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Antitrust Litigation 2021

South Africa
Pieter Steyn
LEX Africa

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Law and Practice

Contributed by:

Pieter Steyn

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1. OVERVIEW

1.1 Recent Developments in Antitrust Litigation

There have been few antitrust litigation cases since the current Competition Act came into force on 1 September 1999. The first court decision was in 2016 and involved a claim by Nationwide Airlines (in liquidation) against South African Airways (SAA) for SAA's abuse of its dominance by incentivising travel agents to prefer SAA over its competitors. Damages of SAR104 million were awarded to Nationwide. Another airline, Comair, also sued SAA and was awarded damages (including interest) totalling over SAR1 billion. The complexity of calculating antitrust damages, lengthy court proceedings and the costs of litigation in South Africa act as disincentives to plaintiffs. In practice, cases are often settled.

1.2 Other Developments

Significant amendments were recently made to the Competition Act. The amendments, however, focussed on strengthening the powers of the Competition Commission, expanding prohibited conduct and public interest provisions, and widening penalty provisions. The provisions of the Act relating to private enforcement and antitrust damages were not changed. From a policy perspective, the Government's focus remains on public (as opposed to private) enforcement.

2. THE BASIS FOR A CLAIM

2.1 Legal Basis for a Claim

The Competition Act provides that the competition authorities created by the Act have exclusive jurisdiction over competition matters in South Africa. The Act provides that if, in any civil court action, a party raises an issue concerning a practice (for example cartel conduct, abuse of

dominance, price discrimination or anticompetitive vertical practices) prohibited by the Act:

- the civil court is prohibited from dealing with the issue on the merits;
- if the issue is covered by a decision of the Competition Tribunal or Competition Appeal Court, the court must apply the Tribunal or Appeal Court's decision on the issue; and
- in other cases, the court must refer the matter to the Tribunal to be considered on its merits if the court is satisfied that the issue has not been raised in a vexatious or frivolous manner and the resolution of the issue is required to determine the final outcome of the action.

The Competition Act further provides that:

- a person who has suffered damage as a result of a prohibited practice must, when instituting a damages action in a civil court, file a certificate (in a prescribed form) from the Chairperson of the Competition Tribunal or Judge President of the Competition Appeal Court confirming that the conduct has been found to be prohibited by the Act;
- such certificate is conclusive proof of its contents and is binding on the civil court;
- any appeal against or review of a Tribunal decision suspends any right to commence an action in a civil court in respect of the same subject matter; and
- a person's right to claim damages arising from prohibited conduct comes into existence on the date of the Tribunal's decision or, if the Tribunal's decision is appealed, the date on which the appeal process is concluded.

2.2 Specialist Courts

The Competition Act established the Competition Appeal Court, whose members are judges and which hears appeals and reviews against decisions of the Competition Tribunal. The Appeal Court however does not decide antitrust

damages claims. Such claims are decided by the civil courts. The civil court in which such claims are brought must have jurisdiction to decide the claim in accordance with its procedural rules.

2.3 Decisions of National Competition Authorities

The Competition Act establishes the following bodies.

- The Competition Commission, which investigates and prosecutes prohibited conduct cases before the Competition Tribunal; the Commission's decisions are not binding on the Tribunal or a civil court.
- The Competition Tribunal, whose decisions are (unless overturned on appeal) binding on a civil court.
- The Competition Appeal Court, whose decisions are binding on a civil court; Appeal Court decisions may be appealed to the Constitutional Court if they relate to a constitutional issue, but such cases are rare in practice.

The decisions of national competition authorities (NCAs) in other states are not binding on a South African civil court. The Competition Act does not permit the Commission, Tribunal or Appeal Court to intervene in civil damages actions. Any such intervention would have to be done in accordance with the court's procedural rules. There has been no such intervention to date and it would only be permitted by the civil court in rare and exceptional cases.

The Commission, Tribunal and Appeal Court are not authorised to award civil damages arising from prohibited practices (although provision is made in the Competition Act for damages to be included in a consent order or settlement concluded by the Commission and approved by the Tribunal if the complainant agrees to such damages – this is rare in practice).

2.4 Burden and Standard of Proof

The plaintiff will bear the burden of proof on a balance of probabilities.

