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Yoon & Yang
Zaid Ibrahim & Co



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Contributing editor

A Neil Campbell
McMillan LLP

Publisher

Gideon Robertson

Business development managers

Alan Lee, George Ingledew,
Dan White, Robyn Horsefield,
Adam Sargent

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Dominique Destrée,
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Parween Bains

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Research coordinator

Robin Synnot

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@gettingthedealthrough.com

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Adam Myers

Production coordinator

Lydia Gerges

Senior production editor

Jonathan Cowie

Production editors

Tim Beaver
Anne Borthwick
Martin Forrest

Director

Callum Campbell

Managing director

Richard Davey

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87 Lancaster Road
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Fax: +44 20 7229 6910
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South Africa

John Oxenham and Maria Webber

Nortons Incorporated

Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation?

Currently, cartel behaviour is regulated by the provisions of section 4 of the South African Competition Act, No. 89 of 1998, as amended (the Competition Act). Cartel conduct will become a criminal offence in South Africa when the Competition Amendment Act, No. 1 of 2009 (the Competition Amendment Act), which has been promulgated, comes into force.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition Act establishes a specialist competition hierarchy for the enforcement of the provisions of the Competition Act, each with distinct functions. The Competition Commission (the Commission) is the body that is entrusted with the responsibility of investigating and prosecuting cartel behaviour. The Competition Tribunal (the Tribunal) is the primary adjudicating body and cartel conduct will be prosecuted by the Commission in the Tribunal. The Competition Appeal Court (the Competition Appeal Court), a statutory court with the status of a high court and staffed by high court judges, hears appeals and reviews in respect of decisions of the Tribunal.

While the Supreme Court of Appeal originally had jurisdiction in competition law matters if such matters were further appealed and had the power to set aside decisions of the Competition Appeal Court; the Superior Courts Act, 2013 (the Superior Courts Act) as well as the Constitution Seventeenth Amendment Act, 2012 (the Constitutional Amendment Act), which came into force in August 2013, have changed the position in relation to appeals and reviews. The Superior Courts Act is designed to increase the capacity of the various courts to hear matters, improve management of the courts, increase access to various courts and to reorganise judicial boundaries. This, read with the Constitutional Amendment Act, has resulted in two significant changes to competition (and cartel) litigation.

In terms of the Constitution Amendment Act, the first major change is in terms of section 3, which will make the Constitutional Court the final court of appeal provided that 'the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court'. The words 'arguable point of law of general public importance' greatly increases the Constitutional Court's ability to hear matters as it will no longer be confined to only 'traditional' constitutional issues.

Second, in terms of the Constitution Amendment Act, the Supreme Court of Appeal is removed as the final court of appeal for

competition matters in terms of the amended section 168, thereby shortening the potential steps that a litigant would encounter en route to the Constitutional Court and making the Constitutional Court the final court of appeal in competition matters.

Accordingly, litigants who seek to appeal or review a decision of the Competition Appeal Court will now proceed insofar as it can to the Constitutional Court. This development is likely to place a significant workload on a court which has traditionally only considered constitutional matters.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Competition Amendment Act (the Competition Amendment Act) was promulgated in August 2009. Currently, the Competition Amendment Act is only partially in force; however, once the Competition Amendment Act comes into full force, it will constitute the most significant overhaul of South Africa's competition law to date.

Recent changes

On 1 April 2013, section 6 of the Competition Amendment Act came into force. Section 6 provides that market inquiries can be initiated at the request of the minister of trade and industry or if the Commission has a reason to believe that any feature of a specific market may prevent, distort or restrict competition. The Amendment Act also grants the Commission broad investigative powers and allows for the power to issue a summons to make a person appear before the Commission. After a market inquiry, the Commission must then publish its findings and make a formal recommendation whether a formal complaint be initiated and referred to the Tribunal. Interestingly, the Commission is not prohibited from initiating a complaint and referring the matter to the Tribunal prior to an investigation into a specific market.

The market inquiry provisions constitute an additional component in the Commission's cartel toolkit. Given the significant investigatory powers granted to the Commission in terms of the market inquiry, it is no longer forced to rely on the Corporate Leniency Policy (CLP) and on information supplied by cartelists seeking immunity through the CLP. Rather, the Commission will be able to employ its wide investigatory powers to uncover cartel activity through the market inquiry process.

