COMPETITION

Naasha Loopoo

CLIFFE DEKKER HOFMEYR WELCOMES NAASHA LOOPOO TO ITS COMPETITION TEAM

The Competition and Regulatory Practice welcomes Naasha Loopoo to the team. Naasha joins us from the Competition Commission where she previously worked in the Enforcement and Exemptions Division.

We wish her all the best in her future career with the firm.

SIBANYE GOLD APPARENTLY BREACHES EMPLOYMENT CONDITIONS

The Competition Commission recently issued a notice of apparent breach of a condition imposed on a merger (Notice of Apparent Breach) to Sibanye Gold. According to the Commission, Sibanye Gold has undertaken a retrenchment process in breach of a condition imposed by the Competition Tribunal to the effect that there may be no merger related retrenchments arising from Sibanye's acquisition of the Cooke mining operations from Gold One International in early 2014 (Retrenchment Condition). The Competition Tribunal's condition prohibited the parties from undertaking merger related retrenchments for a period of two years. Operational retrenchments, voluntary separation agreements and voluntary early retirement packages were not subject to the moratorium on retrenchments.

According to the Commission, it received a formal complaint from the National Union of Mineworkers regarding the fact that the proposed retrenchments were in fact merger specific on 5 November 2014.

The Retrenchment Condition came about as a result of concerns raised during the investigation of the transaction that merger specific retrenchments were taking place in the Sibanye Gold business. The Commission, after an extensive investigation, was not able to find that the retrenchments were merger specific. These retrenchments related to all divisions of Sibanye Gold, which at the time stated that the retrenchments were operational in nature.

During the course of its investigation of the merger, the Commission also found that notices in terms of s189 of the Labour Relations Act, No 66 of 1995 had been issued to employees of the target firm but that these notices were subsequently withdrawn out of concern that the retrenchment process may jeopardise the merger.

Although it could not find that the retrenchments were merger specific, out of caution, the Commission requested that a two year moratorium on merger specific retrenchments be imposed on the merger. The parties did not contest the Retrenchment Condition and the Tribunal agreed with the Retrenchment Condition.

The Commission's Notice of Apparent Breach highlights the significant practical difficulty faced by merging parties in showing the distinction between merger specific and true operational retrenchments where employment conditions have been imposed on their businesses.

Parties issued with Notices of Apparent Breach have a right to approach the Competition Tribunal for review of the notice.

Albert Aukema

DETERMINATION OF ADMINISTRATIVE PENALTIES IN SETTLEMENTS

The Competition Tribunal is empowered to impose administrative penalties for various offences, including collusive tendering or cover pricing which is prohibited by s4(1)(b) the Competition Act, No 89 of1998 (Act).

Cover pricing entails the act of tendering artificially high prices for a contract on the assumption that the tender will not be accepted, in this way ensuring that a competitor with whom an agreement to this effect has been struck becomes the successful tenderer.

It is for the Tribunal to determine whether or not a penalty is appropriate, having taken into account the factors listed in s59 of the Act which include considerations of the nature of the contravention, loss or damage suffered, the behaviour of the contravening party, market circumstances, profit derived, the degree of co-operation of the respondent with the competition authorities and whether the respondent has previously contravened the Act.

In proposing an appropriate amount for administrative penalties to be levied against a number of furniture removal companies involved in cover pricing, it appears that the Competition Commission has adopted a formulaic approach in arriving at the quantum of the penalties. Although not documented in consent orders, it has been explained during Tribunal hearings that the formula entails apportioning a rising scale percentage for penalties depending on the degrees of contraventions. In other words, the penalty levied is based on a sliding scale which results in the percentage of the penalty payable increasing based on the total number of offences.

Some of the removal company respondents were found to have engaged in as few as 12 instances of collusive conduct while others admitted to having been complicit in as many as 3487 instances of collusion.

