

**REFLECTING ON THE EFFECTIVENESS OF COMPETITION AUTHORITY:  
PRIORITISATION, MARKET ENQUIRIES AND IMPACT.**

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Ten years have now past since the introduction of the Competition Act 89 of 1998. The court, which is one of the three institutions created under this Act, began its work in October 2000. It is against the experience and record of this institution that my remarks are made with regard to prioritisation, market enquiries and impact.

The Act was called into question from its inception as to 'whether the purpose of the Act as set out in s 2 is not over – freighted.<sup>1</sup> Simkins was not the only commentator to contend that the Act was preoccupied with an excessive range of 'difficult-to-achieve economic objectives that they load many of them onto one legislative instrument after another, without considering carefully enough the relationship between policies and instruments. When ....read together, the Preamble and section 2 of the Act referred, inter alia, to the interest of workers, owners, consumers, to the regulation of the transfer of economic ownership, the promotion of employment increasing the ownership stakes of historically disadvantaged persons and to the more established and standard provisions in competition legislation, the provision to consumers of competitive prices and product choices. The problem is invariably whether these objectives can be made to point in the same direction.

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<sup>1</sup> Charles Simkins in Brassey et al Competition Law at 109

Faced with this legislative framework, it became obvious from an early stage in the development of competition jurisprudence for South Africa that Robert Bork<sup>2</sup> was not going to be rise to the top of the list of persuasive authority, particularly his approach that ‘anti-trust must content itself with the identification of attempts to restrict output and let all other decisions, right or wrong, be made by the millions of private decision centres that make up the American economy.’

For this reason, the advocated approach needed to extend beyond a narrow definition that harm to competition is defined as harm to efficiency, represented by artificial limitations of output and rises in prices. Faced with decisions such as Brooke Group Ltd v Brown and Williamson Tobacco Corp<sup>3</sup>, that the only anti-competitive harm would be an output limiting harm, a search for a more expansive jurisprudence was mandated by the purposes of the Act as I have outlined it. Accordingly, recourse to the European Union became inevitable; in particular harm to competition was understood to include harm to the competitive process such that the best way to protect consumers as well as to incentivise producers to produce a larger range of products and thus maximise consumer choice was to rely on open markets unimpeded by private firm obstruction and hence the abuse of private power.<sup>4</sup> In this connection, the even more challenging problem was whether harm to competition might also include harm to the competitive dynamic amongst small and particularly, indigenous firms.

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<sup>2</sup> The Anti – Trust Paradox: A Policy at War with itself (1978) at 123

<sup>3</sup> 509 US 209 (1993)

<sup>4</sup> The typology set out regarding different views of harm are derived directly from the work of Eleanor Fox ‘We protect competition, you protect competitors’ 2003 World Competition 149. It should be noted that Prof Fox played a key role in the process of drafting the Act.

A further problem which confronted the competition authorities concerned an economy that, owing to a range of historical factors inherited from the long apartheid period, was unusually concentrated, relied on high levels of state ownership, a marked degree of political intervention and an extremely weak competitive culture.

Within this context, the hugely impressive work particularly of the Commission and the Tribunal has created an educative and deterrent impact, particularly on the private sector of the economy. A number of decisions regarding mergers have probably limited that which would otherwise be an even more extreme form of concentration in key domestic markets. Further, the provisions dealing with abuse of dominance and restrictive practices have produced a number of cases have been successfully litigated including loyalty discounts, resale price maintenance, excessive pricing and squeezes of margins. A nuanced jurisprudence from the Tribunal has begun to engage significantly with erstwhile state ownership and the conversion of public to private monopolies; SAA, Sasol and Mittal, for example, feature prominently in the history of competition litigation over the past decade.

In two of these key cases, however, the court was significantly hamstrung by the absence of an input from the Competition Commission. In both these cases, the problem of balancing the range of competing purposes to which I have already made reference was central to the resolution of the dispute. In Nationwide Poles v Sasol, both the Tribunal and the Court were required to

interpret section 9(1) of the Act and in particular to giving content to the concept of price discrimination. The case concerned a claim by small producer of treated wooden poles against its supplier of wood preservatives who allegedly discriminated against it by charging it higher prices than that charged to its larger rivals. The key dispute in this case turned on the interpretation of the provision that an action by a dominant firm was prohibited price discrimination.

- a) if it is likely to have the effect of substantially preventing or lessening competition.