Proposals and upcoming changes:

Furthermore, once the Competition Amendment Act is in full force, it will have far-reaching consequences for directors and other individuals engaged in or purporting to be engaged in a position having management authority within the firm; who are responsible for causing that firm to engage in cartel behaviour; or knowingly acquiescing thereto, in terms of section 73A of the Competition Amendment

Act. Directors and managers found guilty of contravening section 73A of the Competition Amendment Act will in future be liable to a maximum of 10 years' imprisonment or a maximum fine of 500,000 rand, or both a fine and imprisonment.

The Competition Amendment Act also introduces a section which is not yet in full force, but relates to individual leniency for persons who provide information or otherwise cooperate with the Commission's investigation into cartel conduct. In terms of section 50 of the Competition Amendment Act the Commission may, at any time after receiving or initiating a complaint, certify that any particular person contemplated in section 73A is deserving of leniency in the circumstances. In terms of section 73A(4) of the Competition Amendment Act, the Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Commission has certified that the person is deserving of leniency in the circumstances.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel conduct is specifically governed by section 4(1)(b) of the Competition Act.

Section 4(1)(b) of the Competition Act per se prohibits the following practices between competitors:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating markets, suppliers, territories or specific types of goods or services; or
- collusive tendering.

Conduct falling within the above categories is prohibited outright with no justification permitted on the basis of a rule-of-reason analysis.

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions?

There are no industry-specific offences and defences. However, the minister of trade and industry may 'designate' an industry, after consulting with the minister responsible for that industry, if a particular agreement between competitors or a prohibited practice contributes to the economic stability of that industry. This designation forms the basis for the Commission to grant an exemption for specific cartel conduct in relation to that particular industry. In addition, a firm or individual may apply to the Commission, in terms of section 10 of the Competition Act, to be exempted from the application of certain provisions of the Competition Act, where the effect of an agreement or prohibited practice contributes to the maintenance or promotion of exports, promotion of the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons, or changing the productive capacity to stop decline in an industry.

6 Application of the law

Does the law apply to individuals or corporations or both?

Section 4(1)(b) of the Competition Act applies to agreements between 'firms'. In terms of section 1 of the Competition Act, a 'firm' includes 'a person, partnership or a trust'. Accordingly, the Competition Act currently applies to both individuals and corporations. However, individuals are not held personally accountable for engaging in cartel conduct, as only corporations may be found liable in terms of section 59 of the Competition Act.

As set out in more detail above, once the Competition Amendment Act comes into operation it will be a criminal offence for a director or manager of a corporation to cause the firm to engage in cartel conduct or to knowingly acquiesce thereto.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Section 3 of the Competition Act provides that the Competition Act applies to all economic activity within, or having an effect within, South Africa. Thus, cartel conduct occurring outside South Africa (including cartel conduct relating to indirect sales) may be covered by the prohibition where it can be said to have an effect within South Africa.

Investigation

8 Steps in an investigation

What are the typical steps in an investigation?

Any person may lodge a complaint in respect of a prohibited practice (which includes cartel conduct) to the Commission. Following receipt of a complaint, the Commission undertakes a preliminary investigation of each complaint to ascertain whether there are in fact competition issues to be examined. The Commission may also initiate a complaint itself, either through information provided to the Commission by an informant or based on concerns raised more widely by different groupings, or on the Commission's own research through merger evaluations. The Commission, however, does not receive many complaints that relate directly to cartels, given their secretive nature.

Once it is determined that a complaint has merit, an investigator will be appointed who will commence a preliminary review of the matter. The Commission has available to it various powers of investigation, including powers of subpoena and the ability to conduct dawn raids in order to obtain information for purposes of its investigation.

The Commission has a 12-month period within which to investigate a complaint, although this is most often extended (with the consent of the complainant) and investigations may take over three years to complete.

Following the completion of an investigation, the Commission will either refer the complaint to the Tribunal for adjudication or issue a notice of non-referral. In the event of a notice of non-referral being issued, a complainant may refer its own complaint to the Tribunal for adjudication.

9 Investigative powers of the authorities

What investigative powers do the authorities have?

The Competition Act empowers the Commission to investigate any firm or person connected or associated with an anti-competitive act. The Commission is granted extensive powers to investigate cartel behaviour. In particular, these powers include the right to conduct unannounced visits and to carry out dawn raids at the company's business premises pursuant to obtaining a warrant or, in limited circumstances, without a warrant. The Commission may also summon individuals whom it believes have under their control documents or information that could assist the Commission in its investigation.