The offender with the highest number of collusive arrangements agreed to pay the maximum penalty of 10% of its annual turnover for the relevant year while the offender with the least admitted offences agreed to a penalty equating to 5% of its turnover.

On 12 November 2014, the Tribunal made a further six consent agreements between the Commission and the respective contravening firms orders of court, adding to the previous consent orders already confirmed by the Tribunal.

Considering the multiplicity of offences as well as offenders, it may be that the Commission sees it fit to apply a mechanical method of calculating penalties across a group of offenders, however, it should remain front of mind that this approach may at best serve as a guiding principle as the Tribunal must still abide by the prescripts of the Act when making determinations on the imposition of penalties.

Natalie von Ey and Kitso Tlhabanelo

COMPETITION COMMISSION REMAINS PRO-ACTIVE IN ENSURING JOB SECURITY IN MERGER TRANSACTIONS

In the context of merger transactions, the Competition Commission is mandated to consider the effect of a merger on competition, as well as the effect that a merger has on the continued employment of personnel of the merger parties. Whilst the Commission's mandate is limited to considering whether as a result of the merger, retrenchment of employees would ensue (for example, through the duplication of certain roles post-merger), the Commission is becoming increasingly pro-active in ensuring that employment remains secure even in situations of potential retrenchments where those retrenchments may occur for reasons unrelated to the merger.

The Commission recently approved the acquisition by Coricraft Group (Pty) Ltd (Coricraft) of Dial-a-bed, a division of the financially distressed Ellerines Furnishers (Pty) Ltd (Ellerines) and imposed a condition relating to employment.

In its analysis of the possible effects of the merger on employment, the Commission found that Dial-a-bed employs some 200 employees in its stores, and that 18 of these employees are employed at stores identified by Ellerines as being non-viable. Given that the potential liquidation of Ellerines will result in the retrenchment of an entire workforce of 7,060 employees, the Commission considered that the proposed acquisition presents an opportunity to save at least some jobs.

Coricraft also undertook to the Commission to employ the 18 staff employed at the Dial-a-bed stores identified as non-viable, which staff would potentially have been negatively affected by the liquidation of Ellerines. Notwithstanding the fact that the potential job losses did not occur as a result of the merger, the Commission saw an opportunity to negotiate a condition with the parties which would result in the saving of jobs in danger of being lost. The decision of the Commission demonstrates that in the current economic environment, it is intent on confronting the issues of employment and remedying any potential job losses through the merger analysis forum, even though the retrenchments may not be merger specific.

Nazeera Mia and Alexia Tomazos

THREE TRANSACTIONS APPROVED AS PART OF THE MOVE FOR NASHUA MOBILE TO EXIT THE MOBILE TELECOMMUNICATION SERVICES MARKET

Nashua Mobile Proprietary Limited (Nashua Mobile) is effectively exiting the market for the retailing of mobile telecommunication services to corporate and consumer subscribers and will no longer be operating as a service provider in the telecommunications industry. The apparent reason for this is due to changes in the market that led to the service provider business model becoming obsolete and inefficient.

The Competition Tribunal has approved three separate transactions which respectively result in:

- Altech Autopage Cellular Proprietary Limited (Altech Autopage) acquiring Nashua Mobile's Cell C subscriber base and certain franchisees and dealers of Nashua Mobile;
- Vodacom Proprietary Limited acquiring Nashua Mobile's Vodacom subscriber base; and
- Mobile Telephone Networks Proprietary Limited (MTN) acquiring Nashua Mobile's MTN subscriber base.

These transactions are only three of several interrelated transaction that will result in Nashua Mobile exiting the market.

Nashua Mobile acknowledged the difficulties it faces in the market, but stated that it would be able to continue operating in the market (albeit not in the long-term) and that its exit from the market is largely motivated by the fact that it would, at this stage, still be in a position to offer favourable severance packages to its employees and some returns to shareholders.

