

Ex parte.

CHEMICAL ALLIED INDUSTRIES' ASSOCIATION
("the Association")

Consultant

In re:

COMPETITION AMENDMENT BILL ("the Bill")

CONSOLIDATED MEMORANDUM

A. E. BHAM SC
Chambers, Sendton
28 November 2008

To:

[Redacted]

INTRODUCTION

1. Section 12 of the Bill seeks to introduce a new section 73A into the Competition Act, 1998 (*the Competition Act*). The new section 73A will, if enacted, impose criminal liability on individuals identified in the section in relation to the conduct identified therein. In addition, section 4 of the Bill will, if enacted, introduce a new chapter 2A into the Competition Act, dealing with complex monopoly conduct.
2. I have been requested to deal with three issues which will arise if the Bill is enacted in its present form. The issues are –
 - 2.1 Firstly, whether section 73A(5) will infringe any fundamental right entrenched in the Constitution of the Republic of South Africa, 1996 (*the Constitution*).
 - 2.2 Secondly, whether the provisions of section 73A(6)(b) will, if enacted, infringe any of the fundamental rights entrenched in the Constitution.
 - 2.3 Thirdly, whether the lack of any exemption provision in relation to the complex monopoly provisions contained in chapter 2A would infringe any of the fundamental rights entrenched in the Constitution, having regard to the exemption provisions contained in section 10 of the Competition Act which deals only with exemptions from the application of chapter 2 of the Act (and thus would not apply to chapter 2A as contained in the Bill).
3. I will deal firstly with the provisions of sections 73A(5) and (6). Thereafter, I will consider the Bill's failure to provide for exemption provisions in relation to the intended new chapter 2A, in the manner in which the present Competition Act makes provision for an

exemption from the application of chapter 2 of the present Competition Act.

THE FIRST AND SECOND ISSUES – SECTIONS 73A(5) & (6)

i. Introduction

4. Section 12 of the Bill seeks to introduce a new section 73A into the Competition Act, which would read as follows –

"12. The following section is hereby inserted in the principal Act after section 73:

"Causing or permitting firm to engage in prohibited practice

73A. (1) A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person –

(a) caused the firm to engage in a prohibited practice in terms of section 4(1)(b); or

(b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b)

(2) For the purpose of subsection (1)(b), 'knowingly acquiesced' means having acquiesced while having actual knowledge of the relevant conduct by the firm.

(3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if –

(a) the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b); or

(b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b).

(4) The Competition Commission –

- (e) *may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and*
 - (b) *may make submissions to the National Prosecution Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.*
- (5) *In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b), is prima facie proof of the fact that the firm engaged in that conduct.*
- (6) *A firm may not directly or indirectly –*
- (a) *pay any fine that may be imposed on a person convicted of an offence in terms of this section; or*
 - (b) *indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted."*

5. Section 73A is structured as follows –

- 5.1 Firstly, it provides that a person would commit an offence if such person, while being a director of a firm or while engaged or purporting to be engaged in a position of management authority within the firm either causes the firm to engage in a prohibited practice in terms of section 4(1)(b) or knowingly acquiesces in the firm engaging in such a prohibited practice. In this regard, the phrase "*knowingly*

acquiesced is defined as *"having acquiesced while having actual knowledge of the relevant conduct by the firm"*.

- 5.2 Secondly, the section provides that a person may be prosecuted for an offence in terms of this section only if –
- 5.2.1 the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in such a prohibited practice; or
- 5.2.2 the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm did engage in such a prohibited practice.
- 5.3 Thirdly, the section deals with the effect of the Competition Commission having certified that the person is deserving of leniency, and with the submissions which the Competition Commission may make to the National Prosecuting Authority if it has certified that the person is deserving of leniency.
- 5.4 Fourthly, the section deals with the manner in which the acknowledgement in a consent order or finding by the Competition Tribunal or the Competition Appeal Court can be used as evidence in criminal proceedings against the accused person.
- 5.5 Fifthly, the section deals with the prohibition against the firm paying any fine which may be imposed on a person convicted of an offence in terms of this section and with prohibitions relating to the expenses which such a person may incur in defending himself or herself against a prosecution in terms of the section.