2.5 Direct and Indirect Purchasers

There is no restriction on who can bring claims. Anyone who suffers loss or damage due to a prohibited practice, may bring a claim. Plaintiffs will, however, have to prove the amount of their damages claims on a balance of probabilities. As set out in **2.1 Legal Basis for a Claim**, a civil court is bound by a decision of the Tribunal and Appeal Court and this significantly assists the plaintiff in a civil damages claim as it only needs to prove the amount of its damages and not the other South Africa common law requirements for a damages claim, namely conduct, unlawfulness/wrongfulness, fault, causation and harm.

2.6 Timetable

Litigation in South Africa can be protracted and may take years to finalise (including appeals). As set out in **2.1 Legal Basis for a Claim**, a civil court may not consider a prohibited conduct issue on its merits and must refer it to the Tribunal. This will (to the extent that the issue relates to the civil court proceedings) result in the civil court proceedings being suspended until the Tribunal (or Appeal Court) decides the issue.

3. CLASS/COLLECTIVE ACTIONS

3.1 Availability

Class actions are recognised under the South African Constitution but have not been regulated by the Competition Act (or other statutes). The courts have developed South African common law to accommodate class actions for non-constitutional infringements such as conduct prohibited by the Competition Act.

The South African Constitution does not distinguish between opt-out or opt-in class actions and the cases dealing with class actions have not limited class actions to opt-in or opt-out. Each case will be dealt with having regard to its specific facts and circumstances. In the case of *Nkala and Others v Harmony Gold Mining Co Ltd and Others* (which dealt with claims by miners suffering from silicosis), the court allowed both opt-in and opt-out procedures at various stages of the litigation.

3.2 Procedure

The Constitution contemplates that anyone acting as a member of, or in the interests of, a group or class of persons, may approach a competent court. Certification of the class action is required by a competent court. The following requirements must be met by the class seeking certification:

- there must be an identifiable class;
- such class must have a common claim and a valid cause of action;
- a suitable representative of the class must be identified; and
- the class action must be the most appropriate way of determining the claims of the class members.

3.3 Settlement

The courts are not involved in settlements. A settlement agreement may be made an order of court by agreement between the parties.

4. CHALLENGING A CLAIM AT AN EARLY STAGE

4.1 Strikeout/Summary Judgment

South African civil court procedure provides for strikeout and summary judgment applications. Strikeout applications (or exceptions) raise points of law or fact which, if not cured,

negate the validity of the cause of action and can result in the case being dismissed before trial. The court will usually give the defendant an opportunity to cure any defects in its cause of action. A plaintiff's summary judgment application must deal with (and negate) the defence raised in the defendant's plea. However, if the defendant is able to indicate a valid defence, the summary judgment application will fail. As set out in **2.1 Legal Basis for a Claim**, antitrust damages claims will rely on the Tribunal and Appeal Court's findings on the facts and merits and are focussed solely on the amount of damages suffered. This reduces the scope for relying on summary judgment/strikeout applications in practice.

4.2 Jurisdiction/Applicable Law

Under South African common law, a South African court will have jurisdiction if the court has personal and subject matter jurisdiction over the defendant. Personal jurisdiction is established if the defendant resides or conducts business in the area of the court's jurisdiction or if the defendant submits to the jurisdiction of the court or if property is attached to found jurisdiction. Subject matter jurisdiction will be established if there is some reasonable link between the claim/cause of action and the jurisdiction of the relevant court.

South African competition law will generally apply to all conduct within or having an effect within South Africa. The South African common law relating to conflict of laws will apply if there is a dispute as to whether South African or a foreign law is applicable.

4.3 Limitation Periods

In terms of the Prescription Act, civil damages claims prescribe or lapse on expiry of three years from the date on which the plaintiff has knowledge of the claim. The Competition Act provides that a person's right to claim damages arising

from prohibited conduct comes into existence on the date of the Tribunal's decision or, if the Tribunal's decision is appealed, the date on which the appeal process is concluded.

5. DISCLOSURE/ DISCOVERY

5.1 Disclosure/Discovery Procedure

The rules of the civil courts provide for discovery of documents after pleadings in the trial have closed. Each party is obliged to disclose all relevant documents on affidavit (ie, under oath or affirmation). Provision is made in the court rules for a party to apply to the court for additional or better discovery if it is not satisfied with the discovery made by the other party.

