

American Bar Association Fall Forum

South Africa Excessive Pricing – An Evaluation of the *Sasol Chemical Industries Decision* – A New Dawn, Or a Continuation of the *Status Quo*?¹

ABSTRACT

In June 2015, the South African Competition Appeal Court handed down judgment in a case likely to become the leading jurisprudence on excessive pricing in South Africa.

In this paper we briefly discuss the history and policy behind excessive pricing cases in South Africa and the relevant legislative provisions of the South African Competition Act, before turning to examining the *Sasol* case and the implications which the *Sasol* case may have on the future of excessive pricing cases.

Introduction

The former Chairperson of the South African Competition Tribunal (the “**Tribunal**”), once described prosecuting abuse of dominance offences as “*the most engaging and controversial area of competition law enforcement*”.²

Indeed, in most antitrust jurisdictions, abuse of dominance complaints are notoriously challenging to prosecute successfully.³

South Africa is no different. This is evidenced by the fact that in the past 15 years of antitrust enforcement, there have been relatively few cases in which an administrative penalty has been imposed by the South African competition authorities (“the **Competition Authorities**”), on the basis of an abuse of dominance.

We focus on arguably the most challenging species of abuse of dominance: that of excessive pricing⁴. In particular, we examine how the prohibition against excessive pricing has been enforced by the Competition Authorities. In doing so we have regard to the recent decision of the Competition Appeal Court (the “**CAC**”) in *Sasol Chemical Industries (Pty) Ltd v Competition Commission of South Africa* 131/CAC/Jun14

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² D Lewis, *Thieves at the Dinner table – Enforcing the Competition Act* (2012) Jacana Media (Pty) Ltd Auckland Park 152.

³ Furthermore, apart from a “successful prosecution” there remains wide ranging debates in Europe as to whether a ‘successful prosecution’ was in fact ‘correctly determined’ by the relevant court..

⁴ The Competition Appeal Court has described the investigation and prosecution of excessive pricing as a “*complex area*”.

(the “*Sasol case*”)⁵. The *Sasol* case is the latest word on excessive pricing by the CAC, and is binding precedent on the Competition Commission (the “**Commission**”) and Tribunal.

We examine the *Sasol* case with particular reference to:

- the approach and interpretation of the applicable legislative provisions relating to excessive pricing,
- the policy at play within the Competition Authorities, and
- the role of the Competition Authorities themselves and the importance of expert evidence when it comes to excessive pricing complaints.

We address these issues in turn below, and conclude on what implications arise in the enforcement of excessive pricing cases in South Africa.

Part 1: Background to Abuse of Dominance and Excessive Pricing in South Africa

To date, there have been six cases dealing with excessive pricing⁶. Of these, only two have been prosecuted before the Competition Tribunal, the remainder having been settled before adjudication.⁷

South Africa’s limited jurisprudence is largely attributable to the fact that:

- firstly, like many other emerging authorities, South African agencies initially focussed their resources on merger control and combating restrictive horizontal practices,⁸ and
- secondly, as will be demonstrated, excessive pricing cases are particularly difficult to prosecute.

The preamble to the South African Competition Act, 89 of 1998 (the “**Competition Act**”) states that

“[A]partheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against

⁵ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14. The *Sasol* case follows the case of *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 (“**the Mittal case**”).

⁶ *Hazel Tau v GlaxoSmith Kline; Harmony Gold v Mittal* (13/CR/Feb04); *Competition Commission v Sasol Nitro* (31/CR/May05 and 45/CR/May06); *Competition Commission South Africa v Foskor (Pty) Ltd* (43/CR/Aug10); *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun.

⁷ Of these, it is only in respect of the *Sasol* case that a finding has been made. Although *Mittal* was heard in the CAC, it was referred back to the Tribunal for hearing, but was settled between the parties before the Tribunal heard the matter for the second time.

⁸ In terms of Section 4, 5 and 12 of the Competition Act respectively.

anti-competitive trade practices, and unjust restrictions of full and free participation in the economy by all South Africans.”

