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# COMPETITION ALERT



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### Beyond COVID-19: Recent abuse of dominance and prohibited practice (cartel) settlements (part 2)

Following our previous alert detailing the developments in respect of merger control outside the realm of COVID-19 (accessible [here](#)), this alert focusses on other recent - non-pandemic-related - abuse of dominance and prohibited practice developments in South Africa, particularly with reference to settlement agreements.

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### Abuse of Dominance

In 2015, the Competition Commission (Commission) received a complaint that Rooibos Limited (Rooibos) had been engaged in anti-competitive conduct, including allegations that Rooibos had effectively induced producers not to deal with its competitors through the conclusion of certain long-term supply agreements relating to the procurement of rooibos tea from rooibos producers which required the producers not to deal with other rooibos processors.

Further in its capacity as a production researcher, Rooibos had also allegedly leveraged access to its production research output in the rooibos tea industry by requiring producers to supply up to 50% of their rooibos tea production to Rooibos to the exclusion of its competitors as a prerequisite to access the research, thereby amounting to an alleged abuse of dominance.

The allegations resulted in an investigation by the Commission who found that the long-term supply agreements and supply-based commitments had the cumulative effect of locking in at least 39% of rooibos tea production in favour of Rooibos, and to significantly foreclose other competitors from accessing it or to prevent their expansion in the market. In an attempt to remedy this and conclude the matter, the Commission and Rooibos entered into a settlement agreement in 2020.

Although Rooibos does not admit to contravening the Competition Act 89 of 1998 (Act) in terms of the settlement agreement, it undertook to publish its production research on its website without corresponding access conditions or restrictions. From a long-term supply agreement perspective, Rooibos undertook not to enter into long-term supply agreements with producers which exceeded a duration of five years; that restricted or prevented producers from contracting to supply rooibos to Rooibos' competitors; and if the aggregate volume of the rooibos supplied to Rooibos by virtue of long-term supply agreements annually equals more than 10% of the total annual rooibos crop as estimated by Rooibos in respect of that particular year.

The settlement reaffirms that parties, who for the purposes of the Act are dominant, must exercise significant caution in the drafting and implementation of long-term supply agreements. Provisions which expressly or by effect induce a customer not to deal with a competitor should be avoided and thought should be given to the efficiency justification for exclusivity. Bearing in mind that the Competition Appeal Court has previously held that in the analysis of efficiencies, it is relevant to consider "*whether they are relationship specific, whether the parties can achieve them through less restrictive means and whether the efficiencies outweigh any anti-competitive effects on consumers*". Further, more 'unusual' conditions, such as granting conditional access to research output in lieu of greater supply, may not be the Commission's cup of tea and may be visited with investigation and possible sanctions under the Act.

## Beyond COVID-19: Recent abuse of dominance and prohibited practice (cartel) settlements (part 2)...*continued*

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### Prohibited Practice

The genesis of the cement cartel stretches back to 2008. Towards the backend of 2020, the Commission concluded a settlement agreement with successful corporate leniency applicant, Pretoria Portland Cement Company Limited (PPC), in terms of which it was granted final immunity from both prosecution in the cement cartel cases.

As part of the Commission's investigations, it conducted a search and seizure raid on the premises of four of the five cement producers subsequent to which PPC came forward under the then new Corporate Leniency Policy (CLP) to apply for leniency.

In terms of the settlement agreement concluded between PPC and the Commission, PPC admitted to having contravened sections 4(1)(b)(i) and (ii) of the Act thereby concluding all proceedings with the Commission. PPC also undertook not to engage in any form of prohibited conduct, including price fixing conduct, which contravenes the Act; and to ensure it engages in competitive pricing. As a successful corporate leniency applicant under the CLP, PPC was granted final immunity from both prosecution and an administrative penalty.

This settlement agreement reaffirms that successful applicants under the CLP may be afforded certain benefits, such as immunity from prosecution and administrative penalties. Important, however, is that the benefits that may be afforded to alleged cartellists under the CLP are subject to leniency applicants adhering, as PPC did, to a host of conditions under the CLP.

These conditions include that the applicant under the CLP must: (i) honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity; (ii) generally be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view, to institute proceedings in relation to a cartel activity; (iii) offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Competition Tribunal or the Competition Appeal Court are completed; (iv) immediately stop the cartel activity or act as directed by the Commission; (v) not alert other cartel members or any other third party that it has applied for immunity; (vi) not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and (vii) not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

Although the CLP serves to offer leniency to cartellists, parties would be best placed to ensure, through careful and considered evaluation, that their conduct at all times does not amount to a contravention of the Act. Particularly considering that, obtaining final immunity is a cumbersome process and significant management time and company resources can be tied up during the often-lengthy period that prohibited practice matters take to conclude.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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