COMPETITION

IN THIS ISSUE

COMPETITION COMMISSION CONDITIONALLY APPROVES TAKEALOT'S ACQUISITION OF KALAHARI

COMPETITION APPEAL COURT DISMISSES APPEAL IN FAVOUR OF SAB

RELIANCE ON COMPETITION LAW PRINCIPLES IN CONTRACTUAL DISPUTES

TRIBUNAL DISMISSES PRIVATE ACTION TO HAVE PROFESSIONAL OPTOMETRY RULES

COMPETITION COMMISSION CONDUCTS DAWN RAID AT AKULU MARCHON AND INVESTCHEM

SOUTH AFRICAN COMPETITION COMMISSION SEEKS PUBLIC COMMENT ON ITS DRAFT GUIDELINES

LEWIS AND SHOPRITE CHECKERS ACQUIRE PARTS OF THE BUSINESS OF ELLERINES

UPDATE ON THE HEALTHCARE INQUIRY

COMPETITION COMMISSION CONDITIONALLY APPROVES TAKEALOT'S ACQUISITION OF KALAHARI

The Competition Commission has conditionally approved the acquisition by Takealot Online Proprietary Limited (Takealot) of Kalahari.com, a division of MIH Internet Africa Proprietary Limited (Kalahari). As a result of this transaction Takealot will acquire the entire business of Kalahari and, in return, MIH Internet Africa Proprietary Limited will acquire a non-controlling interest in Takealot, equal to the shareholding of Takealot's existing majority shareholder, Tiger Global.

Takealot and Kalahari are South Africa's two largest online retailers of consumer goods and products and the transaction will see the consolidation of these businesses under the Takealot brand. It is envisaged that the merged entity will, due to the increased size of the combined operations, be able to compete more effectively with its competitors that operate through brick and mortar stores.

The transaction was approved subject to public interest conditions that relate to employment. In particular, the Commission imposed a condition that no more than 200 employees of the combined merged entity will be retrenched as a result of the merger and that a training fund will be established for the benefit of affected employees.

Cliffe Dekker Hofmeyr acted for Takealot in this matter.

Leana Engelbrecht

COMPETITION APPEAL COURT DISMISSES APPEAL IN FAVOUR OF SAB

In March 2014, the Competition Tribunal dismissed a case against South African Breweries Limited (SAB) in respect of its distribution systems. The Competition Commission alleged that SAB's conduct amounted to (i) unlawful price discrimination in contravention of s9 of the Competition Act, No 89 of 1998 (Act) to the extent that SAB charged a different price to its authorised distributors (being the retail price minus a discount) than to other distributors (being the retail price) (referred to as the price discrimination case); (ii) market division in its authorised distributors for the distribution of SAB products in the exclusive territories (referred to as the horizontal case); and, alternatively, (iii) a vertical restrictive practice in contravention of s5(1) by virtue of the territorial carve-outs being anti-competitive and not capable of justification (referred to as the vertical s5(1) case); and (iv) minimum resale price maintenance in contravention of s5(2) of the Act (referred to as the minimum resale price maintenance case).

The Tribunal found that (i) SAB's conduct did not amount to price discrimination as the transactions between SAB and authorised distributors on the one hand and independent distributors on the other hand were not functionally equivalent; (ii) the relationship between SAB and its distributors cannot be characterised as the type of horizontal relationship the legislature intended to scrutinise in terms of those provisions of the Act that prohibit market allocation as the authorised distributors were not autonomous economic actors; (iii) the conduct did not lead to a substantial lessening or prevention of competition that would be prohibited in terms of s5(1) or s4(1) of the Act; (iv) there was no evidence to suggest that SAB intentionally imposed a computer system on its authorised distributors (that limited authorised distributors from setting their own price) in order

continue

to enforce a system of resale price maintenance or that SAB penalised its authorised distributors for granting discounts.