This statement is instructive as to the motivation behind the Competition Authorities’ prosecution of abuses of dominance – in particular excessive pricing. Given South Africa’s historical context and, particularly, the apartheid government’s strategy of promoting domestic industry in the face of sanction-backed isolation from world trade, cases involving abuse of dominance have invariably involved firms which historically received extensive state support.⁹ This is exemplified by the two leading cases on excessive pricing in South Africa, namely, the *Sasol* and *Mittal* cases.

Moreover, the interpretation of what constitutes an abuse by excessive pricing has not been interpreted nor prosecuted with any degree of consistency within the Competition Authorities. As we discuss further, it appears that the Competition Authorities now pursue excessive pricing cases largely to advance particular industrial-policy agendas¹⁰ and as a result the interpretation lacks consistency.

The paper seeks, through an analysis of the *Sasol* case, to demonstrate how this pursuit has a concomitant impact on the development and application of Section 8(a) of the Competition Act.

Part 2: The Law

Excessive pricing is expressly prohibited in terms of Section 8(a) of the Competition Act which states that:

“It is prohibited for a dominant firm to –

(a) charge an excessive price to the detriment of consumers;”

(In terms of Section 1(ix) an ‘excessive price’ means a price for a good or service which –

(aa) bears no reasonable relation to the economic value of that good or service; and

(bb) is higher than the value referred to in subparagraph (a))

Unlike the United States, a contravention of the applicable section in relation to excessive pricing (section 8(a) of the Competition Act) is a *per se* contravention.¹¹ Thus, there is no ‘rule of reason’ defence available to a dominant firm found guilty of charging an excessive price to the detriment of consumers.¹² While the

⁹ S Roberts, *Effects-Based Tests for Abuse of Dominance in Practice: The Case of South Africa*, (2012) Working Paper 4/2012 Centre for Competition Economics University of Johannesburg 13.

¹⁰ http://www.thedti.gov.za/industrial_development/docs/niPF-3aug.pdf (accessed 29-09-2015).

¹¹ The *per se* contravention highlights the industry dynamics between South Africa and other jurisdictions (especially the USA) and confirms that the legislature considers excessive pricing as a serious harm to consumers which is on par with cartel conduct.

¹² The requirement that an excessive price charged must be to the “*detriment of consumers*” has not been fully explored by the Competition Authorities and thus, suffice it is to say that in the ordinary course of events, an excessive price charged would generally be to the consumers’ detriment.

case law evidences traces of the European approach to the interpretation to excessive pricing and in particular that of the *United Brands* case¹³, the more recent approach of the CAC in the *Sasol* case demonstrates a slight deviation from the established principles.

Before a firm could be found liable for excessive pricing under the Competition Act, it must be found to be dominant.¹⁴ Interestingly, in its *Mittal* decision, the Tribunal considered that a firm must be “*super-dominant*” before it would be found to have breached the excessive pricing provisions. This finding was criticised by the CAC, which noted (correctly) that there is no differentiation in the legislation between dominance and ‘super-dominance’. Despite this criticism, more recently, ‘super-dominance’ nevertheless appears to be a factor which the Competition Authorities take into consideration when deciding to prosecute a firm for excessive pricing.¹⁵

The critical and most challenging aspect of prosecuting such a case is obviously what constitutes an “*excessive price*”.¹⁶ The Competition Act defines an “*excessive price*” as being a price charged which “*bears no reasonable relation to the economic value of that good or service*”.¹⁷ As is apparent from the cases and as is discussed below, there exist further practical challenges, namely, what constitutes “*economic value*”? And how does one determine whether it bears a “*reasonable relation*” to underlying costs?

The landmark case on excessive pricing in South Africa is the *Mittal* case. Prior to the *Sasol* case, *Mittal* was the only case on excessive pricing that came before the Tribunal, and set the framework that was later applied in the *Sasol* case.¹⁸

After receiving two complaints against *Mittal*,¹⁹ the Commission decided not to refer the matter for hearing before the Tribunal. The complainants subsequently self-referred their own complaints to the Tribunal, as they are entitled to do in terms of the Competition Act.

