Fighting over breadcrumbs

Cartels and the Competition Act 89 of 1998

By Decide Makhubele
In South Africa there is an increase in cartel activities that are forbidden by s 4(1)(b) of the Competition Act 89 of 1998. This article discusses the consequences of cartels on the market, economic development and consumers. The discussion will also provide the legal position regarding cartels by referring to statutory provisions and the prevailing judicial precedent on the matter. It will also highlight the punishments that are available and can be imposed on the cartel members.

The Competition Act provides that a person who has suffered loss or damage as a result of a prohibited practice, may commence civil action against the cartel firm. The legislature introduced provisions for criminal liability in the Competition Amendment Act 1 of 2009, which is expected to come into operation on a date to be proclaimed by Parliament.

Recent cartel case

The Competition Commission recently reached settlement with 15 construction firms for collusive tendering in contravention of s 4(1) of the Competition Act (Competition Commission v Murray & Roberts Ltd (Competition Tribunal) (unreported case no 017277/2009Feb-279/2009Sep-4641) (N Manoim, Y Cassim and T Madima). The settlement was for the amount of R 1,45 billion as a penalty. There were consumers alleging that they suffered harm as a result of this construction cartel and threaten to take civil action against the cartel firms. Should the affected parties commence civil action it would set a judicial precedent.

Purpose of the Competition Act

Before discussing the important provisions regarding cartels it is of paramount importance to lay out the purpose of the Competition Act in as far as it relates to the above matter. The Competition Act was promulgated to promote and maintain competition in South Africa in order to –

- promote the efficiency, adaptability and development of the economy;
- to provide consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (s 2 of the Act).

Section 4(1)(b) of the Competition Act provides –

’An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if:

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.’

Why do firms engage in cartel activities?

In general, firms engage in cartel activities to maximise the joint profits of cartel members, which means trying to operate collectively as if they were a monopoly (Tapera G Muzata, Simon Roberts, and Thando Vilakazi (2012) ‘Penalties and settlements for cartels in South Africa seen through an economic lens’ (Working Paper no 9/2012 at p 6).

In Competition Commission v Pioneer Foods (Competition Tribunal) (unreported cases nos 15/CR/Febr07 and 15/CR/ May/08, 3-2-2010) (Y Cassim, D Lewis Date and N Manoim) the Competition Tribunal found that Premier, Tiger Brands, Pioneer and Foodcorp contravened s 4(1)(b)(i) and (ii) of the Competition Act. In this matter Pioneer contested its participation in a cartel (more especially cartel arrangements nationally and in the Western Cape) despite being implicated by the other major producers. The Tribunal found that there had been collusive conduct from 1999 to 2006, across the country, and in 2006 in the Western Cape. These four bread firms contravened the Competition Act in that:

- During 1999 they concluded an agreement, or engagement in a concerted practice in terms of which they divided markets among themselves in the South Gauteng, Free State, North West and Mpumalanga regions.

- Between 2003 and 2004 they –

  - fixed the selling price of bread and the dates by which the said prices were to be implemented;

  - entered into a ‘gentlemen’s agreement’ in terms of which they resolved that during the period of bread price increases, they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier; and

  - agreed not to poach one another’s customers.

- During July 2006, Pioneer, Premier and Tiger Brands agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area

- During the last week of November 2006, Pioneer, Premier and Tiger Brands, fixed the selling price of bread by agreeing to increase the said price by 30c per loaf in Gauteng with effect from 18 December 2006.

- None of the firms would supply new distributors.

- other’s former employees.

- None of the firms would make bread deliveries on 25 and 26 December 2006.

Damage as a result of the contravention

The Competition Tribunal in the Pioneer Foods case held that the damage to competition by Pioneer’s conduct caused harm to consumers in the form of higher prices, less choice and inferior services. It was further held that the bread market supplied a staple food to millions of South Africans; especially the poor, and that any increases in prices would have a disproportionate impact on this sector. The Tribunal could not quantify the extent of the damage accurately, but concluded that ‘the result of this was that poorest of all South Africans paid more for their bread than any other person’ (para 160).

The fixing of agents’ commissions and agreement not to poach agents in the Western Cape led to higher costs of distribution into the informal sector and eliminated the negotiating power, if any, of these agents. The loss and damage to competition caused by the contravention in the inland region was likely to be greater due to the permanent nature of the bakeries’ market division agreement. Moreover, the consequences of closing bakeries were not limited to the urban areas but stretched into the rural areas.

Impact of cartel activities on consumers

Consumers are harmed by both higher price, and by the lower quantities they choose to buy. The loss to consumers occurs because higher cartel prices force consumers to withdraw from buying the cartelised product and to consume inferior substitutes, if any are available (see Mazuta et al at p 7).

The overcharge is effectively the difference between the price charged during the cartel period and the prices that would have been charged in a competitive market absent the conduct. In addition, higher prices have the distortionary effect of reducing demand (see Mazuta, et al at p 15).

The results of cartel arrangements at
‘The introduction of criminal liability to individual cartel members in s 73A(3) and (4) of the Competition Amendment Act should be welcomed with both hands. It is common cause that most cartel activities are done deliberately by the individuals who know its effects on consumers, economic development and the market.’

In order to succeed in a civil action a party claiming suffered loss or damages must prove its case on the balance of probabilities. This means that the damages suffered must be properly quantified by a party claiming damages. It is difficult to estimate the level of benefits that accrue to firms as a result of engaging in cartel conduct and even more complex to determine the level of harm imposed on society (Mazuta et al at p 7). The difficulty in proving the harm suffered by the consumers is most probably the reason there is no record of civil actions instituted.

**Conclusion**

Cartel activities hinder the purpose of the Competition Act. It is seen in the Pioneer Foods case, the companies had an agreement not to compete, while one of the purposes of the Act is to promote competition. Small bakeries closed and people lost their jobs as a result of cartel activities. The purpose of the Act to promote economic development and employment was also hindered. Consumers were detrimentally affected in that their choices of products were compromised.

**Civil actions against cartel members**

Section 65(6) of the Competition Act provides that:

‘A person who has suffered loss or damage as a result of a prohibited practice –

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form –

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.’

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