THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a

private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views toward protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties

to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
New York
March 2020

Chapter 21

SOUTH AFRICA

Rosalind Lake[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Few civil claims for damages related to contraventions of antitrust legislation have been brought to date in South Africa. One example is the claim by South African airline Nationwide against national carrier South African Airways (SAA), arising from findings that SAA had abused a dominant position through anticompetitive agreements it entered into with South African travel agents. Nationwide's claims arose out of two complaints against SAA. The first claim was settled by means of a confidential out-of-court settlement; the second is the first of its kind in which follow-on damages have been awarded by the High Court in South Africa.[2] In 2019, Comair Ltd entered into a settlement with SAA for approximately 1.1 billion rand[3] in respect of the decision of the High Court in 2017[4] that confirmed that Comair was also entitled to damages as a result of SAA's abuse of dominance. The judgment confirmed that a person found to have engaged in prohibited anticompetitive conduct is liable for damages to any person harmed by that conduct. The methodology used to calculate damages is the lost revenue less avoided costs.

The city of Cape Town has taken steps to institute action against certain construction companies for civil damages arising from their agreement to rig bids in relation to the construction of the Green Point Stadium in Cape Town. This arises from the rigging of bids by construction companies for the 2010 FIFA World Cup stadiums and other major infrastructure projects.

On 31 March 2017, the City of Cape Town was granted leave to amend its particulars of claim in relation to its claim for damages. The amendments were largely designed to include allegations that the various collusive agreements were implemented and to indicate what resulted from the implementation thereof (and thus what prejudice was sustained by the City of Cape Town). These amendments were required to assist in the claim for damages.[5] The High Court action for civil damages has been set down for hearing in 2020.

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1 Rosalind Lake is a director at Norton Rose Fulbright South Africa Inc.

2 *Nationwide Airlines (Pty) Ltd (In Liquidation) v. South African Airways (Pty) Ltd* (12026/2012) [2016] ZAGPJHC 213.

3 The confirmation of the settlement agreement by the Supreme Court of Appeal is unreported, see the news article at https://www.fin24.com/Companies/comair-gets-r11bn-in-final-competition-settlement-with-saa-20190215.

4 *Comair Limited v South African Airways (Pty) Ltd* [2017] JDR 0298 (GJ).

5 *City of Cape Town v. WBHO Construction (Pty) Ltd and Others* (86873/2014) [2017] ZAGPPHC 271 (31 March 2017) at Paragraph 25.

Private actions in the form of class actions are expected to increase following a decision by the Supreme Court of Appeal (SCA) in the Pioneer bread cartel case,[6] which clarified the requirements for bringing a class action. A number of non-government organisations and five individuals attempted to launch a class action against Tiger Brands, Pioneer Foods and Premier Foods following the successful prosecution of their bread price-fixing cartel by the Competition Commission in 2010.[7] The High Court initially refused to certify the action as a class (a prerequisite for bringing a class action in South African law), which led to an appeal to the SCA. In 2012, the SCA sent the case back to the High Court for reconsideration. The same process was followed in the Mukkadem case, which involved distributors taking action against Tiger Brands, Pioneer Foods and Premier Foods for their participation in the bread cartel. In this case, however, the matter had to go all the way to the Constitutional Court before being sent back to the High Court for reconsideration.[8] The High Court has yet to decide whether these classes should be certified. The cases are still pending, but if successful are likely to be the first class actions arising from a competition law infringement in South Africa.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Private antitrust enforcement

The Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction in respect of the interpretation and application of, inter alia, Chapter 2 of the Competition Act, 1998 (Competition Act), which regulates prohibited practices.[9] However, Section 62(5) of the Competition Act precludes the Competition Tribunal and the Competition Appeal Court from making an assessment of the amount of damages and awarding damages arising from a prohibited practice: only the South African civil courts can award damages for a contravention of the Competition Act (Section 65(2) of the Competition Act).

Sections 62 and 65(2) of the Competition Act thus provide that the competition authorities have exclusive jurisdiction to determine whether a prohibited practice under the Competition Act has occurred, but the civil courts have exclusive jurisdiction to determine whether a claimant is entitled to damages, and if so, how much.[10]

The substantive requirements for instituting civil action are set out in Section 65 of the Competition Act, and a finding by the competition authorities of a prohibited practice is a prerequisite for a civil claim for damages.

If requested by a claimant, the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court must issue a certificate certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Competition Act.[11] A certificate issued in terms of Section 65(6)(b) of the Competition Act is

6 *Children's Resource Centre Trust v. Pioneer Foods* (50/2012) [2012] ZASCA 182 (29 November 2012).

7 *Competition Commission v. Pioneer Foods (Pty) Ltd* (91/CAC/Feb) [2010] ZACAC 2 (15 October 2010).

8 *Mukaddam v. Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23 (27 June 2013).

9 Section 62(1) and (2) of the Competition Act.

10 There is provision in the Competition Act for an amount of damages to be awarded in terms of a consent order settling a complaint; however, this is seldom used in practice.

11 Section 65(6)(b) of the Competition Act.

conclusive proof of its contents and is binding on a civil court.[12] This means that a claimant will not need to prove any prohibited conduct before the civil court, and any action will relate only to whether the other elements of a delictual (tort) claim for damages have been met.

In a 2015 SCA decision, the SCA considered a situation where the leniency applicant had not been cited as a respondent to a complaint referral of the cartel complaint by the Competition Commission to the Competition Tribunal. The SCA found that civil action could not be pursued against the bread manufacturer Premier (although it was granted leniency) because the Competition Commission had failed to cite it as a respondent.[13] In December 2015, the Competition Commission brought an application for leave to appeal this decision to the Constitutional Court in an effort to protect the rights of those that had suffered damage as a result of the prohibited practice. Prior to the application for leave to appeal being heard, a settlement agreement was reached between Premier and civil society organisations including Black Sash, COSATU, the Children's Resources Centre and the National Consumer Forum. The application for leave to appeal has therefore been withdrawn.

ii Limitation to bringing a claim for damages

Any action for a civil claim for damages must be instituted within three years from the date on which the cause of action arose.[14]

A person's right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person (i.e., the finding of prohibited practice); or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.[15]

III EXTRATERRITORIALITY

The Competition Act applies to 'all economic activity within, or having an effect within, the Republic', with limited exceptions for collective bargaining between employees and employers and agreements in terms of the Labour Relations Act, as well as concerted conduct that is designed to achieve a non-commercial socioeconomic objective or similar purpose or any conduct that has been exempted in terms of Section 10 of the Competition Act.[16]

To the extent that a public or private entity is engaged in economic activity with an effect in South Africa, they will be subject to the Competition Act.