5.2 Legal Professional Privilege

Privileged documents are not required to be disclosed. A distinction is made between legal advice privilege and litigation privilege. Legal advice privilege applies to all documents relating to legal advice provided, even if it does not relate to any particular litigation. However, in the context of litigation privilege, the contemplation of litigation is a precondition for the non-disclosure of the documents.

5.3 Leniency Materials/Settlement Agreements

The Competition Commission's leniency policy provides for a confidential process and the Commission is required to maintain the confidentiality of all information, evidence and documents submitted by a leniency applicant. However, the Commission is entitled to use documents and information submitted by a leniency applicant in its prosecution of other cartel members before the Tribunal. The Commission's rules allow for the protection of confidential information and the leniency applicant is well advised to claim confidentiality of all confidential information

submitted to the Commission. This will give the leniency applicant legal standing in any third-party proceedings before the Tribunal to have access to such information. The identity of the leniency applicant will be disclosed in Tribunal proceedings and the grant of leniency does not protect the applicant from criminal or civil liability (including damages claims) arising from its participation in the cartel.

Consent orders (the South African term for settlement agreements) concluded by the Commission and a respondent must be approved by the Tribunal. Approved consent orders are published in the Government Gazette although confidential information will be "blacked out" if a confidentiality claim has been submitted and has not been challenged or set aside by the Tribunal or Appeal Court.

6. WITNESS AND EXPERT EVIDENCE

6.1 Witnesses of Fact

Witnesses of fact may be relied on depending on the facts and circumstances of the case. Witness statements are submitted and oral evidence may be given. Witnesses are subject to cross-examination and may be compelled to give evidence through a subpoena process in terms of the court's procedural rules.

6.2 Expert Evidence

In antitrust cases, expert evidence is critical to prove or disprove the amount of the loss or damage suffered by the plaintiff. The success of the case generally depends on the expert evidence. Witness statements are submitted and oral evidence is generally given. Expert witnesses are subject to cross-examination. The court's express permission to adduce expert evidence is not required. The court will generally require issues in dispute to be identified and narrowed

at a pre-trial conference but joint statements by experts are not legally required and “hot tubbing” is not practised.

7. DAMAGES

7.1 Assessment of Damages

The general principle is that the plaintiff should be placed in the position it would have been had the unlawful conduct not occurred. The plaintiff is accordingly required to prove its actual loss and damages. Exemplary or punitive damages are not available. The plaintiff also has a common law duty to mitigate its loss and damages.

7.2 “Passing-On” Defences

The plaintiff is required to prove its actual loss and damages and also has a common law duty to mitigate its loss and damages. The defendant may challenge the amount of damages claimed by the plaintiff, including by relying on the passing-on defence.

7.3 Interest

The Competition Act provides that interest on damages claims commences on the date of issue of the certificate by the Chairperson of the Competition Tribunal or Judge President of the Competition Appeal Court. The rate is determined by the Minister of Justice in terms of the Prescribed Rate of Interest Act and is currently 7% per year.

8. LIABILITY AND CONTRIBUTION

8.1 Joint and Several Liability

There have been no antitrust litigation cases involving cartels or more than one defendant. The plaintiff is not required to sue all the parties to the prohibited conduct on a joint and several basis and the apportionment of dam-

ages between more than one defendant adds complexity to the claim and provides a potential defence to individual defendants. Leniency or immunity applicants receive no favourable treatment in civil damages claims.

8.2 Contribution

Where damages are suffered as a result of the acts or omissions of multiple parties and one party pays the plaintiff, it may claim a contribution from the other parties.

9. OTHER REMEDIES

9.1 Injunctions

The Competition Act allows a complainant to apply to the Competition Tribunal for injunctive or interim relief in respect of any alleged prohibited practice. The Tribunal may grant the interim order if it believes it is reasonable and just to do so having regard to the evidence, the need to prevent serious and irreparable damage to the applicant and the balance of convenience. Interim relief applications are, in practice, generally heard quickly (within three months). The Act obliges the Tribunal to give the respondent a reasonable opportunity to be heard having regard to the urgency of the proceedings.

If interim relief is granted but the hearing in the matter is not concluded within six months, the Tribunal may extend the interim order for a maximum period of six months. The Tribunal's decision may be appealed to the Competition Appeal Court.

