence to this will minimise litigation against the police for searching, seizing and arresting the wrong people.

Contraband cannot be successfully policed by only focusing on the sellers and not dealing with or closing available markets. As the growth of trade in contraband is largely influenced by available markets, closing production sites will minimise the need to produce large quantities of contraband, as the sellers will have no market for their products. Criminalising the purchase and the possession of contraband goods, knowing it to be prohibited and illegal goods, could go a long way in minimising this crime, compared to the current situation where only sellers and dealers are arrested and prosecuted. The arrest and prosecution of

buyers of contraband, knowing it to be contraband, will consolidate the fight against it by incorporating the arrest and prosecution of producers and sellers, as well as the buyers and consumers of such products.

Dealers in contraband often make use of vulnerable, undocumented foreign nationals to sell goods for them. South Africa should enforce immigration laws to curb abusive practices by the dealers of contraband goods. Law enforcement agencies should arrest and deport people who have not entered the country legally. This will stop the abuse of vulnerable people by illicit dealers and will also put a stop to law enforcement officials who constantly demand bribes from perpetrators of crime.

CONCLUSION

In developing countries, including South Africa, contraband trade is a complex, multimillion-dollar crime that cannot be effectively policed by the SAPS alone. The police need the cooperation and expertise of all concerned, considering the sophistication and skills that are used to produce and smuggle contraband inter-countries. The intricate involvement of syndicates in the trade augments the problem for the police. The findings and the implementation of the recommendations of this article could contribute to the effective and efficient policing of contraband in South Africa, especially since current policing strategies used to deal with this crime are not producing the desired results. This is evidenced by the availability of contraband in most marketplaces across the country, and the impunity with which contraband goods are sold on most street corners in the country. This is despite contraband not having been approved to be sold to people. They have the potential to pose a threat to humans and negatively affect the environment. Policing of contraband cannot be conducted efficiently and effectively by a single entity without the involvement of intelligence and communities.

REFERENCES

- Ampratwum, E.F. (2009). Advance fee fraud '419' and investor confidence in the economics of sub-Saharan African. *Journal of Financial Crime*. Vol. 16(1): 67-79.
- Basu, M.M. & Lee, Y. (2015). Factors affecting intention to buy counterfeit products. Marketing Management Association. Springs 2015 Proceedings: 39-47.
- BASCAP. (2009). *The impact of counterfeiting on government and consumers*. London: Frontier Economics.
- Beauchamp, E.R. (1998). *Dimensions of contemporary Japan: A collection of Essays*. New York: Garland.
- Bian, X. & Veloutsou, C. (2007). Consumers' attitudes regarding non-deceptive counterfeit brands in the UK and China. *Journal of Brand Management*, Vol.14: 211-222.
- Bikoff, J.L., Heasley, D.K., Sherman, V. & Stipelman, J. (2015). Fake it 'till we make it: Regulating dangerous counterfeit goods. *Journal of International Property Law & Practice*, Vol. 10 (4): 246-254.