The *Mittal* decision set out the four steps that must be considered in determining whether a price charged is “*excessive*”.²⁰

¹³ The European Court in *United Brands Company v Commission*¹³, held that a mere comparison between prices at which the seller actually sold the relevant product to different buyers in the same market was an insufficient basis upon which to conclude that the higher price was excessive; [1978] ECR 207.

¹⁴ Section 7 of the Competition Act sets out the thresholds applicable to determine whether a firm is dominant. In terms of this provision, a firm is “*dominant*” in a market if has at least 45% of that market. If a firm has between 35-45% of the market there is a rebuttable presumption that the firm will be dominant.

¹⁵ *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 at para 84.

¹⁶ As set out in the definitions section namely Section 1(ix) of the Competition Act.

¹⁷ Section 1 (IX) of the Competition Act.

¹⁸ While there had previously been excessive pricing cases, most were resolved by way of a consent order and the Competition Authorities did not have to consider the correct interpretation of Section 8(1) of the Competition Act.

¹⁹ The complainants were Harmony Gold Mining Company Ltd and Roodepoort Deep Ltd.

²⁰ The CAC acknowledged that this approach was not without its own difficulties, however, was meant to provide a framework within which to operate.

- firstly, the actual price must be determined;
- secondly, the economic value of the good or service should be determined;
- thirdly, a comparison must be done between the actual price and the economic value to determine whether there is a reasonable relationship between the two prices; and
- finally, that the price charged must be shown to be detrimental to consumers.²¹

While these steps simply set out the logically necessary framework, implied by the wording of the Competition Act, the key contribution of the *Mittal* case was to set out a conceptual definition of “economic value”. Crucially, the CAC held that the South African legislature must have meant that the “*economic value*”²² is the notional price of the respective “*good*” or “*service*” under assumed conditions of “*long-run competitive equilibrium*”. Moreover, the CAC, in *Mittal*, held that economic value is a notional, objective, competitive *market* standard, and not one derived from the circumstances that may be peculiar to the specific dominant firm in question, such as a unique history of state support, subsidised finance, or a firm-specific cost advantage.²³ These points of framework are critical in the conception of the “economic value” in any given case, and in particular the estimation of the price benchmark under long-run competitive equilibrium, in which notional competitive firms operate on the basis of market-specific circumstances that might or might not match the circumstances of the dominant firm.

As indicated above, once a price has been determined to be higher than the economic value, it must then be determined whether the actual price charged is “*reasonably related*” to the economic value.

It is at this stage, being the test for ‘*reasonableness*’ that an enquiry into the circumstances peculiar to a particular firm is to be taken into account. To this extent, the CAC stated that:

“*it would seem sound, when considering whether the higher price bears a reasonable resemblance relation to the economic value or not, to take into account the benefits flowing to the firm the subsidised loan, long-term low rental, or other special advantages which may serve to reduce its own long-run average costs below the notional norm.*”²⁴

²¹ The first two steps require a factual evaluation, while the second two steps require a subjective analysis.

²² Referred to in the definition section, namely Section 1 of the Competition Act.

²³ *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 at para 40.

²⁴ *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 at para 43.

Part 3: Policy at Play

Before discussing the *Sasol* case, it is necessary to address recent South African Government (the “**Government**”) policy initiatives which have, we submit, indirectly motivated the prosecution of Sasol for excessive pricing, and more recently the decision of Commission to seek leave to appeal the CAC’s decision to the Constitutional Court²⁵.

The case against Sasol was brought by the Department of Trade and Industry (the “**DTI**”).²⁶ It is no secret that the DTI and the Competition Authorities have identified the Sasol case as an opportunity to develop the law on excessive pricing in South Africa. This despite the fact that the current Competition Commissioner, Mr Tembinkosi Bonakele (“**Bonakele**”), stated publicly that the application of competition law should not be used to address loopholes in the implementation of industrial policy.