The Commission unsuccessfully appealed the decision of the Tribunal to the Competition Appeal Court (CAC). The CAC found that:

- Horizontal case of market allocation: the CAC criticised the Tribunal for considering the independence of the authorised distributors as the only relevant factor in its enquiry, but confirmed that it is a relevant consideration. The CAC found the central consideration to be whether the relationship between SAB and its authorised distributors could be characterised as a horizontal relationship (as between competitors) or a vertical relationship (as between supplier and customer). The CAC concluded that (in line with international precedents) the relationship between SAB and its authorised distributors is more accurately characterised as a vertical relationship and that the horizontal component of the relationship was incidental to and flows from the vertical supply arrangement. Accordingly, the conduct of SAB cannot be appropriately considered under s4 of the Act.

- Vertical s5(1) case: the CAC agreed with the finding of the Tribunal that the Commission could not, on the evidence, show that the conduct, in fact, led to a substantial lessening or prevention of competition. On the contrary the distribution system achieved lower warehousing, primary distribution and secondary distribution costs and ensured that the demand of all purchasers of more than ten cases of beer were met at the lowest cost and, overall, benefitted consumer welfare.

- Price discrimination case: the CAC did not deem it necessary to considered whether the transactions between SAB and its authorised distributors, on the one hand, and its independent distributors, on the other hand, were equivalent transactions (and, hence, subject to scrutiny in terms of s9(1) of the Act). The CAC concluded that any such inquest is unnecessary as the Commission did not establish that the alleged price discrimination was likely to have the effect of substantially lessening or preventing of competition, of the kind which would undermined the competitive process and ultimately harm consumers.

- Minimum resale price maintenance case: the CAC supported the conclusion reached by the Tribunal and found that there was no evidence to suggest that SAB enforced a practice on its distributors to prevent the distributors from charging less than the listed prices.

Accordingly, the CAC dismissed the Commission's appeal with costs. It has been reported that the Commission is considering its options to appeal the decision of the CAC to the Constitutional Court.

Leana Engelbrecht

RELIANCE ON COMPETITION LAW PRINCIPLES IN CONTRACTUAL DISPUTES

The Competition Tribunal, on 20 November 2014, published reasons for its decision to dismiss a complaint referred directly to it, on the basis that the complainant failed to demonstrate a competition law case.

Increasingly, parties aggrieved by failed contractual relationships attempt to seek re-dress through, amongst others, competition law. Importantly however, is that parties bear in mind that competition harm needs to be occasioned first, before reliance is placed on competition law remedies.

During June 2013, Lekoa Fitment Centre (Lekoa) lodged a complaint with the Competition Commission against Altech Netstar Proprietary Limited (Netstar). After investigating the complaint, the Commission issued a Notice of Non-referral. Dissatisfied with the Commission's decision to non-refer, Lekoa referred the complaint directly to the Tribunal.

Lekoa was contracted, on an exclusive basis, to install, register, re-register and service Netstar products to a particular standard of quality and in return, Netstar would pay Lekoa a pre-determined fee. The parties' relationship broke down in early 2014 when Netstar terminated the agreement for alleged breach by Lekoa.

Lekoa alleged, *inter alia*, that the vertical relationship between Netstar and itself substantially prevents and lessens competition and that Netstar was abusing its dominant position in the market by engaging in an exclusive agreement with Lekoa. Lekoa sought relief from the Tribunal.

The relief sought by Lekoa in respect of the vertical arrangement between the parties was inherently contradictory. This is because Lekoa alleged that the agreement substantially prevents and lessens competition, but at the same time sought a declaration that the termination of the agreement be rescinded. If the agreement was in fact unlawful for running afoul of the Competition Act, the Tribunal would not be competent to rescind the termination thereof.

Lekoa alleged that the agreement prevented it from dealing with any products and/or services of Netstar's competitors and as a result, the agreement failed to provide an opportunity for small businesses to participate equitably in the economy. Lekoa failed to substantiate this argument further. In alleging dominance, Lekoa simply stated that there exists a particular market and that Netstar enjoys dominance

continue

in that market. Lekoa was neither able to delineate the relevant market, nor was it able to establish dominance.

