Chapter 35

Competition

'I think it's wrong that only one company makes the game Monopoly.'

Steven Wright (1955–)
American comedian

What is covered in this chapter

WHY THIS CHAPTER IS IMPORTANT

Our law places a high value on the principle of freedom of trade, which gives consumers greater choices and better purchasing power for their money. Society accepts that some businesses may not do well because of increased competition, and some businesses even may fail. However, it is not acceptable for some traders to use unlawful means to ensure the downfall of their rivals. Nor is it acceptable for competitors to work together secretly to ensure that prices are kept artificially high, or collude to force consumers to buy goods or services from one supplier only.

Sometimes the line between what is an acceptable form of competition, and what is an unacceptable form of competition, may become blurred. This is why it is important for you to understand the common-law position, as well as the prohibitions contained in legislation regarding unfair forms of competition.

COMPETITION

1 Common-law forms of unlawful competition

Our common law recognises two general forms of unfair competition: the unfair use of a competitor's fruits and labour, and the misuse of confidential information in order to advance one's business interests and activities at the expense of a competitor.

Specific examples of unlawful competition at common law include the following:

- **Passing off**: The law of 'passing off' is concerned with unfair competition between traders, rather than with the deception of the public. Its origins lie in the rules for medieval traders, who were required to distinguish their goods by marks so that the makers of defective goods could be prosecuted. Customers began to select particular

bakers and brewers whose goods they enjoyed, on the basis of the distinguishing mark. Centuries before trademark legislation was enacted, the trader's goodwill in their mark was protected by an action that has become known as 'passing off'.[1]

Today, passing off refers to the situation where one person disguises their goods as that of another person by using misleading names, marks, or descriptions. This may be done by any of the following:

- Falsely selling your goods as those manufactured by another.
- Using, adopting, or imitating the distinctive name or trademark of another in a way that is calculated to deceive.

***Media24 Bpk v Ramsay, Son and Parker (Edms) Bpk*[2]**

The publisher of a magazine called *Weg* applied for a court order prohibiting the publication of a magazine called *Wegbreek*. The publishers of *Wegbreek* also published a magazine named *Getaway*, and had previously obtained an order prohibiting the applicant from publishing a magazine with a name that constituted passing off on the *Getaway* trademark.

The court held that the standard for proving deception was the probability, and not the reasonable possibility, of confusion. Since both parties had agreed in the settlement agreement to the previous case to use the names *Weg* and *Wegbreek* respectively, both parties had apparently considered the trademarks to be different. It was therefore difficult to accept that the differences between the two names were substantial enough to cause confusion among potential buyers of the magazines. There was accordingly no passing off.

- Using, adopting, or imitating the distinctive design or get-up of another's goods in a way that is calculated to deceive.
- Carrying on your business under the distinctive name of another business, so as to deceive the public into thinking that the two businesses are associated.
- Trading under the distinctive trade name of another so that your goods are passed off as the other's goods.

***Adcock Ingram Products Ltd v Beecham SA (Pty) Ltd*[3]**

The court held that passing off consists of a representation, direct or indirect, by a manufacturer or supplier that their business or goods or both are those of a rival manufacturer or supplier. In deciding whether or not there has been a passing off, the court will consider the whole get-up of the two businesses. This involves comparing appearances made to the public, impressions created, and comparisons of the items concerned.

Passing off may apply to slogans or visual images that can be used by radio, television or newspaper advertising campaigns to lead the market to associate with a product, provided that the descriptive material has become part of the goodwill of the product. The test is whether the product has derived from the advertising a distinctive character recognised by the public.[4]

- **Misappropriation of advertising value**: Consumers are mislead into thinking that a product or service is associated with another that is advertised. The trader who is

1 Terry, A and Giugni, D, *Business, Society and the Law*, 3rd edition, Melbourne: Thomson 2003.
2 *Media24 Bpk v Ramsay, Son and Parker (Edms) Bpk* 2006 (5) SA 204 (C).
3 *Adcock Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W).
4 *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* (1981) 55 ALJR 333 at 336.

unlawfully 'piggy-backing' their product onto another's advertising is in effect stealing the value created by the other's advertising.

Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and another[5]

Cochrane used the unregistered trademark CLEARVU extensively in relation to security fencing, and M-Systems sold a competing product. M-Systems paid Google for a service known as an AdWord. This meant that every time that CLEARVU was shown in a Google search, a linked advertisement was shown for M-systems and its competing product.

Cochrane claimed this was passing off, as it represented that the competing product was associated with Cochrane.

The court held that the important question was whether there was any likelihood of confusion on the part of consumers. Cochrane had not produced any evidence that this was likely, and so its case was dismissed.

- **Misappropriation of confidential information or trade secrets**: Information in the public domain that is easily accessible probably would not be classed as a trade secret. The courts would examine factors such as the commercial value and utility of the information to competitors, and the conduct of the owner in protecting the information. Information and trade secrets which have been found to be confidential include the following:
  - Customer lists kept confidential for purposes of a trader's own business.
  - Information received by an employee about business opportunities available to an employer.
  - Information received in confidence by an employee while acting in the course and scope of employment.
  - Information contained in stolen documents.
  - Information which, although public, has been acquired by the exercise of care and skill and use of labour.
  - Information relating to proposals for the name, design, packaging, get-up, and marketing of a new product, or the specifications and process of manufacturing a product, if these are the result of skill and industry and have been kept confidential.
  - Information made available by its owner to a user under a licence requiring the user to guard its secrecy.
  - Information relating to prices at which one person has tendered to do work competitively for another.
- **Misappropriation of a rival's performance**: The unlawfulness lies in the fact that the trader does not use their own efforts, but uses another person's knowledge as a springboard to obtain advantage for themself.
- **Spreading of disparaging and untrue allegations about a rival's goods, services, or business**.
- **Harassment of a rival's customers, suppliers, or employees**.
- **Instigation of a boycott against a rival**: It would be necessary to prove some form of wilful act or conduct that induces, coerces, or persuades people to act in a particular way. The effect of the act or conduct must be that people either stop doing business with a third party or break their existing business relationship with that person. As a

5 *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and another* [2016] 3 All SA 345 (SCA).

result of the boycott the trader's business or goodwill must be either potentially or actually prejudiced.

To establish unlawful competition at common law, the plaintiff must prove the following:[6]

- An interest in the information (which does not have to be ownership).
- The interest is confidential.
- A relationship between the plaintiff and the defendant, for example employment.
- The defendant knowingly made use of, or took, the confidential information.
- The defendant made improper use of that information to obtain an unfair advantage.
- The plaintiff suffered damages as a result.

Non-compliance with restraint of trade clauses in employment contracts may result in former employees being held liable under the common law for damages for the improper use of confidential information acquired from their previous employer – for example, using previous trade connections and customers.[7]

2 The Competition Act[8]

The Competition Act[9] applies to all economic activity within South Africa, or to any economic activity that has an effect in the country. This means that any transaction between people overseas that has an effect in South Africa is subject to the provisions of the Act.

The purpose of the Act is to promote and maintain competition in South Africa in order to provide consumers with competitive prices and product choices; expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa; and ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

The Act regulates mergers. In addition, it prohibits restrictive vertical practices, restrictive horizontal practices and abuse of dominance.

The Act creates three authorities to ensure compliance:[10]

- The Competition Commission investigates and evaluates mergers, prohibited practices and exemptions. It may allow or disallow small and intermediate mergers and makes recommendations to the Competition Tribunal regarding large mergers.
- The Competition Tribunal is responsible for the approval of large mergers. It adjudicates on conduct that is prohibited in terms of the Act and may impose penalties. It also hears appeals and reviews of the Competition Commission decisions.
- The Competition Appeal Court consists of three high court judges and shares exclusive appellate jurisdiction with the Tribunal in respect of most aspects of the Competition Act although there is a limited right of appeal to the Supreme Court of Appeal or to the Constitutional Court.

6 *Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W).

7 *Rawlins and another v Caravantruck (Pty) Ltd* [1993] 1 All SA 389 (A); *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd and others* [2005] 1 BLLR 104 (D).

