Abstract

Does section 73A of the Competition Amendment Act 1 of 2009 creates reverse onus?

Section 73A of the Competition Amendment Act 1 of 2009 (“the Amendment Act”) introduces criminalisation of hard core cartels in South Africa. In terms of the Amendment Act, 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 Amendment Act, he/she may be imprisoned for up to 10 years or have to pay a fine of up to R 500 000.

Criminalisation of hard core cartels has been on the rise internationally with Australia being the latest to introduce it. In South Africa, the law that criminalise cartel conduct was passed but is not yet implemented owing to some possible constitutional challenges of Section 73(A)(5), which is perceived to create reverse onus. Section 73A (5) of the Amendment Act states that in a criminal court proceedings against a director, an acknowledgement in a consent order by the firm or a finding by the Competition Tribunal or Competition Appeal Court that a firm has engaged in prohibited practice is a prima facie proof of the fact that the firm engaged in that conduct. This is argued to be creating a reverse onus.

The argument on the reverse onus is that a director accused of causing or being acquiescing to the actions of a company which contravened section 4(1) (b) of the Competition Act, will have to disprove the finding that the firm was engaged in prohibited practice. This may well infringe an individual’s fundamental constitutional rights such as the right to a fair trial, which includes the right to remain silent and the presumption of innocence.

This paper seeks to explore if section 73A Amendment Act creates reverse onus, its effects on the constitutionally enshrined presumption of innocence. The paper will further explore whether other jurisdictions are faced with the same challenge faced by the South African jurisdiction.

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Introduction

On 28 August 2009, the South African President assented to the Competition Amendment Act No. 1 of 2009. The amendment Act introduces various powers to the Competition Commission ("Commission"), including provisions that hold personally liable those individuals who cause firms to engage in a cartel conduct, in particular Section 73A (1) of the Competition Amendment Act 1 of 2009 ("the Amendment Act").

This section provides that 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 causes the firm to engage in a prohibited practice in terms of section 4(1)(b) of the Act, while knowing that the firm is engaging in a prohibited practice. Such person may be prosecuted for an offence once the firm acknowledged in a consent order or the Competition Tribunal ("Tribunal") or the Competition Appeal Court ("Appeal Court") has made finding that the relevant firm has engaged in a prohibited practice in terms of section 4(1) (b) of the Act.

Section 73A (5) further provides that in any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49(D) by the firm or finding by the Tribunal or 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.

It is our view the provision of section 73A (5) creates a reverse onus for directors whose firms are found guilty of cartel conduct by the Tribunal or Appeal Court. In the normal circumstances in criminal proceedings, the onus of proof is on the State to prove all the elements of a crime beyond a reasonable doubt. It has been held by the Constitutional Court that a reverse onus is unconstitutional as it affect the accused right to a fair trial. Section 35(3) (c) of the Constitution provides that every accused person shall have a right to a fair trial, which include the right to be presumed innocent and to remain silent and not testify or incriminate himself or herself during the trial.

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2 S v Coetzee Case CCT 50/95
The reverse onus

A reverse onus in a criminal proceeding refers to a shift in the burden of proof from the State proving its case to an accused person to disprove the State’s case. The right to a fair trial entails, inter alia, the right to to be presumed innocent, to remain silent, and not to testify during the proceedings and not to be compelled to give self-incriminating evidence. Reverse onus generally refers to shifting burden of proof from he who accuses to the accused.

Section 73A (5) provides that in any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49(D) by the firm or finding by the Tribunal or 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.

In our view, section 73A (5) creates reverse onus by stating that the finding by the Tribunal or 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 prohibited conduct. The reverse onus is created for the director who has to defend himself against the allegations in terms of section 73A (1) in that there is already a finding that the firm has contravened the Act and that finding is a prima facie proof of that fact, which the director has to now disprove.