In this regard, Bonakele made a presentation in Parliament, organised by the DTI, in which he explained that the use of competition policy and litigation as a mechanism to reduce prices was a “*delayed remedy to the market*”. Bonakele expressly stated that the *Sasol* case was effectively addressing a “*loophole in industrial policy and regulation*”, and that there are perhaps better alternatives such as pricing regulation which could be utilised to address pricing concerns.²⁷

Given Bonakele’s views, and the fact that the Commission has committed significant resources to prosecuting Sasol (the case was referred to the Tribunal in 2005²⁸), it is concerning that the Commission has more recently sought leave to the Constitutional Court to appeal the CAC’s decision²⁹. Leave to appeal was sought despite the CAC’s significant criticism levelled at the Commission and the Tribunal in respect of the evidence put before the Tribunal. The Constitutional Court has, however, dismissed the Commission’s application for leave to appeal the CAC’s decision on the basis that it “*bears no prospect of success*”.³⁰

The motivation behind the *Sasol* case is, furthermore, concerning in light of the fact that Mr Ebrahim Patel (“**Patel**”), the current Minister of Economic Development (the “**DEE**”) who now oversees the functions of

²⁵ The Constitutional Court has, however, refused leave to appeal.

²⁶ At the time, the Competition Authorities fell under the DTI, while today the Department of Economic Development oversees the functions of the Competition Authorities.

²⁷ <http://www.bdlive.co.za/business/2014/08/27/competition-policy-not-best-way-to-plug-industrial-loopholes> (accessed 20-09-2015).

²⁸ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* para 4.

²⁹ <http://www.bdlive.co.za/business/energy/2015/07/09/sasol-is-not-yet-off-the-hook-over-high-prices>.

³⁰ <http://nortonsinc.com/ebriefs/competition-briefs/nortons-inc-november-2015-ebrief> (accessed 24-11-2015).

the Competition Authorities, has repeatedly stated that competition policy and litigation should be utilised as a tool to promote industrial and trade policy.³¹

More recently, Patel has indicated that the Competition Authorities should “*have the power to break up large conglomerates that abuse their dominance and that the Competition Authorities should also look at divestiture remedies with a far more vigour*”.³²

Furthermore, Patel has stated that, while the Competition Authorities have been highly proactive in relation to cartel investigations, Government’s attention will shift to “*regulating industrial organisation*”. Importantly, Patel is in the process of drafting amendments to the Competition Act in relation to excessive pricing provisions. We expect that the proposed amendments will be influenced by the outcome of the *Sasol* case.

While we have not yet had sight of the proposed amendments, Patel’s comment that “*giving a dominant player the right to set its own price results in an unfairness*” is a good indication that the amendments are likely to facilitate the prosecution of excessive pricing complaints.

Part 4: The *Sasol* case before the CAC

We set out below the relevant facts insofar as it is required to provide context and only engage with the various economic theories and factors at play to the extent that it is necessary to do so.

Briefly, the case before the CAC involved an appeal by a subsidiary within the Sasol group, Sasol Chemical Industries (Pty) Ltd (“**SCI**”) against a decision of the Tribunal that SCI had contravened Section 8(a) of the Competition Act by charging excessive prices in relation to propylene and polypropylene (the “**SCI Products**”)³³ between 2004 and 2007.³⁴

The Commission contended that the prices at which the SCI Products were sold to domestic customers were not based on economic production costs, but rather on theoretical alternative values, and import parity prices. The Commission contended that these prices bore no reasonable relationship to the economic value

³¹ See <http://africanantitrust.com/tag/patel> (accessed 01 10 2015); see also <http://www.gov.za/speeches/minister-patel%E2%80%99s-budget-vote-announces-r23bn-funding-black-industrialists-retail-sector> (accessed 29-09-2015); <http://www.dispatchlive.co.za/business-2/patel-reworks-competition-act/> (accessed 29-09-2015).