Nashua Mobile made substantial commitments to minimise the effects on employment, including:

- undertaking to redeploy affected employees within its holding group (especially unskilled employees that are viewed as most vulnerable and least likely to find alternative employment);
- offering favourable severance packages;
- establishing support structures to provide employees with psychological and financial counselling;
- assistance in updating their CVs;
- having their CVs circulated within Nashua Mobile's holding group and being afforded preferential consideration in the event of vacancies arising; and
- reference letters.

This decision is indicative of the steps that merging parties are expected to implement in the event of the retrenchment of employees as a result of a merger, where a moratorium on merger specific retrenchments cannot be applied.

Leana Engelbrecht

MONDI GRANTED ACCESS TO INFORMATION USED BY THE COMMISSION TO INITIATE COMPLAINT

On 12 November 2014, the North Gauteng High Court issued its reasons in respect of the interlocutory application brought by Mondi Limited (Mondi) against the Competition Commission. Mondi requested the Court to order the Commission to provide the Registrar of the Court with the record in respect of the Commission's decision to initiate a complaint against Mondi and SAPPI Southern Africa Limited.

The Commission initiated a complaint against Mondi based on information it obtained from mergers involving the pulp and paper industry and a, subsequent, scoping exercise undertaken by the Commission. Mondi, consequently, applied to obtain access to the reasons for the Commission's decision to initiate an investigation in order to determine whether the initiation was done lawfully and reasonably in accordance with the law and developed case law in this regard.

It is accepted in our law that the Commission may initiate an investigation where the Commission is "at the very least in possession of information concerning an alleged practice which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice." It is further accepted that the Commission may only exercise its investigatory powers based on an initiated investigation and not for purposes of a fishing expedition.

The Commission argued that the existing case law did not concern the validity of the initiation of a complaint, but rather the summons and that the validity of initiation of a complaint cannot be challenged. The Commission stated that to do so would "plunge the activities of the Commission into disarray as suspect firms will do everything in their power, like in the present case, not to be investigated for contravention of the Act."

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The Court noted that the initiation of a complaint by the Commission is not absolved from scrutiny and that legality and rationality must be satisfied. The Court stated that "if there are no facts before the Commission justifying such initiation based on reasonable suspicion, the initiation and subsequent investigation will be unlawful and challengeable."

The Court took into account the information available to the Commission (and on which the Commission based its decision to refer the investigation) and was not able to conclude that the Commission had no legal basis for initiating the complaint, as the Commission had in its possession information that would justify a reasonable suspicion of prohibited practices taking place. This was, however, not the Court's final determination in the case.

The Court further considered the Commission's argument that the information forming part of the record of its reasons for initiation of the complaint was confidential and could not be disclosed. The Court noted that the Competition Act, No 89 of 1998 (Act) makes provision for challenging the confidentiality of the information (claimed as such in terms of the provisions of the Act) before the Competition Tribunal and that such an approach may have been beneficial. Nevertheless, the Court found that the provisions of the Act relating to claiming information as confidential were not complied with and there was, accordingly, no valid claim for confidentiality.

Ultimately, the Court found that Mondi should have access to the information relied on by the Commission to make a decision to initiate the complaint as "[t]he Commission is challenged on the basis that it has no reasonable suspicion that Mondi has committed any of the prohibited practices. As this is a requirement for the initiation of a complaint, Mondi should therefore be entitled to the disclosure of the information or documents upon which the initiation is based" and in the absence of the legislated procedures for confidentiality to be claimed in terms of the Act, the Commission "has only itself to blame as it failed to furnish sufficient information in making a claim of confidentiality".

The Commission has indicated that it views this decision as significant and that it will appeal the decision to the Supreme Court of Appeal.