The question is whether section 73A (5) is constitutionally validity given that it shifts a burden of proof from the accuser to the accused. In the matter between the State vs. Coetzee, the Constitutional Court (“CC”) stroked down the provisions Section 245 of the Criminal Procedure Act 51 of 1977, which provided that if at the criminal proceedings at which an accused person is charged with an offence of which false representation is an element, if it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

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3 S v Coetzee Case CCT 50/95 Para 6
The CC held that the presumption falls into a class of reverse onus provisions which have been held by the court to infringe on the right of an accused person to be presumed innocent as envisaged by section 35(3) (h) of the Constitution. The function and the effect of the presumption is to relieve the prosecution of the burden of proving all elements of the offence with which the accused is charged. The presumption is in conflict with the long standing established rule of common law on the burden of proof that it is always for the prosecution to prove the guilt of the accused person, and that the proof must beyond reasonable doubt.

The provisions meant that the presumption created by section 245 of the Criminal Procedure Act may be rebutted by proof on a balance of probabilities by the accused. Failure to prove, for example, where the probabilities are evenly balanced at the end of the trial, the court would be obliged to convict, notwithstanding the existence of a reasonable doubt regarding the state of mind of the accused.

In the matter between the S v Mbatha the presumption of innocence issue was further canvased by the CC. The applicants in this matter challenged the constitutionality of section 40(1) of the Arms and Ammunitions Act 75 of 1969 (“Arms Ammunitions Act”). Section 40(1) provides that “Wherever in any prosecution for being possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at that time was on or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until contrary is proved”.

The CC held that the presumption in section 40(1) created a reverse onus because it shifted the burden of proof of guilt away from the State to the accused to disprove the presumed fact on balance probabilities. In this case the fact presumed was possession which constituted an essential element of the offence. The presumption required the accused to disprove possession on balance of probabilities. This means that even if the accused established a reasonable doubt he or she could still be convicted for failing to disprove the presumed fact on balance of probabilities.

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4 Subra, Para 5
5 S v Mbatha CCT 19/95
The provisions of the Amendment Act as they stand violates the presumption of innocence and shift the onus of proof to the accused, who now has to rebut the finding by the Tribunal or the Appeal Court. This is despite the fact that the prosecution has a duty to establish a case against the accused beyond reasonable doubt without assistance from the accused.

The provisions of section 73A (5) are problematic in that removes the duty of the prosecutor to prove all the elements of the crime allegedly committed. To illustrate the point by way of example, a director who is accused of causing or knowingly acquiesced in the firm engaging in a prohibited practice, the prosecutor will not be required to proof this element (of causing a firm to collude) as the Tribunal or Appeal Court would have already made a finding in this regard. A director will therefore not have an opportunity of creating a reasonable doubt in the State’s case in respect of this element, as the Tribunal or Appeal Court findings are regarded as *prima facie* proof of collusion.

This is aggravated by the fact that section 49A (3) provides that 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 a statement in criminal proceedings. In terms of section 73A (5) of the Amendment Act, a director who provides self-incriminating information to the Commission while being summoned, and that information is then used by the Tribunal to make a finding against a firm, that information is admissible in a criminal trial. The finding of the Tribunal which is based on self-incriminating information is now *prima facie* proof of a commission of an offence against a director. The right not to self-incriminate is violated as a result.

Under the Enterprise Act the Office of Fair Trading (“OFT”) has compulsive powers to compel the production of documents and answers to questions. The use of compulsive powers in criminal investigations has been somewhat circumscribed by the jurisprudence of the European Court of Human rights in as much as it held that the admission of any

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6 Section 49A (3) 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 a statement in criminal proceeding, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or 73(2) (d), and then only to the extent that the answer or statement is relevant to prove the offence charged.
evidence obtained from the accused using compulsory questioning powers would amount *prima facie* to a breach of their privilege against self-incrimination\(^7\).

It follows that section 73A (5) is in conflict with section 49A (3) of the Act as well as section 35 (3) of the Constitution.

**The limitation clause liaise**

The next question is whether the infringement can be said to permissible limitation to the right to be presumed innocent until proven guilty in terms of section 33(1) of the Constitution. In order to pass the muster, a law which limit rights in the Constitution must, in addition to being a law of general application, be reasonable, justifiable, in and open and democratic society based on freedom and equality\(^8\).