³² <http://www.bdlive.co.za/economy/2014/09/05/power-needed-to-split-up-market-abusers> (accessed 20-09-2015).

³³ SCI is the only significant producer of purified propylene in South Africa and had a market share of between 64% and 90% for the two SCI Products, over the complaint period. Polypropylene is manufactured from purified propylene. While the initial complaint brought and referred by the Competition Commission related to three complaints against SCI and Safripol (Pty) Ltd, two were settled. Only the SCI Products complaint formed the substance of the appeal.

³⁴ The SCI Products were considered important products for converters who manufacture plastic industrial and household products.

of the products and were accordingly excessive, and detrimental to consumers, and, furthermore, that domestic consumers were paying between 32% and 55% more than the economic value of the products.

The case, both before the Tribunal and before the CAC, was largely dedicated to determining the “*economic value*” of the SCI products.³⁵ The production of the SCI Products is dependent on the production of feedstock propylene (“**Feedstock**”), which is one of the major inputs to SCI, and which is then purified by SCI to result in purified propylene, which is in turn processed to product polypropylene, collectively the SCI Products. Feedstock itself is a by-product of the production of synthetic fuels by Synfuels (Pty) Ltd, another subsidiary of the Sasol Group. Synfuels have no real alternative use for Feedstock and accordingly SCI is able to source Feedstock at a discounted rate^{36 37}.

Central to the dispute were the two fundamental aspects to the definition of excessive pricing. The first being the proper interpretation of “*economic value*”, the second being how the ‘reasonableness’ of the price *vis-à-vis* the ‘economic value’ is to be assessed.³⁸ It was in assessing these in relation to what would constitute SCI’s notional competitor firm that the main factual dispute arose.³⁹

The CAC ultimately upheld the appeal and dismissed the case against SCI. In a complex and lengthy judgment, some important observations and remarks were made by the CAC which have implications for future enforcement of excessive pricing complaints.⁴⁰ The general approach and principles set out in *Mittal* were affirmed as providing a framework within which to consider excessive pricing cases.

However, despite the accepted precedent of *Mittal*⁴¹, the CAC in *Sasol*, in considering the vital issue of the impact of the ‘cost’ of Feedstock to be utilised in determining the economic value of the SCI Products, indicated that it was unnecessary to engage in complex issues relating to ‘pricing’ of the Feedstock (“*unnecessary to intervene in the complex issues relating to pricing*”⁴²). Rather, and importantly, the CAC concluded that the actual cost of Feedstock is to be utilised in calculating the economic value of the SCI

³⁵ The Commission cross-appealed against the administrative penalty imposed by the Tribunal and sought to have a greater administrative penalty imposed on SCI.

³⁶ Discounted in comparison to the price a comparable entity would obtain Feedstock in other jurisdictions.

³⁷ The Feedstock issue concerned the proper basis for the determination of the cost of Feedstock propylene, the main input cost in the production of the SCI Products (propylene and PP).

³⁸ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 34. Furthermore, during the Tribunal hearing, SCI contended that the price of Feedstock should be adjusted upwards to reflect the price of Feedstock in a competitive market. In addition, SCI contended that the prices of the SCI Products could not be excessive merely because SCI did not pass their special price advantage (being the low cost of Feedstock) on to the consumer. During the appeal, SCI objected to the Tribunal’s evaluation of a number of other cost related adjustments which would, in SCI’s calculations, show that the economic cost of the SCI Products was significantly higher than that suggested by the Commission and found by the Tribunal. These included the valuation of capital assets, the level of capital return on capital, the allocation of group costs, the allocation of fixed costs.

³⁹ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 71-83.

⁴⁰ While the judgment is generally well reasoned, the CAC’s handling of the Feedstock issue and the lack of explanation by the CAC as to why a price which is not more than 20% of the economic value, would be considered to be ‘unreasonable’. We discuss these issues further in the paper.

⁴¹ The CAC in *Mittal* also expressly stated that when calculating the economic value of a product “*any other special advantage, current or historical, that serves to reduce the particular firm’s costs below the notional competitive norm ought to be disregarded*”. *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 at para 43.

