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**SANCTIONS IN ANTITRUST CASES**

**Paper by Vani Chetty**

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## SANCTIONS IN ANTITRUST CASES - A SOUTH AFRICAN PERSPECTIVE

-- Paper by Vani Chetty\* --

### 1. Introduction

1. The imposition of the largest administrative penalty in South African competition law history in the matter between *The Competition Commission and ArcelorMittal South African Limited*<sup>1</sup> ("**ArcelorMittal Case**") demonstrates the increasingly hard line approach of the South African Competition Commission ("**Commission**") to antitrust enforcement. In particular, punitive penalties and onerous remedies are being imposed to sound calls of deterrence to firms falling within the authority's jurisdiction.

2. The incremental incline in the quantum of monetary penalties and the broadening scope of behavioural remedies that are being imposed do not represent the totality of consequences that could arise from a finding of a prohibited practice under the South African Competition Act 89 of 1998 ("**South African Act**").

3. The presentation will seek to explore the multitude of consequences that flow from antitrust infringements in South Africa with a view to determining whether these consequences, taken together, constitute an overly-deterrent approach to South African antitrust enforcement.

4. Accordingly, the presentation will describe:

- some examples of the increasing quantum of administrative penalties as well as examples of the behavioural remedies that have been imposed in the recent past;
- examples of compensatory damages cases that have followed from findings of a prohibited practice by the competition authorities;
- other government interventions that have been instituted to supplement the private damages movement in South Africa. In this regard, the construction industry settlement will be used as a case study for the points being raised; and
- the recently enacted criminal liability provisions of the Competition Amendment Act and the potential tension between the criminalisation of cartel conduct on the one hand and the success of the South African corporate leniency policy as an integral component of cartel enforcement, on the other.

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\* This paper is a summary of the discussion points by Ms. Vani Chetty, Partner, Baker & McKenzie, BIAC ([Vani.Chetty@bakermckenzie.com](mailto:Vani.Chetty@bakermckenzie.com)).

<sup>1</sup> Case No: CR092Jan07/SA090Aug16. DU PLESSIS, VAN DER MERWE INC. (REGISTRATION NUMBER 2012/047447/21), TRADING AS BAKER & MCKENZIE. Baker & McKenzie is a member of Baker & McKenzie International, a Swiss Verein.

5. Against this background, certain concluding remarks will be made as to whether an appropriate balance is being struck between ensuring deterrence on the one hand and imposing disproportionately punitive sanctions on the other, taking into account the various consequences that occur beyond the prosecution of conduct under the South African Act.

## 2. Recent penalties and other remedies

6. While it is certainly intuitive that administrative penalties are expected to incrementally increase over time, the recent and unprecedentedly high penalty imposed in the ArcelorMittal case has signalled a new phase in the Commission's fining behaviour.

7. The Commission itself acknowledged that "the penalty sends a strong message of deterrence and is an important milestone in the Commission's enforcement against cartels."

8. The ArcelorMittal fine, as compared to previous administrative penalties levied in South Africa's antitrust enforcement history, is illustrative of the increase in fines imposed. By way of example, ArcelorMittal agreed in 2016 to pay an administrative penalty of USD 107 811 000<sup>2</sup> for its involvement in various antitrust infringements as compared to the collective settlements agreed with the entire construction industry in 2013, amounting to approximately USD 104 936 000<sup>3</sup> in total (that is, in relation to all settling firms). Both of the examples above were the subject of cooperative settlement - however, it is clear that the administrative penalties being imposed, even in the settlement context, are pointedly higher as at present day.

9. In addition to the penalty imposed, AMSA also agreed to a pricing remedy by capping its margin for a period of 5 years and committed to USD 330 619 000<sup>4</sup> in capital expenditure over the five year period. In relation to these remedies, the following points are noted:

- In relation to the pricing remedy, it must be borne in mind that the Competition Tribunal ("**Tribunal**") itself has expressed a reticence to engage in price regulation. For example, in the matter between *Harmony Gold Mining Company Limited and Another and Mittal Steel South Africa Limited and Another*,<sup>5</sup> the Tribunal noted that "[t]he reluctance of competition practitioners to assume a price regulating function does not only derive from the truly massive technical difficulties entailed in determining the 'right' or, for that matter, 'wrong' price, but from the founding principle underpinning the world view that the practice of competition law and economics that holds that price determination is best left to the interplay of independent actors engaging with each other in the market place."<sup>6</sup> It therefore appears that, even in the face of this reluctance, the competition authorities are seeking to negotiate pricing remedies with contravening firms;

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<sup>2</sup> Rand to dollar exchange rate ZAR 1 = USD 0.07187 as at 29 November 2016.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Supra* at 2.