The relevant considerations in the balancing process include the nature of the right that is limited, its importance in an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society, the extent of the limitation, its efficacy and particularly where the limitation has to be necessary, whether the desired end could be achieved through other means less damaging to the right in question\(^9\).

The purpose of section 73A (5) of the Amendment Act is to facilitate the prosecution of individuals found guilty of contravening the provisions of section 4(1) (b) of the Act. There is no doubt that a pressing need for the effective prosecution of hard core cartels in terms of the Competition Act is necessary for an efficient and effective economy. However the rights entrenched in section 35(3) of the Constitution are fundamental in nature and no justification can be enough to infringe those rights, which include the right to a fair trial. In a number of

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\(^7\) Simon Williams –Cracking Cartels: Trends and Issues : UK perspective

\(^8\) Section 33(1) (a). The rights which are granted by chapter 3 of the Constitution may be limited by a statute or common law, but only if such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality. The following factors should be taken into account, nature of the right, importance of the purpose of the limitation, nature and extent of the limitation, relation between the limitation and its purpose and least restrictive means to achieve the purpose.

\(^9\) Ibid Para 11
cases decided by the Constitutional Court\textsuperscript{10}, emphasises was placed on the importance of the rights entrenched in section 35(3) of the Constitution, which included the right to be presumed innocent, in an open and democratic society based on freedom and equality.

Underlying the decisions in those cases is the recognition that a consequence of the value system introduced by the Constitution is that the freedom of the individual may not lightly be taken away. Presumptions which expose an accused person to the real risk of being convicted despite the existence of a reasonable doubt as to his or her guilt are not consistent with what is clearly a fundamental value in our criminal justice system\textsuperscript{11}.

The question is whether it makes it so difficult as to justify the infringement of the accused’s right to be presumed innocent on the grounds of necessity. The court was not persuaded that this difficulty is, in itself, sufficient to outweigh the importance of the right infringed and to justify the reversal of the onus. Discharging the burden of proof is a function which the criminal justice system requires the prosecution to perform in the normal course with regard to many common law and statutory offences\textsuperscript{12}.

The reverse onus is not justifiable in terms of section 36(1) of the Constitution in that it creates the risk of the accused not having an opportunity to create a reasonable doubt on the State case. The reverse onus can therefore not be held to constitute a limitation of the right to a fair trial.

\textbf{Irish perspective on criminalization of cartels}

The Irish Competition Act was first passed in 1991, and in 1996, and recent revisions of the Competition Act made contraventions of the Act criminal violations. A new Act in 2002 revoked the 1991 and 1996 legislation and increased penalties for violations of the Act, and added a series of statutory presumptions and added penalties for price fixing, bid rigging and

\textsuperscript{10} S v Mbatha CCT and S v Coetzee Case CCT
\textsuperscript{11} Ibid Para 14
\textsuperscript{12} Supra Para 15
market sharing agreements. Sections 6 and 7 of the Competition Act criminalize violations of Sections 4 and 5 and provide punishments for both individuals and undertakings\textsuperscript{13}.

The Director of Public Prosecutions determines whether to prosecute cases on indictment. Criminal cases brought on indictment are tried before a jury and guilt must be established beyond a reasonable doubt. The Director enjoys substantial prosecutorial discretion, including extending immunity from prosecution to individuals and undertakings\textsuperscript{14}.

In Ireland the criminalising cartels undoubtedly has impacted on the procedures that are deployed by an enforcement agency. Methods and standards of gathering and retaining evidence will have to adapt and change to take into account the different standards required for presenting evidence at a criminal trial. The rights of suspects also change when moving from the civil to the criminal enforcement model\textsuperscript{15}.

