



COMPETITION

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NEW APPOINTMENTS AT THE COMPETITION COMMISSION

Cliffe Dekker Hofmeyr (CDH) congratulates Ms Nompucuko Nontombana on her appointment as Divisional Manager of the Enforcement and Exemptions Division of the Competition Commission. CDH wishes her a prosperous career in her new position.

*New
Appointments at
the Competition
Commission.*

SUPREME COURT OF APPEAL DELIVERS RULING REGARDING THE ENFORCEMENT OF CIVIL CLAIMS AGAINST SUCCESSFUL LENIENCY APPLICANTS

On 4 November 2015, the Supreme Court of Appeal (SCA) delivered its judgement in respect of Premier Foods Proprietary Limited's (Premier Foods) challenge to the Competition Tribunal's powers under s65(6) of the Competition Act (Act). This judgment relates to a procedural matter that required clarification and impacted on the civil damages claims brought against the firms that participated in the so-called bread cartel.

Section 65(6) of the Act sets out the basis on which a person, who suffered loss or damage as a result of collusive conduct, may institute a civil claim for damages. Such a person must obtain a certificate from the Chairperson of the Tribunal or the Judge President of the Competition Appeal Court, certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Act. For damages to be claimed for loss or damage caused by collusive conduct claimants must first obtain such a certificate.

Premier Foods was the leniency applicant in the bread cartel and - due to the leniency awarded to it - it was not prosecuted with the other members of the cartel and was not party to the referral by the Competition Commission. Premier Foods, as a leniency applicant, participated in the hearing before the Tribunal and assisted the Commission in prosecuting the matter. The Tribunal's

ultimate finding was that "[d]uring December 2006, Pioneer, Premier and Tiger Brands contravened s4(1)(b)(i) and (ii) of the Competition Act".

The claimants in the class action, in line with the provisions of the Act, consequently applied to the Chairperson of the Tribunal for the relevant certificate based on this finding by the Tribunal for purposes of instituting a class action against the firms involved in the bread cartel. The issuing of the certificate was, however, opposed by Premier Foods. Subsequently, Premier Foods launched an application for declaratory relief relating to the Tribunal's jurisdiction under s65 of the Act. Premier Foods' opposition was based on the fact that a certificate could not legitimately be issued against it as the complaint was not referred against it and it was not party to the proceedings before the Tribunal. Additionally, Premier Foods argued that its right to be heard would be infringed should a certificate be issued against it in respect of proceedings that were not referred against it.

Premier Foods launched an application for declaratory relief relating to the Tribunal's jurisdiction under s65 of the Act.

SUPREME COURT OF APPEAL DELIVERS RULING REGARDING THE ENFORCEMENT OF CIVIL CLAIMS AGAINST SUCCESSFUL LENIENCY APPLICANTS

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During 2013, the High Court found that the Tribunal has jurisdiction to issue a s65 certificate in respect of Premier Foods' involvement in the bread cartel, irrespective of whether it was cited as a party in the referral or not. It is this decision that was the subject of Premier Foods' appeal to the SCA.

The question that arose was whether the complaint by the Commission as it relates to Premier Foods fell within the ambit of the referral despite Premier Foods not being cited as a respondent and no relief being sought against Premier Foods in the complaint referral (a jurisdictional requirement to enable the Tribunal to make a finding against a respondent that it engaged in prohibited conduct).

The SCA overturned the decision of the High Court in favour of Premier Foods and found that the Tribunal did not have the power to grant an order declaring that Premier Foods engaged in prohibited conduct, as Premier Foods was not part of the referral and although it admitted liability as a leniency applicant a finding against it would result in *'liability to legal process through oblique or informal acquaintance'* (a concept that was rejected by the Constitutional Court in *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd & Others* [2014] ZACC 35).

The SCA found that as a result of this lack of jurisdiction on the part of the Tribunal, the order declaring that Premier Foods engaged in prohibited conduct was a nullity. As the Tribunal had no jurisdiction

to make the declaration against Premier Foods, there is no conduct that can be certified for purposes of the institution of a civil claim.

The SCA did not decide on whether a leniency applicant can be referred to the Tribunal and stated that it would consider this question once it is appropriately raised before it. This decision, accordingly, leaves some uncertainty as to whether the Tribunal could ever competently declare that a leniency applicant engaged in prohibited conduct, with the result that a certificate for civil prosecution can be issued. It is clear that the citation of a leniency applicant in the complaint referral is not sufficient to establish this jurisdiction and a leniency applicant must be fully engaged in a referral before a competent declaration can be made against it. The latter being an unlikely situation as the premise of the Commission's corporate leniency policy is to 'reward' cartel members that blow the whistle through not subjecting these parties to prosecution or the imposition of an administrative penalty even though cooperation in the prosecution of the cartel is a requirement to be awarded leniency.