The Tribunal may also, in terms of section 54(c) of the Competition Act, summon to a hearing any individual to give evidence or to produce documentation relevant to a complaint referral.

Further, as set out herein, the Commission, as of 1 April 2013, has been granted extensive investigatory powers in respect of 'market inquiries' as set out by section 6 of the Competition Amendment Act.

Importantly, the Competition Act upholds the constitutionally enshrined right against self-incrimination and no individual is required to answer any question put to him or her by an investigator or during a Tribunal hearing that may be self-incriminating. It is, however, an offence to knowingly fail to answer questions truthfully or to knowingly provide false or misleading information. The

Commission has recently sought to enforce this provision and has laid charges of perjury against two directors of local companies.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

A number of the activities of the Commission and the Tribunal involve interaction and collaboration with international competition bodies and competition authorities in other countries. This is due to the fact that although enforcement is national, many businesses are competing in international markets, where cartels may form and cross-border mergers take place. International cooperation and networks are therefore useful in joint enforcement and ensuring the smooth and consistent review of international mergers. Although there is no specific legal basis for cooperation in the Competition Act, the Tribunal and Commission have benefited from a number of formal and informal relationships with various international institutions and agencies (including the European Commission, the US Department of Justice and Federal Trade Commission and the Australian Consumer and Competition Commission). The South African competition authorities form one of the 15 founding members of the International Competition Network (ICN) and continue to be actively involved in the ICN. The Commission also has strong bilateral relations with countries in the Southern African Development Community, and these have been extended to the field of competition law. Since their establishment, the South African competition authorities have had support from the United States Federal Trade Commission and the Department of Justice. The Commission also has relationships with competition authorities in the United Kingdom, Norway, Australia, Canada and the Netherlands. In 2000, the Commission concluded a cooperation agreement with the Norwegian competition authority, which facilitated the exchange of information around the approach to the enforcement of competition law in the respective jurisdictions.

The Commission has engaged with various agencies in performing coordinated dawn raids during investigations into a number of multi-jurisdictional cartel investigations. More recently, the Commission has been involved in developing ties with its regional counterparts and was instrumental in founding the African Competition Forum.

11 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

The Commission has benefited tremendously from its membership of organisations such as the ICN, and in particular from its involvement in the cartel working group, where exposure to recent international trends in cartel investigations and enforcement has aided the Commission in uncovering cartel conduct. Further, there are a number of cross-border cartels currently being investigated simultaneously by a number of international agencies, including South Africa.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated?

The Commission will – where it believes a case has been made arising from its investigation – refer a matter to the Tribunal for adjudication, by way of pleadings in the form of a ‘referral affidavit’. Recent case law has established that the referral must contain sufficient particularity and clarity to survive the test of legality and intelligibility. Respondents against whom a particular allegation is made must know what the charge is in order to enable them to prepare to meet and rebut it. In this regard, the referral affidavit is likened

to a criminal summons. The Commission cannot, therefore, during the course of the proceedings when further evidence regarding parties not originally named in the initiation statement comes to light, materially add to or change its original complaint.

The relevant respondents will have an opportunity to file an answering affidavit countering any allegations in the Commission’s pleadings, following which the Commission will file its replying affidavit. A complainant may also seek to be permitted leave to intervene in the proceedings before the Tribunal and to co-prosecute the matter with the Commission; this may be opposed by the respondents.

Following the conclusion of the pleadings, the matter will be set down for a pre-hearing before the Tribunal, which will deal with various procedural issues that will include a timetable for the hearing of the matter. The Tribunal will also hear various interlocutory issues such as discovery of documentation and the filing of witness statements.

The hearing into the matter will usually take the form of the Commission calling its own witnesses and experts who will be cross-examined in turn by the respondents’ legal representatives. The Tribunal may also require additional witnesses and information to be made available and often seeks to clarify issues of the various witnesses during the hearing itself.

In the situation where a complaint has not been referred to the Tribunal by the Commission, the complainant may self-refer its complaint to the Tribunal and in effect it will step into the shoes of the Commission. The necessary pleadings will, in such a situation, be filed by the complainant and the respondent as set out above.

Following the hearing of the matter, the Tribunal issues its decision. Where the Tribunal is of the view that there has been a contravention of section 4(1)(b) of the Competition Act it may make an appropriate order, including imposing an administrative penalty. The penalty may not exceed 10 per cent of the company’s annual turnover in South Africa (including its exports from South Africa) during the preceding financial year.