In the ANSAC decision,[17] the Competition Appeal Court and then the SCA considered the extraterritorial application of the Competition Act, and in particular the meaning of the word 'effect' contained in Section 3 of the Competition Act. The case involved a complaint lodged by Botswana Ash and Chemserve against ANSAC and CHC Global (Pty) Ltd (CHC) that they had contravened Sections 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act. ANSAC

12 Section 65(7) of the Competition Act.

13 *Premier Foods (Pty) Ltd v. Norman Manoim NO* (20147/2014) [2015] ZASCA 159 (4 November 2015).

14 Section 11 of the Prescription Act 1969.

15 Section 65(9) of the Competition Act.

16 Section 3 of the Competition Act.

17 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa and Others* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003), *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 (13 May 2005).

is an association whose members are competing producers of soda ash in the United States. The association is incorporated in accordance with the provisions of the United States Export Trade Act 1918, commonly known as the Webb-Pomerene Act.[18]

ANSAC did not dispute that the statutory phrase 'an effect' was wide and unqualified, but it argued that Section 3(1), when placed in its proper context and purposively interpreted, had to be read as bringing only anticompetitive activity within its ambit. The Competition Appeal Court and the SCA found that this argument flies in the face of the plain meaning of the statute's wording. ANSAC's argument also required that words be read into Section 3(1). The SCA found that there 'was no discernible justification for doing so'. The SCA ultimately found that the correct approach is that all effects are captured (i.e., both positive and negative).[19] The SCA quoted the Competition Appeal Court, which pointed out that Section 3(1):

> *does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences . . . The question is . . . one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory "net", concerns not only anticompetitive conduct but also conduct the import of which still has to be determined.*[20]

Accordingly, the territorial scope of the application of the Competition Act is wide in the South African context. A number of consent agreements have been concluded with foreign entities whose conduct elsewhere in the world has had an effect in South Africa, and these entities therefore submitted to the jurisdiction of the Competition Act.[21]

In 2019, a number of banks took exception to a complaint referral by the Competition Commission against many banks related to allegations of collusive conduct in respect of forex trading, including a challenge to the jurisdiction of the competition authorities in respect

18 The purpose of this Act is to exempt United States associations engaged in export trade from the application of the Sherman Act, which is the counterpart of South Africa's Competition Act. The Competition Commission's investigation found that members of ANSAC were obliged (in terms of their membership agreement) to sell soda ash for export exclusively through ANSAC to any country outside the United States other than Canada. ANSAC through its board of directors determined prices and trading conditions in respect of the sales. In South Africa, ANSAC had engaged CHC as its agent to give effect to the pricing decisions made by ANSAC.

19 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 (13 May 2005) at Paragraphs 24 to 29.

20 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa and Others* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003) at Paragraph 18.

21 *The Competition Commission v. British Airways PLC* (42/CR/Jul10) [2012] ZACT 87 (22 October 2012), *The Competition Commission v. Nippon Yusen Kabushiki Kaisha Ltd* (CO054Jun15) (8 September 2015) and *The Competition Commission v. Autoliv Inc* (CO189Oct17) (22 November 2017).

of conduct of foreign entities. In its decision, the Competition Tribunal[22] found there to be three broad categories of respondent banks: local banks, local peregrini (foreign banks that have a presence in South Africa) and pure peregrini (international banks that have no presence in South Africa. No issue of jurisdiction was raised in relation to the local banks.

The pure peregrini banks were those international banks that had no presence in South Africa. The Competition Tribunal, in line with common law precedent, found that it did not have jurisdiction to issue an order requiring the foreign banks (pure peregrini) to pay any administrative penalty as such an order would not be effective. It therefore constrained the Competition Commission, in relation to these banks, to seek an order declaring the conduct of these pure peregrini to be anticompetitive.

Regarding those foreign banks which have a presence in South Africa, the local peregrini, the Competition Tribunal found that because an order requiring the payment of a penalty against such banks could be enforced, the Competition Commission could seek to extract an administrative penalty, but only to the extent that such a penalty was calculated on the turnover of the representative in South Africa.

The Competition Tribunal found that, in both of these instances, the Competition Commission would still need to allege that the conduct of the respondent banks had an effect in South Africa, that met the internationally recognised threshold of being direct or immediate, and substantial before the Competition Tribunal could assert its jurisdiction in making any order.

IV STANDING

The Competition Act provides an express mandate for private actions both before the competition authorities and the civil courts.

i Standing to bring a complaint about anticompetitive conduct in terms of Section 49B of the Competition Act

Section 49B of the Competition Act recognises the right of any person to submit a complaint to the Competition Commission for investigation. If the Competition Commission issues a notice of non-referral in respect of a complaint submitted by a complainant, the complainant may, in terms of Section 51(1) of the Competition Act, refer the complaint directly to the Competition Tribunal within a limited time frame.

22 Macquarie Bank and Competition Commission (CR212Feb17/EXC037May17); HSBC Bank and Competition Commission (CR212Feb17/EXC028Apr17); SNYS (Standard New York) and Competition Commission (CR212Feb17/EXC034May17); BAMLI (Bank of America) and Competition Commission (CR212Feb17/EXC036May17);Standard Bank SA and Competition Commission (CR212Feb17/EXC042May17); HSBC Bank USA and Competition Commission (CR212Feb17/EXC328Mar18); Competition Commission and Bank of America and Others (CR212Feb17/OTH270Jan18); Standard Chartered Bank and Competition Commission (CR212Feb17/OTH121Jul17);ANZ Banking Group and Competition Commission (CR212Feb17/EXC029May17); Commerzbank AG and Competition Commission (CR212Feb17/EXC031May17); JP Morgan Chase and Competition Commission (CR212Feb17/EXC032May17).

ii Standing to bring a claim for damages arising from anticompetitive conduct in terms of Section 65 of the Competition Act

Any party who has suffered loss as a result of a contravention of the Competition Act may commence civil action to recover the loss once the Competition Tribunal has certified that the prohibited conduct has occurred.[23]

In principle, the Competition Act affords an indirect purchaser the right to institute a claim for damages if the plaintiff can prove he or she suffered a loss or damage as a result of a prohibited practice. In the *Pioneer* bread class action case, the High Court did not make a ruling on whether an indirect purchaser claim is available; however, the High Court did recognise that Section 38 of the Constitution of the Republic of South Africa, 1996 (Constitution) identifies the following persons that may approach a court to institute a class action:

a anyone acting in his or her own interest;
b anyone acting on behalf of another person who cannot act in his or her own name;
c anyone acting as a member of, or in the interest of, a group or class of persons;
d anyone acting in the public interest; and
e an association acting in the interests of its members.[24]

In the *Comair* case, the High Court confirmed that damages claims for anticompetitive conduct are not limited to rivals;[25] a person found to have engaged in prohibited anticompetitive conduct is liable for damages to any person harmed by that conduct.