The Tribunal explained its interpretation of these words thus:

“[W]hat the legislature wanted in section 9(1)(a) was to create a threshold, but a low one that related not to competitive harm but to competitive relevance... [S]ubsection 9(1)(a) invites a complainant to establish a competition relevance to his complaint but does not require proof of some standard of harm as contended for by [the respondent]. When the legislature asks is it ‘likely’ it is asking us to situate the complaints as one relevant to competition. When it asks is it ‘substantial’ it invites us to distinguish the trivial effect from the weightier.”

In divining the purpose of this section and thus justifying its reconstruction of the wording of the section, the Tribunal said the following:

“It is our view that the proscription of price discrimination reflects the legislature’s concern to maintain accessible, competitively structured markets, markets which accommodate new entrants and which enable

them to compete effectively against larger and well-established incumbents. This set of concerns points directly to problems confronting small and medium sized enterprises (SMEs) which, in the absence of a 'level playing field', or, what is the same thing, in the presence of discrimination, may well find it difficult to enter new markets and even more difficult to thrive, to compete effectively 'on the merits'."

This decision was overturned by the Court, not I might add without considerable difficulty. The court found that there was insufficient evidence before it in respect of the effect of discrimination on small customers generally so that, even if the test was the determination of a reasonable possibility that the dominant firm's pricing structures was likely to substantially affect competition in the downstream market, the evidence to succeed was not available. The real problem in this case that confronted both the Tribunal and the Court was an express purpose of the Act, namely the promotion of small and medium size businesses within the broader and problematic context of price discrimination as expressly provided for in section 9(1)(a) of the Act.

The Commission was absent from these proceedings and accordingly, the paucity of available evidence dogged proceedings. Understandably, the small producer of treated wooden poles, who heroically litigated this case, was unable to put forward the kind of evidence that the Commission would have been able to procure to ensure that a different evidential matrix confronted the court. In this way, a significant opportunity was lost to lay

down a more coherent framework for a section of the Act which, within the context of this dispute, clearly demanded some form of balancing, which to its great credit, the Tribunal had attempted. The court was criticised for literal reading of the applicable section that began with the words chosen by the legislature but the case floundered on evidence not interpretation.

This is perhaps an opportune time to clarify the meaning of a purposive interpretation to the Act. Briefly, this approach attributes meaning to a provision of a statute in the light of the purpose which it seeks to achieve within the context of the Act of which it forms a part. Now, while I accept the significance of the linguistic turn which emphasises plasticity of language and hence judicial choice in interpretation, that does not mean that the adjudicator can evaluate the evidence, determine a result and then decide to dispense with the applicable statute and formulate a provision which provides the predetermined result.<sup>5</sup> In the first place that breaches the rule of law in that a statute becomes completely what the adjudicator determines. Secondly, it breaches the principle of separation of powers in that the adjudicator becomes the legislature and judiciary.

While the further justification is offered that in competition law that the inquiry is of an economic nature and that the statute should be relegated to a back seat, the intellectual problem of this canard is best dealt with thus: the Act uses economic concepts and hence they must be given meaningful content. The evidence must be applied to these concepts and, to be sure, that requires an understanding of the economics underpinning this evidence and thus a good grasp of economic principles.

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<sup>5</sup> See for example, R Coombe 1989 Mc Gill Law Journal 603.

.But when the judgement is produced , the order must be justified in terms of the evidence as understood and the application of the applicable provisions of the Act . Only in this way , can the balance of the economic community attempt to comport their activity in the future.

A similar problem confronted the court in Harmony Gold v Mittal Steel. This case concerned the question of excessive pricing. In this connection, the applicable section essentially followed the wording developed in United Brands, a leading European excessive pricing case<sup>6</sup> in which an excessive price was defined as ‘a price for a good or service which;

- (aa) bears no reasonable relation to the economic value of that good or service;
- (bb) is higher than the value referred to in sub-paragraph (aa).

Essentially, the case concerned an allegation that the giant steel producer Mittal imposed an excessive price on its sales of flat steel products in the domestic market. The Commission had elected not to refer the complaint to the Tribunal and hence the complainants litigated themselves. After an extremely lengthy trial, the Tribunal found in favour of the complainants. Mittal was held to have contravened section 8(a) of the Act by charging an excessive price and the largest administrative penalty levied in South Africa of R691, 8m was imposed upon Mittal.

Not only was this case important because it was the first to deal with the question of excessive pricing but it also concerned a state owned company Iscor which had been converted into a public company in 1989 and had been

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<sup>6</sup> United Brands v Commission [1978] ECR 207

selected to lead the then South African government's privatisation programme. Here, was a case, where a company which had been state owned, was now converted into a private company but the legacy of its state ownership insured that it was, to use the Tribunal's term, super-dominant. The case was about a firm which was super-dominant because of South African state policy and which was now to enter the market and be subjected to the competitive rigours thereof. A failure to so adhere to this discipline demanded a response from the competition authorities.