- Blackstone, E.A. & Hakim, S. (2013). Competition versus monopoly in the provision of police. *Security Journal*, Vol. 26(2):157-179.
- Bumatay, A. (2015). A look at trade key: Shifting policing burdens from trademark owners to online marketplaces. *Hastings Business Law Journal*, Vol. 11(2): 341-360.
- Burger, J. (2011). To Protect and Serve: Restoring public confidence in the SAPS. *South African Crime Quarterly*, 36:13-19.
- Cabezas, M.D. (2010). Counterfeit medicines as global treat. *Pharmaceuticals Policy and Law*, 12 2010: 179-192. DOI 10. 3233/PPL-2010-0304 IOS Press.
- CEPOL. (2015). *European Police Research & Science Conference*. Lisbon: CEPOL.
- Cohen, M. (2000). Measuring the costs and benefits of crime and justice. In Duffee, D (ed), *Criminal justice: Measuring and analysis of crime and justice*. Washington DC. NIJ, Vol 4.
- Chorev, N. (2015). Narrowing the Gaps in Global Disputes The case of Counterfeits in Kenya. *St. Comp. Int. Dev.*, 2015, 50: 157-186. DOI 10:1007/s12116-015-9183-5.
- Chuchu, T, Chinomona, R. & Pamacheche, R. (2016). Factors that influence the purchase of counterfeit products by students: A case of South Africa. *International Conference on Ethics of Business, Economics and Social Sciences-ICEBESS Proceedings*, 324-337.
- De Chermatony, L., Mcdonald, M. & Wallace, E. (2011). *Creating powerful brands*. 4th edition. Oxford: Butterworth-Heinemann.
- Deveymaeker, G. (2015). Making sense of the numbers: Civil claims against the SAPS. *South African Crime Quarterly*, 54: 29-41.
- Dlabay, L.R. & Scott, J.C. (2011). *International business*. 4th edition. Mason. South Western Cengage Learning.
- European Commission. (2014). Report on EU customs enforcement of intellectual property rights: Results at the EU border. Luxembourg: European Commission Taxation and Customs Union.
- Ferguson, V & Schneider, M. (2016). Enforcement of intellectual property rights in Africa. *Journal of Intellectual Property Law & Practice*, Vol. 10 (4): 269-279. DOI: 10. 1093/jiplp/jpv034.
- Heike, S. (2010). Effects of counterfeits in the image of luxury brands: An empirical study from the consumer perspectives. *Journal of Brand Management*, Vol. 18 (2): 159-173.
- Heinonen, J.A. & Wilson, J.M. (2012). Product counterfeit at the state level: An empirical examination of Michigan related incidents. *International Journal of Comparative and Applied Criminal Justice*, Vol. 36 (4): 273-290.
- Joossens, L., Chaloupka, F., Merriman, D. & Yurekli, A. (2000). *Issues in the smuggling of tobacco products*. New York: Oxford University Press.
- Lewis, K. (2009). *The fake and the fatal: The consequences of counterfeits*. London: The Park Place Economist.
- Mackenzie, S. & Hamilton-Smith, N. (2011). Measuring police impact on Organised crime: Performance management and harm reduction. *An International Journal of Police Strategies & Management*, Vol 3 (1): 7-30.
- Mofokeng, J.T. (2012). Perspectives of supervision and mentorship with in the SAP detective service. *Acta Criminologica*, Vol.1: 70-84.
- Mogase, K. (2011). The battle against counterfeiting. Intellectual property. *Without Prejudice*, Vol. 11 (10): 64-65.
- Mohamed, K. & Wahid, R. (2014). Fighting counterfeiting: importance of enforcement of intellectual property rights. *Journal of International Commercial Law and Technology*, Vol. 9 (4): 249-257.

- Moneyweb. (2011). South African counterfeit industry worth R362 billion. Available from <http://www.moneyweb.co.za/archive/sa-content-industry-worthr362bn>. Accessed on 18 February 2020.
- Nalla, M.K. & Newman, G.R. (2013). *Community policing in indigenous communities*. London: CRC Press.
- Naude, M.J. (2015). The fight against counterfeit products in Zimbabwe: A case study at a South African automobile component manufacturer. *Journal of Contemporary Management*, Vol. 12: 249-267.
- Newham, G. & Faull, A. (2011). Protector or predator: Tackling police corruption in South Africa. Pretoria, *Institute of Security Studies*, Monograph 182: i-64.
- OECD. (1998). The economic impact of counterfeit. Paris: OECD.
- OECD. (1998). The economic impact of counterfeit. Paris: OECD.
- Pascu, E., Nedeia, P.S. & Milea, O.M. (2012). The non-quality of counterfeit products and their effect on consumers and the intellectual property right. The USV Annals of Economics and Public Administration, Vol 12(2) 16. 148-154.
- Penz, E., Schlehelmilch, B.A. & Stottinger, B. (2009). Volunteer purchase of counterfeit products: Empirical evidence from four countries. *Journal of International Consumer Marketing*, Vol. 21: 67-84.
- Ratcliffe, J. H. (2003). *Intelligence-led Policing: Trends and Issues in Crime and Criminal Justice*. Canberra: Australian Institute of Criminology.
- Rojek, C. (2016). Counterfeit Commerce: Relations of production, distribution and exchange. *Cultural sociology*. 1-16. Sage.
- SAFACT. (2009). Piracy in South Africa. Available from <http://safact.co.za/piracy-facts>. Accessed 20 October 2019.
- South African Police Services. (2014). National Crime statistics for the South African Police Services. Pretoria: Government Printers.
- South Africa. (2008). Consumer Protection Act, 2008 (Act 68 of 2008). Pretoria: Government Printer.
- South Africa. (2006). Khampepe Commission of Inquiry report 2006: The commission of Inquiry into the Mandate and location of the Directorate of Special Operations. Final report, February. Pretoria: Government Printer.
- South Africa. (1997). Counterfeit goods Act, 1997. (Act 37 of 1997). Pretoria: Government Printer.
- South Africa. (1996). Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). Pretoria: Government Printer.
- South Africa. (1993). Tobacco Product Control Act, 1993. (Act 83 of 1993). Pretoria: Government Printer.
- South Africa. (1993). Trademarks Act, 1993. (Act 194 of 1993). Pretoria: Government Printer.
- South Africa. (1978). Copyright Act, 1978. (Act 98 of 1978). Pretoria: Government Printer.
- South Africa. (1978). Patents Act, 1978. (Act 57 of 1978). Pretoria: Government Printer.
- South Africa. (1977). Criminal procedure Act, 1977. (Act 51 of 1977). Pretoria: Government Printer.
- South Africa. (1964). Customs Excise Act, 1964. (Act 91 of 1964). Pretoria: Government Printer.
- South Africa. (1941). Merchandise marks Act, 1941. (Act 17 of 1941). Pretoria: Government Printer.
- South African Institute of Intellectual Property law. (2015). *South Africa dumping ground for counterfeit*. Johannesburg: SAIPL.