The suspect’s right to silence continues all through an investigation and up to and including any trial that may follow the investigation. This may seem extraordinary to many cartel enforcers unfamiliar with the criminal process. However, it must be remembered that even at trial there is no obligation on the accused person to given evidence in their own defence. Indeed, the accused person need not make out any case in his or her own defence. The burden of proving the case against him falls entirely on the prosecution and if the prosecution fails to reach that standard during the trial, the case collapses.

In Ireland there is no obligation on the accused to outline what evidence or witnesses that he or she intends to call in his own defence. An outline of this was given in the Supreme Court in the matter between the Director of Public Prosecutions v Sweeney where Geoghegan J said:

\begin{itemize}
\item[\textsuperscript{13}] Cartel criminalisation in Ireland and Europe , Carolyn Galbreath, Cartels Division
\item[\textsuperscript{14}] Ibid, page 16
\item[\textsuperscript{15}] Some thought on criminalisation of cartels ; David McFadden: Legal Advisor Competition Authority
\end{itemize}
Only the prosecution must show its hand. Subject to some modern statutory exceptions in relation to alibi evidence the defence is entitled to spring surprises and above all is perfectly entitled, pending the trial, to give no indication as to what issues might be raised\footnote{[2001] 4 I.R 102 (S.C.)}.

**Australian perspective on criminalization of cartels**

The Trade Practices Amendment (Cartel Conduct and Other Measures) Act ("Amendment Act") of 2008 came into effect bringing with it a new dual criminal and civil cartel enforcements regime in Australia. In terms of section 44ZZRF and 44ZZRG of the Amendment Act the civil proceedings operate parallel to the criminal cartel offences. The Australian Competition Consumer Commission ("ACCC") is responsible for investigating all cartel matters and conduct enforcement proceedings in respect of civil cartel conduct. With the introduction of the new criminal sanctions, it will be the Commonwealth Director of Public Prosecution ("CDPP") that is responsible for criminal prosecutions of the cartel conduct.

The Amendment Act provides for a number of exceptions to the new criminal cartel offences and civil cartel prohibitions. For each of these exceptions, there is an evidentiary burden on the director seeking to establish the exception. This requires the person to point to evidence that suggests a reasonable possibility that the exception is made out. In a criminal matter, the probative burden would then fall on the prosecution to disprove the exception beyond reasonable doubt\footnote{Criminal Sanctions for the cartel conduct introduced into Trade Practices Act}. This would mean that when firms in the same line of business form a legitimate joint venture for a valid purpose and they are charged with contravention of criminal cartel provisions, the firms can raise joint venture as a defence.

The Amendment Act creates a defence more than a reverse onus in Australia. In South Africa, the Amendment Act creates a reverse onus based on elements of a crime and evidentiary burden of proof. In Australia once a person has been convicted of a criminal cartel offence, he or she will not be liable to an action by the ACCC for a pecuniary penalty. If civil proceedings are on foot when a criminal proceeding is commenced, the civil proceedings will be stayed until criminal proceedings are completed. If the defendant is
convicted, the civil proceedings will be dismissed. However, if a person is convicted of contravening a civil cartel provision, he or she may still be liable to criminal prosecution\textsuperscript{18}.

**New Zealand perspective on criminalization of cartels**

In New Zealand the Commerce (Cartel and Other Matters) Amendment Bill criminalises hard core cartel conduct. In the terms of section 82(B) (4) of the amendment bill, an individual who commits an offence against this section is liable on conviction on indictment to imprisonment for term not exceeding 7 years.

The Amendment bill sets out a parallel criminal offence and civil prohibition, consistent with the approach taken in Australia. The distinguishing feature of the criminal regime is that criminal offence requires the additional element of intent. Additionally, where cartel conduct is prosecuted, a criminal investigation requires a high standard of proof of beyond reasonable doubts\textsuperscript{19}.

If a defendant knowingly enters into a cartel conduct, it can escape liability if it can prove, on balance of probabilities that a relevant exemption applies. This is also the case in Australia. Section 82B (2) of the Amendment bill exempt undertakings from the provision of section 30, hence an undertaking charged with a contravention of section 30 can raise sections 31, and 33 respectively as a defence to a conduct. We submit that these sections in no way create a reverse onus and contravene the presumption of innocence principle.