⁴² *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 109.

Products.⁴³ Furthermore, the CAC found that the actual price which SCI paid for Feedstock was as a result of an arm's length contract concluded some years prior between SCI and Synfuels, and that deference should be shown (by competition authorities investigating this price) as this price had been the subject of independent scrutiny (in tax considerations, as this was a transfer price between co-owned subsidiaries).⁴⁴ Without stating so expressly, the CAC has, in relation to the Feedstock issue, considered costs peculiar to SCI.⁴⁵

Despite the approach that the CAC took to the costing of the Feedstock issue, the CAC reverted to the *Mittal* precedent in dealing with the issue of the cost adjustments. In this regard, the CAC was prepared to make cost adjustments in accordance with a notional objective market standard as opposed to costs derived from the circumstances peculiar to SCI.^{46, 47}

On the basis of the evidence placed before it, the CAC then determined that the prices for the respective SCI Products namely polypropylene was 24-28% below the economic value and the prices charged for propylene was 12-14% above the economic value.⁴⁸

Accordingly, the CAC only continued to assess whether the price of propylene was reasonably related to its economic value, as the price of polypropylene was found to be less than its economic value.

The issue of 'reasonableness' was brought to the fore in terms of assessing whether the price of propylene was reasonably related to the economic value. In this regard, the CAC⁴⁹ was critical of the Tribunal's

⁴³ This is somewhat of a strange remark to make, considering that an assessment as to what the notional economic value of a product necessitates engaging in the complex arena of pricing.

⁴⁴ Because of Sasol's (SCI's sister company) unique oil-from-coal process, its costs of production of feedstock propylene is significantly lower than that of a normal oil refinery. Accordingly, the CAC did not confirm or consider the issue ventilated by the Commission as to whether a special cost advantage which is not passed on to the consumer would necessarily be taken into account when determining the economic cost of the product. It is unfortunate that the CAC did not, on this point, provide greater clarity as to their departure from the general premise that 'economic value' is to be calculated with respect to the notional costs and not necessarily the actual cost.

⁴⁵ The CAC did not accept SCI's argument that the economic value of a product is an objective market standard and should for that reason be based on the Feedstock cost of a normal oil refinery and not on the basis of SCI's uniquely low cost. Importantly, the CAC expressly stated that a "*measure of deference is called for in these enquiries not only because of the importance of freedom of pricing but also to obviate converting courts into pricing regulators*" at para 109; As to the evaluation of the other quantifications (cost-adjustments) which the notionally competitive firm would incur in the production of the SCI Products, the CAC held that the Commission and Tribunal's assessment based on the evidence before them was incorrect and that a number of assumptions were made which could not be backed up by expert evidence. In contrast, SCI had placed coherent evidence before the Tribunal and CAC which was logical and supported by expert evidence; *Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07 at para 43.

⁴⁶ According to the framework set out in *Mittal*, circumstances peculiar to a particular firm should not be taken into account when determining economic value (the second stage of the *Mittal* analysis), but only when determining whether there is no reasonable relation between the price and the economic value of the good (the third stage). This is important because firm-peculiar factors, such as history of state support or a firm's own costs of production, can only be considered *after* the economic value of the good has been *objectively* determined (and the actual price of the good is higher than that value). This is necessarily so if economic value is treated as an objective concept at para 43.

⁴⁷ It is of course conceivable that the actual cost and notional cost may in certain circumstances be similar, however, the CAC did not indicate as much in respect of the Feedstock issue.

⁴⁸ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 152-160.