Importantly, the respondent party and the Commission may at any stage prior to the commencement of the Tribunal hearing enter into settlement discussions. Once the parties have reached agreement (this will usually require the respondent to admit guilt), the parties must appear before the Tribunal for the settlement agreement (known as a ‘consent order’) to be confirmed by the Tribunal.

13 Appeal process

What is the appeal process?

An appeal against a finding by the Tribunal that a firm or individual has engaged in cartel conduct requires the applicant to prepare a notice of appeal to the Competition Appeal Court. A firm affected by a Tribunal decision may also make an application for the decision of the Tribunal to be reviewed by the Competition Appeal Court.

The appeal (and review) process is initiated when the affected firm or party files its notice of appeal (setting out the grounds on which it appeals the decision of the Tribunal) on any person who was a party to the proceedings before the Tribunal within the prescribed period (15 business days after the date of the decision or order that is being appealed or reviewed). Within 40 business days of filing a notice of appeal, the appellant must serve on the Commission and all relevant parties a copy of the record of proceedings before the Tribunal and four copies of the record must be filed with the registrar of the Competition Appeal Court.

The registrar of the Competition Appeal Court will then inform the parties of the date, time and place of the hearing. The parties must then file their heads of argument with the Competition Appeal Court (the applicant, 15 business days prior to the hearing and the respondent, 10 days prior).

The Superior Courts Act read with the Constitutional Amendment Act now require that a litigant wishing to appeal or review a decision of the Competition Appeal Court must approach the Constitutional Court. While no litigant has, at the time of writing, tested the new legislative provisions, the relative inexperience of the Constitutional Court in competition law matters is likely to result in a novel development of South African jurisprudence.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In terms of section 4(1)(b) (cartel offences) of the Competition Act, the Commission (or the self-referring complainant) must prove that the respondent has contravened the Competition Act.

Section 4(2) of the Competition Act sets out a rebuttable presumption that an arrangement to engage in a restrictive horizontal practice (cartel activity) exists between two or more firms if any of the firms owns a significant interest in the other, or they have a common director, and a combination of the firms engages in cartel activity. In these instances, the burden of proof therefore rests with the respondent to rebut the presumption and this onus is discharged on a balance of probabilities.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

The Competition Act currently does not provide for criminal sanctions or penalties in respect of cartel conduct, except in circumstances where persons involved in cartel behaviour knowingly provided false information to the Commission or attempted to mislead the Commission in the course of its investigation.

However, the recently promulgated Competition Amendment Act (a portion of which is yet to come into force) introduces criminal liability for directors and managers who caused the firm to engage in cartel conduct or who knowingly acquiesced thereto (knowingly acquiesced' is defined as having acquiesced while having actual knowledge of the cartel conduct). As set out in above, while section 6 of the Amendment Act is in force, the provisions dealing with the introduction of criminal liability of directors and managers is yet to come into full force and effect.

Such an individual is liable to a fine not exceeding 500,000 rand, to imprisonment for a period not exceeding 10 years or to both a fine and imprisonment. In addition, convicted individuals will be barred from holding director positions in terms of the Companies Amendment Act.

During 2013, the Competition Commission settled with 15 construction firms for collusive tendering (cartel activity) in contravention of section 4(1)(b) of the Competition Act after successfully implementing its fast-track settlement process for the first time. Twenty-one firms responded to the Commission's offer of early settlement and the Commission uncovered three hundred instances of bid rigging as a result thereof. The settlements revealed that the construction cartel has been in operation for some time, and that collusion was widespread in the construction market. The firms Group 5, Construction ID and Power Construction will be investigated and prosecuted as they have not settled with the Competition Commission.

The construction cartels and fast-track settlement process generated huge public interest in South Africa as many of the construction projects connected with the cartel were publically funded. To add to the cartelists' woes, the Directorate for Priority Crime Investigation has indicated that it may pursue action to hold directors or executives criminally liable for their involvement in the construction cartel.

This is indeed possible by means of the Prevention and Combating of Corrupt Activities Act, which creates a general offence for corruption and criminalises corrupt activities such as racketeering, which may be used to charge the directors or executives who engaged in the construction cartels price-fixing, market allocation and bid rigging.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel conduct (ie, a contravention of section 4(1)(b) of the Competition Act) in respect of a company is punishable through the imposition of an administrative penalty by the Tribunal, which may not exceed 10 per cent of the company's annual turnover in South Africa including its exports from South Africa during the company's preceding financial year.