There are no requirements for applicants in interim relief proceedings to provide any undertakings (including a cross-undertaking in damages) if the substantive case is unsuccessful. The Competition Act contemplates that respondents will be prosecuted by the Commission but a complainant may initiate private proceedings before

the Tribunal if the Commission decides not to prosecute or refer the matter. If a complainant is unsuccessful in private prosecution or referral proceedings, the Tribunal could grant a costs order against it. The respondent could (depending on the facts and circumstances) have a damages claim against a complainant which lodges vexatious or unsubstantiated complaints to the Commission.

9.2 Alternative Dispute Resolution

Alternative dispute resolution methods such as mediation and arbitration are available but are not mandated or required by law. It is left to the parties to agree on whether to rely on alternative dispute resolution.

10. FUNDING AND COSTS

10.1 Litigation Funding

Third-party funding of claims is not regulated by statute but has been permitted by the courts (the previous common law position was that litigation funding or champertous agreements were contrary to public policy and void unless in good faith to assist a poor litigant). Third-party funders have been joined as co-litigants in the court proceedings and may be held liable for legal costs orders if they control the litigation.

10.2 Costs

Costs may be awarded by a court in favour of a successful litigant based on a fixed court tariff. Generally the costs are awarded on the “party and party” scale, which is often significantly less than the actual costs. Costs on the attorney and client scale include party and party costs as well as other legal costs. Costs on the attorney and own client scale are the actual costs. Attorney and client and attorney and own client costs are seldom awarded by the courts.

The court rules allowing a defendant to request a plaintiff to furnish security for costs, were initially limited to a foreign (non-resident) plaintiff who did not own any immovable property in South Africa. Security for costs may now also be required from a local plaintiff if the action is vexatious, reckless or amounts to an abuse of process. The nature of the security will depend on the facts and circumstances of each case but may include bank guarantees.

11. APPEALS

11.1 Basis of Appeal

Civil court judgments may be appealed ultimately to the Supreme Court of Appeal which has final appellate jurisdiction over all non-constitutional matters. Leave to appeal must be granted by the initial court or by petition to the higher court. Appeals are not limited to points of law and the appeal court may overturn the decisions of the lower courts.

Contributed by: Pieter Steyn, *LEX Africa*

LEX Africa is Africa's largest legal alliance. It was formed in 1993 and has over 600 lawyers in 26 African countries. Each member is an independent law firm whose key specialist focus is on general corporate/commercial law, litigation/dispute resolution and regulatory matters, including antitrust/competition. Legal expertise

is combined with knowledge and experience on the local business, political, regulatory, cultural and economic environment. With its 28-year track record, LEX Africa provides a pan-African legal team for both cross-border and local African legal solutions for its clients.

AUTHOR



Pieter Steyn has been a director of Werksmans since 1996 and Chairperson of LEX Africa since 2001. He has been practising all aspects of competition law since 1999 and was Co-Chair of the

Antitrust Committee of the international Bar Association (IBA) in 2016 and 2017 and currently serves on its Advisory Board. He was co-chair of the IBA African Regional Forum in 2019 and 2020. He has advised several clients on the merger control regimes and competition laws in COMESA as well as in other African countries. Pieter and his team lodged the first ever merger filing for Funai Electric with the COMESA Competition Commission in 2013. Pieter has written several articles, been interviewed on radio and television and spoken and chaired panels at conferences and seminars on competition law in South Africa and other African countries. He has been involved in several IBA submissions and

programmes including to the South African, Namibian, Nigerian, Indian and COMESA competition authorities. Pieter has acted in South African merger control cases for, inter alia, Toshiba, Mitsui/Gonvarri, Zhejiang Geely/Volvo, Cadbury/Kraft, Johnson Controls, Ford Corporation, Tata, BASF, ArcelorMittal, Schaeffler, Eastman Kodak, Goldman Sachs, Yazaki Corporation, Aon Corporation, Tupperware Corporation, Voestalpine AG, Cargill, Tiscali, Bollore and several South African corporate clients. Pieter has also advised numerous corporate and multinational clients with regard to cartels, other prohibited practices, compliance programmes, due diligence and leniency applications under South African competition law including clients in the shipping, automotive parts, maize milling, wheat milling, lumber, vehicle, gas, steel, aviation fuel, airline, pharmaceutical, pet food, caravan and vehicle tracking industries.

LEX Africa

The Central
96 Rivonia Road
Sandton
Johannesburg
South Africa

Tel: +27 11 535 8296
Fax: +27 11 535 82696
Email: psteyn@werksmans.com
Web: www.lexafrica.com