8 Competition Act 89 of 1998.

9 Ibid.

10 Competition Act, *Business and Investment in South Africa*, Johannesburg: Cliffe Dekker Attorneys 2004.

2.1 Prohibited practices

The Act prohibits agreements or practices between competitors that substantially prevent or lessen competition in a market, unless a party to the agreement or practice can prove that technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect. The onus is on the firm engaging in the relevant practice to prove that the gains outweigh the anti-competitive effect.[11]

2.1.1 Restrictive horizontal practices

The Act specifically prohibits any restrictive horizontal practice:[12]

- **Price fixing**: It is prohibited for competitors to directly or indirectly fix prices, discounts, credit terms, or other price- and volume-related trading conditions. The prohibition applies irrespective of whether it is done by a group of purchasers or a group of sellers or service providers. A 'fee guideline' constitutes indirect price fixing.
- **Market sharing**: It is prohibited for two or more competitors to divide markets by allocating customers, suppliers, territories or specific types of goods or services. The term 'competitors' also extends to potential competitors.[13]
- **Collusive tendering**: Bid rigging is prohibited. For example, when competitors undermine the tender process by agreeing that one of them should not submit a tender, or submit a very high-priced tender so as to ensure that the other competitor wins.

***American Natural Soda Ash Corporation and another v Competition Commission of SA and others*[14]**

The court held that that in terms of the Competition Act,[15] price fixing was prohibited. This meant that the efficiency defence expressly contemplated by the defendant could not be raised to justify such conduct. Price fixing was inimical to economic competition, had no place in a sound economy and was anti-competitive. Evidence seeking to justify price fixing is irrelevant and inadmissible.

If a firm owns a substantial shareholding in another firm, or they share a common director, there is a presumption that an agreement between the two firms is a horizontal restrictive practice. This presumption does not apply to wholly-owned subsidiary companies.

2.1.2 Restrictive vertical practices

A 'vertical agreement' is one between a firm and its suppliers, or a firm and its customers. It will be a 'restrictive' vertical practice if it has the effect of substantially preventing or lessening competition in a market, unless a party can prove that the technological, efficiency, or other pro-competitive gain resulting from it outweighs the effect. Restrictive vertical practices are typically found in distributorship, licence, supply, purchase, franchise and certain agency agreements.

Any exclusive distribution, purchasing, licensing, franchising or know-how agreement, as well as any long-term exclusive supply agreement, must be capable of being justified in terms of the Act if the agreement prevents market access by other firms. Unless justified, the

11 Competition Act, *Business and Investment in South Africa*, Johannesburg: Cliffe Dekker Attorneys 2004.
12 Coetser, P, Competition Law Primer – The risk of (too) friendly competitors, *De Rebus*, Pretoria: Law Society of South Africa April 2006.
13 *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd and others* (case 95/IR/Oct05 unreported, 1-02-2006).
14 *American Natural Soda Ash Corporation and another v Competition Commission of SA and others* [2005] 3 All SA 1 (SCA).
15 Competition Act 89 of 1998.

relevant anti-competitive provisions may be struck down by an order of the Competition Tribunal.

'Minimum resale price maintenance' typically occurs when the supplier or producer of an item dictates to its distributor or retailer the price at which it must on-sell the product to third parties. For example, a situation where motor vehicle manufacturers place restrictions on vehicle dealers relating to the discounts they can offer on the vehicles sold to the public. If the dealers ignore these restrictions, penalties are imposed by the manufacturers.[16]

Minimum resale price maintenance is completely prohibited. Faced with such an allegation, all that an enforcement authority has to establish is that the conduct complained of did in fact occur. It need not show any effects on the competitive process. Moreover, the firm under scrutiny cannot produce evidence, however compelling, that the practice resulted in benefits for a given market.[17]

***Cancun Trading et al v Seven-Eleven Corporation*[18]**

Thirteen franchisees alleged that their franchisor had engaged in minimum resale price maintenance by requiring them to purchase goods from suppliers determined by it, and preventing them from purchasing identical and better-priced goods from competing suppliers. This substantially prevented or lessened competition in the relevant market in contravention of the Competition Act. Secondly, they argued that by requiring them to sell their merchandise at prices determined by it, the franchisor was in violation of the strict prohibition on minimum resale pricing under the Act.

The tribunal held that the franchisor did not permit its franchisees to sell their merchandises below the prices it had determined, or even at higher prices. Accordingly it had violated the Competition Act.

