CPI's Africa Column Presents:

Follow-on Damages for Anti-Competitive Conduct in South Africa: A Need for Legislative Intervention?

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Introduction

Although still very much a developing area of law in South Africa, follow-on damages and collective redress (i.e. class actions) are now a very real feature of South Africa's competition law landscape.

This follows from a number of judgments handed down by the South African Constitutional Court and the Supreme Court of Appeal in relation to the 'bread cartel' and more recently the High Court's decision to award over US$ 100 million in civil damages to Nationwide Airlines and Comair Airways (the "Plaintiffs") following the Competition Tribunal's finding that South African Airways had abused its dominant position.

Accordingly, respondents who are found to have engaged in conduct which is prohibited by the South African Competition Act may be exposed to significant liability, not only in respect of administrative penalties and criminal sanctions, but also from a civil damages perspective.

This article discusses briefly the framework in terms of which civil damages claims are assessed in South Africa, highlighting some of the challenges that plaintiffs and defendants are faced with, before concluding with recommendations for legislative intervention.

A 'Section 65 Certificate'

For follow-on civil redress, a claimant in South Africa need only obtain what is known as a Section 65 Certificate from the Competition Tribunal, in order to proceed with a civil damages case before the High Courts.

It has generally been accepted that once a Section 65 Certificate is obtained, all that a plaintiff would be required to prove is the casual link between the prohibited conduct and the quantum of the damages suffered.

In other words, a defendant would not be entitled to raise a defence excluding "wrongfulness" which is ordinarily one of the five elements of a common delict which a plaintiff must prove to succeed with a civil claim.

The South African Supreme Court of Appeal appears to have favoured an interpretation that once the

Competition Tribunal has made a finding that a respondent has engaged in anti-competitive conduct, such conduct is irrebuttably presumed to be "wrongful" for purposes of a follow-on civil damages case.

Absence of Wrongful

The importance of "wrongfulness" as a separate delictual element is particularly relevant given the *per se* nature of certain conduct prohibited by the South African Competition Act (Competition Act) – such as the "cartel conduct" and resale price maintenance provisions.

Under the Competition Act, agreements between Parties that directly or indirectly fix a selling or purchase price, trading condition or amount to market allocation are prohibited and a respondent is not entitled to raise any rule of reason or other justification for engaging in such conduct – even if the conduct is ultimately procompetitive.

Furthermore, the South African Competition Authorities have not yet recognised the "characterisation" argument as a complete defence to anti-competitive conduct. Even if the conduct, therefore, was not designed to be anticompetitive or collusive, if it amounts to the indirect fixing of prices between competitors, that is the end of the inquiry. Take for example the "fixing of a purchase price" between two competitors who collectively negotiate a better price from a common supplier. Absent any characterisation argument, the Competition Act expressly prohibits this form of conduct as a *per se* contravention.

Assuming that the competitors' pass on some or all of the benefit of the reduced input costs to consumers, this could result in a net pro-competitive outcome (assuming that the upstream supplier is not foreclosed).

Unless a defendant is entitled to raise either a characterisation argument or 'lack of wrongfulness', the defendant would be liable to damages suffered by the supplier.

A further example could be found in considering a franchisor-franchise relationship. There are a number of pro-competitive reasons why a franchisor may want all franchisees to adopt uniform prices. Brand protection, avoidance of internal cannibalisation or ensure profitable models for

franchisees are all procompetitive arguments. Franchisors, however, could find themselves potentially exposed to significant civil liability as a result of engaging in minimum resale price maintenance practices.

Accordingly, if a defendant is not entitled to raise the characterisation or rule of reason defence before the Competition Tribunal, and is also not entitled to raise the "exclusion of wrongfulness" defence at the civil proceedings stage, a defendant may find itself in a particularly prejudicial position. It would be a welcome development if the South African courts were to provide clear guidance as to the appropriate framework for assessing follow-on damages in South Africa – with due regard not only to the most egregious forms of anticompetitive conduct, but also other types of conduct that may not be 'designed to be collusive' or conduct that is in fact procompetitive.

Litigation Challenges

In addition to the challenges related to the various delictual elements that must be proved to sustain a successful damages claim, litigants will also have to be mindful of other challenges in respect of future follow-on civil cases.

These include, in particular, issues surrounding prescription and joint and several liabilities.

Prescription

The general three-year prescription period is likely to commence from the date that the Competition Tribunal makes a determination that a respondent has engaged in "prohibited conduct". The nature of cartel investigations, however, often entails lengthy investigations taking more than three years to conclude. In many cases investigations take more than five years to be finalised for a variety of reasons.

Plaintiffs who intend waiting until the entire investigation has been concluded may risk prescription claims against those respondents who chose to settle their cases early on in the investigation stage (as the prescription period is likely to commence from the date upon which a settlement agreement is made a consent order by the Competition Tribunal).

Joint and several liability

On the flip-side, respondents who conclude early settlement agreements may be prejudiced as they are subject to joint and several liability.[1]

Joint and several liabilities may present particular challenges for a variety of reasons. For instance, how does one calculate the entire damages of the cartel before the entire cartel has been defined? Further, from a policy perspective, should an early settler or leniency applicant be held liable for the entire damages of a cartel – even in cases where the particular respondent did not in fact cause the damage or only caused nominal damages as opposed to larger players in the cartel?

If the burden on early settlers is too great, respondents may rather look to embark on a lengthy litigious strategy in order to ensure that they are not potentially saddled with the burden of paying the full amount of damages caused by the entire cartel.

The costs of litigation in this regard would likely be far less than those that would be incurred in trying to recover the *pro rata* portion of damages from the other wrongdoers.

Lengthy conclusion of investigations is one of the key challenges to plaintiffs for other reasons –with the lapse of time, evidence is lost or destroyed, witnesses no longer recall certain events as accurately and potential plaintiffs may no longer be in a position to institute a damages claim.

Policy Recommendations

Accordingly, the legislature should consider possible mechanisms to ensure that an adequate balance is struck between ensuring that plaintiffs are not saddled with insurmountable hurdles in obtaining legal relief for their damages suffered, while ensuring that respondents are not overly prejudiced to the extent that they may be discouraged from finalising the case against them expeditiously.

Possible solutions to the problems caused by joint and several liability may be found by turning to

[1] In South Africa, a party who suffers civil damages is ordinarily entitled to claim the entire damages caused from one wrongdoer. The wrongdoer who pays the entire damages amount is then entitled to recoup the pro-rata portion of damages from the other wrongdoers.

guidance from the UK's position – in terms of which a leniency applicant may only be held severally liable for the damages which it caused and not that of the entire cartel. A similar mechanism might also be considered for respondents who are not 'first through the door' (and, therefore, cannot receive leniency under South Africa's Leniency Policy) but still sought to conclude an expeditious settlement with the South African Competition Authorities.

Conclusion

The recent South African judgments on follow-on civil redress have not yet sufficiently clarified the legal basis upon which liability is based. To the extent that a particularly defendant's conduct is not as blameworthy as that which is usually associated with "hardcore cartel conduct" prohibitions, we believe that the common law delictual elements may be interpreted in a manner which adequately balances the competing interests between law and policy.

As to some of the additional challenges which are likely to present themselves to civil litigants in future follow-on damages cases, legislative intervention to achieve an appropriate balance between issues such as prescription and joint and several liability requires, in our view, a holistic view of the entire legal framework (in terms of which civil damages are assessed) insofar as it relates to civil redress in South Africa.

To view our Paper which was presented at the 11th Annual Competition Conference in South Africa in August 2017, and which deals with the issues addressed in this article in more substance, please click here.