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THE COMPETITION AND CONSTITUTIONAL CONUNDRUM: CARTELS, CRIMINALISATION AND COMPLEX MONOPOLIES[1]

President Zuma has recently signed the Competition Amendment Bill[2] (the "Bill") into law.[3] The Bill had been virtually in limbo owing to concerns about its constitutionality. From 2008, the Bill sought to introduce important amendments to the Competition Act (the "Act").[4] It was subject to a series of criticisms.[5] The Bill was amended, in part, in response to some of those criticisms. Nevertheless, despite these amendments, various legal opinions were provided to the Presidency which set out why the Bill in its current form was unconstitutional. However, regardless of these criticisms, the Bill was passed by Parliament on 21 October 2008. It was then referred to President Motlanthe (as he then was) for signature. Instead of signing it, in part owing to legal advice the then President received, he referred the Bill back to Parliament on 27 January 2009 because of these constitutional concerns. The Portfolio Committee on Trade and Industry and the

[1] Arguments to be used in this paper were developed in conjunction with Wim Trengove SC and Sir Christopher Bellamy.
[2] B31D–2008.
[3] In terms of section 81 of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), the Bill, once signed, becomes an Act, and will take effect when published, or on the date determined in terms of the Act. At the time of writing, it is unclear when the Act will come into effect.
[4] 89 of 1998.
[5] Various entities, such as Business Unity South Africa, the Law Society of South Africa, and Business Leadership South Africa, have criticised the Bill. Importantly, the Competition Commission and the Competition Tribunal have also raised concerns about the Bill.

Select Committee on Economic Affairs and Tourism rejected these concerns, and referred the Bill back to the then President in February 2009. In the normal course of events, the Bill would have been passed into law by the President signing it.[6] Another Bill too, which was also on the "to-do list" at the time – the Consumer Protection Bill – was, for example, signed by President Motlanthe before he left office in April 2009. The same did not happen with the Bill.

President Zuma, on becoming President, was faced with an important decision: should he sign the Bill so that it became an Act of Parliament,[7] or, owing to doubts about its constitutionality, should he refer it to the Constitutional Court in terms of section 79(4)*(b)* of the Constitution for a decision on its constitutionality?

No decision was taken by the President for close to three months. Then, seemingly in response to questioning by an opposition party, the Bill was signed on 28 August 2009. For the reasons that follow, it is our view that the decision to sign the Bill was regrettable, as it introduces provisions which are clearly unconstitutional. Ironically, had the Bill been referred by President Zuma to the Constitutional Court instead, the fight against cartels would have been speeded up.

The Bill has introduced various amendments to the Act. The most important changes are the imposition of criminal liability for directors of firms found guilty of hard-core cartel conduct ("HCCC") and tools to counter complex monopolies. We will discuss those two issues.

In summary, the Act, as amended, is clearly unconstitutional in several respects as it:

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[6] Section 79 of the Constitution of the Republic of South Africa, 1996, provides in relevant part as follows:

"(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

. . .

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either–

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality."

[7] Section 81.

- imposes a reverse onus on directors or managers who are to be tried for HCCC. The reverse onus is unjustifiable – especially as one has the right to be tried in the ordinary courts – and thus unconstitutional;

- prevents a company from assisting such a director or manager by paying for his or her legal defence. This is an unjustifiable violation of the right to be presumed innocent and unjustifiably violates the director's fair trial rights – especially the right to choose one's legal practitioner and to be able to prepare one's defence adequately;

- prohibits a company from paying a fine imposed on a director for HCCC. This could be a violation of the freedom and security of the person;

- violates the separation of powers by providing the competition authorities (and ultimately the Competition Appeal Court) with over-broad powers which will result in them setting economic policy due to their powers relating to complex monopolies; and

- is irrational in a number of aspects: it criminalises conduct which cannot be predicted in advance and its provisions in relation to complex monopolies are out of synch with economic rationality.

The unconstitutionality of section 73A[8]

The Act, as amended, now provides that if a director is found guilty of engaging in or knowingly acquiescing in a prohibited practice in terms of section 4(1)*(b)* of the Act, he or she may be imprisoned for up to 10 years or have to pay a fine of up to R500 000. Section 4(1)*(b)* prohibits agreements or practices between competitors, which involve:

> "(i) directly or indirectly fixing a purchase or selling price or any other trading condition;
> (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
> (iii) collusive tendering".

The Supreme Court of Appeal has held that:

> "[p]rice-fixing is inimical to economic competition, and has no place in a sound economy. Adopting the language of United States anti-trust law, price-fixing is anti-competitive per se. All countries with laws protecting economic competition prohibit the practice without more. The fact that price-fixing has occurred is by itself sufficient to brand it incapable of redemption".[9]

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[8] The proposed section 73A of the Act reads, in relevant part, as follows:

"(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.

. . .

(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."

[9] See *American Natural Soda Ash Corporation and Another v Competition Commission of SA and Others* 2005 (9) BCLR 862 (SCA) at para 37.