A supplier or producer, however, may recommend a minimum resale price to the reseller provided that it is clear that the recommendation is not binding, and if the product is clearly marked with the words 'recommended price' next to the stated price, wherever the price of the product is displayed. The recommendation of a minimum resale price must be genuine, and the supplier may not retaliate against a customer that decides to ignore it. If a supplier were to retaliate against a non-compliant customer, an enforcement authority is likely to regard the recommendation as a sham.[19]

***Competition Commission of South Africa v Federal Mogul et al*[20]**

A complaint was made that a company had reduced the rebate at which one of its customers supplied its products. This effectively increased the ultimate price, and was done in retaliation for the customer's decision to sell the company's products at a lower price than other customers.

The tribunal held that it was not necessary for the parties in a vertical relationship to agree on minimum price maintenance in order to establish a violation under the Act. Also, the Act was not

16 *Competition Commission v Toyota South Africa Motors (Pty) Ltd, Competition Tribunal Case* (case 41/CR/May04 (dated 2 June 2004) unreported).

17 Chalebi, M, Seven-Eleven and the Competition Tribunal – The audacity of hope, *De Rebus*, Pretoria: Law Society of South Africa July 2007.

18 Cancun Trading No 24 CC and others v Seven-Eleven Corp SA (Pty) Ltd, (CT) (unreported case no 18/IR/Dec99, 7-4-2000) .

19 Chalebi, M, Seven-Eleven and the Competition Tribunal – The audacity of hope, *De Rebus*, Pretoria: Law Society of South Africa July 2007.

20 *The Competition Commission of South Africa v Federal Mogul et al* (case 09/CR/Mar01).

concerned with the harm suffered by the targeted firm, but rather with the harm inflicted on the competitive process.

It may be more problematic to enforce a prohibition in a franchise agreement that precludes the franchisee from selling outside their territory or to certain types of customers. It is also not always easy to justify objectively prohibitions against the franchisee dealing with competitors of the franchisor or engaging in other business unrelated to the franchise. While an instruction to use only raw materials supplied by the franchisor or their nominee may be seen as protecting the integrity and quality of the franchised product (and should therefore generally be pro-competitive), this would not be the case where those materials are merely incidental to the end product or where they are very much more expensive in relation to the overall price.[21]

Franchisors often argue that the typical restrictive provisions in the franchise agreements protect their intellectual property against exploitation or dilution. However, this is not an automatic defence and the Competition Commission will consider a balance of all the various competitive considerations. It is possible for a franchisor to be exempted from the Act for this purpose; however, this must be applied for.[22]

Refer to chapter 29: '*Consumer protection*' and chapter 33: '*Franchising*'.

2.1.3 Abuse of dominant positions

The provisions of the Act relating to abuse of dominant positions only apply to firms with annual turnover or assets above R5 million.

A firm is 'dominant' in a market if it has at least 45% of that market; or over 35% of that market and is unable to prove that it does not have market power (the ability to control prices, exclude competition, or behave to an appreciable extent independently of its competitors, customers, or suppliers); or it has less than 35% of that market and has market power.

Abuse of a dominant position is prohibited. It is prohibited for a dominant firm to:

- Charge an excessive price to the detriment of consumers. An excessive price is one that bears no reasonable relation to the economic value of the product, as determined by costs analyses, comparative pricing exercises and the rate of return on average capital employed for similar goods.[23]

Harmony Gold Mining Ltd Durban Roodepoort Deep Ltd and Mittal Steel South Africa Ltd Macsteel International Holdings BV[24]

Macsteel received flat steel products from Mittal at prices significantly lower than those charged to other steel merchants. However, Macsteel was contractually prevented from making this steel available on the domestic market. Similar conditions were imposed on other customers. The contractual limitations all involved measures which prevented customers who received steel at prices lower than the pre-selected domestic list price from on-selling the product to domestic customers.

21 Coetser, P, Competition Law Primer – Prohibition of 'vertical' anti-competitive competitive practices, *De Rebus*, Pretoria: Law Society of South Africa May 2006.

22 Ibid.

23 Coetser, P, The abuse of dominance – The monopolist's preserve? *De Rebus*, Pretoria: Law Society of South Africa January/February 2006.

