The criminal liability provisions for directors and individuals holding management authority

16. Section 12 of the Bill[4] criminalises conduct of a director of a firm or one acting in a position having management authority within a

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[4] Section 12 of the Bill seeks to introduce a new section 73A into the Competition Act, which reads 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 -

(a) 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 Prosecuting 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 acknowledgment 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 direct 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"

firm, who causes the firm to engage in a prohibited practice. The Section also provides that in the prosecution of such a person an acknowledgement by the firm that it has engaged in a prohibited practice will serve as *prima facie* proof that the firm engaged in that conduct. The Section also provides that a firm may not directly or indirectly pay a fine that may be imposed on that person if convicted. The firm may however reimburse the person if he/she is acquitted or the prosecution is abandoned.

17. There are two elements of the Section that merits comment. Firstly, the aspect of "reverse onus" and secondly, the prohibition against financially assisting someone who is facing criminal prosecution. Reverse onus occurs when the State in a criminal prosecution is excused from tendering evidence to establish an element of the crime and that element is *prima facie* held against an accused person.

18. I am in respectful agreement with the opinion of the Senior Counsel in the memorandum that Section 12(5) of the Bill introduced a reverse onus on an accused person inconsistent with the provisions of Section 35 of the Constitution (the right of an accused person to be presumed innocent, to remain silent, and to

testify during the proceedings against him/her[5]). It would be perilous for an accused person to "remain silent" in the face of a *prima facie* proof introduced by the subsection.

19. The Court[6] has held that there are circumstances in which a reversed onus may be justified where it does not result in undue hardship or unfairness on an accused person. The nature of the conduct sought to be proscribed in Section 4 (complex monopoly conduct) is a complex matter and to disturb any *prima facie* case would no doubt great undue hardship and unfairness on an accused person.

20. I am for that reason, in agreement with the opinion of the Senior Counsel in the memorandum that the reverse onus in the Bill is open to constitutional attack. The attack if mounted would have great prospects of success. It is my considered opinion that the

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[5] Scagell & Others v Attorney-General of the Western Cape & Others 1997 (2) SA 368 (CC) at 373 para [7] "It is clear that this provision imposes a legal burden upon the accused. Once a certain set facts is established, an element of the offence is presumed to have been proved and the accused is required to produce evidence on a preponderance of probabilities to rebut that presumption."

[6] State v Zuma and Others 1995(4) BCLR 401 SA 421 para 38 to 43 per Kentrige J "The reverse onus may in some cases obviate or shorten a trial within a trial. Those of my colleques on the Court who have had considerable experience of criminal trials doubt that is so. Even if it were the case, and even if it did release police or prosecution from the inconvenience of marshalling and calling of their witnesses before the accused gave evidence, I cannot regard those inconveniences as outweighing and justifying the substantial infringement of the important rights which I have identified. The argument from convenience would only have merit in situations where accused persons plainly have more convenient access to prove, and where the reversed burden does not create undue hardship or unfairness. Cf R v Oaks (1983) 3 CRR 289 at 304 per Martin JA in the Ontario Court of Appeal. That is not the case here."

President would be well advised to refer the Bill back to Parliament to address this aspect of the Bill.

21. The other element on whether or not Section 5(6) [prohibition of a firm to finance legal defence of its director or a person in management] can survive constitutional muster requires comment. It is clear that Parliament intends to visit serious sanction upon people who are guilty of this conduct. It is also practice that a firm would be guilty of complex monopoly conduct mainly through its directors or people in management. It would therefore undermine the purpose of the legislature if the firm were to ultimately be responsible for the payment of the fine or the disbursements incurred in the legal defence of the individual.

22. It is my considered view that to the extent that an argument could be made (I doubt the argument to be correct in any event) that precluding a firm from financially assisting legal defence of its directors or people in management facing such a prosecution, would amount to limitations of an accused person to a fair trial, such limitation would be justifiable in terms of Section 36 of the Constitution. The Section does not preclude an accused person from seeking legal assistance through other means. Evidently, I am

in respectful disagreement with the opinion of Senior Counsel expressed in the memorandum in this regard.

Exemption provisions relating to the complex monopoly provisions

23. It is submitted that the Bill would require amending to provide an exemption in an appropriate circumstances where public interest demands and it is also argued that the exemption provided for in Section 10 of the Act should apply equally to complex monopoly conduct.