The Commission announced that on 25 November 2015 it applied for leave to appeal this decision to the Constitutional Court, following a similar application by the victims of the bread cartel filed with the Constitutional Court on 23 November 2015.

Leana Engelbrecht

As the Tribunal had no jurisdiction to make the declaration against Premier Foods, there is no conduct that can be certified for purposes of the institution of a civil claim.

The question that arose was whether the complaint by the Commission as it relates to Premier Foods fell within the ambit of the referral despite Premier Foods not being cited as a respondent and no relief being sought against Premier Foods in the complaint referral.

COMPETITION COMMISSION CONDITIONALLY APPROVES VODACOM/NEOTEL DEAL BUT PROHIBITS MTN/TELKOM DEAL

With revenue from voice services in decline, mobile network operators are increasingly reliant on data revenue to remain profitable. Mobile broadband spectrum is, however, a scarce resource. For this reason, the Competition Commission's divergent recommendations in two recent large mergers involving access to the spectrum warrant closer scrutiny.

Vodacom/Neotel

At the end of June, the Commission recommended to the Competition Tribunal that the large merger whereby Vodacom Proprietary Limited (Vodacom) will acquire Neotel Proprietary Limited (Neotel) be approved, subject to conditions that address competition and public interest concerns.

Given Vodacom's position as market leader, the Commission found that the acquisition of additional spectrum from Neotel would probably consolidate Vodacom's dominant position and result in the lessening or prevention of competition in the mobile telecommunications market.

In order to address the Commission's concerns, the parties agreed to the following structural and public interest conditions:

- a moratorium on the use of Neotel's spectrum by Vodacom for a duration of up to 2 and a half years in order to allow policymakers to address South Africa's spectrum issues;
- a commitment to spend R10 billion on fixed network, data and connectivity infrastructure within 5 years of the approval of the merger; and
- an obligation to significantly increase its BEE-shareholding.

In terms of the Competition Act, No 89 of 1998 the Commission's recommendation is subject to the approval of the Tribunal, which may approve the merger subject to conditions, approve the merger unconditionally or prohibit the merger.

The Tribunal was due to hear the application to approve the merger from the end of November, with various stakeholders and competitors expected to participate in the proceedings to challenge the conditions. The hearing was, however, postponed to enable the merging parties to explore a revised transaction structure.

MTN/Telkom

In contrast, Mobile Telephone Networks Proprietary Limited (MTN), a subsidiary of MTN Group Limited, and Telkom SA SOC Limited (Telkom) decided to abandon a transaction whereby MTN would acquire certain of its competitor's radio access network assets, after the Commission recommended the prohibition of the merger on competition grounds and public interest grounds.

As part of the transaction, MTN and Telkom would enter into a network management services and reciprocal roaming agreement, with each party able to roam on the other's network. According to the Commission, this would have allowed MTN to access additional spectrum, a key requirement for its plan to roll out its next generation LTE network.

A commitment to spend R10 billion on fixed network, data and connectivity infrastructure within 5 years of the approval of the merger.

The Tribunal was due to hear the application to approve the merger from the end of November, with various stakeholders and competitors expected to participate in the proceedings to challenge the conditions.

COMPETITION COMMISSION CONDITIONALLY APPROVES VODACOM/NEOTEL DEAL BUT PROHIBITS MTN/TELKOM DEAL

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The Commission, however, argued that the transaction, while benefiting MTN by giving it unlimited access to Telkom's mobile data capacity, would limit Telkom's ability to grow and compete, given that the agreement would limit the spectrum available to it. According to the Commission, the smaller firms Telkom and Cell C typically drive competition in the mobile telecommunications market. However, the Commission decided that these smaller firms would in all likelihood be unable to act as competitive constraints to MTN by matching MTN's product and service offerings were the transaction to be approved. The Commission also opined that the transaction would entrench a market structure with two dominant firms, to the detriment of the broader telecommunications industry and consumers.

Other factors that the Commission considered are MTN's poor record of passing through benefits to consumers in the form of lower prices, South Africa's relatively high telecommunications prices and objections received from competitors.

