competition commission
south africa

Media Statement
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COMPETITION APPEAL COURT DISMISSES THE BANKS FOREX APPEAL WITH COSTS

The Commission welcomes the decision of the Competition Appeal Court (CAC) which dismissed the appeal by various banking institutions and in turn upheld the cross appeal by the Commission in the Rand Dollar manipulation matter.

Delivered in Cape Town this morning, the CAC set aside the Competition Tribunal order in the matter which had partially ruled in favour of the banks. In June 2019 the Tribunal rejected the banks call for the referral against them to be dismissed but ordered the Commission to redraft its charge sheet within 40 days.

The bank in the matter basically fall into three categories - local banks, international banks with presence in South Africa and those overseas based banks without any presence in the country. The two international categories are referred to as local peregrini and pure peregrini, respectively.

The Tribunal found that it did not have jurisdiction (authority) to issue an order compelling the foreign banks that had no presence in South Africa to pay any administrative penalty. The order would not be effective, it said. It directed the Commission to seek only an order that declared the conduct of these to be anti-competitive, and not an administratively penalty.

The international banks with no presence in South Africa appealed this order. The banks are Bank of America Merrill Lynch International Limited, JP Morgan Chase & Co, Australia and New Zealand Banking Group Limited, Standard New York Securities Inc., Nomura International Plc., Macquarie Bank Limited, HBC Bank USA, National Association, Merrill Lynch Pierce Fenner and Smith and Credit Suisse Group.

The CAC said, within 40 days, the Commission must file a new referral (charge sheet) replace all previous affidavits and must set out the facts it relies on to allege it was foreseeable that the alleged conduct would have direct or immediate, and substantial effect in the South Africa.

Further, among other thigs, the Commission must confine its case to one of a single over-arching conspiracy, provided that the Commission is not restricted from alleging that this may be founded on an agreement, arrangement or concerted practise.

The new affidavit must in addition set out the facts on which Commission relies to allege that there are adequate connecting factors between the banks and the Tribunal's jurisdiction.

It additionally ordered that certain paragraphs of the previous referral, those related to the conduct of a J.P Morgan entity, should not be included in the amended referral, sufficient to establish personal jurisdiction against the accused banks.

The Tribunal deferred the question as to whether the Commission could join certain additional banks until it had filed the above-mentioned amended referral and dismissed one of the respondent banks' (Investec Limited) application for an order declaring the conduct of the Commission in prosecuting the referral to be vexatious and unreasonable.

Thus, the CAC dismissed the application by the banks with costs.

Ends.

BACKGROUND

Since April 2015, the Commission has been investigating a case of price fixing and market allocation in the trading of foreign currency pairs involving the Rand.

The investigation found that from at least 2007, the respondents had a general agreement to collude on prices for bids, offers and bid-offer spreads for the spot trades in relation to currency trading involving US Dollar / Rand currency pair.

Further, the Commission found that the respondents manipulated the price of bids and offers through agreements to refrain from trading and creating fictitious bids and offers at particular times.

Traders of the respondents primarily used trading platforms such as the Reuters currency trading platform to carry out their collusive activities. They also used Bloomberg instant messaging system (chatroom), telephone conversation and had meetings to coordinate their bilateral and multilateral collusive trading activities.

They assisted each other to reach the desired prices by coordinating trading times. They reached agreements to refrain from trading, taking turns in transacting and by either pulling or holding trading activities on the Reuters currency trading platform.

They also created fictitious bids and offers, distorting demand and supply in order to achieve their profit motives. Despite the Commission filling its papers to the Tribunal on 15 February 2017, against 17 banks, none of the banks have to date filed their answer to the merits of the case except HSBC which has filed papers disputing its participation in the cartel.

The Commission sought an order from the Tribunal declaring that the respondents have contravene the Competition Act. Further, it sought an order declaring that the respondents are liable for the payment of an administrative penalty equal to 10% of their annual turnover.

