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South Africa: Developments in Cartel Enforcement

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Introduction

The past 18 months have witnessed significant developments in the investigation and prosecution of cartel conduct in South African competition law.

In summary, these developments are the following:

- The Supreme Court of Appeal recognised the availability of ‘opt out’ class actions for private damages and set out a procedure through which plaintiffs can seek certification of a class.
- The Constitutional Court extended the availability of class actions for private damages by recognising ‘opt-in’ class actions where the interests of justice permit such a procedure.
- The Competition Commission (the Commission) for the first time utilised a fast-track settlement process in relation to the prosecution of a widespread cartel in the construction industry.
- An amendment to the Competition Act, 89 of 1998 (the Act) was promulgated giving the Commission the power to institute market enquiries. The Commission has indicated that it wishes to conduct a market inquiry into the private health-care sector.
- The Supreme Court of Appeal broadened the scope for the Competition Tribunal (the Tribunal) to adjudicate complaints prosecuted by the Commission.
- The Supreme Court of Appeal confirmed that leniency applications submitted to the Commission by a leniency applicant are subject to legal privilege unless the Commission makes reference to the application in a complaint referral to the Tribunal – in which case it will be taken to have waived privilege.
- The North Gauteng High Court found that a leniency applicant is not protected from private damages claims – even where it is not cited by the Commission as a respondent in complaint proceedings brought before the Tribunal.

These developments are further dealt with below.

Legislative overview

The Act prohibits firms from entering into agreements or becoming involved in concerted conduct that amounts to price fixing, market allocation or collusive tendering (bid rigging).

Cartels remain an enforcement priority in South Africa. This is evidenced by the fact that in 2011 the Commission established a dedicated Cartels Division.

The principal tool employed by the Commission to uncover and prosecute cartels is the Corporate Leniency Policy (CLP). In terms of the CLP a successful leniency applicant can avoid liability for its participation in a cartel in exchange for providing information to the Commission about the cartel and assistance in prosecuting the cartel. The success of the CLP is illustrated by the record number of leniency applications during the past 18 months .

In 2009, the Competition Amendment Act¹ (Amendment Act) was signed into law. Despite this, only a portion of the Amendment Act has been brought into operation, this provision concerns extending powers to the Commission to conduct market investigations.²

The provisions of the Amendment Act dealing with market investigations have strengthened the competition authorities’ ability to respond decisively to anti-competitive conduct.

Significant developments in cartel enforcement

Class actions

Following the decision of the South African Supreme Court of Appeal (SCA) in a landmark ruling in November 2012³ and a later decision of the Constitutional Court (CC), the South African courts now recognise both ‘opt-in’ and ‘opt-out’ class actions for private damages.

The SCA’s judgment established the procedure that should be followed by prospective opt-out class action claimants to seek the certification of a particular class. In a separate but related matter, the CC extended the ability of private litigants to bring class actions by recognising opt-in class actions as also being permissible under South African law in circumstances where using this procedure would be ‘in the interests of justice’.

The effect of the two judgments, in relation to cartel conduct, should become evident in the course of the next 12–18 months as a number of private damages claims are brought by way of class actions. South Africa, unlike the US, does not recognise punitive damages, and therefore damages awarded would be based on the economic assessment of ‘harm’ (a key requirement in the certification of a class action) to the litigants, which may pose some difficulties.

Ultimately, the computation (and subsequently the) award of damages will shape the impact that private antitrust litigation has in cartel enforcement.

Leniency policy

It remains to be seen how the developments discussed above regarding the risk of private class action damages as well as the recent developments in relation to potential criminal prosecution for cartel conduct, discussed below, will influence the efficacy of the Commission’s CLP. The CLP has, however, been at the centre of a number of recent precedent setting decisions.

In the case of *Premier Foods (Pty) Ltd v Manojim NO and Others*,⁴ before the North Gauteng High Court, the Court was confronted with a situation where a leniency applicant had not been cited as a respondent to a complaint referral by the Commission to the Tribunal. When a prospective class of plaintiffs sought to obtain a certificate from the Tribunal (which is required in terms of the Act for a party to pursue a private damages claim), the point was raised that they could not obtain the certificate because the party against whom they sought it (which had been a leniency applicant) had not been referred to the Tribunal.