Whilst the Tribunal was sympathetic to Lekoa's case, the Tribunal found that Lekoa was unable to demonstrate that the vertical arrangement between the parties substantially prevents and lessens competition or that Netstar was abusing its dominance by engaging in an exclusionary act, and that the mere assertions of anti-competitiveness by Lekoa does not in fact make it so.

Nazeera Mia and Alexia Tomazos

TRIBUNAL DISMISSES PRIVATE ACTION TO CHALLENGE PROFESSIONAL OPTOMETRY RULES

The question of whether Rule 8 (Rule 8) of the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act of 1974, read together with the Policy Document on Undesirable Business Practice (Policy), facilitated a prohibited practice under s4(1)(1) of the Competition Act, No 89 of 1998 (Act) was referred to the Competition Commission by Ian Walter Buchanan. In essence, Rule 8 and the Policy prohibit private businesses from acquiring ownership in the professional practice of optometrists and also do not allow for optometrists to practice professionally in the employ of or be in partnership with anyone not registered as an optometrist. The Commission issued a notice of non-referral, thereby dismissing the complaint and, consequently, Mr Buchanan privately referred the matter to the Competition Tribunal.

In concurrence with the Commission, the Tribunal dismissed the matter on the grounds that no prevention or lessening of competition arose from the prohibition.

The Tribunal, however, confirmed that Rule 8 and the Policy fell within the definition of a decision by an association of firms (one of the elements required to establish a restrictive horizontal practice) on the basis that, they were formulated through the Health Professionals Council of South Africa's rule making process which involves inputs by competitors who, among other parties, serve on the Professional Board of Optometry and Dispensing Opticians. Nevertheless, the prohibition could not be shown to lead to a substantial lessening or prevention of competition and, hence, did not constitute a transgression of s4 of the Act.

In its dismissal of the matter, the Tribunal stressed that compelling, empirical evidence is required to show the substantial effect of lessened competition in a market. Without adequately discharging the onus of proving the competitive benefit of allowing private corporate institutions to independently own optometry practices, the complainant's argument had to fail.

Kitso Tlhabanelo

COMPETITION COMMISSION CONDUCTS DAWN RAID AT AKULU MARCHON AND INVESTCHEM

The Commission is armed with an arsenal of powers to conduct its investigations into alleged anti-competitive behaviour. One such power is the use of search and seizure operations, otherwise known as dawn raids. Section 48 of the Competition Act, No 89 of 1998 (Act) empowers the Commission to enter a firm's business premises in order to inter alia search the premises, inspect and request copies of any document, search electronic data and remove items from the premises, provided it has a bearing on the investigation.

In the previous year, the Commission actively engaged in a number of dawn raids, affirming its intention to bring an end to anti-competitive collusive behaviour. On 3 April, the first dawn raid of 2014 was carried out at the business premises of Unilever South Africa Proprietary Limited in Durban, Kwa-Zulu Natal and Sime Darby Hudson and Knight Proprietary Limited in Boksburg, Gauteng. On 4 July 2014, the second dawn raid was carried out the business premises of Precision and Sons, Eldan Auto Body in Pretoria, Gauteng and Vehicle Assessment Centre in Centurion, Gauteng.

The final dawn raid of 2014 occurred in December. The Commission determined that it had reasonable grounds to believe that since 2003, Akulu Marchon Proprietary Limited (Akulu Marchon) and Investchem Proprietary Limited (Investchem) have allegedly engaged in anti-competitive collusive behaviour in contravention of s4(1)(b)(i) and (ii) of the Act.