The Commission invited the parties to propose remedies to address the competition concerns, but, unlike in the Vodacom transaction, the parties were unable or unwilling to identify workable remedies to the Commission's satisfaction. As a result, the parties abandoned the transaction 16 months after notifying the Commission, rather than challenge the Commission's recommendation before the Tribunal.

George Miller

Other factors that the Commission considered are MTN's poor record of passing through benefits to consumers in the form of lower prices, South Africa's relatively high telecommunications prices and objections received from competitors.

COMPETITION TRIBUNAL CONDITIONALLY APPROVES TIE-UP BETWEEN PIONEER FOODS AND FUTURE LIFE

The Competition Tribunal approved Pioneer Foods Proprietary Limited's (Pioneer) acquisition of fifty percent of the shares in Future Life Health Products Proprietary Limited (Future Life). Pioneer manufactures various fast moving consumer goods, including cereals and Future Life manufactures functional food under the same brand.

This finding follows the Competition Commission's recommendation of an unconditional approval of the transaction, but resulted in a hearing before the Tribunal with Kellogg Company of South Africa Proprietary Limited raising concerns in respect of the proposed transaction.

Cliffe Dekker Hofmeyr acted for the merging parties in this matter.

Leana Engelbrecht

CONSTITUTIONAL COURT DISMISSES COMMISSION'S APPEAL IN SASOL EXCESSIVE PRICING CASE

In May 2015, the Competition Tribunal imposed a staggering R500 million administrative penalty on Sasol Chemical Industries Limited (SCI), as a dominant firm in the supply of purified propylene and polypropylene, for charging excessive prices in contravention of s8(a) of the Competition Act, No 89 of 1998 (the Act).

SCI appealed the decision of the Tribunal to the Competition Appeal Court (CAC). The CAC released its judgment in this matter on 17 June 2015 and overturned the decision of the Tribunal, concluding that SCI's higher price was not unreasonable so as to render the price excessive and in contravention of s8(a) of the Act.

Subsequently, the Commission applied for leave to appeal the CAC's decision to the Constitutional Court. On 16 November 2015, the Constitutional Court dismissed the Commission's application and did not grant it leave to appeal the matter. Consequently, the CAC's decision in this matter stands.

The Commission, in a press release, stated that it was disappointed in this outcome and that it *"remains concerned about the pricing behaviour of dominant firms operating upstream, especially in markets with high levels of concentration. For this reason, the Commission will go back to the drawing board to determine its next approach to handling excessive pricing complaints going forward."*

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Leana Engelbrecht

On 16 November 2015, the Constitutional Court dismissed the Commission's application and did not grant it leave to appeal the matter. Consequently, the CAC's decision in this matter stands.

COMMISSION PUBLISHES TERMS OF REFERENCE IN SUPERMARKET INQUIRY

The Competition Commission, on 30 October 2015, published the Terms of Reference for the Grocery Retail Sector Market Inquiry (Inquiry). This follows the announcement of the Inquiry in May and the publication of the draft Terms of Reference in June 2015.

The Commission is empowered to launch a market inquiry where it has reason to believe that a market has features which prevents, distorts or restricts competition or to achieve the purposes of the Competition Act, No 89 of 1998. In this instance, the Commission's belief is based on several factors, including:

- (i) the market power yielded by the large supermarket chains in respect of positioning in shopping centres or malls to obtain grocery anchor tenant status through long term exclusive leases;
- (ii) the rate of expansion of the larger supermarket chains (through acquisition and greenfield development), especially in townships, peri-urban and rural areas;
- (iii) the impact of the expansion of larger supermarket chains on informal traders in these areas;
- (iv) various aspects related to the practice of franchising by large supermarket chains, including designated supply provisions, prescribed pricing, branding and packaging and the acquisition of independent franchised stores by the large supermarket chains; and
- (v) the dynamics of competition between local and foreign nationals operating informal retail offerings.

The scope of the market inquiry will include:

- the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers in townships, peri-urban and rural areas and the informal economy;
- the impact of long term exclusive leases entered into between financiers, property developers and national supermarket chains on competition in the grocery retail sector;
- the dynamics of competition between local and foreign owned small and independent retailers in townships, peri-urban areas, rural areas and the informal economy;
- the impact of regulations, including, among other things, municipal town planning and by-laws on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy;
- the impact of buyer groups on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy; and
- the impact of certain identified value chains on the operations of small and independent retailers in townships, peri-urban areas, rural areas and the informal economy.

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Leana Engelbrecht

The impact of long term exclusive leases entered into between financiers, property developers and national supermarket chains on competition in the grocery retail sector

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The impact of buyer groups on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy.

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