⁴⁹ Firstly, the CAC held that a firm will always have to be dominant before even embarking on an excessive pricing evaluation. Secondly, that the Tribunal had agreed that there was a significant amount of Feedstock in the market. Thirdly, that the negative effect on consumers is a separate enquiry altogether and should not be a separate factor to consider whether the pricing is reasonable.

approach,⁵⁰ and re-affirmed the key *Mittal* principle that the relevant cost test must not be firm-specific (namely dominant-firm specific) and criticised the Tribunal's emphasis on the origins of SCI's dominance.⁵¹

The CAC held that even if the price of propylene is 14% more than its economic value, this on its own cannot justify the inference for holding that the price bears no reasonable relation to the economic value of the good or service. Most importantly, it was confirmed that the CAC would follow European jurisprudence to the extent that a price must be substantially higher than the defined economic value before an adverse finding can be made against the dominant firm.^{52 53}

Notably, while it acknowledged that the principles set out in *Mittal* were correct, the CAC in *Sasol* appeared to favour a more formulaic approach to the determination to what is 'reasonable', as opposed to the more open ended inquiry envisaged in *Mittal*.

In this regard, the price of propylene was not held to be unreasonably related to its economic value. The CAC did not need to make a finding as to whether there was any "consumer detriment" in terms of step four of the *Mittal* case.

Throughout its judgment, the CAC was highly critical of the conduct of the Commission and the Tribunal's evaluation of the evidence placed before the Tribunal.⁵⁴

⁵⁰ The Tribunal and the Commission considered the following as factors in concluding that the price charged by SCI was unreasonably related to the economic value:

1. SCI was dominant in the relevant markets;
2. the barriers to entry in the market were high and access to the SCI Products would require reliable and significant supply of Feedstock;
3. SCI enjoyed a cost advantage in respect of obtaining Feedstock;
4. Synfuels had an abundance of Feedstock and little use for it;
5. SCI has not been able to demonstrate that its market position was a result of innovation or risk taking on its part;
6. Sasol had enjoyed very significant state support and had leveraged this support to establish its dominance; and
7. the high input costs of prices of the SCI products had negative effects on downstream industries.

⁵¹ Namely the fact that it arose through state support rather than a lack of innovation or risk taking. In this regard, the Tribunal stated that "patent holder may charge a price which bears no relation to the economic value of the product for the duration of the specific patent..." The CAC stated that this statement by the Tribunal was manifestly incorrect and held that Section 8(a) of the Competition Act did not permit such an interpretation.

⁵² Ultimately the CAC concluded that a price which fell less than 20% of the figure used to determine the economic value of the products does not justify the judicial inference that the figure is not reasonably related to the economic value. Curiously, and in what can only be described as a sort of antitrust originalism, the CAC referred to a ruling of the *Talmud* that if a profit gained was more than 16.67%, it was regarded as excessive *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 175. Accordingly, while the CAC's judgment in *Sasol* may be interpreted to suggest that provided your pricing is not more than 20% (or at least 16.7% as in *Talmud*) of the economic value of the product, the relevant product pricing would not be considered excessive, this interpretation may be too aggressive in light of the CAC's acknowledgement in both *Mittal* and *Sasol* that the inquiry into the 'reasonableness' of the price is a subjective inquiry.

⁵³ Paragraph 175.

⁵⁴ The CAC was highly critical of both the Commission and the Tribunal for the manner in which expert evidence was presented and accepted. Furthermore, the CAC cautioned the Competition Authorities against using expert economic witnesses to give evidence in respect of legal issues. The CAC set out briefly what the duties and responsibilities of an expert witness should be:

1. Expert evidence should be, and should seem to be, the independent product of an expert uninfluenced by the litigation proceedings;
2. An expert witness should only provide evidence in respect of the area for which he is regarded an expert and should make it clear when a particular statement or opinion given falls outside of his
3. An expert witness should not omit to consider material facts which would detract from his opinion.
4. When an expert witness's opinion cannot be properly researched because there is insufficient data available, the expert witness must state that his opinion is merely a provisional one.