6. If enacted, section 73A would have far reaching consequences for the category of persons identified in section 73A(1). Such persons will be personally answerable for their participation in a firm's engagement in practices prohibited by section 4(1)(b) of the Competition Act, and the consequences of not only a conviction but also a prosecution and a criminal trial could be quite severe and potentially ruinous. The issues in relation to section 73A which have been raised for consideration in this memorandum though do not deal with the principle of the imposition of such personal criminal liability. Rather, they deal with the constitutional validity of certain aspects relating to the application of the section.
7. Section 73A(5) would allow the prosecution, in a criminal case against a person being prosecuted for the conduct identified in section 73A(1) to use an acknowledgement in a consent order contemplated in section 49D of the Competition Act by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a practice prohibited in terms of section 4(1)(b) as *prima facie* proof of the fact that the firm had engaged in such conduct. Section 73A(6) on the other hand would prohibit a firm, whether directly or indirectly, from financially assisting the accused with the costs incurred in defending himself or herself against the prosecution in terms of section 73A until such time as that prosecution is either abandoned or the accused is acquitted.
8. For reasons set out below, I am of the view that both these provisions violate the right to a fair trial guaranteed by section 35(3) of the Constitution. Prior to setting out my reasons for this conclusion in relation to each of section 73A(5) and section 73A(6)(b), I first consider the nature of the right to a fair trial.

ii. The right to a fair trial

9. Section 35 of the Constitution deals with the rights of arrested, detained and accused persons. Section 35(3) guarantees an accused person a right to a fair trial. This right includes –
- 9.1 the right of an accused person to have adequate time and facilities to prepare a defence¹; and
- 9.2 the right of an accused person to be presumed innocent, to remain silent, and not to testify during the proceedings against him/her.²
10. Previously there was no requirement for a criminal trial to be fair. All that was required was that the *"formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted"* be adhered to.³ The Constitution though introduced, as a fundamental right, the right to a fair trial and this has, *inter alia*, had significant implications for the law of evidence in criminal trials.
11. Allied to this is the presumption of innocence which is now constitutionally enshrined. An important aspect of this presumption is that the State bears the burden of proving the guilt of the accused beyond a reasonable doubt. This requires that the State must prove, beyond a reasonable doubt, each element of the offence with which the accused is charged. A rule which lowers the burden of proof cast on the State in criminal proceedings offends against the presumption of innocence and can only be sustained if justified in terms of the general limitations provision set out in section 36(1) of

¹ Section 35(3)(c)

² Section 35(3)(h)

³ *S v Rudman* 1992 (1) SA 343 (A)

the Constitution. The concern to guard against is the conviction of an accused where there may be reasonable doubt about his guilt.⁴

12. The issue of lessening the burden of proof on the State has arisen mostly in what is referred to as "*reverse onus provisions*". These are provisions which place either an evidentiary burden or a full burden on the accused in respect of an issue which is an element of the crime or which needs to be proved for purposes of securing a conviction. These provisions normally arise through the creation of rebuttable presumptions of law which require that certain facts be assumed unless the contrary is presumed. Thus, if no evidence is led to disturb the rebuttable presumption or the evidence which is led does not disturb the rebuttable presumption, then the presumption stands and that fact is taken as proven against the accused. The fact can be disproved on a balance of probabilities, but if the probabilities are evenly balanced then the court has to accept the rebuttable presumption against the accused.
13. This offends against the presumption of innocence because it introduces the risk of a conviction even though there is a reasonable doubt on an issue which the State would otherwise have to prove in order for the accused to be convicted.⁵
14. Reverse onus provisions, even though they may intrude on the presumption of innocence, do operate in different legal systems (including our own), where "... *it clearly is reasonable and desirable that exceptions be made to strict application of the presumption of innocence*"⁶ The example, given in the chapter on evidence written by Matthew Chaskelson in Chaskelson et al (*supra*) is that

⁴ Scagell & Others v Attorney-General of the Western Cape & Others 1997 (2) SA 358 (CC) para [7]

S v Coetzee & Others 1997 (3) SA 527 (CC) paras [31] - [43] & [187] - [190]

⁵ S v Prinsloo 1996 (2) SA 464 (CC) para [12]

Scagell (*supra*) & S v Coetzee (*supra*)

