**From:** Jim Foot <footj999@gmail.com>
**Sent:** 13 August 2018 05:29 PM
**To:** Peter-Paul Mbele
**Subject:** Section 9 Competition bill : Comment J Foot re Nationwide v Sasol

Good afternoon.   Please allow me to introduce myself.   In the seminal case of Nationwide Poles v Sasol concerning Price Discrimination, it was me that prosecuted Sasol.

I have kept abreast with this Price Discrimination issues as best I can, and would if permitted like to add such comment as I feel is relevant to this Section of the Bill.

I am led to understand that the following is proposed:

*Amendment of section 9 of Act 89 of 1998*

*6. Section 9 of the principal Act is hereby amended—*

*(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:*

*‘‘(a) it is likely to have the effect of [substantially] preventing or lessening competition;’’; and*

*(b) by the addition of the following subsections after subsection (2):*

*‘‘(3) When determining whether the dominant ﬁrm’s action is prohibited price discrimination, the dominant ﬁrm must show that its action does not impede the ability of small and medium businesses and ﬁrms controlled or owned by historically disadvantaged persons to participate effectively. (4) The provisions of subsections (1) to (3), read with the changes required by the context, apply to a dominant ﬁrm as the purchaser of goods or services.’’.*

It is these proposed amendments that I wish to address.

In the NWP v Sasol case, the Commission refuse to prosecute so the burden of the matter was taken up by the management of Nationwide Poles.   The presence of permitted private prosecution in the Act at very least suggests that Parliament intends for small business to be able to prosecute in the event that the Commission refuses so to do.   It is implicit in this permission that small business should be able to mount a respectable prosecution within the bounds of the resources available to it.  In the event that the hurdles of successful prosecution are too high for the small business to entertain the matter, the presence of private prosecution are moot.  Within this context, it must be so then, that our legislature wanted to achieve a set of circumstances which would permit successful private prosecution by all.  Included in this possibility must then be the interests of small business, micro business as well as the interests of the sole proprietor.

In our case, this burden imposed a two year period of full devotion to the task.  In perspective, I worked 18 hours a day, six days a week to achieve that which we managed to do.   Again, in perspective, I hold an MBA degree and have worked within dominant business as well as within the micro environment.   Accordingly  hold myself as uniquely qualified to comment on these issues.   Especially so, as our matter included and Appeal Court appearance.

What then was the most problematic area we faced?   It is this.   For many reasons, it is not possible to prove in evidence that competition is likely to be substantially prevented or lessened.  Even less so by the small business constrained by resources and already suffering from the effects of competitive abuse.  It is this hurdle that we, according to the CAC failed to overcome in the presentation of our case.  At the time of the Appeal case, we asked the Court to detail precisely those proofs necessary to allow a successful prosecution, so that others that follow would have the benefit of this knowledge.   Regrettably this was not traversed by the Appeal Court in its judgement.   We do note the subsequent interpretation that lessening of competition includes the creation of hurdles to competing which point we argued in the appeal hearing.

In my view, the prosecution of anti-trust matters is highly complex.   The dominant party is at pains to avoid documented evidence that could further any prosecution.  Further, the dominant party often influences potential witnesses to avoid providing critical information necessary in proving the case.  At least, this was our experience.   All this means that the collection of evidence is significantly problematic and vastly time consuming.

In the Nationwide circumstance, the effects of price discrimination ultimately resulted in the closure of the business, as the reinvestment decisions in the face of ongoing competitive abuse could not be justified.  In particular, without very significant resources and expert witnesses, the part of the Act requiring proof of an effect on competition are beyond the reach of almost all , if not all, of small business.

Again in my view, the retention of this burden of proof, albeit somewhat watered down by the proposed amendment, will continue to maintain an unassailable hurdle for small business. Equally, the burden of proof for the Commission will remain an unaffordable and most expensive exercise, unsuited to the prosecution of cases on behalf of small business.   Accordingly, the aim of the Act, namely equitable and fair participation in the economy becomes, in substance, thwarted.  I do not believe that this was ever the intention of our Parliament.

It is my view that the Morton Salt judgement was fully correct.  That is, the presence of price discrimination will inevitably drive the competitor paying the lower price to market share growth and drive the competitor paying the highest price into extinction.   One can hardly contemplate that Section 9 intends for this to happen.   This is especially so, in the context of an emerging economy presented with the commercial inequalities held by historically and still dominant vendors.  It is precisely the practice of price discrimination that has been so effective in holding back small business.   In counter position it has permitted and indeed eased the competitive positioning of larger and better connected competitors.

If Section 9 is to have any practical meaning, the drafting of its content must be such that prosecution under this section is realistically possible by small business and affordable by the Commission.  Equally so, those responsible for this bill must decide on whether price discrimination is an evil it wishes to eradicate.   If so, then that which I have seen above, in my view, will fail to do so.  The burden of proof will remain unassailable.

If what I have said so far is real, then can Section 9 be corrected to permit successful and affordable prosecution?  In my view, two possibilities exist.

Firstly, permit within the Act, a small business procedure, perhaps with limited application, that is not subject to appeal, the Tribunal being legislated as the sole and final arbiter.   I would imagine that in this event, any such ruling could be limited to an order mandating compliance and not acquiring formal precedent in law.

Secondly, the requirement of competitive harm should be restated to permit and facilitate evidentiary proof within the bounds of pragmatic and affordable prosecution.    This concept suggests a deviation from the refrain of protect competition, not competitors.  In the execution of the Act, any successful prosecution will always better the position of the erstwhile aggrieved party and worsen the position of the party having previously been the beneficiary of price discrimination.  Equally so, any unsuccessful prosecution will retain the status quo, namely a larger competitor obtaining economically unjustifiable and unfair benefit.  This is so because the remainder of Section 9 requires that the transactions be equivalent and that dominance be present.  Accordingly, in order to enforce the Act, one or another competitor in the case of a successful prosecution must be advantaged from the position occupied prior to the enforcement.   It is clear then , that the Act can only be enforced by having an effect on one or another competitor.  If this is so, then surely the proof should properly be whether the act complained of is likely to have the effect of lessening or preventing the ability of a competitor to compete.  In my view, the Act should simply say so.     In this offending part of Section 9, where the onus is on (and problematically remains on) the complainant to prove the offence, it is my suggestion that it be re-drafted to state as follows:

**(a)    it is likely to have the effect of [substantially] preventing or lessening the ability of a competitor to compete;**

Should the committee feel that personal attention be devoted to this matter, I would be fully prepared to offer such additional or clarifying views as may be needed.

I do apologise for the late communication, however I have only recently become aware of the hearing and the content to be debated.

Attached is a document I wrote in 2015 that you may find to be worthwhile examining.  It more fully explains certain aspects that are too lengthy for an e-mail communique.

Kind regards and best wishes,

Jim Foot

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