While there is no specific clarity yet in South Africa on the availability of an indirect purchaser claim, the remission of the matter by the SCA to the High Court for certification may suggest that the South African courts may be willing to accept that class actions can be brought on behalf of both direct and indirect purchasers: what will be important is whether a causal link between the anticompetitive conduct and harm caused can be established.

V THE PROCESS OF DISCOVERY

i Discovery procedures before the competition authorities

Pretrial discovery procedures apply to both stages of private antitrust litigation in South Africa (i.e., proceedings before the competition authorities, and damages actions before the civil courts).

Section 27 of the Competition Act, read with Rule 22(1)(c)(v) of the Rules for the conduct of proceedings in the Competition Tribunal (the Tribunal Rules),[26] states that the Competition Tribunal may give directions in respect of the production and discovery of documents (whether formal or informal) at a pre-hearing conference.

There are no specific provisions in the Competition Act or the Tribunal Rules relating to discovery procedures. The Competition Tribunal has, in terms of Rule 55(1)(b) of the

23 Section 65 of the Competition Act.

24 *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v. Pioneer Foods (Pty) Ltd and Others*, *Mukaddam and Others v. Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011) at Paragraph 24.

25 *Comair Limited v. South African Airways (Pty) Ltd* [2017] JDR 0298 (GJ).

26 Published under GG 22025 of 1 February 2001.

Tribunal Rules, a discretion to apply the High Court Rules.[27] In practice, strict adherence to the formalities of the civil courts does not occur. For example, in *Allens Mescho (Pty) Ltd and others v. the Commission and others*,[28] the Competition Tribunal confirmed that Rule 55 of the Tribunal Rules confers on it a discretion to apply the High Court Rules. The Competition Tribunal found this is something less exacting than importing the entire rule once one has identified a lacuna in the Tribunal Rules. The reason for this is that the proceedings in the two forums are not sui generis. Uncritical borrowing of a High Court Rule, the Competition Tribunal found, may lead to impracticality.[29]

Owing to the more informal nature of proceedings before the competition authorities, orders relating to the ad hoc production of relevant documents are not uncommon at appropriate times during the course of proceedings. For example, prior to the close of pleadings, respondents in proceedings before the competition authorities regularly make use of Rules 35(12)[30] and 35(14)[31] of the High Court Rules to request the production of documents. In addition, decisions have confirmed that litigants are entitled to access the Commission's investigation record in terms of Rule 15 of the Competition Commission Rules.[32] The interpretation of this rule is still subject to litigation; however, Rule 15 has subsequently been amended effective 25 January 2019, removing these issues in future complaints.

Rule 15 of the Competition Commission's Rules does not provide a time period within which the Commission must provide the record to a requesting party. In *Group Five Ltd v. Competition Commission*,[33] the Competition Appeal Court found that the Competition Commission must do so within a reasonable time period.[34] The concept of a reasonable time period was tested in *The Standard Bank of South Africa Limited v. The Competition Commission of South Africa*.[35] Standard Bank is one of the 18 respondents in a complaint referral that the Competition Commission has brought against local and international banks concerning alleged collusive conduct with regard to trading in foreign currencies. As part of the proceedings, Standard Bank requested, in terms of Rule 15 of the Competition Commission's Rules, that the Competition Commission make a copy of its record available to it. After various requests over a two-month period, Standard Bank brought an application to compel delivery of the record. The Competition Tribunal was required to consider what a reasonable time period would be within which to produce a record.

27 Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

28 *Allens Meshco (Pty) Ltd and Others v. Competition Commission and Others*, *Cape Gate (Pty) Ltd v. Competition Commission and Others* (63/CR/Sep09) [2010] ZACT 37 (28 May 2010).

29 ibid. at Paragraph 6.

30 This rule permits the respondent to request access to documents that have been referred to in the applicant's papers.

31 This rule permits the respondent to request access to a clearly specified document that is necessary for the purpose of pleading.

32 *Group Five Ltd v. Competition Commission* (139/CAC/Feb16) [2016] ZACAC 1 (23 June 2016).

33 ibid.

34 ibid. at Paragraph 10.

35 *The Standard Bank of South Africa Limited v. The Competition Commission of South Africa* (CR212Feb17/DSC027Apr17) (6 November 2017).

The Competition Tribunal noted that there are two points to consider when determining what constitutes a reasonable time. This includes how soon the requestor needs the record and what challenges confront the Competition Commission in responding to such a request.[36]

The Competition Tribunal found that, in complex cases involving a lengthy record that is subject to numerous claims, the documents in the record may constitute restricted information, and where discovery has not yet taken place, may justify delaying production of the record until the record is ready to be discovered in the underlying case.[37][38]

In light of the fact that Standard Bank had not advanced any facts as to why the record was required prior to discovery, the complaint referral relates to a period of at least seven years and there are at least five separate accounts of alleged co-operation between the respondents, the record is likely to be voluminous and raise logistical issues.[39] The Competition Tribunal therefore found that it would not be unreasonable for the Competition Commission to provide the record when it makes discovery. However, the Competition Tribunal did go on to state that if Standard Bank had reasons for requiring the record more urgently, there was nothing that prevented it from bringing a further request in terms of Rule 15.[40]

Standard Bank took the decision on appeal arguing that there was no rationale on the part of the Competition Tribunal to link the production of the record under Rule 15 of the Competition Commission Rules relating to discovery.[41]

The Competition Appeal Court found that the decision in Group Five 'applies unabatedly in the present matter'.[42] In other words, the fact that Standard Bank was a litigant should not have been a factor in determining a reasonable time.[43] The Competition Appeal Court ordered that the record be produced to Standard Bank within five days. The Competition Commission has taken the decision on appeal to the Constitutional Court. The hearing took place on 5 March 2019; however no decision has been issued by the Constitutional Court as yet. The contentious aspect of Rule 15 has since been amended as discussed below.

Owing to the commercially sensitive nature of certain documents likely to be required to be produced during complaint proceedings (e.g., pricing schedules and strategic plans), Section 44 of the Competition Act permits a person who submits information to the Competition Commission or Competition Tribunal to identify information that they claim to be confidential. In practice, legal representatives and expert economists sign confidentiality undertakings, which then allow them to access these confidential documents for the purpose of advising their clients in Competition Tribunal or Competition Appeal Court proceedings.