24. I have already concluded that the proviso in Section 10A in the Bill offers an exemption where a firm can show that there is technological, efficiency or other pro-competitive gains which outweigh the effect of the complex monopoly conduct. The public interest contended for and which is argued impels the amendment of the Bill, i.e. public interest should be able to be demonstrated under the proviso.

25. I have also concluded that the differentiation (if there is any) in how the legislature deals with restricted vertical and restricted horizontal practices on the one hand and the complex monopoly conduct on the other hand, does not amount to differentiation

inconsistent with provisions of Section 9(1) of the Constitution (right to equal protection and benefit of the law).

Compliance with public participation

26. On a letter dated 28 October 2008, addressed to the President by Webber Wentzel, the following, amongst others, is said:

26.1 On 27 June 2008, Mastercard raised its concerns with clause 4 of the Original Bill, to the Portfolio Committee. The Bill sought to introduce complex monopoly provisions.

26.2 On 8 August 2008, the First Revised Bill did not address the concerns raised by Mastercard.

26.3 On 21 August 2008, Mastercard wrote to the Minister requesting a revision of the Bill to introduce the proposed amendment.

26.4 On 22 and 27 August 2008, the attorneys addressed two letters to the Select Committee raising the same concerns as well as the constitutional issues. Some of the concerns

were addressed except that the complex monopoly provisions still remained.

27. Mastercard concludes by saying that the stakeholders had no opportunity to comment on the Second Revised Bill before it was passed by the National Council of Provinces ("the NCOP") on 25 September 2008 or the National Assembly on 21 October 2008. This is a factual matter which if true, will hold serious constitutional implications. The Constitution requires public participation and the Court has held that it is a constitutional requirement that the public must participate in the law making process[7].

28. I have not been provided with the information as to what public participation was afforded the stakeholders to make their own input and whether or not such input was made and the content thereof. If the stakeholders were not afforded an adequate opportunity to make the representation the Bill will suffer constitutional invalidity.

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[7] Doctors for Life International v Speaker of NA 2006 (6) SA 416 at 466 and 467.; Minister of Health and Another N.O. v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 CC para 630 "The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issues and have adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case"; Matatiele Municipality v President of RSA 2007 (6) SA 477 para 40

29. On the other hand, if the crux of the complaint is that the National Assembly and the NCOP did not embrace the suggestions made by various stakeholders regarding proposed amendments to the intended provisions relating to the complex monopoly provisions in the Bill, then the Bill cannot suffer challenge for want of compliance with the provisions of Sections 59 and 72 of the Constitution.

Other issues

30. The submission to the President is that the Bill also suffers other constitutional impairments. It is argued that in the first instance, it is difficult to determine what conduct would amount to complex monopoly conduct. The argument is that the definition is vague, ambiguous and offers no criteria to the regulator to decide if firms are engaging in conscious parallel conduct.

31. It is correct that the rule of law requires that law must be clear and not vague, obscure or imprecise[8]. The challenge in respect of the definition is however misplaced. The factual permutations that

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[8] President of the Republic of South Africa v Hugo 1997 (4) SA 1 CC at para 102; Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others 2001 (1) SA 545 CC

may open themselves to the restricted conduct are equally infinite to demand any precise catalogue[9]. The openness of the definition in the circumstances is warranted and justifiable

32. The attack that the Competition Commission is given a discretion to determine whether or not the particular conduct amounts to "conscious parallel conduct" and that the ambit of such a discretion must be described with sufficient clarity to allow those subject to it to know the extent of the functionary's powers, is also misguided. Matters such as competition law and the regulators appointed to administer it require that the individuals are persons with suitable qualifications and experience in Economic, Law, Commerce, Industry or Public Affairs. As a result, when the legislature confers such discretion on the entity, it is with full appreciation that the entity has specialised skills in a specialised area.

33. In the circumstances it is my considered opinion that the other grounds of attack are not sufficiently cogent to mount a successful constitutional attack on the Bill.

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[9] Armbruster and Another v Minister of Finance and Others 2007 SA 17 CC

Conclusion

34. Having considered the various issues, it is my opinion that:

34.1 The only aspect of the Bill that may not survive constitutional scrutiny is the reverse onus provision in Section 12(5) of the Bill.

34.2 The other concerns do not point to any flaw which would justify a constitutional attack.

35. It is therefore my opinion that the President may be better placed to refer the Bill back to Parliament to cure the aspect of the reverse onus in Section 12(5) of the Bill.

I.A.M SEMENYA SC

CHAMBERS, JOHANNESBURG

23 JANUARY 2009