Section 4(1)*(b)* contraventions (HCCCs) have been equated to theft as the consumer is forced to pay a higher price for a good than he or she ought to have paid. It must be noted too that the Prevention and Combating of Corrupt Activities Act[10] makes it an offence to fix prices[11] and to rig bids.[12]

Despite the Competition Act being in force for 10 years, the threat of civil actions has never really materialised. Recent events seem to show that HCCC has not stopped either. The present activity of the Competition Commission (and the flood of leniency applications[13]) has shown that the mere threat of acting unlawfully has not prevented HCCC from occurring.

For this reason, it is clearly not irrational to criminalise HCCC; internationally, HCCC is increasingly being criminalised.[14] There is, therefore, nothing inherently unconstitutional in criminalising HCCC. Despite this, however, three aspects of recent amendments to the Act imposing criminal liability are of questionable constitutional compliance.

i) The reverse onus

A reverse onus in a criminal matter refers to a shift in the burden of proof. The right to a fair trial means that one is presumed to be innocent until proved guilty. In addition, the right to silence means that one is entitled to have the case against one "proved" before one has to decide whether to testify or not. Where a reverse onus is triggered, a fact is presumed to have been proven unless the accused can disprove the fact. This is, generally, constitutionally unsound. It is, however, not without some convenient and constitutionally acceptable application, provided that the reversed

[10] 12 of 2004.
[11] Section 12.
[12] Section 13.
[13] In terms of the Corporate Leniency Policy of the Competition Commission, a firm that comes clean and admits that it was part of a cartel, and splits on its fellow cartel-members, is given "total immunity". This has prompted a flood of such applications.
[14] Canada and Australia, for example, have recently introduced criminalisation of various competition offences. New Zealand is planning on following suit.

burden does not create undue hardship or unfairness.[15] In this regard there is an important distinction to be drawn between evidential presumptions and those presumptions which in fact reverse the onus of proof.[16]

The Constitutional Court has held that only where a reverse onus means that there is a risk that an innocent party could be found to be guilty, is the reverse onus unconstitutional.[17]

Where, however, there is not a true reverse onus, but an evidentiary burden shift, recent jurisprudence suggests that this may be constitutionally tolerable.[18]

To illustrate this, in *S v Zuma*[19] the Constitutional Court had its first opportunity to consider reverse onus provisions. The impugned provision in the circumstances was section 217(1)*(b)*(ii) of the Criminal Procedure Act[20] ("the CPA"), which placed a burden on the accused to prove the inadmissibility of a confession in certain circumstances. Kentridge AJ held that the presumption of innocence would be infringed whenever there were a possibility of conviction despite the existence of a reasonable doubt. But the Court expressly declined to deal with exceptions, exemptions or provisos to statutory offences, suggesting that these might be justified in certain circumstances.[21] It seems likely, therefore, that section 90 of the CPA, for example, which creates a presumption of a lack of authority regarding a relevant licence, would indeed pass constitutional muster on account of the fact that it calls for an accused person only "to prove facts to which he or she has easy access, and which it would be unreasonable to expect the

[15] See *S v Zuma* 1995 (2) SA 642 (CC) at para 38.

[16] Id.

[17] For other cases in which reverse onus provisions were declared unconstitutional, see *Scagell v Attorney-General, Western Cape* 1996 (2) SACR 579 (CC); *S v Coetzee* 1997 (4) BCLR 966 (CC); *S v Mumbe* 1997 (1) SACR 46 (W); *S v Ntsele* 1997 (11) BCLR 1543 (CC); *S v Hoosen* 1999 (9) BCLR 987 (W); *S v Manamela* 2000 (3) SA 1 (CC); and *S v Mello* 1998 (7) BCLR 908 (CC).

[18] See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at paras 25, 29 and 33; and *S v Mbatha* 1996 (3) BCLR 293 (CC) at para 26. Also see *The Bill of Rights Compendium*: Viljoen "The Law of Criminal Procedure and the Bill of Rights" (2000) at paragraph 5B45.

[19] Above n 15.

[20] Act 51 of 1977.

[21] Above n 13 at para 41.

prosecution to disprove".[22]

Let us then consider the newly-introduced provisions of the Act. Normally, the onus would be on the state to prove all the elements of a crime beyond a reasonable doubt. Despite this, section 73A(5) of the Act now states that a finding by the Competition Tribunal (the "Tribunal") of prohibited conduct by a firm (or where a firm effectively admits this by entering into a consent order) is *prima facie* proof in a criminal trial of a director that the prohibited conduct has occurred. This creates a "reverse onus", as the State no longer has to prove this element of the crime, and the presumption of innocence is infringed.

But a reverse onus is not automatically unconstitutional. There is a two-stage test to determine whether a reverse onus is unconstitutional.[23]

- First, does the provision violate the presumption of innocence and the requirement that the accused's guilt be proved beyond reasonable doubt? This is so if the provision creates the risk of conviction of the accused despite the existence of a reasonable doubt about his guilt.[24]

  Section 73A(5) creates such a risk because an accused may be convicted despite the absence of any evidence of the fact that the firm had engaged in a prohibited practice.

  If a director remained silent, or led evidence which failed to disprove the *prima facie* evidence, then despite reasonable doubt, an essential element of the crime will have been proved. This leads to the risk of a conviction of an innocent. This is thus

[22] Id at para 41. Also see *S v Chogugudza* 1996 (3) BCLR (ZS), where a reverse onus was found to be reasonable if relating to facts peculiarly within the accused's own knowledge.