With effect from 25 January 2019,[44] Rule 15 of the Competition Commission Rules was amended to bring it in line with Section 7 of the Promotion of Access to Information Act 2000.

The amended rule provides for an exception to the general rule that the record may be copied or inspected upon request.[45] The amended Rule 15 does not permit the copying or

36 ibid. at Paragraph 60.

37 ibid. at Paragraph 68.

38 The discovery process before the competition authorities will only take place once pleadings have closed.

40 ibid, at Paragraph 73.

41 *The Standard Bank of South Africa v. The Competition Commission of South Africa* (160/CAC/Nov17/CR212Feb17/DSC027Apr17) (31 May 2018).

42 ibid, at Paragraph 34.

43 ibid, at Paragraph 35.

44 Government Gazette Number 42191, 25 January 2019.

45 Subject to the information not constituting restricted information.

inspection of a document that is requested for (1) pending criminal, civil or administrative proceedings, (2) after proceedings have commenced and (3) where another law or the rules of any court or administrative body already provide for such production or access to the records.[46]

Furthermore, a record obtained in contravention of Rule 15(5) of the amended Competition Commission's Rules will not be admissible as evidence in the proceedings unless the relevant court or administrative body determines that the exclusion of the record would be detrimental to the interests of justice.[47]

ii Discovery procedures before the civil courts

Discovery procedures in all civil actions instituted in the High Court or Magistrates' Court are determined by Rule 35 and Rule 23 of the High Court Rules[48] and Magistrate Court Rules[49] respectively.[50] Parties to a civil action[51] are obliged to disclose to the other party all documents, tapes or recordings relating to any matter in question in their possession, under their control or that were previously in their possession or under their control that either serve to advance their case or adversely affect their case, or that advance the case of the other party to the proceedings.[52] A party's failure to discover any document will result in that party not being able to rely upon such document in the action.[53] Furthermore, there are procedures in place that permit an application to compel the discovery of documents that have a bearing on the action.[54] In practice, the courts will not hear a matter if discovery has not been finalised.

A party can also request the other party to make further and better discovery in addition to the documents they have already discovered.[55] Either party can call on the other to provide copies of its discovered documents or to make the same available for inspection.[56] Any documentation that is subject to privilege is not discoverable, but a list of these documents must nonetheless be produced.[57]

In a 2015 case, *City of Cape Town v. South African National Roads Authority Limited & Others*,[58] the SCA dealt with the issue of confidential information in discovery. In this case, the respondent sought to prevent the appellant from referring to its confidential information in its affidavits. The confidential information was obtained by the appellant through the application of civil procedure discovery rules.[59]

When providing the confidential information, the parties agreed that the appellant would provide a confidentiality undertaking that would prevent the appellant from using or

46 See Rule 15(5) in Government Gazette Number 42030 of 12 November 2018.
47 See Rule 15(6) in Government Gazette Number 42030 of 12 November 2018.
48 Footnote 23.
49 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.
50 Discovery will only take place once pleadings have closed.
51 There is no discovery procedure for high court litigation instituted by way of application unless this is ordered by the court. Discovery only applies if the litigation is instituted by way of action.
52 Rule 35(1) of the High Court Rules and Rule 23(1) of the Magistrate Court Rules.
53 Rule 35(4) of the High Court Rules and Rule 23(4) of the Magistrate Court Rules.
54 Rule 35(3) of the High Court Rules and Rule 23(3) of the Magistrate Court Rules.
55 Rule 35(3) of the High Court Rules and Rule 23(3) of the Magistrate Court Rules.
56 Rule 35(6) of the High Court Rules and Rule 23(6) of the Magistrate Court Rules.
57 Rule 35(10) of the High Court Rules and Rule 23(11) of the Magistrate Court Rules.
58 (20786/2014) [2015] ZASCA 58 (30 March 2015).
59 Rule 35 of the High Court Rules.

disclosing any information received from the appellant for any purpose other than the matter at hand, and only in a manner agreed between the parties or in accordance with the directions of a court or judge. In breach of the agreement between the parties, the appellant filed an affidavit that contained references to the respondent's confidential information. The SCA held that the High Court prohibited the publication of all information from the Rule 53 record (a record filed in a review application), including the non-confidential record, whereas the respondent's case was that all such information, apart from certain specified portions, could be made public immediately, while other parts of the information must be kept secret only until the respondent filed its answering papers, not until the hearing of the matter. This judgment confirms that, in relation to confidential information and public access to court records, the position is now that:

> *court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified.*[60]

While confidential documents will need to be discovered, in certain circumstances a party can approach the court to order a regime where confidentiality can be specifically dealt with.[61] In practice, parties can reach agreement with one another to limit availability of confidential information such as inspection rather than retention of sensitive documents.

VI USE OF EXPERTS

Experts play a key role in prohibited practices cases before the competition authorities and damages actions before the courts in South Africa. In particular, economists are crucial in identifying substantive competition law issues such as market definition and anticompetitive effect.

In England and Wales, the use of expert evidence in competition matters is subject to the guidelines of the court. The courts generally aim to control the manner of production of expert evidence in competition matters by, for example, giving directions on the issues in relation to which expert evidence may be produced, guiding the parties to narrow the issues of the matter or sanctioning discussions between the various experts involved in the matter.[62]

In the United States, the courts have narrowed down the instances where expert testimony may be utilised in competition cases to the following cases: when the expert has sufficient specialist knowledge and expertise with respect to the field in question; when the methodology and data used to reach the expert's conclusions are sufficiently reliable; and when the expert's testimony is sufficiently relevant to assist the tester of fact.[63]

60 Footnote 54 at Paragraph 47.

61 *Crown Cork + Seal Co Inc + Another v. Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093(W).

62 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 44, quoting CPR 35.7(1); CAT Guide to Proceedings, Paragraph 3.4(iv).

63 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 188, quoting *City of Tuscaloosa v. Hacros Chemicals Inc*, 158 F.3d 548, 562-63 (11th Cir. 1998); FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993).

The reliability of the expert evidence is a second factor to the inclusion of expert evidence, and is frequently the cause of most expert evidence being excluded from antitrust cases.[64]

In contrast to England and Wales as well as the US, however, in South Africa there are no specific rules on the use of expert evidence in antitrust cases heard by the competition authority.