In addition, individuals or companies who have suffered loss or damage as a result of cartel behaviour or other conduct prohibited in terms of the Competition Act may bring civil proceedings against the members of the cartel in order to recover the loss suffered.

During the period January 2008–October 2013 the Commission levied fines exceeding 4 billion rand on contravening companies. This equals an average of approximately 800 million rand per year in administrative fines. While all of the statistics for the current financial year are yet to be finalised there is an increasing trend in the number and quantum of fines levied per year. The frequency of fines is, however, a matter hinging on the number and nature of cases before the Commission. It is important to note that the Tribunal has a low-tolerance approach to cartel activity and has expressed that 'absent any mitigating circumstance, [hard-core cartelists] deserve the maximum penalty provided for in the Act'. The Tribunal has certainly attempted to impose the most severe administrative penalties on cartelists in the recent financial year.

The Competition Appeal Court recently overruled the Tribunal's method of calculating the manner in which administrative penalties are imposed for cartel conduct. The Competition Appeal Court held that an administrative penalty must be considered after a prohibited practice, in terms of section 4 of the Competition Act, has been determined. Thereafter, the Tribunal must consider all of the relevant factors contained in section 59(3) of the Competition Act (such as, *inter alia*, duration of the conduct, quantum of affected turnover, and mitigating circumstances) to reach a decision as to the quantum of the potential fine. Only after reaching a decision as to an appropriate penalty in respect of the first two steps will the Tribunal then ensure the quantum is within the limits set out in section 59(2) (10 per cent of the firm's annual turnover within South Africa).

17 Sentencing guidelines

Do sentencing principles or guidelines exist? Are they binding on the adjudicator?

There are currently no sentencing principles or guidelines.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements?

There are currently no provisions in the Competition Act providing for debarment.

However, following the recent construction cartel investigation and fast-track process discussed in question 15, the South African government has tasked the Construction Industry Development Board to appoint a team to consider the imposition of fines or barring the construction cartel companies from government tenders. The companies could potentially face fines, being banned from public-sector construction work for a period of up to 10 years, or both.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal and administrative sanctions can be pursued in respect of the same conduct in cartel proceedings. Importantly, what is required in pursuing either a criminal or civil claim is that there must be a finding by the Competition Tribunal of cartel conduct. Absent a finding, it is not possible to pursue civil damages.

The Competition Amendment Act specifically caters for a situation in terms of which an administrative sanction may be imposed on a corporation while criminal sanctions may, subsequently, be brought against the respondent firm's directors. Directors (or persons having management authority) may only be tried for a criminal offence once there has been a finding by the Tribunal or the Competition Appeal Court that the respondent firm has engaged in cartel conduct, or the respondent firm has entered into a consent order with the Commission.

Furthermore, a person or firm may only pursue a claim for civil damages once there has been a finding that the respondent firm has engaged in a prohibited practice (the cartel conduct).

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

A person who has suffered loss or damage as a result of cartel conduct may bring a claim for civil damages. Before such a claim may be brought there must be a finding by the Tribunal that the conduct in question constitutes a contravention of the Competition Act. Furthermore, in the event that an individual or firm has been awarded damages by way of a consent order agreement before the Tribunal, that person or firm is precluded from pursuing a claim for civil damages. The South African courts will not award punitive damages.

Should an individual pursue private damages, there is no ceiling on such an award provided that a link between the harm occasioned and damages sought is proven. The court adjudicating such a matter has a discretion in relation to the issued costs.

Claims are not limited to direct purchasers, however, the requirements for damages must be proven in order to claim relief.

Following a recent landmark decision of the Supreme Court of Appeal and a later decision of the Constitutional Court, the South African courts now recognise both 'opt-in' and 'opt-out' class actions for private damages.

In the Supreme Court of Appeal's judgment, it laid down the procedure that would need to be followed by prospective class action claimants to first seek the certification of a particular class. In a separate but related matter, the Constitutional Court 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 utilising this procedure would be 'in the interests of justice'.

The effect of these significant developments should become evident in the course of the next 12–18 months as private damages claims are brought by way of class actions in respect of a number of cartels – in particular the construction cartel. Further, in a recent High Court matter, 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 Competition 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.

For present purposes the interesting issue implied in this application is whether being a leniency applicant (and not being referred to the Tribunal) would grant a firm immunity from follow-on damages. 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. Most importantly, the judgments recognise that class action damages can be brought within the scope of the Competition Act.