[23] See *S v Zuma* above n 13 at para 21 *S v Coetzee and Others* 1997 (3) SA 527 (CC) at paras 8–10; 118–9; and 190–1; and *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at paras 14–15.

[24] See *S v Zuma* above n 13 at para 38; *S v Bhulwana* 1996 (1) SA 388 (CC) at para 8; and *S v Mbatha* 1996 (3) BCLR 293 (CC) at para 9.

a true reverse onus and not a constitutionally acceptable evidentiary burden shift.

- Secondly, is it a justifiable limitation in terms of section 36(1) of the Constitution? The principal considerations are the purpose of the reverse onus provision and the risk it creates of the conviction of an accused despite the existence of a reasonable doubt. In making its determination, the court will weigh the infringement caused against the purpose, effects and importance of the impugned law.[25]

  The apparent purpose of the reverse onus provision in this case is ensuring that the finding of prohibited conduct occurs in the Tribunal rather than the criminal courts. This is, however, not a legitimate purpose, because an accused is entitled in terms of section 35(3) of the Constitution to a trial "before an ordinary court", which the Tribunal or the Competition Appeal Court ("CAC") are not.

  The risk of conviction despite the existence of a reasonable doubt is real, because the accused may not have been privy to or participated in the firm's prohibited practice and may not have been party to the proceedings in the Tribunal or the CAC which determined that question. The section targets not only directors (and thus presumably non-executive directors, too) but anyone in a position having management authority. A firm may enter into a consent order for a variety of reasons. It may decide that the expense of fighting a prosecution before the Tribunal and the negative publicity is not worth its while, and rather settle the matter. This consent order will be proof in a director or manager's trial, which he or she may not be able to disprove. It is therefore an unjustifiable violation.

This is aggravated, because section 56(3) requires a person to answer a question or produce any article or document, even if it is self-incriminating to do so.[26] The constitutional invalidity that

[25] See *S v Coetzee* above n 23 at para 191; and *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 104.

[26] Subsection 56(3) of the Act reads:

we argue exists thus operates at two related levels: first, at the investigation stage, where witnesses are required to give self-incriminating testimony; and, secondly, at the trial stage (should the testimony-giver subsequently be prosecuted). A similar issue arose in regard to subsections 417(1) and (2) of the Companies Act[27] in the Constitutional Court's split decision in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*.[28] The Court held that subsection 417(2)*(b)* embodied a constitutionally impermissible injunction. Ackermann J explained as follows:

> "In the end result . . . the examinee, facing compulsion under s 417(2)*(b)* of the Companies Act to give self-incriminating testimony, is subjected 'to the cruel trilemma of self-accusation, perjury or contempt' . . . I have no doubt that the provisions of s 417(2)*(b)* . . . which require an examinee summoned under ss (1) to answer, under pain of fine or imprisonment, or both, any question put to the examinee, notwithstanding that the answer might tend to incriminate the examinee and notwithstanding that any answer to any such question may thereafter be used in evidence against the examinee, infringe the examinee's s 11(1) right to freedom, more particularly the residual s 11(1) right of an examinee at a s 417 enquiry not to be compelled to incriminate himself or herself." (Footnote omitted).

In similar fashion, it can be said that section 56(3), read with the new section 73A, is constitutionally invalid. Section 56(3) is qualified by section 49A(3),[29] which provides that self-incriminating statements may not be used at a subsequent criminal trial except for a trial for

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"The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self incriminating to do so."

[27] Act 61 of 1973.

[28] 1996 (1) SA 984 (CC).

[29] Section 49A(3) reads:

"No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged."

perjury and specified offences,[30] which exclude HCCC. However, self-incriminating evidence which a director gives which results in the firm being found guilty of engaging in HCCC will be slipped in through the back door and used against him or her at his or her trial. This is because the finding of the Tribunal – based on this evidence – is *prima facie* proof against the director at his or her trial. The constitutional protection against self-incrimination is therefore violated, unjustifiably.

For the above reasons, we conclude that the section 73A(5) provisions are unjustifiable and constitutionally invalid.

ii) Prohibition on defence funding

Section 73A(6)*(b)* prevents a company from financially assisting in the defence of an employee charged in terms of this section unless the prosecution is abandoned or the director is acquitted. The fact is that competition litigation is complex, time-consuming and expensive. It requires teams of lawyers and economists because of its difficulty and ambiguity. The Competition Commission spent some 10 years seeking to prosecute the American Natural Soda Ash Company, and the matter was resolved within that time limit only when the company entered into a consent agreement (see *American Natural Soda and another v The Competition Commission of SA and others* [2008] 2 CPLR 207 (CT)).[31] A director or manager stands no chance of being able to fund such a defence.

A director has a constitutional right to choose his or her legal representative[32] and to

[30] See sections 72 and 73.

[31] The litigation spanned more than 8 years: see *American Natural Soda Ash Corp v Botswana Ash (Pty) Ltd* [1999–2000] CPLR 299 (CT), decided in September 2000 and the consent order dated November 2008: http://www.comptrib.co.za/comptrib/comptribdocs/976/49CRApr00.pdf . The Tribunal described the litigation as "Methuselah" – referring to the biblical figure who lived more than 900 years – *American Natural Soda and another v The Competition Commission of SA and others* [2008] 2 CPLR 207 (CT), at para 1.

