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THE TELKOM DECISION: DIALLING IN TO CONCURRENT JURISDICTION

Introduction

In the recent decision of *Competition Commission v Telkom* [2009] ZASCA 155,[1] the Supreme Court of Appeal ("the SCA") dealt with the application of section 3(1A)*(a)* of the Competition Act 89 of 1998 ("the Act"), which confers concurrent jurisdiction on the competition authorities (the Competition Commission, the Competition Tribunal and the Competition Appeal Court) and various sector regulators. This paper will discuss the past and current South African legislative positions on the issue of concurrent jurisdiction between the competition authorities and sector regulators, before engaging in a discussion of the *Telkom* case. Parallels are then drawn between the outcome of the *Telkom* case and the provisions relating to concurrent jurisdiction contained in the Competition Amendment Act 1 of 2009 ("the Amendment Act"). The paper then takes a brief comparative look at European jurisprudence in this regard.

[1] 623/2008.

The Competition Act 89 of 1998

Originally, when the Act came into effect, section 3(1)*(d)* excluded from the application of the Act "acts subject to or authorised by public regulation".[2] The competition authorities could not, therefore, scrutinise anti-competitive conduct which was authorised by public regulation. This was confirmed by the SCA in *Standard Bank Investment Corporation v The Competition Commission and others* 2000 (2) SA 797 (SCA), when it ruled that bank mergers, being "acts" subject to "authorisation" by the Minister of Finance in terms of section 37 of the Banks Act,[3] were excluded from scrutiny by the competition authorities by virtue of s 3(1)*(d)* of the Act.

The repeal of section 3(1)*(d)* and the introduction of section 3(1A)*(a)* by the Competition Second Amendment Act 39 of 2000 made it clear that sectors of the economy subject to public regulation were no longer immune from scrutiny by the competition authorities.[4] Section 3(1A)*(a)* provides that:

> "**in so far as** this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing **concurrent jurisdiction** in respect of that conduct"

[own emphasis].

"Regulatory authority" is defined as "an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry".

A particular regulatory authority will therefore share concurrent jurisdiction with the

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[2] "Public regulation" means "any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorization issued by a regulatory authority or pursuant to any statutory authority" – s 1(1) of the Act.

[3] 1994 of 1990.

[4] Save for mergers in terms of the Banks Act. See section 18(2) and (3) of the Act.

competition authorities, *in so far as* its enabling legislation or regulation confers the power to consider competition law aspects of regulated conduct. In this way, competition law does not attempt to interfere with a regulator's functions. However, the competition authorities shall not be deprived of their ordinary competition law jurisdiction merely because an industry regulator has the power to deal with same. It is submitted that, in conferring jurisdiction on both the regulatory and competition authorities, the Act recognises the fact that both authorities have a role to play: the competition authorities being experts in competition law, and a particular regulator having specific expertise on industry-related matters.

The question then arises as to how this concurrent jurisdiction is to be exercised in practice. Section 3(1A)*(b)* provides that "[t]he manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)*(h)* and 82(1) and (2)".

Section 21(1)*(h)* provides for the Competition Commission ("the Commission") to "negotiate agreements with any regulatory authority to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act". The Commission has thus far entered into agreements with the Postal Regulator, the National Electricity Regulator (NER) and the Independent Communications Authority of South Africa (ICASA).

Section 82(1) and (2) provides that both the Commission and a regulatory authority which has jurisdiction in respect of conduct regulated in Chapter 2 or 3 *must* negotiate such agreements with each other and, in respect of a particular matter, *may* exercise their jurisdiction by way of such an agreement.

The use of the words "must" and "may" respectively seems to indicate an intention on behalf of the legislator that, while it is peremptory for the Commission and the relevant regulatory authority to enter into some kind of agreement in order *inter alia* to "identify and establish procedures for the management of areas of concurrent jurisdiction and to promote co-

operation between the regulatory authority and the Competition Commission",[5] neither authority is obligated to exercise its jurisdiction in terms of such agreement. Irrespective of any agreement that may be in place, *both* parties retain the authority to adjudicate on the particular dispute. The wording of the section indicates that these agreements are to serve as useful guidelines as to who should exercise jurisdiction over a particular dispute, but they can never take away the jurisdiction that either authority has by virtue of the empowering legislation. The section suggests that it is therefore not for a party to challenge the jurisdiction of either authority on the basis that an agreement was not complied with or, indeed, that there was no agreement in the first place. The exercise of either authority's jurisdiction emanates not from any agreement between them but from the empowering legislation. This interpretation is in line with the findings of the SCA in the *Telkom* decision, where the exercise of the concurrent competition jurisdiction shared by the competition authorities and ICASA was comprehensively considered.

