Dawn loses ‘characterisation' plea at Competition Tribunal

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Despite Dawn Consolidated Holdings' and Sangio Pipe's argument that its conduct should not be characterised as collusive, the Competition Tribunal has found that they engaged in market division in relation to the plastics pipes market in South Africa.

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The matter involved a merger transaction where Dawn, which had 49% in Sangio, wished to increase its shareholding to 100%.

The Commission initially approved the transaction without conditions, however during the investigation it found that the shareholders’ agreement between Dawn and Sangio had a non-compete clause which provided that Dawn and its subsidiaries would not manufacture HDPE piping (a certain type of plastic piping) in South Africa.

The Commission alleged that the clause sought to allocate the market, as contemplated in s4(1)(b)(ii) of the Competition Act, by preventing Dawn from entering the relevant market.

To counter the allegation of collusion, Dawn and Sangio argued that, if properly characterised, the non-compete clause “was not an agreement designed to avoid competition but was a normal restraint in joint ventures to protect the investments

in the joint venture and had no effect on competition in the market."

The concept of 'characterising' conduct prohibited by the Act was mooted by the Supreme Court of Appeal in American Natural Soda Ash Corporation and Another v Competition Commission of South Africa. 'Characterisation" involves establishing whether the character of the conduct complained of coincides with the character of the prohibited conduct.

Certain conduct, which at face value appears to meet the strict definition of price fixing or market allocation in the Act, may actually be designed to achieve outcomes other than anti-competitive and consumer-welfare-diminishing outcomes. In such circumstances, one should first determine the character of the agreement before embarking on the enquiry of whether or not it falls within the legislative prohibition in s4(1)(b).

For example, both cartel agreements and joint venture agreements are collaborative agreements between competitors. However, the difference is that where a cartel is intended to lessen competition, a joint venture is intended to achieve economies of scale. In the latter case, even if the joint venture strictly or literally involves the fixing of a joint price, or the division of responsibilities between the different parties, the conduct should not be characterised as collusive and therefore should not be evaluated in terms of s4(1)(b) of the Act.

No joint venture agreement

In the Dawn matter, the Tribunal decided that on the face of it the conduct could not be characterised as falling outside of the scope of s4(1)(b). It concluded that the shareholders' agreement was not a joint venture because the agreement itself stated that the arrangement was not a joint venture. It then concluded the restraint was not a commercially justifiable restraint associated with a joint venture arrangement because the arrangement was explicitly not a joint venture.

In addition, the Tribunal found that the non-compete clause was also not a garden-variety restraint of trade because it sought to restrain the buyer (instead of the seller) for a long period and not the usual short period. Therefore, according to the Tribunal, on a prima facie basis, the relevant clause limited competition between Dawn and Sangio in the national market for regular HDPE piping, and needed to be assessed under s4(1)(b) of the Act.

The Tribunal finally found in the Commission's favour, after analysing the question of whether the parties were competitors in the relevant market, and concluding that the respondents had failed to put up sufficient evidence to contradict the prima facie case.

The Tribunal appears to have paid lip service to the characterisation assessment, emphasising the 'plain reading' and 'textual' interpretation of the shareholders' agreement in order to understand the character of the conduct. However, it does not appear to have given much thought to the nature of the relationship, rather focusing on what the relationship was called in the agreement.

Conclusion

Accordingly, we still have little guidance from the Tribunal as to whether ancillary restraints required for commercial purposes in the context of collaborative arrangements can be found to be justifiable.

Although characterisation has not been canned entirely, the Dawn case suggests that parties entering into collaborative agreements must carefully consider any restraints they may want imposed, and they cannot be assured that such restraints purportedly imposed for commercially justifiable reasons will be sufficient to take the parties out of the realm of s4(1)(b).

Dawn is appealing the Tribunal's decision.

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