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COMPETITION

ALERT

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IN THIS ISSUE

SASOL FOUND GUILTY OF EXCESSIVE PRICING

The Competition Tribunal released its decision, in finding that Sasol Chemical Industries Limited (SCI), as a dominant firm in the supply of purified propylene and polypropylene, had engaged in excessive pricing in contravention of the Competition Act, No 89 of 1998.

The Competition Commission alleged excessive pricing by SCI in respect of its pricing of purified propylene and polypropylene to domestic customers - being key inputs in the manufacture of industrial and household plastic products. SCI supplies polypropylene to domestic customers at import parity pricing (ie the price at which a customer would pay for the goods should it have been imported from another country) and also exports polypropylene. Purified polypropylene, on the other hand, is not exported and is only supplied to one domestic customer.

In terms of s8(a) of the Act, excessive pricing by a dominant firm is prohibited. An excessive price is a price for a good or service which bears no reasonable relation to the economic value of that good or service.

In determining whether excessive pricing has, in fact, taken place the actual price of the goods must be weighed up against the economic value of the goods and the difference between the two must be analysed, on a value judgment, to determine whether, firstly, the excessive price is unreasonable and, secondly, whether the charging of the excessive price is to the detriment of consumers.

The Tribunal engaged in various economic exercises to determine the difference between the actual price and the economic value of the goods. The Tribunal ultimately found that in the light of SCI's history in becoming a dominant firm, the extensive support

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received from the State (previously being a State-owned entity) and the importance of the goods as intermediate inputs, the price charged by SCI for purified propylene and polypropylene was excessive. Furthermore, the Tribunal concluded that the prices charged by SCI had a detrimental effect on its customers, in substantially increasing their input costs, and the conduct led to consumer harm.

The Tribunal commented, in the interests of consumer protection, that the excessive prices charged and maintained by SCI resulted in a "*missed opportunity for innovation and development for domestic manufacture of downstream plastic goods*" and, in the absence of such high input prices local plastic goods manufacturers would have been able to compete more competitively with imported goods, improve manufacturing capability, increase employment opportunities and ultimately benefit consumers through greater choice and innovation.

The Tribunal imposed a staggering R500 million administrative penalty and certain behavioural remedies. The Tribunal did not opt to impose a maximum administrative penalty of 10% of total turnover and concluded that such a stringent penalty would not be appropriate in the circumstances and in the light of the market in which the conduct occurred.

The Tribunal has always been reticent to act as a price regulator when exercising its functions and has clearly stated that its role is to safeguard competition in markets (through promoting and defending competitive market structures and to guard against conduct in the market which undermine the competitive structures) and not to interfere with competitive decisions made by independent actors in markets. Although, in this instance, the Tribunal has not gone as far as to regulate the prices in the market the Tribunal has imposed a behavioural remedy requiring SCI to submit a proposed pricing remedy based on a price formulation linked to price charged in regions in the world with the lowest prices for purified polypropylene. The remedies imposed by the Tribunal do not constitute price regulation but they indicate the difficulties faced by competition regulators in imposing remedies for conduct such as excessive pricing, where it would be necessary to address the failings in the existing competitive structures that enabled excessive pricing conduct to occur but not go as far as outright regulating the prices charged in such markets.

Leana Engelbrecht

HEALTHCARE INQUIRY: STATEMENT OF ISSUES AND DRAFT GUIDELINES FOR PARTICIPATION ISSUED FOR PUBLIC COMMENT

On 30 May 2014, the Competition Commission published the Statement of Issues and Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector for public comment.

The Statement and Guidelines are fluid documents that may change during the course of the Market Inquiry into the Private Healthcare Sector but provide stakeholders with insight into the aspect on which the Market Inquiry into the Private Healthcare Sector will focus and the procedures to be followed in conducting the Inquiry. The finalisation of these documents marks the effective starting point of the Inquiry in respect of active stakeholder participation. Stakeholders will, once these documents are finalised, have a definitive framework for those aspects of competition in the private healthcare market which the Inquiry panel hopes to address and which stakeholders will be expected to make submissions on. It also provides a framework for making submissions to the Inquiry panel and for participating in the Inquiry.

Public comments, at this stage, will, accordingly, be aimed at proposing matters that have been identified as matters possibly affecting competition in the private healthcare market that should be investigated by the Inquiry panel and ensuring that stakeholders are able to effectively participate in the Inquiry.

Stakeholders are invited to comment on the Statement and Guidelines by 30 June 2014.