- Spilsbury, R. (2009). *Counterfeit: Stopping fakes and forgeries*. Los Angeles: Enslow.
- Spoor & Fisher. (2013). *The Allure of Africa's rapidly Growing economy to counterfeiters*. Pretoria: Spoor & Fisher.
- Spoor & Fisher. (2008). *Counterfeiting: A South African Perspective*. Pretoria: Spoor & Fisher.
- Staake, T & Fleisch, E. (2008). *Countering Trade: illicit market insights best-practice strategies and management toolbox*. Heidelberg: Springer.
- Steinberg, J. (2005). The illicit abalone trade in South Africa. Institute of Security Studies, Paper 105: 1-13. Pretoria: Institute of Security Studies.
- Treadwell, J. (2011). From the car boot to booting it up? Ebay, online counterfeit crime and transformation of the criminal market. *Criminology and Criminal Justice*, Vol. 12 (2): 175-191.
- TRIPS. (1995). Agreement on Trade-Related Aspects of Intellectual Property Rights. Geneva: World Trade Organization.
- Thenga, G. (2018:80). *A critical analysis of the policing of contrabands in South Africa*. Unpublished thesis. PhD in Criminal Justice. University of South Africa, Pretoria.
- The Patent Office. (2006). *Counter offensive: An Intellectual Property crime strategy*. Available from <http://www.ipo.gov.uk/ipcrimeStrategy.pdf>. Accessed on 10 January 2020.
- UN. (2017). ECOSOC Youth forum. (30-31 January 2017): The role of youth in poverty eradication and promoting prosperity un a changing world. Office of the Special Adviser in Africa: OSAA.
- Von Lampe, K. (2011). The application of the framework of situational crime prevention to Organized crime. *Criminology and Criminal Justice*, Vol.11(2):145-163.
- Ward, M. (2011). *A straight forward guide to intellectual property and the law*. Brighton: Straightforward Publishers.
- Whitelaw, B., Smith, R. & Hansen, S. (2012). Policing disorder: Calgary Transit peace officers and the Alberta law enforcement framework. *The Institute of Public Administration of Canada*, Vol. 55 (3): 411-432.
- WIPO. (2009). Advisory Committee on enforcement. 5th session. Geneva: WIPO.
- Welchy, V. (2010). Contributory Trademark infringement: Who bears the burden of policing online counterfeit activity? *SMU Science and Technology Law Review*, Vol. XIII: 361-376.
- WIPO. (2014). What is Intellectual Property? Available from http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub-450.pdf. Accessed on 25 February 2020.
- Zibas, J.C. (2012). *Defending the distributor in counterfeit cases*. London: Aspen.