The computation of damages will equally shape the impact that private antitrust litigation has on cartel enforcement. 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.

Given the novelty of this area and the fact that the first cases in this regard are now before the courts, the question of whether damages are limited to direct purchasers only still needs to be ultimately determined by South African courts.

21 Class actions

Are class actions possible? What is the process for such cases?

There is no express legislative provision under the Competition Act for class actions. The South African Constitution does allow for class actions to be brought by a representative of a group where a constitutional right has been infringed. Furthermore, given the absence of express statutory recognition, the South African courts have recently developed precedent in relation to recognising class actions are available and secondly, in setting out the manner in which these should be brought.

A recent Supreme Court of Appeal judgment recognised that, as set out above, every South African citizen has the right of access to courts and as such, class actions may be an appropriate course of action in circumstances other than when a Constitutional right is infringed. This will particularly apply in circumstances where each respective claim by a certain class of people is not sufficiently large to warrant their claim to be pursued separately and that if those claims cannot be pursued by way of class action, they are not capable of being pursued at all. The Supreme Court of Appeal held that class actions should be recognised, not only in respect of Constitutional claims, but also in any other case where it would be the most appropriate means of litigating the claims of the members of the class in terms of the access to justice provisions in section 34 of the Constitution.

The Supreme Court of Appeal set out that a court asked to certify a class action must be satisfied that the following requirements are met, namely: that there is an objectively identifiable class; a cause of action raising a triable issue; and common issues that can appropriately be dealt with in the interests of all members of the class. There must also be appropriate procedures for distributing damages to the members of the class and the representatives must be suitable to conduct the litigation on behalf of the class.

In a related matter taken to the Constitutional Court, the majority judgment stated that the standard for determining whether to allow a class action is to determine whether the institution of the class action, while taking account of the requirements laid down by the Supreme Court of Appeal, is in the 'interests of justice'.

Accordingly, the requirements for seeking class action relief have been diluted somewhat and greater discretion is now given to the court which considers the application. Essentially, the Constitutional Court has broadened the ambit of class action relief and lowered the threshold required in order to move beyond certification.

Cooperating parties

22 Leniency/immunity

Is there a leniency/immunity programme?

The Commission's CLP facilitates the process through which firms participating in cartel conduct are encouraged to disclose information to the Commission in return for immunity from prosecution. The CLP was revised in May 2008 and exists within the context of the Competition Act, but until the promulgation of the Competition Amendment Act lacked legislative backing. The CLP is now specifically recognised in terms of the Competition Amendment Act.

An applicant who has succeeded in obtaining leniency in terms of the CLP will remain liable should any potential action for civil damages be brought by a third party who has suffered damages.

The Competition Amendment Act also introduces individual leniency for persons who provide information or otherwise cooperate with the Commission's investigation into cartel conduct. In terms of section 50 of the Competition Amendment Act the Commission may, at any time after receiving or initiating a complaint, certify that any particular person contemplated in section 73A is deserving of leniency in the circumstances. In terms of section 73A(4) of the Competition Amendment Act, the Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Commission has certified that the person is deserving of leniency in the circumstances.

23 Elements of the leniency/immunity programme

What are the basic elements of the leniency/immunity programme?

The CLP outlines a process through which the Commission will grant immunity to the first self-confessed cartel member to approach the Commission relating to its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.

The CLP grants immunity only to corporations and is not applicable in respect of individuals. It is a compliance mechanism devised to encourage cartel participants to disclose to the Commission a cartel activity and to discourage or prevent the formation of cartels. Immunity granted by the Commission in this context means that the Commission would not subject the successful applicant firm to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration.

Furthermore, the Commission would not propose to have any fines imposed on the successful applicant firm. As previously mentioned, a successful immunity applicant is not shielded from any subsequent civil liability.

24 First in

What is the importance of being 'first in' to cooperate?

Only a firm that is 'first in' to confess and provide information to the Commission in respect of particular cartel activity will potentially qualify for complete immunity from prosecution. The CLP also makes provision for a marker system in terms of which an immunity applicant may protect its place in the queue of immunity applications pending finalisation of its application.

25 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

There is no leniency plus or penalty plus policy in terms of the CLP. If other members of the cartel wish to come clean on their involvement in a cartel to which the applicant has already confessed involvement, the Commission may explore other processes outside the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order.