In the absence of specific rules in relation to the calling of expert witnesses, and in particular economists in Competition Tribunal proceedings, the High Court Rules relating to the use of expert evidence will generally apply. In terms of Rule 36(9) of the High Court Rules, no person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he or she shall, not less than 15 days before the hearing, have delivered notice of his or her intention so to do; and not less than 10 days before the trial, have delivered a summary of such expert's opinions and his or her reasons therefor.[65] Typically in matters before the Competition Tribunal, provision is made in the pretrial timetable for the exchange of expert witness statements with an opportunity for the parties to supplement their expert witness statements in reply.

In a 2015 decision,[66] the SCA dealt with the issue of the use of expert evidence to prove damages. The SCA held that courts in South Africa and other jurisdictions have experienced difficulties dealing with evidence from expert witnesses who are often described as 'hired guns'.[67] The SCA made reference to a passage from the judgment of Justice Marie St-Pierre in *Widdrington (Estate of) v. Wightman*,[68] which stated the following in relation to the standard that should be met in the use of expert evidence in civil proceedings:

> *Legal principles and tools to assess credibility and reliability*
>
> *[326] Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.*
>
> *[327] As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.*
>
> *[328] An opinion based on facts not in evidence has no value for the Court.*
>
> *[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.*
> *[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:*
> *accepts to perform his or her mandate in a restricted manner;*
> *presents a product influenced as to form or content by the exigencies of litigation;*

64 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 188, quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. at 593-94.

65 The parties can by agreement set longer time periods for compliance with this rule.

66 *PricewaterhouseCoopers Inc v. National Potato Co-Operative Ltd* (451/12) [2015] ZASCA 2 (4 March 2015).

67 ibid.

68 2011 QCCS 1788 (CanLII).

shows a lack of independence or a bias;
has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
advocates the position of the party that retained his or her services; or
selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.

The SCA evaluated the expert evidence adduced in this case in terms of these principles, thereby creating a precedent in South Africa for the standards to be met for the use of expert evidence in civil claims.

Following the SCA decision, the Competition Appeal Court stated that the guidelines from the *Ikarian Reefer* case[69] should be followed in future hearings before the Competition Tribunal.[70] The duties and responsibilities of expert witnesses as recorded in *Ikarian Reefer* include:

a Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.[71]

b An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his or her expertise.[72] An expert witness in the High Court should never assume the role of an advocate.

c An expert witness should state the facts or assumption upon which his or her opinion is based and not omit to consider material facts that could detract from the concluded opinion.[73]

d An expert witness should make it clear when a particular quotation or issue falls outside his or her expertise.

e If an expert's opinion is not properly researched because insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.[74] In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.[75],[76]

In a novel decision in South Africa, the Competition Tribunal introduced the concept of a hot-tub hearing in the *Timrite/Tufbag* merger.[77] The principle of hot-tubbing has been used

69 *National Justice Compania Naviera SA v. Prudential Assurance Company Limited* (1993) 2 Lloyd's Rep 68.

70 *Sasol Chemical Industries Limited v. The Competition Commission* (131/CAC/Jun14) (17 June 2015) at Paragraph 182.

71 *Whitehouse v. Jordan* [1981] W.I.R. 246 at p. 256 per Lord Wilberforce.

72 See *Polivitte Ltd v. Commercial Union Assurance Co Plc*, [1987] Lloyd's Rep. 379 at p. 386 per Mr Justice Garland and Re J [1990] F.C.R. 193 per Mr Justice Cazalet.

73 Re J sup.

74 ibid.

75 ibid at Paragraph 181.

76 'Derby & Co Ltd and Others v. Weldon and Others', *The Times*, 9 November 1990 per Lord Justice Staughton.

77 Timrite (Pty) Ltd and the Mining Bag Division of Tufbag (Pty) Ltd (IM100Jul17) (19 February 2018),

in recent years in other jurisdictions to allow opposing experts to meet and independently discuss and identify points of agreement. This process ensures that only issues in contention are ultimately argued at the hearing before the Competition Tribunal.

Each expert gave a short opening presentation, and the remainder of the experts' testimony took the form of direct discussion between the experts.[78]

As mentioned above, the competition authorities have discretion in applying the High Court rules. In a claim for damages before the civil courts, the High Court rules would apply.

In the *Nationwide* and *Comair* decisions,[79] extensive expert evidence was used to demonstrate what the value of damages should be. The High Court did not, in this case, set out defined parameters for the standards to be applied in the use of expert evidence. It is, however, clear from the conclusions reached that it is the role of the relevant forum (the competition authorities or the civil court) at which the expert or economist evidence is being presented to determine the value that should be attached to the evidence.

VII CLASS ACTIONS

Unlike the legislation of some other jurisdictions, South Africa's Competition Act does not provide for class actions in antitrust cases. However, Section 38(c) of the Constitution allows for class actions for an infringement of any fundamental right in the Bill of Rights. There is no specific class action legislation in South Africa.

The *Pioneer* bread class action was the first of its kind in South Africa, and confirmed that class actions for damages are possible in South Africa. In this case, the SCA gave the following guidance on class action proceedings:[80]

a class action proceedings may be sanctioned by a court where constitutional rights are invoked and in other appropriate cases;

b it is necessary to apply to court for certification to institute a class action;

c there must be a clear and explicit definition of the class to be encompassed, the identification of some claim or issue that could be determined by way of a class action, and evidence of the existence of a valid cause of action;

d the court must be satisfied that the class representative is suitable to represent the members of the class;

e the court must be satisfied that the class action is the most appropriate procedure to adopt for the underlying claims; and

f the definition of the class must have sufficient precision so that a particular individual's membership can be objectively determined by examining the situation in the light of the class definition. This test and commonality are likely to give rise to the most difficulties that litigants will experience in getting a class certified.[81]

78 https://econex.co.za/the-use-of-concurrent-expert-evidence-before-the-competition-tribunal-is-the-hot-tub-getting-hotter/.

79 ibid Footnote 2 and 4.

80 The Court noted that the factors are merely guidelines to be considered on a case-by-case basis. Footnote 4 at Paragraph 15.

81 Footnote 4.

Following the *Pioneer* case, class action case law in South Africa has been developing, as demonstrated in the case of *Nkala*.[82] On 13 May 2016, judgment was handed down by the High Court in relation to an application by 69 mine workers seeking to bring a class action against 32 mining companies for compensation for contracting silicosis and pulmonary tuberculosis while working in their mines. The Court issued an order for certification of the class after finding that, in this context, a class action was the only realistic option through which the applicants could assert their claims effectively against the mining companies. This action was settled on 26 July 2019 on terms acceptable to the court.[83] The settlement involved the establishment of a trust to administer the settlement terms.

