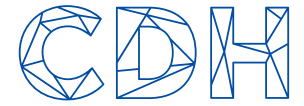


Competition Law

ALERT | 19 March 2025



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ALERT**

The National Consumer Tribunal's unprecedented approach to unfair pricing

In the recent decision of *Julie Williams v Cell C Ltd, NCT/300948/2023/75(1)(b)*, the National Consumer Tribunal (Tribunal) made a notable finding regarding pricing practices.

The Tribunal fined cell phone service provider Cell C R500,000 for imposing unfair, unreasonable and unjust contract conditions and an unreasonable price on a consumer, in contravention of the Consumer Protection Act 68 of 2008 (CPA). The consumer had requested an increase in her contract limit and activated international roaming before traveling overseas. Despite ostensibly agreeing to a new limit of R3,785, Cell C later billed the consumer R11,265.32 for international roaming charges, despite notifying the consumer that her limit had been reached. The consumer disputed the charges, arguing that they exceeded her agreed limit.

The Tribunal ruled in the consumer's favour, ordering Cell C to refund the amount charged over her account limit, granting an interdict restraining Cell C from engaging in similar prohibited conduct in the future, imposing a R500,000 administrative fine payable to the National Revenue Fund, and ordering Cell C to cover her legal costs.

While the case addressed several issues relating to contracting terms with consumers, what was notable was the Tribunal's declaration that the price in question was unfair, unreasonable and unjust. Determining price fairness is a complex and fraught exercise and there is little precedent for how this is to be approached in the context of the CPA.

Absence of a clear rationale or systematic approach

Traditionally, pricing assessments involve detailed economic analysis, and both in South Africa and abroad, interrogations of pricing fairness have generated complex case precedent and debate. For example, although section 8(3) of the Competition Act 89 of 1998 (Competition Act), dealing with excessive pricing as an abuse of dominance, sensibly provides that excessive pricing occurs when a price is higher than a competitive price, and the difference is deemed unreasonable, the inclusion of this provision in the Competition Act flows from a line of fraught case law which set out a range of factors that should be considered under the Competition Act.

The factors codified in the Competition Act include the respondent's profit-cost margins, return on investment and profit history; comparisons with prices in competitive markets, different geographic regions or for similar products; the prices and profitability of competitors in a competitive market; the duration for which the price has been maintained; and market structure elements such as market share, barriers to entry, and any advantages not due to the respondent's efficiency.

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Unfortunately, no such guidance is provided in the CPA and in the case under discussion, the Tribunal did not articulate a clear rationale for its determination that the price charged for international roaming was unfair.

While it cited section 48(1)(a)(i) of the CPA, which prohibits suppliers from entering into agreements at unfair, unreasonable or unjust prices, its conclusion was apparently based only on a type of 'Does it shock?' approach based on a comparison between the consumer's standard monthly usage limit of R1,785 (prior to the increase), and the price ultimately charged for a short period of roaming. As obvious as the unfairness seems on the face of it, the Tribunal's decision does not even attempt to arrive at a notional value for the service in order to compare it to the price actually charged.

Uncertainty surrounding the interdict

Another key issue arising from this decision is the ambiguity surrounding the consequences of the interdict that the Tribunal granted against Cell C's conduct. The Tribunal has granted an interdict restraining Cell C from engaging in similar prohibited conduct in the future. However, it remains unclear how this order should be implemented – whether Cell C is required to refrain from imposing limits altogether or to ensure that any imposed limits are strictly adhered to.

The risk of blanket approaches

The Tribunal's approach in this case also raises concerns about the potential for blanket determinations in future matters. If pricing is declared unfair, unreasonable or unjust without a rigorous assessment, there is a risk of disproportionate enforcement, where businesses cannot anticipate how their pricing strategies might be evaluated.

Conclusion

The Tribunal's decision represents a departure from established principles governing pricing assessments. The absence of a clear rationale or systematic approach raises concerns about regulatory consistency and the broader implications for market participants.

Without a clear rationale, it remains uncertain what factors were considered in arriving at the conclusion that the price was unfair, unreasonable and unjust. Moreover, it is unclear what the next steps are for affected parties.

Albert Aukema and Leah Williams



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OUR TEAM

For more information about our Competition Law practice and services South Africa and Kenya, please contact:



Chris Charter

Practice Head & Director:
Competition Law
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Albert Aukema

Director:
Competition Law
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Andries le Grange

Director:
Competition Law
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Lebohang Mabidikane

Director:
Competition Law
T +27 (0)11 562 1196
E lebohang.mabidikane@cdhlegal.com



Martha Mbugua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E martha.mbugua@cdhlegal.com



Susan Meyer

Joint Sector Head: Healthcare
Director: Competition Law
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Nelisiwe Khumalo

Senior Associate:
Competition Law
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com



Reece May

Senior Associate:
Competition Law
T +27 (0)11 562 1071
E reece.may@cdhlegal.com



Brian Muchiri

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E brian.muchiri@cdhlegal.com



Duran Naidoo

Senior Associate:
Competition Law
T +27 (0)21 481 6463
E duan.aidoo@cdhlegal.com



Robin Henney

Associate:
Competition Law
T +27 (0)21 481 6348
E robin.henney@cdhlegal.com



Taigrine Jones

Associate:
Competition Law
T +27 (0)11 562 1383
E taigrine.jones@cdhlegal.com



Christopher Kode

Associate:
Competition Law
T +27 (0)11 562 1613
E christopher.kode@cdhlegal.com



Mmakgabo Mogapi

Associate:
Competition Law
T +27 (0)11 562 1723
E mmakgabo.makgabo@cdhlegal.com



Ntobeko Rapuleng

Associate:
Competition Law
T +27 (0)11 562 1847
E ntobeko.rapuleng@cdhlegal.com

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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@cdhlegal.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@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

NAMIBIA

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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