<sup>5</sup> Case No: 13/CR/Feb04. The Tribunal also noted the following in this case: "*Not least of the difficulties of assuming a price regulator's role, is that if the price is determined without intervening in either the underlying structural conditions and the ancillary conduct which cumulatively gives rise to the excessive price, the competition authority will have to maintain its regulatory role because the administratively determined price cannot be 'right' for all time. This, of course, precisely described the modus operandi of an ex ante regulator but is antithetical to that of an ex post regulator that responds to conduct that is allegedly in breach of a statutory obligation.*"

<sup>6</sup> Paragraph 74.

- In relation to the capital expenditure remedy, it is unclear as to the nexus between the cartel infringements being prosecuted by the Commission and the remedy itself. Put differently, the condition appears to be unrelated to the conduct that had been the subject of the settlement.

10. In the matter between *the Competition Commission and Sime Darby Hudson Knight Proprietary Limited* ("**Sime Darby**"),<sup>7</sup> Sime Darby not only agreed to pay an administrative penalty of USD 2 515 580<sup>8</sup> coupled with an undertaking to invest USD 9 702 750<sup>9</sup> to commission and build a new packaging and warehousing facility, but it also undertook to use the services of a Black Economic Empowerment distributor to undertake some of its distribution requirements.

11. The case of *Competition Commission and Media 24 Proprietary Limited* ("**Media 24**"),<sup>10</sup> in which allegations of predatory pricing were levelled against Media 24, is another case that illustrates the breadth of remedies that are being contemplated by the South African antitrust authorities. In this case and in relation to a finding that Media 24 engaged in exclusionary abuse of dominance in the supply of community newspaper publications in a certain geographic locality, the Tribunal imposed a "credit guarantee remedy" which would allow a new entrant access to favourable credit terms with distribution and printing companies that are part of the Media 24 group.

12. From the above discussion, it is clear that, not only is the quantum of the penalties becoming significantly higher, but the extent of the behavioural remedies that are being imposed are also increasingly more burdensome.

13. While penalties and remedies are integral to achieving the authority's enforcement objectives, it is argued that proportionality should play an important role in determining the appropriateness of the remedies imposed. Applying overarching principles of proportionality will ensure that the remedies imposed do not, in and of themselves, undermine the very purpose that the South African Act seeks to achieve, namely robust economic activity and healthy competition.

### **3. The growing momentum of compensatory damages cases and other government interventions**

14. While civil damages cases arising out of findings of antitrust infringements have been slow to start, the institution of these cases has gathered momentum recently.

15. In relation to the uncovered and prosecuted bread price fixing cartel, certain non-governmental organisations, trade unions and individual end-users of bread approached the civil courts for an order granting them leave to institute a class action, seeking compensation and related relief on behalf of all persons that purchased the respondents products during the period in question and suffered damages as a result.

16. In relation to findings against contractors in the construction industry, a number of summonses have been instituted by allegedly aggrieved parties. It is therefore clear that, in practice, aggrieved parties are increasingly demonstrating an appetite to institute civil claims for damages.

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<sup>7</sup> CT Case No: CO247Mar16.

<sup>8</sup> *Supra* at 2.

<sup>9</sup> *Supra* at 2.

<sup>10</sup> CR154Oct11/013938.

17. The first ever civil claim for damages arising out of anticompetitive practices was instituted by Nationwide Airlines Proprietary Limited ("**Nationwide**") against South Africa's national carrier, South African Airways ("**SAA**"). This case was ultimately concluded in August 2016, the outcome of which was that SAA was ordered to pay Nationwide USD 7 519 780<sup>11</sup> plus interest as compensatory relief for the damages that arose from the abuse of dominance found to have been perpetrated by SAA.