Leana Engelbrecht

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AWARDING COSTS IS AN EXERCISE OF JUDICIAL DISCRETION

The Competition Tribunal recently confirmed that its discretion to award costs where an application is withdrawn or abandoned should be exercised judiciously with due regard to the principles of justice and fairness.

As a general rule, an applicant who subsequently abandons or withdraws an application before the Tribunal is considered as having conceded on the merits and is responsible for the wasted costs incurred by the respondent in having to defend the matter.

However, National Union of Metal Workers of South Africa (NUMSA) versus Marley Pipe Systems (Pty) Ltd (Marley) and the Competition Commission (Commission) presented a unique set of facts.

In terms of the background, the Tribunal approved a merger involving Marley, as the acquirer, subject to a condition requiring Marley to re-employ a number of the target firm's employees. This condition could be lifted, revised or amended by the Commission on good cause shown.

Marley then approached the Commission with a request to revise the condition. The Commission denied this request on the basis that the revision did not meet the threshold for good cause shown. This led to Marley filing an urgent application to the Tribunal to review the Commission's decision. NUMSA was cited as a party to the review application and filed answering affidavits dealing extensively with the facts and issues of law raised by Marley. Ten days before the scheduled hearing, NUMSA was made aware that the Commission and Marley were in exploratory discussions regarding settlement of the matter, but nevertheless persisted with filing its papers. A day before the application was to be heard, Marley withdrew its application. The reason for withdrawal was as a result of a last minute decision by the Commission to review the employment condition (ie there was no longer any need to review the Commission's decision as the last minute offer by the Commission provided Marley with the relief it sought).

NUMSA then sought an order for wasted costs against Marley. In Marley's defence, it argued that it had not acted *mala fide* in withdrawing the application, the application was rendered moot by the settlement agreement that it reached with the Commission and withdrawal of the application ensured that the Tribunal and the parties' time was not wasted in seeking relief that was now not necessary.

The Tribunal held that the withdrawal of the review application was not a concession on the merits by Marley; it was neither fair nor logical for Marley to continue with the application in light of the settlement agreement and whilst it appreciated the role played by NUMSA in assisting the Tribunal with its submissions, justice and fairness dictated that each party pay its own costs.

Whilst this decision indicates that a *bona fide* withdrawal of an application may avert an adverse cost order, the Tribunal will decide each matter on its own facts. Importantly, principles of justice and fairness will guide the Tribunal's discretion and it is thus essential that, when abandoning a matter, notice of the withdrawal is provided to the other party as soon as possible.

Susan Meyer and Nazeera Mia

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PROPERTY MERGER – PARETO LIMITED AND FOUNTAINHEAD PROPERTY TRUST COLLECTIVE INVESTMENT SCHEME

The Competition Tribunal has recently unconditionally approved a large merger between Pareto Limited and Fountainhead Property Trust Collective Investment Scheme in Property, which has an interest in Westgate Mall. The transaction resulted in the acquisition of sole control by Pareto in Westgate, which has been jointly controlled by the merging parties pre-transaction.

The Tribunal accepted the product market definition identified by the Competition Commission as the market for the provision of rentable retail space in comparative centres. Interestingly, the Commission departed from the traditional approach to product market definition in the retail property industry, which was primarily based on the size of the retail centre concerned. The Commission acknowledged that, while Westgate is a super-regional centre in terms of size, size alone is not determinative of the substitutability of other centres. The Commission, in conducting a more intensive investigation into the market, noted that "*centres of vastly different sizes do in fact constrain one another.*" The Commission therefore elected to define the market as the market for comparative centres.

In terms of geographical market definition, the market was assessed by reference to a 15km radius. It was found that retail space beyond this radius would not exert a competitive constraint on Westgate.

Based on this market definition, the Tribunal found that the transaction would not result in a substantial prevention or lessening of competition in the relevant market. The Tribunal noted that while Pareto already controls a number of retail spaces in South Africa, Pareto's only interest within the relevant market is its sole ownership of Cresta Shopping Centre. Additionally, the Tribunal found the transaction would not result in any market share accretion as Pareto would continue to hold between 16% and 27% of the market post-merger.

In determining whether the transaction would incentivise Pareto to engage in anti-competitive conduct, the Commission found that post-merger rental rates would be determined solely by Pareto. In light of this, the Commission contacted various tenants to ascertain whether the transaction would enable Pareto to increase rental prices. The majority of tenants contacted by the Commission indicated that they were already in the process of renewing their lease agreements which would extend into Pareto's term as sole controller of Westgate. The Commission also stated that Pareto would not be able to exercise market power post-merger as it would be constrained by other comparative centres.