The Commission stated, in its media release, that it had reasonable grounds to believe that Akulu Marchon and Investchem have held meetings and agreed to fix the price for surfactants and allocate customers between one

continue

another in the market for the production and supply of a range of surfactants. Surfactants are used as key inputs in the manufacture of blended household detergents, cosmetics and toiletries. After obtaining warrants from the North Gauteng High Court, the Commission conducted a dawn raid at the offices of Akulu Marchon and Investchem on 4 December 2014. Competition Commissioner Tembinkosi Bonakele, in the Commission's media release, submitted that the information obtained from the dawn raid would enable the Commission to determine whether or not the parties have engaged in the alleged conduct.

It is encouraged that firms have comprehensive plans in place to deal with dawn raids, thus safeguarding their rights.

Naasha Loopoo

SOUTH AFRICAN COMPETITION COMMISSION SEEKS PUBLIC COMMENT ON ITS DRAFT GUIDELINES

Section 79(1) of the Competition Act, No 89 of 1998 (Act) empowers the Competition Commission to prepare guidelines to support its policy approach on matters within its jurisdiction. In this light, the Commission published its draft *Guidelines for the Determination of Administrative Penalties for Prohibited Practices* (Guidelines) for public comment on 10 December 2014.

Administrative penalties are intended to serve to deter firms from engaging in anti-competitive behaviour. The Guidelines outline the methodology to be implemented by the Commission in determining administrative penalties for the purpose of concluding consent orders, settlement agreements and recommending an administrative penalty in a complaint referral before the Competition Tribunal. The aim of the Guidelines is to promote objectivity and transparency.

The Commission's methodology is based on a six-stage test developed in the case of *Competition Commission v Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd (Case No: 84/CR/Dec09)* which was later confirmed by the Competition Appeal Court. In essence, the six-stage test comprises of the following steps:

(i) the determination of the affected turnover (being the turnover derived in the market in which the collusive conduct took place);

(ii) the calculation of the base amount by multiplying the affected turnover with a percentage of up to 30% determined with reference to the nature and extent of the contravention, loss and damage suffered as a result of the contravention and market circumstances;

(iii) multiplying the base amount by the duration of the contravention;

(iv) reducing the amount obtained at step (iii) if it exceeds the statutory limit for an administrative penalty of 10% of total turnover;

(v) a consideration of aggravating and mitigating factors; and

(vi) reducing the amount obtained at step (iv) if it exceeds the statutory limit.

Some of the notable features of the Guidelines include:

- In addition to the existing factors listed in s59(3) of the Act, the Guidelines imposes additional factors to be taken into account in the determination of an administrative penalty. For example, s59(3)(c) of the Act relates to the behaviour of the respondent in the market. Additional factors, amongst others, include the nature of a firm's involvement in the contravention (ie whether the firm was a passive or proactive participant), the involvement of directors and/or senior management in the contravention and the firm's encouragement of its employees' participation in the contravention ought to be taken into account.

- Once the Commission has applied its proposed methodology, it may offer the respondent firm a discount ranging between 10% and 50% off the administrative penalty. The Commission shall be guided by the respondent firm's willingness and co-operation to conclude a consent order and the extent to which the respondent firm assists the competition authorities in the prosecution of other firms.

- Under exceptional circumstances, the Commission will take into consideration the respondent firm's ability to pay the administrative penalty. The Commission shall be guided by the production of objective evidence such as audited financial statements which can attest to the veracity of the firm's financial position. If the Commission is satisfied that the administrative penalty shall put the respondent firm at risk, then it may consider the use of payment terms amenable to both parties.

continue

- The Commission may in certain instances impute liability on a holding company where its subsidiary company has been found to have contravened the Act.

As the Commission puts it, "the imposition of administrative penalties is not a precise science" and the competition authorities will continue to apply discretion on a case-by-case basis, implying that the Guidelines are in no way binding on the competition authorities.

In the spirit of natural justice, openness and transparency, the Commission is to be commended for taking steps to spell out its processes and techniques when setting administrative penalties. The deadline for making submissions to the Commission on the deadlines has been extended until 16 February 2015.