[32] Section 35(3)*(f)* of the Constitution states:

"(3) Every accused person has the right–

prepare his or her defence adequately.[33] These rights are limited by this prohibition. In the situation where a company is willing to fund the director's defence, that would allow the director's constitutional rights to be more fully exercised. However, this prohibition prevents the exercise of these rights. But for the prohibition, it is safe to assume that a director would be able to exercise freely his or her freedom to choose. It is also highly likely that in the absence of this assistance, the choice of most directors to fund and prepare their defence is limited.

There are clearly less invasive means to ensure that cartel conduct is stamped out. A constitutional challenge brought on the basis of this second argument will, however, be required to establish the infringement either of the right to choose one's legal practitioner or the right to adequate facilities and time to prepare a defence to be successful. While it is our opinion that a serious constitutional challenge may be made on this basis, we are unable to come to a firm conclusion on this point owing in large part to the present dearth of direct case authority.

The section is, however, a clear and unjustifiable violation of the rule of law. Its purpose appears vindictive and it is a means which is wholly inappropriate to achieve its aim. The section is unconstitutional on that basis.

In the words of Yacoob J:

> "Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution."[34]

. . .

(f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly."

[33] Section 35(3)*(b)* of the Constitution provides:

"(3) Every accused person has the right–

. . .

(b) to have adequate time and facilities to prepare a defence."

[34] *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at para 24; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).

In *New National Party*,[35] the Court examined the impugned provisions on their face and subsequently proceeded to evaluate their practical effect.

The starting point must be the purpose of the Act. The long title of the Act indicates, *inter alia*, that it was created to provide for "control and evaluat[e] . . . restrictive practices, [and] abuse of dominan[ce], position and mergers". The long title of the Bill stated its purpose, *inter alia*, to be "to introduce provisions to address other practices that tend to prevent or distort competition in the market for any particular goods or services; to provide more guidance in relation to conducting market enquiries as a tool to identify, and make recommendations with respect to, conditions that tend to prevent, distort or restrict competition in the market for any particular goods or services; to introduce provisions to hold personally accountable those individuals who cause firms to engage in cartel conduct . . .". Both purposes are legitimate: the legislature is taking a 'hard line' against anti-competitive behaviour for sound economical and public-interest related reasons. The crucial question is therefore whether the prohibition on the funding of the defence of a director, who would be presumed innocent of the offences charged at that stage, is rationally connected to the stated purpose of the legislation. A cursory facial examination of the proposed provision is, in our opinion, the end of the enquiry.

The amendments to the Act clearly seek to end cartel behaviour, which is the foe of competition and which causes direct consumer harm. However, the prohibition on funding is not rationally connected to this aim. The criminalisation of cartel behaviour achieves this purpose. Preventing a director from mounting a full defence of his or her conduct cannot be rationally linked to this aim.

There is therefore no rational basis for the yoke that the Act seeks to hang and the provision is, as a result, clearly unconstitutional on this basis.

[35] Id.

iii) Prohibition on funding of a fine

Section 73A(6)*(a)* prohibits a firm from assisting in the payment of any fine imposed in terms of this section. Coupled with section 73A(6)*(b)*, this section shows the extraordinary means being employed to prevent HCCC. Such means may not be constitutional on the same basis as that immediately above, that is, the constitutional requirement that the law should not be arbitrary or irrational.[36]

The argument here would be that there is no rational relationship between the purpose for which the power was given and the manner in which it is to be exercised. The punishment appears to seek to punish the director personally. We are not convinced that this is a legitimate purpose. However, this is less objectionable, in isolation, as the prohibition on the funding of the fine as expressed in section 73A(6)*(a)* follows upon a conviction for the criminal offence. It would be a stretch to say that preventing the relevant company from funding the confirmedly deviant conduct of its director were completely arbitrary. We do, however, have grave concerns about it, especially when it is considered in light of all the other problems in the amended Act.

It could possibly be argued that the provision creates a risk of imprisonment for a director which is arbitrarily in contravention of section 12(1) of the Constitution: the right to freedom and security of the person.[37] The argument would be that but for this prohibition, a director who was unable to pay the fine would not have to go to jail, as the firm would have paid the fine.

If an infringement of the Bill of Rights has been established, it seems clear to us that the

[36] Id.

[37] Section 12(1) of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right–
> *(a)* not to be deprived of freedom arbitrarily or without just cause;
> *(b)* not to be detained without trial;
> *(c)* to be free from all forms of violence from either public or private sources;
> *(d)* not to be tortured in any way; and
> *(e)* not to be treated or punished in a cruel, inhuman or degrading way."

provision is disproportionate.[38]. The other constitutional challenges are, however, much clearer cases to make than this one.

iv) Irrationality

Finally, it can also be argued that the criminalisation of HCCC is irrational. The Competition Commission and the Tribunal have gone to the extraordinary lengths of criticising the Bill in one of its earlier forms.[39] One of the strongest criticisms was that the criminalisation of HCCC would result in the end of firms making use of the Corporate Leniency Policy ("CLP"). The CLP allows a cartel member to spill the beans on a cartel. Provided it is the first to do so, and that it co-operates with the Competition Commission so that the other members can be prosecuted, then it will be granted total immunity. This has led to a spate of leniency applications. According to Simon Roberts, the Competition Commission's Chief Economist, at a conference on 17 June 2009,[40] some 35 or 36 marker applications (the prelude to a leniency application) have been received in the last year.