⁶ Chaskelson et al Constitutional Law of South Africa, page 26-10A; S v Zuma 1995 (4) BCLR 401 (SA) 421J-422G

involving the performance of a certain act which requires a licence.
The author states that –

"common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that the accused does not have the required licence, when it is a matter of comparative simplicity for him [the accused] to establish that he does".⁷

15. For a reverse onus provision to sustain Constitutional scrutiny, there must be a justification and amongst the factors taken into account are –
 - 15.1 whether the mischief aimed at by the reverse onus is one of social importance;
 - 15.2 the severity of the offence and the consequences for the accused if convicted;
 - 15.3 whether the offence is truly criminal or merely regulatory in nature;
 - 15.4 whether the effect of the presumption is to cast upon the accused an evidentiary burden or the full burden of proof;
 - 15.5 the significance of the fact to be assumed (i.e. whether it is an essential ingredient of the offence or a defence, excuse or exception);
 - 15.6 the relevant ease with which the prosecution and defence respectively can discharge the evidential burden or burden of proof.⁸

⁷ Page 26 – 10A

⁸ See Chazkelson et al (supra) pages 26-12 – 26-12A.

16. In *Scagell & Others v Attorney-General of the Western Cape* (*supra*), the Constitutional Court had to decide the imposition of an evidential burden not on the basis that it offended against the presumption of innocence principle but rather because it violated the right to a fair trial. Section 37 of the General Law Amendment Act 62 of 1955 had the effect of relieving the State of proving *mens rea* on the part of the accused. The court, in *S v Hoozen*⁹ held that such a provision infringed the accused's right to be presumed innocent because it had the effect that the accused could be found guilty in spite of the existence of reasonable doubt as to his/her guilt. This proposition was confirmed by the Constitutional Court in *S v Mzamele & Another*¹⁰.
17. Section 21(1)(e)(i) of the Drugs and Drug Trafficking Act 140 of 1992 provided for a presumption that an accused found in possession of more than 115 grams of dagga had been dealing in dagga and would be convicted of dealing in dagga unless the accused could prove that he/she was not dealing in dagga. The Constitutional Court in *S v Bhulwana* and in *S v Manyonye*¹¹ declared this to be unconstitutional because it was an unjustifiable limitation on the accused's right to be presumed innocent.
18. Similarly, section 72(4) of the Criminal Procedure Act (dealing with a summary judgment procedure) was set aside as unconstitutional because the effect of the clause was that if the probabilities were evenly balanced, the accused failed (on a reverse onus provision) to satisfy the court as required and conviction would follow even though there was reasonable doubt of the guilt of the accused.
19. On balance, reverse onus provisions (where they create a rebuttable presumption or are stated to be *prima facie* proof of a

⁹ 1998 (9) BCLR 987(n)

¹⁰ 2000 (3) SA 1 (CC)

¹¹ 1996 (1) SA 388 (CC) & 1999 (12) BCLR 1438 (CC) respectively

particular right) have not survived challenges to their Constitutional validity. The essential difficulty has been that such provisions have placed the accused in a position where he/she is required to lead evidence (albeit on a balance of probabilities) to disturb the presumption, and has created the danger that if the probabilities are even, the fact is presumed and the accused could be convicted even though there is reasonable doubt as to that particular fact.

20. In addition to the constitutional right to a presumption of innocence an accused in a criminal trial also has the constitutional right not only to have adequate time to prepare his/her defence, but also to have adequate facilities to do so. Reference to adequate "facilities" is a reference to a generic principle of wide ambit. Dealing with a similar right under article 6 of the European Convention on Human Rights, Stavros stated the following –

*"The accused may be affected in his enjoyment of the right to adequate facilities for the preparation of his defence in ways which cannot be identified in advance ..."*¹²

21. The right to "adequate facilities" in any particular context would be factually driven, but in my view a statutory provision which sets out to deprive an accused from a source of funds which may be available to defend himself/herself could well deprive the accused person of adequate facilities required to prepare a defence. After all, the cost of securing legal representation could be significant, and in some areas could be exacerbated by the esoteric nature of the issues which will be placed before the court which may require substantial expert evidence and which could cover extensive and complicated factual material.

¹² S Stavros *The Guarantees for Accused persons under article 6 of the European Convention on Human Rights: An analysis of the Convention and a comparison with other instruments* (1993) 186