The New Zealand bill rights Act of 1990 section 25 (c) guarantees the accused a right to be presumed innocent until proven guilty. The Supreme Court has held in *R v Hansen*, that a breach of section 25(c) could never be justified in a free democratic society\textsuperscript{20}.

The New Zealand Law Society made submissions to the Ministry of Economic Development regarding criminalisation of hard core cartels and raised concerns with Section 82B exemption. They argued that section 82B (2) (a) will impose a reverse onus on the accused. They submitted that there are some rights and freedoms in respect of which no limitation could be justified in a free and democratic society.

We submit that jurisdictions that introduced criminalisation of cartels are sensitive of constitutional right of accused individuals. The civil and criminal proceedings run its course

\textsuperscript{18} Supra, page 4
\textsuperscript{19} Criminalisation of Cartels, Agency Disclosure Statement (Ministry of Economic Development) page 19
\textsuperscript{20} *R v Hansen* (2007) 3 NZLR
independently. There is nowhere the findings of a Tribunal are used as a *prima facie* case against the accused in a criminal prosecution. What came out clear is that the right of the accused to a fair trial are important and no limitation can justify its infringement.

**British perspective on criminalization of cartel**

Cartel investigations in Britain are done under Chapter I of the Competition Act of 1998 and criminal prosecutions are brought under Section 188 of the Enterprise Act of 2002. Criminalisation of cartels was introduced in 2002 under the latter act. The Enterprise act deals with the criminal prosecution of individuals participating in a cartel whereas the Competition act deals with administrative system for civil prosecution companies.

It is the Office of Fair Trading ("OFT") intention that criminal and the civil regimes will operate parallel in the sense that there may well be a criminal investigation of individuals and a parallel civil investigation of the undertakings in relation to the same cartel. In such cases, it is obviously necessary to ensure that civil proceedings do not prejudice any criminal proceedings. This means that in practice the OFT will need to be careful to judge whether, in some cases, it is undesirable to reach a final decision in a civil case until the criminal trial has be determined\(^\text{21}\).

Section 190 makes a person guilty of an offence under section 188 is liable –

(a) on conviction on indictment, to imprisonment for a term for a term not exceeding five years or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

Section 198 amends by inserting section 30A of the Competition Act of 1998 which states that a statement made by a person in response to a requirement imposed by virtue of any sections 26 to 28 may not be used in evidence against him on a prosecution for an offence under section 188 unless, in the proceedings (a) in giving evidence, he makes a statement

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\(^{21}\) Simon Williams ; Director of Cartel Investigations, OFT, UK, Cracking Cartels, Trends and Issues: UK Perspective,
inconsistent with it, and (b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf.\textsuperscript{22}

The above shows that the British do not have reverse onus provision in their system, as opposed to section 73A Act in that the prosecution has the onus to prove that the accused individual acted dishonestly when making the agreement.

**United States perspective on criminalization of cartels**

In the US, the administrative and cartel enforcement functions are combined in the Attorney General’s office whereas in countries like UK and soon in South Africa, the civil and criminal law enforcement responsibilities are divided. Civil enforcement and investigational responsibilities are entrusted to a Competition authority, while ultimate responsibility for bringing and trying a criminal case arising from cartel violation are with a prosecution authority.

Criminalization, because it involves the deprivation of liberty, justifiably requires legal protections for the accused. Criminalization warrants a higher standard of proof, such as guilt beyond a reasonable doubt. It also triggers a higher level of rights for defendants, such as right to counsel, right to fair trial, right of confrontation of witnesses, and discovery rights.\textsuperscript{23} This is proof that the US legal system does not reverse onus.

\textsuperscript{22} Section 26 governs powers when conducting investigations. Section 27 governs the power to enter premises without a warrant and 28 govern the power to enter premises under a warrant.

\textsuperscript{23} R. Hewitt Pate - International anti-cartel enforcement paper presented before the 2004 ICN Cartels Workshop Sydney, Australia