



competition commission
south africa

MEDIA RELEASE

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COMPETITION COMMISSION CROSS-APPEALS MEDIA24 RULING

Following Media24's appeal to the Competition Appeal Court (CAC) against a decision of the Competition Tribunal (Tribunal) which had found that Media 24 had contravened section 8(c) of the Competition Act, on 25 October 2016 the Competition Commission (Commission) also filed a cross-appeal to the CAC against certain aspects of the Tribunal's decision.

In the cross-appeal, the Commission is asking the CAC to replace the Tribunal's finding that Media24 had contravened section 8(c) of the Competition Act with a more serious finding that it had contravened section 8(d)(iv) of the Competition Act, which prohibits a dominant firm from abusing its dominance by engaging in an anti-competitive strategy of charging prices that are below cost (predatory pricing) in order to drive its competitors out of the market and later recoup its losses by increasing its prices after its competitors have been driven out of the market. The Commission also believes that the remedies imposed by the Tribunal to address the harm caused by Media24's pricing conduct are inadequate to remedy the irreparable harm caused by Media24's abuse of its dominance which led to the closure and exit of a competitor, *GoldNet News*, from the market.

On 31 October 2011, the Commission referred a complaint against Media24 to the Tribunal after its investigation found that Media24 had engaged in predatory pricing through its community newspaper (*Goudveld Forum*) by, among other things, pricing its advertising rates below cost.

The Commission further found that Media24's pricing strategy was intended to exclude competitors and to bolster its reputation as an "aggressive competitor" in order to deter the likelihood of future entry into the Goldfields community newspaper market. The Commission concluded that *Goudveld Forum* was used as a fighting brand to prevent competition with Media24's larger and more lucrative title, *Vista*.

In its decision on the merits, delivered on 08 September 2015, the Tribunal found that evidence presented by the Commission had not established that *Goudveld Forum* had been priced below the relevant cost measure (i.e. average variable cost) in contravention of section 8(d)(iv) of the Competition Act. However, the Tribunal found, among other things, that Media24 had adopted a pricing strategy that sought to exclude a rival community newspaper publication, *GoldNet News*, from the market by pricing its publication, *Goudveld Forum*, below average total costs. The Tribunal concluded that this conduct was in contravention of section 8(c) of the Competition Act. On 06 September 2016, the Tribunal issued its decision on remedies.

Unlike section 8(d)(iv), a contravention under section 8(c) does not attract an administrative penalty for first-time offenders. The Commission's cross-appeal against Media24 is based on its view that Media24's advertising rates were priced below the relevant cost measure, thus the conduct contravened section 8(d)(iv) of the Competition Act. The Commission is also of the view that the remedies imposed by the Tribunal are inadequate to address the harm caused by Media24's anticompetitive conduct.

In the cross-appeal, the Commission seeks the CAC to declare that:

- Media24's pricing conduct constituted predatory pricing in contravention of section 8(d)(iv) of the Competition Act;
- Media24 is liable to pay an administrative penalty of R 20 million;

- Media24 be prohibited for a period of six years from publishing more than one community newspaper in English or Afrikaans in areas affected by its pricing conduct including Welkom, Odendaalrus, Ventersburg and Thabong; and
- Media24 be ordered to establish a fund to benefit community newspaper publishers who operate or intend to operate community newspapers in areas affected by Media24's pricing conduct.

"Media24's abuse of its dominant position has led to the closure and exit of its main rival in community newspaper publications in the Goldfields area in the Free State. This conduct has entrenched the monopoly position of Media24 in the community newspaper market in that area and thus enabling Media24 to price its advertising rates as it wishes because advertisers in community newspapers, many of whom are small businesses in the Goldfields area, have no alternative community newspaper publication to market their businesses. The case also provides an opportunity to the CAC to make a determination on this very important area of law", said acting Deputy Commissioner, Hardin Ratshisusu.

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Explanatory note to journalists

An appeal is a form of legal recourse aimed at challenging findings of fact and law made by an adjudicative body, in this case, the Competition Tribunal.

A cross- appeal is a similar legal recourse, filed in response to an appeal, available to a party in whose favour a decision has been made to certain challenge findings of fact and law made by an adjudicative body e.g. if an accused person in a criminal trial files an appeal against his or her conviction and sentence, the prosecutor may file a cross-appeal against the sentence if he or she believes that the sentence is too low. An appeal and a cross-appeal are usually heard by a court hearing the appeal at the same time.

Sequence of events in the case:

- Commission receives complaint from Berkina Twintig (Pty) Ltd trading *GoldNet News* – 30 January 2009.
- Commission refers the findings of its investigation to the Tribunal – 31 October 2011.
- Tribunal hears the merits of the complaint – November 2013.
- Tribunal issues decision on the merits – 08 September 2015.
- Tribunal issues decision on remedies – 06 September 2016.
- Media24 files notice of appeal – 27 September 2016.
- Commission files cross-appeal – 25 October 2016.