On 3 December 2018, the South Gauteng High Court certified a class action in respect of a listeriosis outbreak early in 2018 that affected over 1,000 people. The defendant, a processed meat manufacturer, has elected not to challenge the certification, however, it has issued extensive subpoenas to meat suppliers and laboratories for various information and these are being challenged across the board. As a result, it is unlikely that this matter will progress quickly.

These developments in advancing the law applicable to class actions for damages claims are already leading to an increase in the prevalence of such private actions in South Africa.

VIII CALCULATING DAMAGES

Section 65(6)(a) excludes a civil claim for damages by persons who have already been compensated for damage in a consent order. In practice, however, damages are seldom agreed to by respondents in consent orders, and accordingly a civil claim may be brought where a finding that a party had contravened the Competition Act has been made.[84]

While the plaintiff will not need to prove the cause of action (that is, that the Competition Act has been contravened), he or she will be required to prove the damage they allege was suffered as a result of the prohibited practice. The general common law principles relating to civil damages claims apply.

In South African common law, to sustain a civil claim for damages, the plaintiff must show that the prohibited practice caused the plaintiff to suffer a loss and the amount of the loss. In other words, the plaintiff must prove, on a balance of probability, that there is a causal nexus between the alleged unlawful conduct and the damages that it claims.

The amount claimed as damages must be capable of being quantified in monetary terms,[85] and should only restore the plaintiff to the financial position he or she was in before the wrongful conduct causing the damage took place. The onus is on the plaintiff to quantify and prove the damages sought, and the court will determine the amount of damages to be awarded, although these will not exceed the actual amount claimed by the plaintiff.[86] In the *Comair* case, the court was satisfied that SAA's anticompetitive conduct had caused damage

82 *Nkala and Others v. Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97 (13 May 2016).

83 https://www.silicosissettlement.co.za/downloads/send/5-notices/30-judgement-bongani-nkala-and-67-other-deputy-judge-president-mojapelo-and-judge-windell

84 In practice, many claims for damages are agreed to by way of private settlement negotiations.

85 The courts in South Africa are entitled to award nominal damages in the event that damages cannot be quantified.

86 J R Midgley, *Law of South Africa*, 'Delict', Volume 15, third edition.

to Comair and that in that case, damages should be calculated based on lost revenue less avoided costs. SAA argued that the lost market share of Comair was attributable to other factors and not as a result of SAA's anticompetitive scheme in place with travel agents. The court was not convinced by this argument given that in its 2010 decision, the Competition Tribunal conclusively determined that an exclusionary abuse of dominance could still be effective despite the growth in the market share of rivals. The court quoted the Competition Tribunal as follows:[87]

> *...foreclosure of rivals does not require a showing that rivals are completely foreclosed from entering or accessing a market or segment of a market, it is sufficient to show that they were prevented or impeded from expanding in the market or in a segment of the market which was still distributed through travel agents (TAS). All the evidence of the witnesses in this case thus far suggests that SAA's rivals were prevented or impeded from expanding in the TAS segment of the market by SAA's incentive agreements with travel agents.*

The court noted that the Competition Appeal Court had also confirmed that SAA's conduct substantially foreclosed the relevant market to its rivals and such conduct accordingly had the requisite anticompetitive effect for the purposes of establishing a contravention of Section 8(d)(i) of the Act. The court therefore held that the findings of the competition authorities are binding on the High Court and, therefore, found that Comair suffered damages as a result of SAA's infringing schemes and was anticompetitively foreclosed from the market for domestic airline travel.[88]

The 'once and for all' rule has the effect that a complainant may generally only claim damages that flow from a single cause of action once.[89] A distinction must be drawn between a single wrongful act that gives rise to a single cause of action and a continuing wrongful act that causes damage over a period of time, which may give rise to a series of rights of action arising from time to time.[90] In *Nkala*, for example, the class action sought damages as a result of alleged liability against the mine owners for silicosis and tuberculosis over an extended period of time.

Prospective loss is accepted as part of the concept of damage in South African law.[91] The following forms of prospective damages are recognised in South African law:

a future expenses on account of a damage-causing event;
b loss of future income (or loss of earning capacity);
c loss of prospective business and professional profit;
d loss of prospective support;
e loss of a chance; and
f future non-patrimonial loss (injury to personality).[92]

87 *Comair Limited v South African Airways (Pty) Ltd* [2017] JDR 0298 (GJ) para 99–101.
88 See above.
89 Visser and Potgieter, *Law of Damages*, second edition, 135–163; Van der Walt Sommeskadeleer 425–485.
90 *John Newmark & Co (Pty) Ltd v. Durban City Council* 1959 (1) SA 169 (N); *D & D Deliveries (Pty) Ltd v. Pinetown Borough* 1991 (3) SA 250 (D); *Gijzen v. Verrinder* 1965 (1) SA 806 (D). Claims for delictual damages and subsidence are based on different causes of action.
91 H J Erasmus and J J Gauntlett, *Law of South Africa*, 'Damages', Volume 7, second edition.
92 ibid.

Non-patrimonial loss is defined as the deterioration of highly personal or personality interests. South African law recognises personality rights (and interests) in regard to physical and mental integrity, bodily freedom, reputation, dignity, privacy, feelings and identity. A deterioration of the quality of any of these interests constitutes non-patrimonial damage.[93] South African law accepts that compensation may be awarded for non-patrimonial damage.[94] Such damages are, however, unlikely to arise as a result of a contravention of the Competition Act.

In Nationwide, the court stated that to determine the damage suffered by Nationwide, it had to compare the performance of Nationwide before and after the abuse period to try and reach some estimation of how it would have performed absent SAA's unlawful agreements with travel agents.[95]

The primary object of an award for damages is to compensate the person who has suffered harm. Plaintiffs may not profit from defendants' wrongdoing.[96] No punitive damages for contraventions of the Competition Act can be awarded by the South African courts.

Ordinarily in a civil case, the unsuccessful party will be responsible for the reasonable legal fees incurred by the successful party, which normally include legal fees. The costs of advocates and experts are generally not included in costs orders unless specifically stated or the expert is declared a necessary witness. There is, however, more than one tariff at which the legal fees are taxed, and the court has the discretion of whether to order costs and the tariff at which it is to be taxed.

IX PASS-ON DEFENCES

The passing-on defence has not yet been tested in South Africa.