The manner in which the Tribunal sought to rely on select portions of the precedent case, namely *Mittal*, was also criticised. Here, the CAC stated that:

“The interpretation seized upon by the Tribunal in much of its determination was informed by a reading of but a few paragraphs of the Mittal, judgment...”

and

*“Unfortunately, both during the evidence that was led and in the determination by the Tribunal, only these paragraphs from the judgment of this Court were canvassed in any detail. What renders the Tribunal determination even more confusing is that, after a lengthy exposition of the law and application to the facts, all based on these paragraphs, the Tribunal belatedly refers to later passages of the judgment. This piecemeal reading is regrettable”.*⁵⁵

Conclusion

While the Commission has identified abuse of dominance as a priority area, there have been very few examples of where the Commission has been successful in relation to prosecuting abuse of dominance cases, particularly so in respect of excessive pricing

Given Government’s stated intentions and also the motivations which initially drove the *Sasol* case, there may be, should leave to appeal the CAC decision not be granted, significant lobbying for legislative amendments to make it easier for the Commission to prosecute excessive pricing and abuse of dominance, and indeed to apply more far reaching remedies, in particular structural remedies.⁵⁶ Having said that, however, from the Commission’s perspective, it would appear that the focus on excessive pricing (at least at this stage) remains on instances where there has been, in the words of the Commissioner of the Competition Commission, *“very clear exploitative abuse, the impact is clear and visible, and the dominance itself is huge.”*⁵⁷

The *Sasol* case, being the first excessive pricing case to be fully litigated by the Commission, highlights the complexity of these types of matters. As is clear from the CAC’s judgment, the *Sasol* case turned substantially on the evidence placed before the CAC⁵⁸. In other words, the Commission faced an evidential, as opposed to legal, burden. In our view this is an important point to bear in mind, especially when

⁵⁵ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 99.

⁵⁶ This is despite the fact that Section 8(a) of the Competition Act was specifically drafted as a *per se* contravention to make it ‘easier’ for the Commission to prosecute dominant firms for excessive pricing.

⁵⁷ ‘Interview with Tembinkosi Bonakele, Commissioner, South African Competition Commission’ - June 2015 (www.antitrustsource.com).

⁵⁸ The evidence which was persuasive was as a result of the use of a number of finance, economic and accounting experts, confirming that substantial resources are required in order to prosecute (at least successfully) firms for charging excessive prices.

government appears intent on legislative intervention to make abuse of dominance easier to prosecute. To simply dilute the evidential threshold of prosecutions is unprincipled. Had the evidence which the Commission placed before the CAC been better substantiated and reasoned, the conclusion reached by the CAC could very easily have been different. In this regard, the CAC stated that:

“[SCI] placed before the Tribunal impressive and cogent evidence which, sadly was not properly gainsaid by the Commission, to the extent that it would have been justified to conclude, on the probabilities, that the Commission’s case should have been upheld.”⁵⁹

Despite the complexities and challenges that present themselves in excessive pricing cases, as things stand, however, the law relating to excessive pricing in South Africa is now relatively clear.

In summary:

- The starting point for any excessive pricing enquiry is thus the determination of the “*economic value*” of the good or service concerned. It appears settled, despite the CAC’s handling of the Feedstock issue in *Sasol*, that the “*economic value*” of a product is its competitive market price, that is, its price in a hypothetical competitive market and that for purposes of calculating cost, a notional objective market standard should be utilised.
- In so far as to what constitutes a “*reasonable relation*”, the CAC in *Sasol* confirmed that the Competition Authorities may take the peculiarity of the firm into account, however, the CAC concluded that a price which is not more than 20% of the economic value, cannot be considered unreasonably related.⁶⁰

The Constitutional Court’s dismissal of the Commission’s leave to appeal the CAC decision has brought finality to a lengthy and complex case. It remains to be seen whether the case will result in intensified efforts to amend the Competition Act so as to assist the Competition Commission in prosecuting excessive pricing cases.

⁵⁹ *Sasol Chemical Industries (Pty) Ltd v The Competition Commission* 131/CAC/Jun14 at para 131.

⁶⁰ Although we would be hesitant to conclude that the conclusion reached in *Sasol* would apply in all circumstances as such an approach would be in contrast to the CAC’s decision in *Mittal*.