Suffice to say, the court overturned the Tribunal's decision but only with regard to the question of interpretation of the applicable sections and remitted the dispute to the Tribunal with, what it thought, were fairly carefully crafted constraints. More about a case that has not ended would be inappropriate at this stage. However, the case raised a further important problem that must be noted. As David Lewis has written;

“The Tribunal has approached the complex and controversial question of excessive pricing by eschewing a price regulation approach both with respect to the decision as to whether the price is indeed excessive and as to the appropriate remedies to be introduced in an affirmative finding. It has rather attempted to use the well known principles and approaches of competition law and economics in examining an allegation of excessive pricing. To this end it has examined the structure of the market as well as ancillary conduct which is relied on

structural super-dominance in order to arrive at a price that is not influenced by any cognisable competition considerations.”<sup>7</sup>

Once again the court was confronted with a case which raised two vital questions being;

- (a) The need to ensure that previously advantaged state enterprises were subjected to the rigour and discipline of competition; and
- (b) The importance of insuring that a competition regulator remains constrained to the objective of the promotion of competition and does not lapse into being a price regulator.

This case called into question the need for balance as set out in section 2 and the Preamble to the Act; again the Competition Commission which could have made a major input into this debate was absent.

The Commission may of course have had its reasons which, at the time were justifiable. But given the paucity of competition expertise at the Bar which deals with these matters, the court was placed under unreasonable pressure to carve out a jurisprudential framework which is never easy within the context of the ambitious purposes of the Act. For this reason, alone the Commission's absence was unfortunate.

Significantly, the Commission have had major success in areas where there would be no disagreement amongst the various schools of competition policy, namely in cartel enforcement. It has been claimed that, at present, the South

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<sup>7</sup> David Lewis; Exploitative Abuse – A note on the Harmony Goldfield v Mittal Steel excessive pricing case unpublished paper 2008 page 26.

African Competition authorities may have more files on leniency or immunity applications in respect of cartel conduct than any other competition regime in the world. A number of reasons may have contributed to this development, including the high level of cartel activities in South Africa, inherited in part from the concentrated market structure of the apartheid era, the Commission's success in pursuing cartel activity and thus persuading corporations that a leniency agreement is 'cheap at the price' and new legislation which seeks to criminalise cartel conduct.

There could be no question that the targeting of cartel behaviour in South Africa, some of which appear to have existed for almost three decades is the correct determination of its priorities. It allows the authorities to increase their reputation, to insure that the possibility of a significant censure will prise cartels into the open, and accordingly, ensure a reduction in prices or an increase in output to more competitive standards.

But these initiatives which redound to the credit of the Competition Commission are not without legal difficulty. The possibility of a criminalisation of cartel conduct will only raise significant problems of litigation, both insofar as the role of the Tribunal which is not a court is concerned, and furthermore in terms of a plethora of possible constitutional challenges which may be expected to be brought by accused persons.

The new section 73A may well give rise to similar challenges brought to the Constitutional Court against s417 of the Companies Act by allowing parties to invoke the criminal provisions of the Bill of Rights –section 35 thereof to

challenge what has now become the successful process leading to leniency agreements. Furthermore, whereas the competition Bar is distinguished (save for some glorious exception) by a paucity of lack of detailed expertise in competition law which would be of assistance to an under resourced and effectively part time court, the same cannot be said for the range of objections, constitutional, administrative and procedural which are consistently raised in cases of cartel activity. It may be unfortunate that well meaning attempts to criminalise the egregious behaviour of cartels could subvert the considerable progress that has been made.

The problem can be summarised thus: once the authorities move against a cartel, interlocutory challenges are brought before the Tribunal and to the court and, with some luck and imagination, to the Supreme Court of Appeal and possibly the Constitutional Court. This strategy known within the South African context as 'Stalingrad jurisprudence', can ensure that cartel cases are never brought to fruition and hence exhaust the resources of the authorities. Once a criminal charge becomes a possibility, the difficulty is exacerbated. It is here that the court has attempted to develop a substantive approach as opposed to a formalistic attitude to the procedural provisions of the Act so as to ensure that cases brought against alleged cartels are dealt with on the merits as quickly as possible. This, in my view, remains the most pressing challenge for the next few years, in that it is the area which demands the priority of the Commission.