In terms of the Act, before instituting a civil damages claim with a civil court, a private litigant must obtain a ‘certificate’ from the Tribunal confirming that it had found that the party against whom the action is to be brought had engaged in a ‘prohibited practice’ – namely, in conduct amounting to, inter alia, price fixing, market

allocation or bid rigging. The 'section 65 certificate' which is binding on the civil court, is conclusive proof that the conduct of a firm has been found to be a prohibited practice.⁵ The civil court has no jurisdiction to reconsider the merits of the affirmation.

For present purposes the interesting issue raised in the application is whether being a leniency applicant (and not being referred to the Tribunal) would protect a firm from follow-on damages. Unlike the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) in the USA,⁶ leniency applicants in South Africa are not expressly afforded protection from follow-on damages in terms of the Competition Act.

Ultimately, the Court held that Commission's failure to formally cite the leniency applicant in complaint referral proceedings to the Tribunal did not prevent the Tribunal from issuing a certificate against that party. The judgment (which is currently being appealed) therefore makes it clear that leniency applicants are not protected from follow-on damages claims.

In another development, the SCA upheld a claim by two respondents in a cartel investigation for access to confidential documents presented by way of a leniency application.

The dispute turned on whether ArcelorMittal South Africa Limited (AMSA) and Cape Gate (Pty) Limited (Cape Gate), fellow respondents in the investigation, were entitled to the production of documents that formed part of SCAW's leniency application. The Commission alleged that the documents which were given to it by SCAW South Africa (Pty) Ltd (SCAW), a respondent in terms of Commission's complaint referral, were protected by litigation privilege and were regarded as restricted information.

The SCA held that the Commission had waived any and all privilege it had to the documents requested in referring to the documents in formal pleadings. The SCA remitted the question of whether the leniency application documents constituted restricted information in terms of the Promotion of Access to Information Act to the Tribunal for determination. AMSA submitted that the documents it sought to access were part of the public records, in terms of rule 15 of the Commission's Rules read with rule 14. The Commission claimed that rule 15 was limited to members of the public and not litigants in proceedings. The SCA rejected the Commission's defence and held that it would be incongruous to prevent a litigant from having access to public documents. Accordingly, any claims of privilege or restriction in terms of rule 14 were invalid and AMSA was granted access.⁷

Fast track settlements in the construction sector

In early 2013, the Commission, for the first time, made use of its fast-track settlement process that was intended to incentivise firms to admit to their anti-competitive conduct by offering an expeditious resolution of complaints, lesser penalties than those they were likely to receive in fully contested proceedings and minimising legal costs.

The fast-track settlement process, launched in February 2011, 'incentivised firms to make full and truthful disclosure of bid rigging in return for penalties lower than what the Commission would seek if it prosecuted these cases.'⁸

During 2013, the Commission settled with 15 construction firms for collusive tendering in contravention of section 4(1)(b) of the Competition Act after successfully implementing its fast-track settlement process for the first time.⁹ Twenty-one firms responded to the Commission's offer of early settlement and the Commission uncovered 300 instances of bid rigging as a result thereof.¹⁰

In addition, the Commission will investigate and prosecute firms which did not disclose any projects but were clearly implicated and who did not make use of the fast-track settlement process.

The matter generated significant public interest considering many projects undertaken by certain respondents were publicly funded.¹¹ The Directorate for Priority Crime Investigation (the Hawks) has indicated that it may seek to hold directors and executives criminally liable for their involvement in bid rigging, which could have implications in the future as to the willingness of parties to make use of the Commission's CLP.

Section 6 market inquiry

In terms of the provisions of the Amendment Act, which have brought market inquiries into operation, the inquiry must be initiated at the behest of the minister of trade and industry, or if the Commission has reason to believe that any feature of a specific market may prevent, distort or restrict competition, the Commission may launch an inquiry.¹² The Commission has been granted very broad investigative powers to probe certain aspects of a market subject to investigation.¹³ The Amendment Act integrates various investigative powers, notably the power to issue a summons for a person to appear before it.¹⁴ After concluding a market inquiry, the Commission must publish its findings and it may make recommendations that a formal complaint be initiated and referred to the Tribunal, or that no further action be taken.¹⁵ Prior to investigating a specific market, the Commission is not prevented from initiating a complaint and referring a matter to the Tribunal. Therefore, the Amendment Act serves as an additional component of the Commission's toolkit. The Commission has indicated that it is considering conducting a market inquiry in relation to the private health-care sector.¹⁶