In contrast, the US has rules dealing directly with pass-on defences. In the US, antitrust defendants are barred from using pass-on defences against a direct purchaser with three exceptions to this rule that have been recognised by lower courts in the US: pre-existing, fixed quantity cost-plus contracts;[97] claims where the direct purchaser is owned or controlled by either the defendant or the indirect purchaser;[98] and claims where the intermediary is a direct participant in a conspiracy with the defendant.[99]

X FOLLOW-ON LITIGATION

The Competition Act makes provision for follow-on litigation following a finding of prohibited practice, provided damages were not awarded as part of a consent order.

Leniency is available for firms for cartel conduct (the direct or indirect fixing of prices or trading conditions, market allocation or collusive tendering that contravenes

93 See Visser and Potgieter, *Law of Damages*, second edition, 96.

94 ibid. at 196.

95 Footnote 2 at Paragraph 53.

96 J R Midgley and J C Vand Der Walt, footnote 57.

97 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *Illinois Brick*, at 735-36; *Mid-West Paper Prods Co v. Continental Group Inc*, 596 F.2d 573, 577 (3d Cir. 1979).

98 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc*, 628 F.2d 971, 974-75 (6th Cir. 1980).

99 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604 (7th Cir. 1997).

Section 4(1)(b) of the Competition Act). However, leniency awarded to a firm by the Competition Commission in terms of the Commission's Corporate Leniency Policy[100] only provides immunity from prosecution by the competition authorities and administrative penalties in terms of the Competition Act, and does not protect the applicant from civil or criminal liability. In practice, the Competition Commission will enter into a consent order or cite the leniency applicant as a party in the main action to ensure that there is an order against that entity to enable civil claimants to obtain a certificate from the Competition Tribunal to proceed against the leniency applicant for damages.

The amendments to the Competition Act that came into effect on 12 July 2019 require the Competition Commission to develop and publish a policy on leniency.[101] Accordingly, there are likely to be amendments to the current corporate leniency policy; however, these are expected primarily to deal with leniency for directors and managers of firms that engage in cartel conduct.

XI PRIVILEGES

Privilege is a fundamental right that protects communication between a legal representative and his or her client from being disclosed.[102] Communication is privileged if it is made to a legal adviser acting within a professional capacity in confidence for the purpose of obtaining professional advice, for the purpose of use in contemplated or pending litigation or prosecution, or for both; and where the client claims the privilege.[103]

i Legal adviser acting within a professional capacity

South African courts have held that there is no distinction drawn between internal legal advisers and attorneys acting within private practice for the purposes of legal privilege.[104] The High Court in *Mohamed*[105] concluded that in the circumstances, confidential communication made between the government and its internal legal advisers was no different from confidential advice obtained from an independent legal adviser.

ii Communication made in confidence

Confidentiality is a question of fact. Courts tend to infer that communication is confidential where it is proven that the legal adviser was consulted in his or her professional capacity to obtain legal advice.[106] Nevertheless, in *Bank of Lisbon*, the Court held that 'the basis of privilege is confidentiality. When confidence ceases, privilege ceases.'[107]

100 See www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-120520081.pdf.

101 Competition Amendment Act, 2018, partially enacted on 12 July 2019.

102 *S v. Safatsa* 1988 (1) SA 868 (A) 886.

103 Schwikkard and Van der Merwe, *Principles of Evidence*, third edition, p. 147.

104 *Van der Heever v. Die Meester* and *Mohamed v. President of the RSA* 2001 (2) SA 1145 (C) 1151.

105 ibid.

106 *R v. Fouche* 1953 (1) SA 440 (W).

107 *Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others* (2) 1983 (2) SA 621 (W) at 629G.

iii Purpose of obtaining legal advice

Communication made for the purpose of obtaining legal advice is also a question of fact. The communication is not limited to advice connected to actual or pending litigation.[108]

It has also been held that legal advice need not be the primary purpose of the communication provided that the purpose is connected with obtaining legal advice.[109] Therefore, a statement made that is unconnected with the giving of legal advice will not be privileged merely because it was made in confidence to a legal adviser.

iv The client must claim the privilege

Privilege attaches to the client, not the legal adviser. The legal representative is obliged to raise the privilege on behalf of his or her client or is bound by the waiver depending on the client's decision.

v Waiver

Privilege can be waived either expressly, impliedly or through imputation. The courts may impute waiver where the client discloses privileged information. In *Wagner*, the Court held that an implied waiver involves 'an element of publication of the document or part of it which can serve as a ground for the inference that the litigant or the prosecutor no longer wishes to keep the contents of the document a secret'.[110]

vi Impact of producing documents to the competition authorities

Leniency applications and the documents attached to such applications have not, to date, been disclosed by the Competition Commission to any complainants or third parties. These have only been released during the discovery process or part of a request for the record in terms of Rule 15. The Competition Commission's view is that both leniency applications and the documents produced in support of them are protected by legal privilege and also constitute restricted information in terms of Rule 14 of the Competition Commission's Rules.[111] To qualify as subject to a claim of legal privilege, the leniency application documents must have been compiled for the dominant purpose of litigation before the Competition Tribunal in contested complaint proceedings and have been placed before legal advisers for advice in respect of such litigation.[112]

However, in a 2013 judgment,[113] the SCA held that although leniency applications are protected from disclosure by a claim of legal privilege (by the Competition Commission), in this particular case the Competition Commission had waived its claim of litigation privilege by referring to the leniency application in the referral document filed with the Competition Tribunal.

108 *Savides v. Varsamopolus* 1942 WLD 49.

109 *Lane and Another NO v. Magistrate, Wynberg* 1997 (2) SA 869 (C).

110 *Ex parte* Minister of Justice: *In re S v. Wagner* 1965 (4) SA 507 (A) 514.

111 Rules for the conduct of proceedings in the Competition Commission published under GG 22025 of 1 February 2001.

112 *Arcelormittal South Africa Limited and Another v. Competition Commission and Others* (103/CAC/Sep10) [2012] ZACAC 1 (2 April 2012).

113 *Competition Commission of South Africa v. Arcelormittal South Africa Limited and Others* (680/12) [2013] ZASCA 84 (31 May 2013).

It is, however, possible that information contained in a leniency application will still be protected to some extent if it has been claimed as confidential in a confidentiality claim submitted by the disclosing party, however, as noted above, usually legal advisers will be permitted access to confidential information subject to a suitable confidentiality undertaking.[114]

This principle was reiterated in a 2016 Competition Appeal Court case in which the Competition Appeal Court found that the Competition Commission's investigative record ought to be disclosed to any person who requests it in terms of Rule 15 of the Competition Commission's Rules[115] provided that those documents are not legally privileged or confidential and do not constitute restricted information.[116] This position has been amended slightly in respect of litigants by the changes to Rule 15 discussed above.