Now that the Bill has been passed into law,[41] a director would be very wary of allowing his or her firm to admit that contraventions had occurred when to do so would be to sentence him or her to jail.

In our view, the criminalisation of HCCC is not irrational. It certainly seems it will be inconvenient for the Competition Commission. What would, however, be irrational, is to

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[38] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 104; and *S v Coetzee* above n 23 at para 190.

[39] See the Bill in its original form, where the proposed section 10A(1)*(b)* provides:

> "(1) A complex monopoly subsists within the market for any particular goods or services if–
> . . .
> *(b)* the firms referred to in paragraph *(a)* conduct their respective business affairs in a co-ordinated manner, *irrespective of whether such firms do so voluntarily or not*, or with or without agreement between or amongst themselves, or as a concerted practice." (Emphasis added).

[40] Keynote Address by Dr Simon Roberts entitled "Enforcement Priorities of the Competition Commission", delivered at the conference – Competition Law and Economics: South African Developments in Light of Recent European Experience.

[41] Although it has not, at the time of writing, come into effect yet.

criminalise acts which it cannot be known are unlawful in advance. Recently, the Constitutional Court discussed this matter again in *Bertie Van Zyl (Pty) Ltd and another v Minister of Safety and Security and Others* [2009] ZACC 11. Justice O'Regan's dissenting judgment (but not on this point) recapitulated the requirement that criminalisation must be prospective and that laws must be certain in advance so that citizens can adapt their behaviour accordingly. O'Regan J quoted the US Supreme Court:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application."[42]

As to the contours of section 4(1)*(b)*, these are unclear. The Supreme Court of Appeal has held–

> "The Tribunal has not yet in express terms construed section 4(1)*(b)* and established its scope (nor what falls outside its scope). Nor is the scope of the prohibition in our view self-evident. The Competition Commission, in its submissions before us, has recognised some of the absurdities that would follow from a construction of section 4(1)*(b)* that prohibits all consensual conduct by competitors that ultimately produces a uniform price for goods emanating from them. The Commission has for this reason been constrained to read words into the statute to avoid the absurdities.
>
> If the statute prohibits all consensual conduct amongst competitors that has the effect of creating

[42] Id at para 102.

> uniform prices for their goods in the market, then the only evidence relevant to the enquiry is no doubt evidence that establishes the existence of a consensus having that effect. But if the prohibition is more restricted, then plainly the terms of the agreement alone might not be decisive.
>
> We are not called upon in this application to give meaning to the prohibition and indeed it is not permissible for us to do so. The jurisdiction of this Court, as we have pointed out, is confined to considering appeals, which contemplates the existence of an order or ruling by another court on the issue under appeal."

Accordingly, the offence itself of price fixing may be unlawfully vague as at this stage, no one can tell what it entails.

The unconstitutionality of section 10A[43]

Section 10A prohibits "conscious parallel conduct", which the Act now defines as occurring "when two or more firms in a concentrated market, being aware of each other's action, conduct their business affairs in a co-operative manner without discussion or agreement". It empowers the Commission to investigate any such suspected conduct of its own accord and, should it be so minded, to apply to the Tribunal for declaratory orders against the relevant entities if the relevant conduct has, *inter alia*, impeded or excluded other firms or caused excessive pricing in that market, or otherwise evinced market characteristics of co-ordinated conduct.

The Tribunal is then empowered in terms of section 10A(5) of the Act to require, prohibit

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[43] The proposed section 10A of the Act provides:

"(1 Complex monopoly conduct subsists within the market for any particular goods or services if–

(a) at least 75% of the goods or services in that market are supplied to, or by, five or fewer firms;

(b) any two or more of the firms contemplated in paragraph (a) conduct their respective business affairs in a conscious parallel manner or co-ordinated manner, without agreement between or among themselves; and

(c) the conduct contemplated in paragraph *(b)* has the effect of substantially preventing or lessening competition in that market, unless a firm engaging in the conduct can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect.

(2) For the purposes of subsection (1)*(b)* 'conscious parallel conduct' occurs when two or more firms in a concentrated market, being aware of each other's action, conduct their business affairs in a cooperative manner without discussion or agreement.

(3) If the Competition Commission has reason to believe that complex monopoly conduct subsists within a market–

(a) the Commission may investigate any conduct within that market without initiating or having received a complaint in terms of Chapter 5; and

(b) Parts A and B of Chapter 5, and section 49D, each read with the changes required by the context, apply to an investigation in terms of paragraph *(a)*.

(4) After conducting an investigation in terms of subsection (3), the Competition Commission may apply to the Competition Tribunal for a declaratory order contemplated in subsection (5) against two or more firms if–

(a) at least one of the firms–

(i) has at least 20% of the relevant market; and

(ii) are engaged in complex monopoly conduct as described in subsection (1); and

(b) the conduct of the firms has resulted in–

(i) high entry barriers to that market;

(ii) exclusion of other firms from the market;

(iii) excessive pricing within that market;

(iv) refusal to supply other firms within that market; or

(v) other market characteristics that indicate co-ordinated conduct.