18. Before the Nationwide case was decided, the prospects of success of civil damages cases arising from antitrust infringements had not been entirely clear, particularly given the significant onus that rests upon the plaintiff to quantify the losses incurred as a consequence of the prohibited practice that had been found to have taken place. The Nationwide case is authority for the proposition that the risk of payment of civil damages (in addition to administrative penalties and other remedies) is a real one. It is anticipated that the outcome of this case will further accelerate the civil damages claims that arise out of antitrust infringements.

19. As alluded to earlier on, the prospect of civil damages claims are separate and distinct from potential government interventions as well. The construction industry agreement is an instructive case study in relation to this point.

20. Six of the fifteen companies involved in collusion uncovered by the Commission entered into a Voluntary Rebuild Programme Agreement with government in terms of which the firms concerned have undertaken to make a significant financial contribution to the development of the construction industry.

21. In terms of the agreement, the parties will collectively make a contribution of USD 107 811 000<sup>12</sup> to a trust to be established for social and economic development with a direct bearing on the construction sector. The money contributed to the trust will support many initiatives including providing bursaries to previously disadvantaged persons studying engineering or being trained as artisans, support for the teaching of maths and science education at public schools, funding for social infrastructure and the development and promotion of construction companies owned and managed by previously disadvantaged persons.

22. The contribution is in addition to the USD 100 623 000<sup>13</sup> administrative penalties already imposed by the Competition Authorities. The firms concerned will further adopt a formalised development programme targeted at the emerging contractors, involving mentorship as well as attainment by the emerging contractors, of specified turnover targets.

23. It is clear that contravening firms that engage in business with government face further monetary consequences, outside of the penalties contemplated in the Competition Act, in relation to antitrust infringements.

#### **4. The criminalisation of cartel infringements and the resultant efficacy of the Corporate Leniency Policy**

24. Personal criminal liability for cartel conduct is a recent introduction into South African antitrust law - this milestone development has been in the making for some time, but is now firmly in force as at 1 May 2016.

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<sup>11</sup> *Supra at 2.*

<sup>12</sup> *Supra at 2.*

<sup>13</sup> *Supra at 2.*

25. Accordingly, individuals holding positions of management authority that engage in or "knowingly acquiesce" to the firm engaging in cartel conduct are liable to monetary fines, imprisonment of up to 10 years or both.

26. Not only do the firms concerned face a number of consequences arising out of the cartel infringements but the individuals concerned face personal liability as well.

27. However, the more relevant consideration in the context of this presentation is the impact that the criminalisation provisions are likely to have on the authority's enforcement priorities. This is because the criminalisation provisions may have the effect of discouraging leniency applications and/or disincentivising the cooperation of executives that would be implicating themselves in future criminal proceedings by furnishing evidence to the Commission.

28. It is acknowledged that corporate leniency has been a significant contributor to enforcement statistics and it is unsurprising that the threat of criminal sanctions may chill individual incentives to cooperate with the Competition Authorities. This may be alleviated if the Commission could guarantee immunity under criminal law to persons of authority that cooperate with the Commission in the course of prosecuting a cartel infringement. However, in the absence of some form of individual immunity as well, the efficacy of corporate leniency is significantly imperilled.

## **5. Concluding remarks on the question of over-deterrence**

29. Onerous administrative penalties, in and of themselves, may amount to over-deterrence if the fines are disproportionately high and ultimately serve to cripple the firms concerned.

30. However, the consequences of cartel infringements in South Africa are not restricted to administrative penalties alone. As described above, administrative penalties, wide-ranging behavioural remedies (some of which appear to be unrelated to the conduct being prosecuted), the real prospect of civil claims, criminal sanctions (without concomitant individual immunity) and industry-related agreements with government, viewed collectively, could irreparably hamper pro-competitive outcomes and other public interest factors such as the viability of the businesses that are facing overly punitive sanctions.

31. The proportionality and reasonableness of antitrust sanctions, should therefore be considered in the context of the myriad of consequences that flow from a finding of a competition law infringement.

32. It should also be borne in mind that firms in comparatively new antitrust dispensations must be given the opportunity to develop a culture of antitrust compliance, which an overly deterrent approach does not acknowledge.

33. All in all, this presentation seeks to emphasise that an overly vociferous approach to enforcement may ultimately undermine the very purpose that the South African Act seeks to achieve, and therefore needs to be carefully balanced to ensure deterrence on the one hand and healthy competition and robust economic activity on the other, both of which are ultimately in the public interest.