The Telkom decision

On 23 February 2009, the Commission referred a complaint against Telkom to the Competition Tribunal ("the Tribunal"), alleging various contraventions of the Act. Telkom then launched proceedings in the High Court to set aside both the Commission's decision to refer the complaint as well as the referral itself. Telkom sought an order declaring that neither the Commission nor the Tribunal had the power or competence to either refer the complaint or to adjudicate the conduct complained of and grant a consequent remedy. Telkom argued that the conduct that formed the subject matter of the complaint fell within the exclusive jurisdiction of ICASA because it was authorised in terms of the Telecommunications Act[6] and by Telkom's public switched telecommunications licence or by ICASA. Consequently, it was argued that it could not have been intended that the competition authorities have the power or competence to adjudicate on such conduct.

[5] Section 82(3)*(a)* and *(b)* of the Act.

[6] 103 of 1996.

The court *a quo* found in favour of Telkom, although on narrow grounds, holding that the Commission evinced bias in coming to the decision to refer the complaint and that the complaint referral was, in any event, made outside the time limits prescribed by section 50 of the Act. It was therefore not necessary for the court to pronounce on the issue of who had jurisdiction over the dispute.

The SCA, however, dismissed Telkom's contention that the Commission was biased in reaching their decision to refer the complaint as well as Telkom's submissions that the referral was time-barred. It was therefore necessary for the jurisdictional issue to be tackled.

The SCA began by stressing the importance of the provision in section 3(1) of the Act wherein it states that the Act "applies to all economic activity within, or having an effect within the Republic ...". The court was of the view that the legislature's express repeal of the previous section 3(1)*(d)*, which excluded from the application of the Act "acts subject to or authorised by public regulation", and the insertion of section 3(1A)*(a)*, were significant. The repeal of section 3(1)*(d)* established the competition authorities as the primary authority in competition matters, and the introduction of section 3(1A)*(a)* established that where another regulator has jurisdiction over any area of matters covered by the Act, its jurisdiction would be concurrent with, but not usurp, that of the competition authorities. [7]

The court defined the term "jurisdiction" in section 3(1A)*(a)* as referring to "the power or competence to hear and determine matters concerning the conduct regulated in terms of Chapters 2 and 3 of the Competition Act".[8] Section 3(1A)*(a)* applies only where the other regulatory authority has jurisdiction in respect of so-called "restrictive practices" or mergers. In the present case, the conduct regulated by the Telecommunications Act overlapped to a sufficient extent with that regulated by Chapter 2, and more specifically sections 8 and 9 of the Act, so that to that extent, ICASA enjoyed competition jurisdiction.

[7] Note 1 at 23–24.

[8] Note 1 at 24–25.

It was Telkom's contention that conduct authorised under specific legislation (i.e. the Telecommunications Act) will ordinarily not be conduct to which a general enactment (i.e. the Competition Act) applies. This is encapsulated in the maxim *generalia specialibus non derogant*, which in simple terms means "what Parliament regulates specifically, it does not undo by general enactment". However, the SCA was of the view that the implication of exclusivity contended will be refuted where it is clear that the later general enactment should regulate a particular subject matter.[9] In the present case, the court was of the view that section 3(1A)*(a)* is a general provision intended to regulate the subject matter and establish the general jurisdiction of the competition authorities in all competition matters.[10]

The SCA held that the authorising legislative and other provisions Telkom relied upon did not oust the jurisdiction of the Commission and the Tribunal but *could well give rise to defences to the complaints referred*.[11]

The decision has confirmed the concurrent jurisdiction that the competition authorities share with various regulatory bodies in certain circumstances. What has been made clear, however, is that the fact that alleged anti-competitive conduct is authorised, either in terms of legislation or by the regulatory regime concerned, does not detract from the Commission and the Tribunal's authority to investigate the conduct complained of. The alleged empowering provision authorising the conduct is to be argued before the Tribunal and, if proven, will provide a defence to the complaints referred. In the same way, the fact that the competition authorities have jurisdiction to hear a dispute does not detract from the jurisdiction that a regulator may have in the same regard.

[9] Note 1 at 32.

[10] Ibid.

[11] Note 1 at 33.

The Competition Amendment Act 1 of 2009

The decision of the SCA in the *Telkom* case in this regard is in line with the provisions of the Competition Amendment Act 1 of 2009 ("the Amendment Act"), which has as one of its objectives the aim of providing certainty with regard to the concurrent jurisdiction between the Commission and other regulatory authorities. The Amendment Act arguably goes a step further than the judgment in the *Telkom* case, however, in that it specifically provides that the competition authorities have the *primary* authority to detect and investigate alleged prohibited practices and to review mergers.