In the event that the matter is referred for adjudication to the Tribunal, the Commission may consider asking the Tribunal for favourable treatment of the applicants who were not the first to apply for leniency. Favourable treatment implies a substantial or minimal reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given.

26 Approaching the authorities

Are there deadlines for applying for immunity or leniency, or for perfecting a marker?

It is usually advisable for a firm to approach the Commission as soon as it suspects or becomes aware that the conduct in question represents a prohibited restrictive practice, as the requirements for immunity are that, inter alia, immunity will only be granted to the first applicant through the door in respect of cartel conduct that the Commission is unaware of, or of which the Commission is aware but does not have sufficient evidence to prosecute. Even if the supporting documentation has not been prepared an applicant should apply for a marker, and thereafter, once the marker has been approved, full disclosure can be made in order to secure immunity. On granting a marker to an applicant, the Commission will usually specify a date by which the applicant is required to submit its leniency application in order to qualify for conditional immunity. After considering an applicant's leniency application, the Commission will request a meeting with the applicant to consider whether to grant immunity or not. Within five days after the initial meeting, the Commission is required to notify the applicant whether the application for conditional immunity has been granted.

In the event that a firm is uncertain as to whether it is eligible for immunity in terms of the CLP, it may approach the Commission (by telephone or in writing) on an anonymous basis in order to ascertain whether an application should be made.

27 Cooperation

What is the nature and level of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

After the granting of conditional immunity, the firm has to offer 'full and expeditious co-operation' in reporting the cartel activity as well as attend a series of meetings with the Commission to supply further information, in order to qualify for immunity. Subsequent cooperating parties may be required to cooperate with the Commission, to the extent requested by the Commission.

The requirements for immunity as set out in Commission's CLP document are: the applicant must 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; the applicant must 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; the applicant must offer full and expeditious cooperation to the Commission concerning the reported cartel activity.

Such cooperation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the Appeal Court are completed; the applicant must immediately stop the cartel activity or act as directed by the Commission; the applicant must not alert other cartel members or any other third party that it has applied for immunity; the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

28 Confidentiality

What confidentiality protection is afforded to the immunity applicant?
Is the same level of confidentiality protection applicable to subsequent cooperating parties?

The CLP process is undertaken on a confidential basis. Disclosure of any information submitted by the applicant prior to immunity being granted would only be made public with the applicant's consent, provided such consent is not unreasonably withheld. Any party may apply to the Tribunal to protect the confidentiality of the relevant information, should the Commission be of the view that such information should be published. If a party makes an application to the Tribunal in this regard, the Commission may not publish the information until the Tribunal or the Competition Appeal Court, as the case may be, has made an order regarding the matter.

Once the matter is referred to the Tribunal, an applicant's identity will most likely be revealed given the likely role of a CLP applicant as a Commission witness during the Tribunal hearing. In another development, the Supreme Court of Appeal confirmed that the documents submitted to the Commission by a leniency applicant will remain legally privileged until such time as the Commission makes reference to the documents in pleadings – in which case the Commission is deemed to have waived privilege over these documents and they can be requested by other respondents to a complaint referral.

29 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Yes, the Commission and respondent party may enter into a consent order, in terms of sections 49D and 58(1)(b) of the Competition Act. The consent order in essence records a settlement agreement between the Commission and the relevant respondent firms, which is subsequently confirmed by the Tribunal. The agreement may be entered into at any time prior to the Tribunal handing down its final order on the merits of the complaint. In terms of the consent order, the respondent is placed under a positive obligation to engage in certain conduct to try and minimise the risk of a repeat offence.

The consent order has the effect of a Tribunal order. Importantly, a consent order does not stop the complainant from pursuing a civil claim for damages against a respondent unless the consent order already includes an award of damages to the respondent. No other authority, apart from when an appeal is lodged in accordance with the appeal procedures dealt with above, has the power to interfere in the content of the settlement agreement and oversight is thus limited to the Tribunal.

30 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

In terms of the Competition Amendment Act, a person may be prosecuted for a cartel offence only in instances where the relevant firm

has acknowledged, in a consent order, that it engaged in cartel conduct or in instances where the Tribunal or the Competition Appeal Court have made a finding that the relevant firm engaged in cartel conduct. If a firm is granted total immunity in terms of the CLP, its directors or managers, current and former, cannot be prosecuted for cartel conduct.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

An application for leniency in terms of the CLP may be made in writing or by way of oral submission.