(5) If the Tribunal, after conducting a hearing in the manner required by Part D of Chapter 5, read with the changes required by the context, is satisfied that the requirements of subsection (4) are satisfied, the Tribunal may make an order reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market, as contemplated in subsection (4)*(b)*.

or set conditions on the relevant firm or entity such that they "mitigate or ameliorate the effect of the complex monopoly conduct on the market". A contravention of such a Tribunal order is a "prohibited practice".

Two attacks can be made against section 10A. First, it is vague and irrational and thus violates the rule of law. Second, it violates the principle of the separation of powers.

i) Vagueness and irrationality

Conscious parallelism is not considered to be anti-competitive on the international plane. What is more, it stands to economic reason that competitors will adapt to one another's behaviour in the market, even without any agreement to that effect: this is a rational and market-related tendency. Indeed, as put by Professor Whish, one of the world's leading commentators on competition law:

> "It would be absurd to forbid firms from behaving in a parallel manner if this is an inevitable consequence of the structure of the market. To put the point another way, it would be strange indeed if competition law were to mandate that firms should behave irrationally, by not acting in parallel, in order to avoid being found to infringe competition law."[44]

We believe that requiring firms to act irrationally must, then, be irrational.

What is more, there are vagueness issues. Subsection 10A(1)*(b)* uses terms such as "conscious parallel manner" and "co-ordinated manner" without more. How do firms know whether or not they fall foul of these provisions? If, for example, the relevant market leader sets an example that the remaining players follow, how can this innocent move be said to be part of a complex monopoly and ultimately prohibited? Considering the breadth of the sanctions that attach to the infringement of these provisions, one might justifiably have hoped for more from the legislature: the provision lacks certainty (see among others *Kruger v President of the Republic of*

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(6) Contravention by a firm of an order contemplated in subsection (5) is a prohibited practice."

South Africa and Others 2009 (1) SA 417 (CC)).[45] Where the legislature fails to speak 'with a clear voice', its ambiguous language will infringe the doctrine of legality, which is a cornerstone of the rule of law – as stated above, the doctrine of vagueness commands that the absence of reasonable certainty is a ground for invalidity.[46] The lack of certainty in the circumstances may in itself be sufficient grounds for the invalidation of section 10A.

ii) Violation of separation of powers

Internationally, complex monopolies are not prohibited. The United Kingdom sought to prohibit them, and abandoned the attempt.[47]

South Africa is characterised by market dominance by a limited number of firms. An oligopoly (that is, a state of limited competition, being the market condition that is said to exist where there are few sellers, as a result of which they can greatly influence price and other market factors) results in a monopoly (the *bête noire* of competition law) by competitors. However, competition law is generally concerned only with the collusive behaviour of such competitors. This is why price fixing is outlawed. Classically, therefore, competition law is concerned with the agreements between firms. The complex monopoly provisions are actually aimed at the structure of the market, as they specifically do not apply when there is an agreement.

Requiring competition authorities to change the structure of the market is a task which they understandably are not falling over backwards to assume.

This makes the wide powers given to the competition authorities all the more unsettling. In effect, those authorities will be given the power, with minimal guidance, to make policy

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[44] See Whish, *Competition Law*, 6th edition at 551.

[45] See for example *Affordable Medicines* above 2006 (3) SA 247 (CC) at para 109; and *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) at paras 65–6.

[46] See *Affordable Medicines* id; *Bertie van Zyl* above n 39 at para 102; *R v Pretoria Timber Co (Pty) Ltd and Another* 1950 (3) SA 163 (A) at 176G.

decisions, determine economic policy and potentially re-structure the relevant industry. Commenting on a previous draft of the Bill,[48] the Competition Commissioner and the Tribunal Chairperson wrote that "investors will be subject to massive uncertainty because they will not be able to know when they will fall foul of these provisions".[49]

We have two primary concerns.

- First, assuming that the delegation of powers to the competition authorities is competent, the delegation has been done in such vague terms, that it is unconstitutional. This is because the provision itself is vague.[50] Even more importantly, it is so because the provision fails to accord with the constitutional imperative that a delegation of power must be done with sufficient guidance that the delegee is able to exercise its powers lawfully.

- Secondly, and in any event, the delegation violates the separation of powers, because it gives the judiciary executive policy-making powers.

a) Vagueness of the delegation

The Tribunal, unlike the Competition Appeal Court,[51] "is not a court",[52] but an administrative body:[53] Where an unelected administrative body is empowered by the legislature to perform an

[47] The Fair Trading Act, 1973, was amended in 2003 to remove the complex monopoly provisions.

[48] The previous draft Bill is different in material respects to the one presently under consideration. The uncertainty does, however, remain.

[49] Page 15 of the Submissions by the Competition Commission & the Competition Tribunal to the Parliamentary Committee on Trade & Industry on the proposed Amendments the Competition Act.

[50] As set out above at paras 43–5.