Leana Engelbrecht

TRIBUNAL PROVIDES CLARITY ON WHETHER COURT REFERRALS WILL BE SUBJECT TO THE PRESCRIPTION PROVISIONS OF THE COMPETITION ACT

In November 2014, the Competition Tribunal dismissed a point *in limine* raised by Linpac Plastics South Africa Proprietary Limited (Linpac), against a referral filed by the Western Cape High Court at the instance of Mr Jacobus du Plessis and Others (Mr du Plessis) in terms of s65(2)(b) of the Competition Act, No 89 of 1998 (Act) (Court Referral). In terms of s65(2)(b) of the Act where a party to a civil action raises an issues relating to anti-competitive conduct (which is prohibited in terms of the Act), the Court hearing the civil action must refer the matter to Competition Tribunal or Competition Appeal Court to make a determination.

In a civil dispute between Linpac and Mr du Plessis before the High Court, a legal question arose as to whether Linpac could claim damages from Mr du Plessis as it is allegedly engaging in conduct that is anti-competitive. As the competition authorities have exclusive jurisdiction over the interpretation and application of Chapters 2, 3 and 5 of the Act, a Court Referral was directed to the Tribunal.

Before the Tribunal could decide the matter on its merits, Linpac argued that the Court Referral was brought out of time and averred that all matters before the Tribunal are subject to a prescription period set out in s67(1) of the Act, which limits the right to refer complaints that are brought out of time (Limitation Clause). Linpac relied on an earlier decision of *Leonard & Others v Nedbank & Others 84/CR/Aug07* (Leonard-decision), where the Tribunal held that a Court Referral does not preclude it from considering the issue of prescription. Mr du Plessis argued that the application of the Limitation Clause is only applicable to complaint procedures as envisaged in the Act and cannot apply with equal effect to Court Referrals.

The Tribunal found that the Limitation Clause does not apply to Court Referrals for the following reasons:

- In terms of the ordinary language approach, the wording in the Limitation Clause makes reference to 'complaint' and 'initiated', whereas the corresponding wording is absent from the Court Referral, which leads to the view that the Limitation Clause is only applicable to a complaint that has been initiated.It would make no logical sense to read these words into the context of the Court Referral.

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- In terms of the functional approach, the Limitation Clause anticipates two dates: the date on which the conduct ceases and the date on which the conduct is initiated. For the Limitation Clause to be triggered, the date of initiation must be certain or at least capable of certainty. The Tribunal held that the date of initiation is either the date the complaint is filed with the Commission or the date that the Commission commenced the investigation. The same reasoning cannot be applied to a Court Referral as the date of initiation is uncertain and it is not capable of certainty.
- in terms of the policy approach, the Act is largely concerned with public enforcement. There are instances where a private civil matter arises and requires the competition authorities' intervention, provided there are compelling policy justifications. The Tribunal is of the view that a Court Referral is one such instance. To deny this right to parties would be to infringe upon a person's right of access to court set out in s34 of the Constitution.

The Tribunal departed from the approach taken in the earlier Leonard-decision as the arguments raised in this case were not considered then. Accordingly, the point *in limine* was dismissed with no costs.

Naasha Loopoo

COMMISSION REFERS COMPLAINT AGAINST MEMBERS OF THE ASSOCIATION OF ELECTRIC CABLE MANUFACTURERS OF SOUTH AFRICA

The Competition Commission, earlier this month, referred a complaint against all the members of the Association of Electric Cable Manufacturer of South Africa (AECMSA). The members of AECMSA allegedly contravened the provisions of the Competition Act, No 89 of 1998 (Act) by fixing the prices of power cables, dividing these markets and tendering collusively.

This alleged conduct occurred under the auspices of AECMSA by virtue of the agreed price escalation formula used by the members of AECMSA as the basis for increasing prices when bidding for short and long term tenders for the supply of power cables.

This referral, again, highlights the importance of firms being mindful of their engagement in industry associations, especially before implementing any industry approved formula for price escalation or exchanging possibly competitively sensitivity information, as firms can unknowingly engage in conduct that contravenes the Act or which, at least, invite scrutiny from the competition authorities.

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