Naasha Loopoo

LEWIS AND SHOPRITE CHECKERS ACQUIRE PARTS OF THE BUSINESS OF ELLERINES

On 12 November 2014 and 12 December 2014, the Competition Tribunal approved two transactions relating to the attempts to raise capital for the struggling Ellerine group as part of the current business rescue process it is engaged in. The Tribunal first conditionally approved the acquisition by Lewis Stores Proprietary Limited (Lewis) of 63 Beares Stores from Ellerine Furnishers Proprietary Limited and then conditionally approved the assignment of certain leases and employment of the employees of selected Ellerine Furnitures Proprietary Limited stores by Shoprite Checkers Proprietary Limited (Shoprite Checkers).

These transactions are a result of the ongoing business rescue process and the sale of certain assets, brands and divisions were undertaken as an alternative to liquidation of the group. As part of this process, Coricraft Group Proprietary Limited acquired Ellerine's Dial-a-bed division (this transaction has also been conditionally approved by the Competition Commission).

In the Lewis transaction, the Commission found that the activities of the merging parties overlap in the market for the sale of furniture products and that, post-merger, Lewis is likely to become a monopolist in certain geographical markets. Nevertheless, the Commission took into account the counterfactual of Beares exiting the market completely as a result of liquidation of the Ellerine group and, accordingly, absent the merger the market would not be left in a more competitive position. Furthermore, the substantial public interest benefits arising from the merger would justify any possible lessening of competition in these geographical markets. Absent the merger, over 1150 employees would have lost their jobs, but post-merger at least 393 of these employees would retain employment and no further merger related retrenchments are permitted. Lewis is, further, obliged to create additional driver and driver assistant positions at each of the stores it is acquiring and to offer these positions (and any further positions created at the transferred Beares Stores in the next year) to those former Beares employees that were retrenched.

In the Shoprite Checkers transaction, Shoprite Checkers obtained the leases to certain Ellerine premises to house Shoprite Checkers stores. This transaction did not pose any competition concerns, neither did it pose public interest concerns (as the retrenchment of Ellerine employees was not as a result of the transaction but as a result of Ellerine's financial difficulties). The Commission did, however, impose employment conditions in order to protect the jobs of the former Ellerine employees that did not accept voluntary severance packages. Shoprite Checkers, accordingly, agreed not to retrench these 300 employees subject to an agreement with the relevant union.

It is well known that the Commission takes a stern stance in respect of matters relating to employment. However, in this instance the job losses were not merger related and it may be argued that the imposition of employment related merger conditions (where there is no immediate nexus between the proposed transaction and the retrenchments) may not be necessary or appropriate. Ultimately, it can be accepted that none of the bidding parties taking over parts of the Ellerine business would be opposed to assisting these employees based on the sensitivities surrounding the financial woes of Ellerine and the anticipated retrenchments of its employees.

Leana Engelbrecht

UPDATE ON THE HEALTHCARE INQUIRY

On 21 January 2014, the Competition Commission published a notice on its website informing stakeholders, media and the public that the panel of the Market Inquiry into the Private Healthcare sector has taken a decision to publish the non-confidential version of all submissions received by the panel on Thursday 5 February 2015.

The submissions can be accessed on **www.healthinquiry.net** or **www.compcom.co.za**

CONTACT US

For more information about our Competition practice and services, please contact:

Nick Altini
National Practice Head
Director
T +27 (0)11 562 1079
E nick.altini@dlacdh.com

Chris Charter
Director
T +27 (0)11 562 1053
E chris.charter@dlacdh.com

Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@dlacdh.com

Susan Meyer
Director
T +27(0)21 481 6469
E susan.meyer@dlacdh.com

Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@dlacdh.com

Albert Aukema
Senior Associate
T +27 (0)11 562 1205
E albert.aukema@dlacdh.com

Leana Engelbrecht
Senior Associate
T +27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com

Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.ramroop@dlacdh.com

Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@dlacdh.com

Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@dlacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

cliffedekkerhofmeyr.com
Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

©2015 0298/FEB15

DLA CLIFFE DEKKER HOFMEYR