[51] See Section 36(1)*(a)* of the Competition Act 89 of 1998, which provides that the Competition Appeal Court "is a court contemplated in section 166*(e)* of the Constitution with a status similar to that of a High Court". In turn, section 166*(e)* of the Constitution provides:

> "The courts are–
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> . . .
>
> *(e)* any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

executive role, it must be given the appropriate guidance. The test has been described, albeit in a delegated-legislation context, as whether the legislation provides, with reasonable certainty, adequate guidance from the perspective of a reasonable person.[54] In the words of Sachs J–[55]

> "[A] complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first place . . . To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law-making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul . . . To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority is whether or not it involved shuffling-off of responsibilities which, in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:
>
> *(a)* the extent to which the discretion of the delegated authority (delegate) is structured and guided by the enabling Act;
>
> . . .
>
> *(f)* any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.
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> These items should not, in my view, be regarded as a checklist to be counted off but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament . . . Delegation takes place within, not outside, the constitutional framework, but even within that

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[52] See *Woodlands Dairy (Pty) Ltd and Another v The Competition Commission* (88/CAC/Mar09) (handed down 26 August 2009) at para 56.

[53] Also see the reasons given in *Pioneer Foods (Pty) Ltd v The Competition Commission* (Case No: 15/CR/Feb07 and 50/CR/May08) at http://www.comptrib.co.za/comptrib/comptribdocs/1045/15CRFeb07%20discovery.pdf [Accessed 12 August 2009]; *The Competition Commission of South Africa v Federal Mogul Aftermarket SA* [2001] ZACT 15 at para 29.

[54] See *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal and Others (No 2)* 2001 (1) SA 389 (N).

[55] See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at paras 206–7.

> framework it can be unconstitutional if it fails to satisfy the above criteria."[56]

This is thus the first concern under this heading. The sweeping powers and wide discretion provided to the Tribunal, virtually untrammelled and unguided as they are, come nowhere near the required standard.

b) Judiciary taking the role of the executive

There is, moreover, a second and more fundamental problem. Even if this wide discretion is held to be valid, the delegation would infringe against the principle of legal certainty, which is an aspect of the rule of law:[57]

> "The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

In terms of section 10A(5), once the Commission and Tribunal have each decided that complex monopoly conduct has arisen, the Tribunal is given the discretion to determine whether or not a remedial order is appropriate in the particular case, and what conditions should be incorporated in the relevant order to mitigate or ameliorate the conduct identified. The practical effect is that the Tribunal, and subsequently (should there be an appeal) the CAC, which is a court as contemplated by section 166*(e)* to the Constitution, will be required to exercise quasi-legislative or legislative policy-making powers to define the offence and develop appropriate remedies. At

[56] Also see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* at para 229.

the same time, they are determining economic policy – a function of the executive. This gives rise to two important issues:

- first, whether it is open to Parliament to delegate this function to the Tribunal; and
- secondly, whether the exercise of the powers by the Tribunal and ultimately the CAC is inconsistent with the doctrine of the separation of powers.

Regarding the first issue, the Constitution sets out that executive authority vests in the President.[58] Together with the Cabinet, the President is responsible for developing and implementing national policy.[59] The national legislative authority is vested in Parliament,[60] and Parliament in turn is expressly given the power to assign "any of its legislative powers . . . to any legislative body in another sphere of government".[61] This division of governmental functions is a fundamentally important constitutional principle. The structure of the provisions that entrust and separate powers between the legislative, executive and judicial branches reflects the significance of this principle in our legal system.[62] In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*,[63] the majority of the Constitutional Court held that the legislature could not constitutionally delegate to the executive the power to amend the provisions of an Act of Parliament. While section 10A does not do this in terms, the Tribunal is empowered

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[57] See *Affordable Medicines Trust and Others v Minister of Health and Others* above n 43 at para 108.

[58] Subsection 85(1) of the Constitution reads:

"The executive authority of the Republic is vested in the President."

[59] Subsection 85(2)*(b)* of the Constitution provides:

"The President exercises the executive authority, together with the other members of Cabinet, by . . . developing and implementing national policy."

[60] Subsection 43*(a)* of the Constitution reads:

"In the Republic, the legislative authority . . . of the national sphere of government is vested in Parliament, as set out in section 44".

[61] Subsection 44(1)*(a)*(iii) provides:

"The national legislative authority as vested in Parliament . . . confers on the National Assembly the power . . . to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government".

[62] See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 37.

[63] Above n 36 1995 (4) SA 877 (CC).

to create new "prohibited practices". This power could, over time, overshadow or undermine the enforcement of the existing prohibited practices under sections 4[64] and 5[65] of the Act. As things stand, there are therefore serious questions regarding the constitutionality of the delegation.

As to the second issue, in *South African Association of Personal Injury Lawyers v Heath and Others*,[66] which concerned the issue of the separation of powers as between the judiciary and the other branches of government, the Constitutional Court held as follows:

> "Ultimately the question is one calling for a judgment to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary . . .
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> . . .
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> There are limits to what is permissible. Certain functions are so far removed from the judicial

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[64] Section 4 of the Act provides, in relevant part, as follows:

"(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if–

(a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

(2) An agreement to engage in a restrictive horizontal practice referred to in subsection (1)*(b)* is presumed to exist between two or more firms if–

(a) any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and

(b) any combination of those firms engages in that restrictive horizontal practice."

[65] Section 5 of the Act reads, in relevant part, as follows:

"(1) An agreement between parties in a vertical relationship is prohibited if it has the elect [sic] of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited."