Wire mesh cartel

There have been several decisions addressing the scope of the Commission's powers and the extent of liability for cartels in the terms of the Act. In the case of *Competition Commission v Aveng (Africa) Ltd t/a Steeldale and Others*,¹⁷ before the Competition Tribunal, the Tribunal was confronted with a defence raised by members of the 'Wire mesh cartel' claiming that they should be exempt from prosecution because they were not actively involved in the cartel's activities. The Commission had lodged a complaint that Reinforcing Mesh Solutions and Vulcania Reinforcing had fixed prices and allocated customers in contravention of section 4(1)(b) of the Act.

The Tribunal, relying on European law, rejected their defence on the grounds that the Act does not require a formal agreement to collude, a mere understanding will suffice. Therefore, 'a party is guilty of participating in a cartel regardless of whether the participant actively participated in the day-to-day implementation of the agreement';¹⁸ this extends to the tacit approval of conduct. The firms were subsequently ordered to pay, respectively, 21.6 million rand and 5.6 million rand in administrative fines. The decision thus extended the scope of section 4(1)(b) to any individual who is in essence 'associated' with cartel activities.

Ambit of complaint referrals

The SCA recently upheld a claim by the Commission that it permits the Commission to refer additional claims to the Tribunal that go beyond the scope of the original complaint initiation. The Commission received a complaint alleging that Sasol Chemical Industries Limited (SCI) had abused its dominance. The complaint, lodged by Nutri-Flo CC and Nutri-Fertilizer CC (Nutri-flo), was only directed at SCI's conduct. The Commission conducted an investigation into the Nutri-flo allegations and sought to refer the findings to the Tribunal. During the investigation, the Commission

found that SCI's competitors, Yara South Africa (Pty) Ltd (Yara) and Omnia Fertilizer Ltd (Omnia) had engaged in collusive conduct. The Commission sought to amend the contents of the referral to include Yara and Omnia on the basis of their respective participation in collusive conduct. Yara and Omnia opposed the referral on the basis that the Commission should limit its referral to the complaint lodged by Nutri-flo. The Tribunal permitted the amendment. The matter was brought on appeal before the Competition Appeal Court, which subsequently upheld the appeal and overturned the amendment. The objection was based on the Commission's intention to prosecute a case before the Tribunal without complying with certain procedural formalities. The SCA, in upholding the Commission's appeal, held that the procedural formalities that Yara and Omnia asserted should be followed, are not contemplated in the Act. Furthermore, in what will undoubtedly have significant ramifications for current and future investigations, the SCA held that the Commission is at liberty to initiate a complaint 'informally and tacitly'. Therefore, by choosing to refer the matter to the Tribunal, the Commission tacitly initiated a complaint (against Yara and Omnia), which was outside the scope of the original complaint lodged by Nutri-flo.

Accordingly, the judgment significantly increases the scope of conduct that the Commission may investigate and refer to the Tribunal.

Conclusion

The past 18 months have seen significant developments in South Africa in relation to private antitrust litigation (where class actions are now a feature of South African law); the impact on the Commission's CLP by developments in relation to possible criminal prosecution (in relation to the Commission's construction investigation and referral); the impact on litigation privilege; and the Commission's inability to shield leniency applicants from private damages claims.

Moreover, the recent legislative amendment giving the Commission broad powers to conduct market inquiries and the recent victories before the SCA (which endorse the ability of the Commission to refer conduct beyond the ambit of the original complaint), coupled with the Commission's adoption of a fast-track settlement process in cartel litigation is a clear indication that the Commission is preparing for an even busier 2014, at least on the cartel front.

Approaching the Commission, in terms of the CLP, is no longer a guarantee that a party will avoid administrative penalties and further sanction. Given the developments covered above, final immunity does not shield the recipient from criminal damages or, conceivably, criminal penalties.