Most applications are made in writing and delivered to the Commission by way of fax or e-mail. The Commission has discretion whether to accept or refuse a request to make an oral application. Regardless of whether an application is made in writing or by way of oral submission, the applicant will have to provide the Commission with all existing written information, evidence and documents in its possession regarding the alleged cartel. The Commission will notify the applicant of whether it is the first member to apply for corporate leniency within five days.

If the Commission has notified the applicant that it is the first to apply for leniency in relation to the alleged cartel conduct, the applicant must arrange a 'first meeting' with the Commission within five days of receiving such notification. During the first meeting, the applicant must reveal its identity and the Commission will assess whether the applicant qualifies for leniency. The Commission may examine relevant documentation during the first meeting but may not make copies.

The Commission must notify the applicant in writing within five days if it qualifies for leniency. If the applicant is successful in clearing this first hurdle, a second meeting is arranged at which the applicant produces all relevant evidence and documentation and allows the Commission to make copies. It is following the second meeting that the Commission will decide whether to grant conditional immunity.

When the Commission is satisfied that an applicant has met all of the requirements for immunity (this is generally after the Tribunal has issued its reasons in writing in the matter against the remaining cartel participants), the Commission will call a final meeting at which full immunity will be granted to the applicant. This will subsequently be confirmed in writing.

The Department of Trade and Industry is currently drafting the rules and regulations that will govern the practical steps in relation to the procedures governing individual immunity.

32 Ongoing policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are currently no ongoing or proposed leniency and immunity policy assessments or policy reviews.

Defending a case

33 Representation

May counsel represent employees under investigation and the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As pointed out above, in order for a 'director or person having management within a firm' to be charged criminally (when section 73A of the Competition Amendment Act comes into force) there must have either been a finding by the Tribunal or Competition Appeal Court that the relevant firm had engaged in cartel conduct,

Update and trends

The past 18 months has 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 by 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 for the first time employed 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 was promulgated giving the Commission the power to institute market

inquiries. The Commission has invoked these powers to initiate an enquiry into the private health-care sector;

- the Supreme Court of Appeal broadened the scope for the Competition Tribunal to adjudicate complaints prosecuted by the Commission;
- the Supreme Court of Appeal confirmed that documents submitted to the Commission by a leniency applicant are subject to legal privilege unless the Commission makes reference to these documents in a complaint referral to the Tribunal – in which case the documents are no longer covered by legal privilege; and
- 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.

or the firm itself must have acknowledged guilt by way of a consent order. While there is no specific mention made in the Competition Amendment Act barring joint representation of employees under investigation as well as the corporation itself, in situations where a corporation has pleaded guilty by way of a consent order the interests of the corporation and its employees may not be aligned, and accordingly joint representation would not be advisable.

It is generally advisable that employees obtain independent legal advice as soon as they become aware that both the corporation and its employees are under investigation.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

There is no impediment to counsel representing multiple corporate defendants as long as no conflict of interest arises.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

In terms of the Competition Amendment Act, a firm may not directly or indirectly pay any fine that may be imposed on a person convicted of an offence in terms of the Competition Act or indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against such a prosecution, unless the prosecution is abandoned or the person is acquitted.

36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions?

Section 3 of the Competition Act imposes a limitation on the extra-territorial effect of contravening conduct and renders only conduct which has had an effect inside South Africa liable to sanction. Section 3 of the Competition Act specifically stipulates that the impugned conduct must have had an 'effect' within South Africa. As such, the South African competition authorities will look at conduct outside of South Africa and issue a fine based on the effect of the conduct as felt within South Africa. There is, however, no specific provision within the Competition Act which precludes the South African competition authorities from imposing penalties on conduct that has formed the subject of administrative penalties in other jurisdictions.

37 Getting the fine down

What is the optimal way in which to get the fine down?

The Commission and Tribunal have, on numerous occasions, emphasised the fact that full and early cooperation will be rewarded when determining the size of the penalty that has to be paid in a settlement agreement. The Tribunal imposes higher penalties on firms that do not cooperate. Other factors that affect the amount of the fine include, inter alia, any previous anti-competitive conduct of the particular firm and the period over which the cartel has been operating.

Nortons Inc
ATTORNEYS AT LAW

John Oxenham
Maria Webber

john@nortonsinc.com

135 Daisy Street
Sandton
Johannesburg, 2146
South Africa

Tel: +27 11 666 7566
Fax: +27 86 608 2055
www.nortonsinc.com

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