[66] 2001 (1) SA 883.

> function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not appropriate to the central mission of the judiciary. They are functions central to the mission of the legislature and executive and must be performed by members of those branches of government."[67] (Footnote omitted).

In the light of *Heath*, the touchstone in the determination of the constitutional permissibility of the section 10A delegation will therefore be to ask whether the function concerned is so far removed from the function assigned to the relevant body as to breach materially the line between the three governmental branches. The court will test whether the content of section 10A is such that it has the effect of usurping a function for the Tribunal or the CAC, as a court, which is in fact central to the mission of the executive.[68] An affirmative finding will mean that the section will infringe the doctrine of the separation of powers and, unless justifiable in terms of section 36 of the Constitution, will be unconstitutional.

Here it seems evident to us that the judiciary will be required to restructure a market and set economic policy, which is a task of the executive and the legislature. The provisions thus violate the separation of powers.

Lack of exemption and lack of public participation

The Bill had also been criticised for not providing an opportunity to apply in terms of section 10 of the Act for an exemption for the prohibition on complex monopoly.

Essentially, the criticism is that this, when compared to the prohibitions on the other

[67] Id at paras 31 and 35.
[68] Id at paras 31 and 35.

prohibited practices, is in conflict with the right to equality,[69] as equally placed companies are able to do so for other prohibited practices. For the following interrelated reasons, however, this argument does have some problems.

- The first constitutional hurdle would be the applicability of the Bill of Rights to the company's challenge. The relevant company may not be entitled to rely on the equality clause at all. Section 8 of the Constitution provides that the Bill of Rights will be binding upon a natural or juristic person only "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC)[70] raised the issue of the applicability of section 9(1), but the Court deemed it unnecessary to decide it in view of the negative conclusion that it reached on the question of the infringement of section 9(1). The same approach would yield an identical conclusion in the present circumstances.

- Assuming, then, that juristic persons do indeed bear section 9(1) rights, the relevant company will be required to show that there is objectively[71] "no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it."[72] The Constitutional Court has explained the

[69] Section 9 of the Constitution provides, in relevant part, as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> . . .
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[70] At para 48.

[71] See *Pharmaceutical Manufacturers* above 2000 (2) SA 674 (CC) at para 86, where Chaskalson P (as he then was) opined unanimously that–

> "[t]he question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass must simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle".

[72] See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 26.

concept in the following way:

> "It must be accepted that, in order to govern a modern country efficiently . . . it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently . . . A person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."[73]

- In the circumstances, the relevant company would be required to show that the disparate manner in which the Act treats different offences fell outside of the bounds of legitimate legislative choice:[74] in other words, it would have to show that the relevant differentiation was not linked to the achievement of the purpose of the Act. If the means is not irrationally connected to the end, the Act will not infringe section 9(1). This is, accordingly, a high threshold, which, in our opinion, section 10A will not meet.

- We are not certain that a company which is accused of a different prohibited practice can be said to be discriminated against merely because in a separate prohibited practice (of which it is not accused) it could have applied for an exemption. This is particularly so because the complex monopoly provision does not provide for a first-off offence, but allows for a process to unfold in the Tribunal prior to there being a finding of a prohibited practice.

The Bill was also criticised for not complying with the principles set out in *Doctors for Life*.[75] In that decision, the importance of meaningful public participation was laid down by the Court. A

[73] Id at paras 24 and 36.
[74] See *Weare* above n 69 at para 58.
[75] Above n 61.

failure to consult would mean that legislation was not properly passed. There have been some criticisms that after the Bill was amended, such consultations have not occurred and thus the process does not meet the test laid down by the Constitutional Court.

We are not privy to the details of this lack of participation. However, given the extensive participation process and the fact that the Bill was amended in response to various concerns of the public, it may be that this process is distinguishable from that in *Doctors for Life*.[76]

Referral to the Constitutional Court

Section 79(4)*(b)* has never been invoked previously. South Africa's Constitution is rather unique as it provides for *a priori* and *a posteriori* constitutional review. This means that prior to a Bill becoming an Act, it can be referred to the Constitutional Court for a theoretical review, without the act applying to any particular facts. In addition, after it has been promulgated, it can also be referred to the Constitutional Court. This *a priori* review was introduced owing to French influence in the Constitutional negotiations. In France, this is the primary means by which to review the constitutionality of a provision.

The *a priori* review poses interesting problems. The Constitutional Court has previously expressed its dislike for hypothetical constitutional challenges[77] – how would that have been resolved? Could an entire Act be challenged, if only part of it were referred by the President? What sort of relief could have been granted?

President Zuma's decision not to refer the Bill to the Constitutional Court means that these interesting questions remain unanswered.

[76] Id.

[77] See *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC).

Conclusion

If we are correct about the Act's unconstitutionality in light of its amendment, one would anticipate that the Act will be bogged down in litigation for years to come. Considering the patent constitutional concerns set out above, and the delays that the consequent constitutional challenges will occasion, it is unfortunate that the Bill was not referred to the Constitutional Court instead of being passed into law. Piecemeal challenges will only involve more delay and wasted cost, which, ironically, will only obstruct the purpose of the legislation: to be a streamlined, cartel-busting legislative instrument.

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Cases

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