Notes

- 1 The Competition Amendment Act 1 of 2009.
- 2 Notably, section 73A of the Amendment Act was not signed into law. When, and if, this section becomes law it will provide for criminal sanctions directed at directors or executives of firms that have engaged in cartel conduct. The personal sanctions against directors will include a fine of up to 500,000 rand, imprisonment for a period not exceeding 10 years or both. The criminalisation of cartel conduct has stirred up a debate regarding the likelihood that it would weaken the incentive mechanism of the CLP used to apprehend cartels given the fear of criminal sanctions.
- 3 *Children's Resource Centre Trust v Pioneer Food (50/50)* [2012] ZASCA 182 (29 November 2012).
- 4 *Premier Foods (Pty) Ltd v Manoim NO and Others* (38235/2012) [2013] ZAGPPHC 236 (2 August 2013) available at www.saflii.org/za/cases/ZAGPPHC/2013/236.html.
- 5 Competition Act 89 of 1998 (as amended) section 65(7).
- 6 ACPERA provides a civil damages limitation by reducing leniency applicants' damages to single actual damages based on their own sales as opposed to treble damages with joint and several liability.
- 7 See *Competition Commission v AcellorMittal South Africa & Others* [2013] ZASCA 84 (31 May 2013).
- 8 Id.
- 9 Media Release, Competition Commission 'Construction firms settle collusive tendering cases with R1.5 billion in penalties' 24 June 2013 available at www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-MediaRelease.pdf.
- 10 Id.
- 11 *Fin24 'Pay-back for construction cartel'* (31 July 2013) available at www.fin24.com/Companies/Industrial/Pay-back-for-constructioncartel-20130731.
- 12 The official newsletter of the Competition Commission of South Africa, *Competition News*, 44th edition, March 2013, p1, available at www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Competition-News-March-2013.pdf.
- 13 Section 43A of the Competition Amendment Act, 1 of 2009.
- 14 Paragraph 2.3, Memorandum on the Objects of the Competition Amendment Bill, Competition Amendment Bill.
- 15 Section 43C(3) of the Competition Act.
- 16 In his keynote address at the Sixth Annual Conference on Competition Law, Economics and Policy, Dr Aaron Motsoaledi, the minister of health welcomed the Competition Commission's market enquiry into the private health-care sector. In his address he states that '[prices] have escalated to uncontrollable levels, and due to the absence of regulation, it may not be dramatic or an over exaggeration to describe the situation as the law of the jungle, where the principle is survival of the fittest.' The official Newsletter of the Competition Commission of South Africa, *Competition News*, 43rd edition, December 2012, page 1, available at www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Competition-News-Special-edition-Dec2012.pdf.
- 17 *Competition Commission v Aveng (Africa) Ltd t/a Steeldale and Others* (84/CR/DEC09) [2012], available at www.saflii.org/za/cases/ZACT/2012/32.html.
- 18 Id, at 81–86. In a subsequent decision by the Tribunal in the plastic pipes cartel affirming its position in Aveng, the Tribunal held that 'once a firm has been placed in such a situation by its rivals it has a positive duty to repudiate the proposal, and that if it does not do so, it will not escape liability because of some private, but unexpressed reservation,' *Competition Commission v DPI Plastics (Pty) Ltd and Others* (15/CR/Feb09) [2012] ZACT 47 (4 July 2012), available at www.saflii.org/za/cases/ZACT/2012/47.html.



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John Oxenham practises broadly in the regulatory field and principally in competition law including industry restructuring initiatives, joint ventures, cartel investigations, leniency applications, merger control, merger intervention, general competition litigation and commercial litigation, before the local South African and regional competition authorities and South African courts. He holds both BA and LLB degrees from the University of Cape Town and completed a diploma in competition law at the University of the Witwatersrand. John previously worked as a foreign antitrust adviser in the antitrust group at Howrey LLP in Washington, DC. John has advised clients on a range of regulatory compliance initiatives including competition law, corruption, white-collar crime and consumer protection law programmes. John continues to advise clients in relation to antitrust matters throughout sub-Saharan Africa and advised, in conjunction with Geroudis, the Mauritian Competition Commission on the implementation of its merger guidelines and procedural rules.

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Nortons Incorporated specialises in competition law, white-collar crime regulation, commercial litigation, consumer protection and general regulatory advice. Anthony Norton, John Oxenham and Anton Roets have once again all been nominated to *Who's Who Legal 2013* and *Global Competition Review*, while *Chambers Global 2012* lists the same three as leaders in the field of competition/antitrust. Nortons Incorporated has also been chosen as the winner of the White Collar Crime Law Firm of the Year in South Africa, for the 2013 Global Law Experts Practice Area Awards.



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