The Amendment Act provides that "*[d]espite anything to the contrary* in any other legislation, public regulation or agreement, this Act applies to all economic activity within or having an effect within the Republic …". Section 3(3) goes on to read:

> "(3) In so far as this Act applies to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another regulatory authority in terms of any other legislation–
>
> *(a)* this Act, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any such conduct that is regulated in terms of both this Act, and that other national legislation ... such that–
>
> (i) any other regulatory authority… will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and this Act; and
>
> (ii) the Competition Commission will exercise primary authority to detect and investigate alleged prohibited practices… and to review mergers…
>
> *(b)* details of the administrative manner in which any concurrent jurisdiction contemplated ... is to be exercised, must be determined by an agreement between the Competition Commission and that other regulatory authority, as provided for in sections 21(1)*(h)* and 82(1)."

The Amendment Act goes further in that it demarcates the roles of both the competition and regulatory authorities into a so-called *ex post* and *ex ante* classification respectively, leaving the regulator primarily responsible for setting conditions in the industry and the competition

authorities responsible for rooting out anti-competitive practices that *have* occurred or are likely to occur within the industry. By explicitly bestowing the primary authority to detect and investigate alleged prohibited practices on the competition authorities, the Amendment Act makes it clear that, under its auspices, a challenge such as that brought by ICASA in the *Telkom* case could not be sustained. As held by the SCA in the *Telkom* decision, if conduct is indeed authorised by legislation or a regulator, the Tribunal may adjudicate on the conduct but, because there exists a valid defence, the conduct may not be found to be prohibited. The issue is therefore likely to turn on whether the conduct complained of does indeed fall within the ambit of what is authorised in order for it to be excusable.

Comparative jurisprudence

The European case of *Deutsche Telekom v European Commission*[12] provides some comparative guidance in this regard. The European Commission (EC) was pursuing a margin squeeze case against *Deutsche Telekom*, which argued, in a similar vein to Telkom, albeit in relation to different allegations, that wholesale access prices were approved by the sector regulator. The Court of First Instance ("the CFI") held that Articles 81 and 82 EC apply only to anti-competitive conduct engaged in by undertakings *on their own initiative*. For the application of Articles 81 and 82 EC to be excluded, an undertaking's restrictive effects on competition must originate *solely* in the national law.[13] The CFI held that if the national legislation or regulatory system leaves the undertaking with some discretion to avoid abusive pricing or prevent anti-competitive conduct, Articles 81 and 82 EC will still apply.[14]

> "Thus, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and

[12] Case T-271/03

[13] Note 15 at paragraph 87.

[14] Note 15 at paragraph 88.

82 EC."[15]

Most importantly, the CFI held, like the SCA in the *Telkom* decision, that the fact that a dominant firm's pricing structure is approved by the relevant regulator does not shield the undertaking from scrutiny by the competition authorities.[16]

Effectively, the CFI may scrutinise conduct allegedly authorised by a regulator, and if it finds that the conduct is so authorised – that is, because it originates solely from a national law – the conduct will not be prohibited. If the conduct is engaged in, even partially, on the own initiative of an undertaking, however, the conduct cannot properly be said to be authorised and thus lawful. This parallels the reasoning of the SCA, wherein it was stated that alleged authorisation does not oust the jurisdiction of the competition authorities but may well give rise to defences to the complaints referred – i.e., if the conduct properly and completely stems from legislation or regulation, then it is unlikely to be prohibited by our competition authorities. If the conduct does not fall within the ambit of the authorising provision relied upon, however, then it cannot be excused on that basis.

Conclusion

The *Telkom* decision clarified the application of the concurrent jurisdiction provisions in the Act, in providing that if a complaint is brought before the Commission, the mere fact that a regulator may also have the power to investigate the dispute will not detract from the authority of the Commission to do the same. This finding is reinforced by the Amendment Act, which will bestow on the competition authorities the *primary* authority to investigate alleged prohibited practices. Firms that are the target of the Commission's investigations may raise statutory or regulatory authorisation as a defence to their alleged unlawful conduct. However, it is submitted that if the firm in question had any discretion open to it to fix its conduct in such a way as to end

[15] Note 15 at paragraph 89.

[16] Note 15 at paragraph 107.

or reduce the restrictive effects of its conduct, then it cannot cry "authorisation" in order to escape scrutiny from the competition authorities and the application of the Act.

Cases

Any questions or comment on the content of this *Sibergramme* may be directed to Robert Legh at rlegh@bowman.co.za.