

Competition Appeal Court prefers narrow interpretation of Competition Tribunal's powers

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The scope of the competition authorities' powers has been the subject of various decisions of the courts in recent times.

In particular, certain of these decisions flow from the fact that the extent of the Competition Tribunal's powers to engage actively in the direction of matters before it are not clearly circumscribed in the Competition Act. Although the tribunal is clearly not subject to the restraint expected of a court in refraining from stepping into the arena in matters before it, the extent to which the tribunal can pursue allegations of prohibited conduct that come to its attention on its own steam, remains contentious.

A narrower interpretation

A recent decision of the Competition Appeal Court (CAC), handed down in the Loungefoam matter, has, however, placed a narrower interpretation on the powers of the tribunal, reflecting a broader ongoing debate in the competition law fraternity between two distinct camps, divided over the question as to how broadly the powers of the authorities should be interpreted. The existence of this tension is acknowledged by Shan Ramburuth, the competition commissioner, in the Competition Commission's Annual Report for 2011 and 2012: "It is not surprising, in light of South Africa's economic history, that there are different visions of the role and scope of competition law in the economy."

Those who are in favour of a broad interpretation of the powers bestowed on the competition authorities argue that the tribunal has the ability to "investigate" and decide on alleged prohibited conduct of which it becomes aware during the course of proceedings before it, without requiring that the relevant allegations be formally referred to it. In no small part, this belief flows from the Constitutional Court's decision in the Senwes matter handed down in 2012. Here, the court held that there was no merit in the contention that hearings before the tribunal were to be restricted only to matters raised in the commission's referral of an alleged prohibited practice. The court found that although the tribunal cannot initiate a hearing on its own, this did not mean that it could not determine a complaint brought to its attention during the course of deciding a referral.

The Senwes decision has been welcomed by the Competition Commission. According to Ramburuth: "The Commission was successful in the Senwes matter where Constitutional Court affirmed that the Competition Act be interpreted in light of its objectives, and not in a narrow, formalistic manner."

Far-reaching implications

Although the tribunal remains subject to the rules of natural justice when conducting its hearings, an over-broad interpretation of its powers under the Competition Act would have far-reaching implications on the prosecution of complaints before it. Respondents brought before the tribunal in relation to a referred complaint could potentially be exposed to a hearing into a complaint that did not form any part of the commission's initial investigation and referral to the tribunal. However, in the absence of further interpretation of the Senwes judgement, one could only speculate as to the ultimate effect thereof on the powers of the tribunal. According to Ramburuth, in reference to other appeals, on similar issues, currently pending before the courts: "The outcomes of the other appeals will provide guidance on the powers of the authorities."

In the Loungefoam decision (the decision related to the commission's application for leave to take the CAC's earlier decision in the Loungefoam matter on appeal to the Supreme Court of Appeal), the CAC argued against an broad interpretation of the Senwes decision, which confers on the tribunal the power to decide complaints not referred to it. According to the CAC, relying on a number of previous decisions in support of its finding, the tribunal has no general power to investigate anti-competitive conduct and it may only determine those complaints properly referred to it. The CAC specifically expressed disagreement with the interpretation that the Senwes decision bestowed the broad powers on the tribunal referred to above.

The decision of the CAC is to be welcomed insofar as it clarifies the interpretation of the tribunal's powers under the Competition Act with reference to existing jurisprudence on the issue. However, the CAC's decision is unlikely to be the last word on the matter.

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