On 12 June 2019, the Competition Tribunal (Tribunal) issued a decision dismissing the exception applications brought by various respondent banks in the currency manipulation case. Some of the respondents, namely, Bank of America Merrill Lynch International Limited, JP Morgan Chase and Co., JP Morgan Chase Bank N.A , Australia and New Zealand Banking Group Limited, Macquarie Bank Limited, HSBC Bank USA, National Association Inc and Smith Inc and Credit Suisse Securities (USA) LLC have since filed notices of appeal with the Competition Appeal Court against the decision of the Tribunal.

In addition to filing notices of appeal JP Morgan Chase and Co., JP Morgan Chase Bank N.A, Australia and New Zealand Banking Group Limited and Credit Suisse Securities (USA) LLC filed review applications against the decision of the Tribunal.

Appeals

In respect of notices of appeal, the respondents, in summary, noted the following objections against the decision of the Tribunal:

- That the Tribunal erred to rule that it can still issue any other declaratory order even after establishing that a respondent is a pure peregrini.
- That the Tribunal should have dismissed the Commission's joinder application in as far as the complaint was not properly initiated against certain of the respondents. In particular, the respondents object to the Tribunal's deference of the question of joinder to a time when the Commission has provided further particulars.

Reviews

In their review applications the respondents were essentially challenging the decision of the Tribunal on the following basis:

The respondents submitted that if the Tribunal lacks jurisdiction to adjudicate a matter against a peregrine respondent, whether by reason of personal or subject-matter jurisdiction, it has no authority to issue any order including a declaratory order.

Further the respondents submitted that the Tribunal was not empowered by the Competition Act 89 of 1998 (as amended) ("the Act") or by the common law to issue a declaratory order without civil or administrative penalty flowing therefrom. Accordingly, they submit that Tribunal erred and acted outside the law by making a distinction between a "*traditional declaratory*" order where civil and administrative penalties will flow and the one it sought to issue in this case.

The respondents also took issue with the fact that the Tribunal's finding that it has authority over local peregrini and as such can issue a declaratory order despite lack of subject-matter jurisdiction.

In summary the respondents sought to review the Tribunal decision on the basis that the Tribunal may only exercise the powers and functions conferred upon it by the Act. As such the Tribunal is not competent to issue orders that fall outside the Act.

On 18 July 2019 the Commission filed its notice of cross appeal against the decision of the Tribunal. In its cross appeal the Commission noted that the Tribunal decision is lacking in the following respect:

Pure peregrini

- Tribunal should have found that the impact of section 3(1) is to:
    - change the common law position in respect of matters regulated by the Act; and
    - expand the jurisdiction beyond entities that are physically resident in South Africa to those who are absent but carry out economic activities that have an effect in South Africa.
- The Tribunal should have adopted the interpretation of section 3(1) that best promotes the purpose and objectives of the Act to maintain and promote competition in South Africa, and to regulate anti-competitive conduct by resident or non-resident entities to the extent that it has an effect in South Africa.

In this regard, The Tribunal should have:

- found that it has the jurisdiction to make an order against foreign respondents, which potentially has civil and penalty consequences, even where the firm is not resident within the country based on a wider territorial jurisdiction of section 3(1) of the Act.
- considered and applied the Supreme Court of Appeal and the High Court's development of the law regarding personal jurisdiction in Multi-Links and Strang cases.
- dismissed the exceptions brought by the pure peregrini in relation to the Tribunal's personal and subject-matter jurisdiction.

Subject matter jurisdiction

The Commission noted that the Tribunal should have given effect to the plain meaning of the words "*economic activity having an effect within the Republic*" in section 3(1) of the Act.

The Tribunal should have found the cumulative effect of the conduct is sufficient to make it "not trivial" for the purposes of the section 3(1) of the Act.

Further, the Tribunal should have found that the Commission is only required to plead that the conduct involved the use of the South African currency to meet the requirements in section 3(1) of the Act.

[ENDS]

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