The decision is a reminder of the necessity to notify transactions in respect of which the acquiring firm already has a pre-existing interest in the target entity, but will be acquiring a form of unfettered control by virtue of the transaction. The decision furthermore suggests that the retail property market is not solely determined by the size of the shopping centres concerned, but by various factors that are relevant to the determination of substitutability.

Lerisha Naidu

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THE COMPETITION TRIBUNAL SAWS THROUGH APPLICATION

The Competition Tribunal recently dismissed an application for interim relief brought by Normandien Farms (Pty) Ltd, a sawmill owner, against Komatiland Forests (Pty) Ltd, a timber plantation owner.

To contextualise the application, a supply agreement was concluded between the parties in terms of which Komatiland undertook to supply Normandien with a specified amount of sawlog. The sawlog is supplied at an open market price and prices are adjusted in accordance with supply and demand. In 2013, Normandien placed a bid for sawlog from a pool (Pool 2) belonging to Komatiland. Pool 2 was oversubscribed and in accordance with general practice, the price would increase in the second round. As a result of the price increase, Normandien and other bidders elected not to bid in the second round.

In its application, Normandien alleged that Pool 2 was never actually oversubscribed and that Komatiland said this to artificially increase the price. Normandien alleged that Komatiland's conduct amounted to price manipulation and contravened provisions of the Competition Act, No 89 of 1998 (Act) relating to excessive pricing and exclusionary conduct. It was also alleged that Komatiland committed breach of contract by its unilateral variation of a term of the supply agreement relating to Broad Based Black Economic Empowerment (BBBEE) rebates.

Ultimately, the Tribunal dismissed the application on the basis that Normandien had failed to substantiate any of the competition law allegations raised. In respect of the excessive pricing claim, the Tribunal found that no evidence was presented to indicate the economic value of the product in question. The Tribunal also noted that merely having to pay more for a product does not automatically give rise to a competition law contravention. In relation to the alleged exclusionary conduct, the Tribunal stated that Normandien did not even attempt to establish that Komatiland is impeding Normandien's ability to expand in the market. The mere fact that Normandien may have been negatively affected by the conduct does not automatically result in a substantial prevention or lessening of competition in the market as a whole.

In addition, the Tribunal stated that while the unilateral variation of the BBBEE rebates may amount to breach of contract or even fraud, Normandien had failed to show why such an issue was brought before the Tribunal. The Tribunal recognised that while certain conduct may amount to both a contractual breach and a prohibited practice in terms of the Act, such a nexus must be proven. Consequently, the contractual allegation was dismissed for falling outside the Tribunal's jurisdiction.

Kayley Keylock and Christelle Wood

COMPETITION COMMISSION GIVES NOTICE OF MARKET ENQUIRY INTO LPG SECTOR

On 20 June 2014, the Competition Commission published terms of reference giving notice of its intention to institute a market enquiry into the state of competition in the Liquefied Petroleum Gas (LPG) sector.

The Commission is concerned regarding what it believes to be the limited supply of LPG available in South Africa and the impact that this may have on competition in the sector.

Amongst other things, the Commission will consider the role of gas brokers in the LPG market and the impact of imports of LPG.

In its terms of reference, the Commission also notes that there has been increased diversification of energy supply sources by consumers in light of power shortfalls and increases in electricity costs, with LPG likely to become a more important source of energy in future. According to the Commission, LPG is also identified as of strategic importance in the national development plan.

The aims of the enquiry include:

- analysing the price regulatory framework to determine whether it can be improved to avoid the abuse of market power;
- assessing the extent of barriers to entry and general competition dynamics at various levels of the LPG value chain; and
- assisting other regulators with policy formulation recommendations as well as making recommendations relating to necessary changes to competition policy and law.

Market enquiries are instituted into sectors as a whole and do not necessarily relate to the conduct of specific firms in the sector under scrutiny.

According to the terms of reference, it is anticipated that the market enquiry will commence in June 2014 and conclude in October 2015. Although the relevant notice states that the market enquiry commences on 20 June 2014 (the same day as the publication of the terms of reference), the Competition Act, No 89 of 1998 requires that the terms of reference must be published at least 20 business days before the commencement of the enquiry.

Albert Aukema

ANNUAL COMPETITION SEMINAR

A reminder that our Annual Competition Law Seminar will be held at our Sandton offices on 17 July 2014. For further details please contact Kayley Keylock at kayley.keylock@dlacdh.com or (011) 562 1217.

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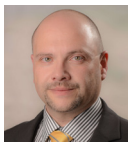

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