Commencing 12 July 2019, certain provisions of the Competition Amendment Act, 2018 came into force. These included significant amendments to both Section 44 and Section 45 of the Competition Act. In particular, with regards to information submitted to the Competition Commission, the Competition Commission will determine whether the information is confidential information and, if it determines that the information is confidential, may make any appropriate determination concerning access to that information.[117] An aggrieved party will be entitled to refer the Competition Commission's decision to the Competition Tribunal, which may confirm or substitute the decision. The Competition Tribunal will be entitled to make a determination in respect of confidential information submitted to it.

The effect of these amendments is that it is no longer be necessary to approach the Competition Tribunal to make a determination on whether information submitted to the Competition Commission, which has been claimed as confidential, is confidential information. It bears mention that if confidentiality has been claimed over information, it will continue to remain confidential until a determination to the contrary has been made. However, the amendments to Section 45 of the Competition Act will allow for the Minister of Trade, Industry and Competition, or any other relevant minister and any relevant regulatory authority to access confidential information in merger proceedings for the purposes of their participation in merger proceedings (although in practice the Minister is provided with a confidential copy of all merger filings by the Competition Commission).

Confidential information is defined in Section 1 of the Competition Act as 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others'.

XII SETTLEMENT PROCEDURES

In terms of Rule 34 of the High Court Rules and Rule 18 of the Magistrate Court Rules, provision is made that in an action where a sum of money is claimed, a defendant may at any time, unconditionally and without prejudice, make a written offer to settle the plaintiff's claim, which must be signed by the defendant him or herself, or by his or her attorney authorised in writing to do so.

114 Section 44 of the Competition Act.

115 Footnote 28.

116 Footnote 28.

117 See Section 44 of the Competition Act.

Where a settlement offer is made on a without prejudice basis and the offer is not accepted, then the offer may not be used or referred to in court or in arbitration proceedings except insofar as a cost order is concerned. In the case of an unconditional formal settlement offer, should the offer not be accepted, either party is entitled to refer to the offer in proceedings.[118]

An example of this in a civil action for damages in an antitrust case is the settlement reached between Premier and civil society organisations including Black Sash, COSATU, the Children's Resources Centre and the National Consumer Forum for damage suffered as a result of Premier Foods' participation in the bread cartel.[119] Any party can approach the court to have a settlement agreement made an order of court to enable it to be enforced as an order.

XIII ARBITRATION

There is nothing preventing parties from agreeing to arbitration or other alternative dispute resolution mechanisms as a means of addressing a damages claim after a finding of prohibited practice has been made.

XIV INDEMNIFICATION AND CONTRIBUTION

The Competition Act does not provide for joint and several civil liability. In terms of Section 2(6) of the Apportionment of Damages Act, 1956, if judgment is given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the joint wrongdoer has, if the judgment has been paid in full, a right of recourse against other joint wrongdoers in the proceedings for a contribution in respect of such an amount. Such a claim will prescribe 12 months from the date of the judgment.[120]

In the US, the Supreme Court has held that an antitrust defendant is not permitted to seek a contribution from the other participants in an anticompetitive arrangement.[121] This decision was based on the finding by the Supreme Court that Congress in the US had not explicitly or implicitly created any statutory right to contribution for an antitrust defendant, and also had not conferred any authority on the US federal courts to create a common law right to contribution in favour of an antitrust defendant.[122] There are no clear rules in US antitrust law in relation to the right of a defendant to indemnification.[123]

In South Africa, it is possible for defendants in a case to apply to join other parties in certain circumstances.

118 Peté, S, Civil Procedure: A Practical Guide, second edition, p. 365.

119 www.compcom.co.za/wp-content/uploads/2016/01/Media-Release-Competition-Commission-welcomes-settlement-between-Premier-Foods-and-Civil-Society-1.pdf.

120 Section 2(6)(b) of the Apportionment of Damages Act, 1956.

121 *Texas Industries v. Radcliff Materials* 451 U.S. 630, 639-46 (1981).

122 ibid.

123 Knable Gotts, I (ed.) *The Private Competition Enforcement Review*, second edition, p. 199.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Criminal liability for individual managers or directors who participate or knowingly acquiesce in price fixing, market allocation or collusive tendering in contravention of Section 4(1)(b) of the Competition Act was introduced in South Africa on 1 May 2016. Individuals face administrative penalties of up to 500,000 rand and prison sentences of up to 10 years if found guilty. No individuals have been prosecuted yet, because of difficulties in reaching agreement between the National Prosecuting Authority and the Competition Commission on how prosecutorial discretion will be applied in these cases in order to allow the Competition Commission to grant leniency to individuals.

The Competition Amendment Act, 2018 was partially enacted on 12 July 2019. The amendments are far-reaching, and are likely to result in increased cartel litigation and private enforcement in respect of abuse of dominance contraventions, this is especially so as many amendments to the abuse of dominance provisions are designed to allow for easier prosecution of these cases.

With continued public enforcement of high-profile cartel cases, and with further clarity arising in respect of civil claims, private enforcement is likely to increase in South Africa, albeit slowly as South Africa is not a particularly litigious society and there is backlog in the court system.

Appendix 1

ABOUT THE AUTHORS

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Rosalind is the director at Norton Rose Fulbright South Africa, specialising in competition, consumer and data privacy law.

Rosalind has extensive experience in regulatory investigations and compliance audits. She is highly skilled in developing and implementing customised compliance programmes and training employees on how to comply with the law.

Rosalind has substantial experience in cartel investigations, leniency applications, merger notifications and competition law opinions across all sectors. She advises clients on merger filings and consumer protection issues across a number of African jurisdictions, including COMESA.

Rosalind is listed as a recommended competition lawyer by top international research publication *The Legal 500* in 2019 and the same publication has described her as 'very efficient, thorough and knowledgeable' and having a 'tremendous reputation'. *Chambers Global* 2017 describes Rosalind as 'a pleasure to work with'.

Rosalind co-authored the book *Understanding the Consumer Protection Act*, published by Juta Law in 2012. Rosalind also co-authored the LexisNexis Practical Law series on South African competition law, along with other similar publications. Rosalind also authored a number of chapters in the Thomson Reuters sales and marketing guide for South Africa. Rosalind is a regular conference and guest speaker and is often interviewed on television and radio as a specialist in competition and consumer protection-related topics. She also frequently contributes articles to mainstream, academic and specialist publications on these subjects.

Rosalind joined the practice in 2006 and holds a BA, LLB and LLM (with distinction) from Rhodes University.

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