24 *Harmony Gold Mining Ltd Durban Roodepoort Deep Ltd and Mittal Steel South Africa Ltd Macsteel International Holdings BV* (13/CR/Feb04) [2006] ZACT 53 (19 June 2006).

The Tribunal said that price fixing through the manipulation of supply is the most conspicuous contravention of competition law and principles, and causes considerable damage to customers of the affected products and to the structure and fabric of the economy.

The Tribunal imposed a penalty of R691 800 000, representing 5.5% of Mittal's total turnover earned on flat steel in both the local and export market during the preceding year. This was significantly less than the additional revenue that the pricing methodology had produced in a six-year period of R20.7 billion.

The Tribunal also ruled that Mittal may not impose upon any customer of its flat steel products any conditions in respect of the customers' use or resale of those products. It also ordered Mittal to make known in the public domain at all times, its list prices, rebates, discounts and other standard items of sale for flat steel products.

- Refuse to give a competitor access to an essential facility when it is economically feasible to do so.
- Engage in an act that prevents a firm from entering into, or expanding within, a market by:
  - Requiring or inducing a supplier or customer to not deal with a competitor. For example, one cannot sell products on condition that the customer does not buy similar products from a competitor.

***Competition Commission v South African Airways*[25]**

Travel agents were offered additional incentive commissions by SAA if they sold SAA flights to their customers. The Competition Tribunal held that this constituted an inducement to agents to sell SAA tickets rather than tickets of competing airlines.

After an appeal, the High Court ordered South African Airways to pay more than R104 million to liquidated airline Nationwide, for damages caused by SAA's abuse of market dominance for the period between 2001 and 2006.

  - Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible.
  - Selling goods or services on condition that the buyer purchase separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract. For example, the dominant supplier of a cold drink may not require the retailers of the cold drink to buy or rent a fridge in which only those products may be kept. It may also be anti-competitive to bundle the sale of two unrelated products together at a price which is cheaper than that at which those items could be purchased separately.[26]
  - Selling goods or services below their marginal or average variable cost. This is called 'predatory pricing', and it is illegal because of the likelihood that, as soon as such sales have driven competitors out of the market, the dominant enterprise would increase its prices to monopolistic levels.
  - Buying a scarce supply of intermediate goods or resources required by a competitor.

25 *Competition Commission v South African Airways* [2005] CPLR 303 (CT).

26 Coetser, P, The abuse of dominance – The monopolist's preserve? *De Rebus*, Pretoria: Law Society of South Africa January/February 2006.

Price discrimination by a dominant firm is prohibited. An action by a dominant firm as the seller of goods or services is prohibited if: 1) it is likely to have the effect of substantially preventing or lessening competition; 2) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and 3) it involves discriminating between those purchasers in terms of the price or payment, any discount or rebate, or services in respect of the goods or services.

Despite the above, conduct involving differential treatment of purchasers will not be found to be prohibited price discrimination if the dominant firm establishes that the differential treatment:

- Makes only reasonable allowance for differences in cost, or the likely cost of, the manufacture, distribution, sale, promotion, or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers.
- Is constituted by doing acts in good faith to meet a price or benefit offered by a competitor.
- Is in response to changing conditions affecting the market for the goods or services concerned, including any action in response to the actual or imminent deterioration of perishable goods; any action in response to the obsolescence of goods; a sale pursuant to a liquidation or sequestration procedure; or a sale in good faith in discontinuance of business in the goods or services concerned.

Sasol Oil (Pty) Ltd v Nationwide Poles CC[27]

The Competition Tribunal found Sasol, a dominant firm having more than 45% share of the market, had discriminated against small purchasers who paid between 3.6% and 4% more for the product than large purchasers.

The Competition Appeal Court held that once a supplier has been proved to be dominant in the market and engaged in discriminatory pricing practice, the test was whether there was a reasonable possibility that competition could be adversely affected by a practice under which the dominant firm sold its goods at a cheaper price to some customers at the expense of others. Competition law did not protect the competitor; it protected competition. Evidence should have been led to show how Sasol's price discrimination affected small purchasers in general, and not an individual competitor.

The Competition Commission may grant an exemption from the prohibitions relating to abuses of firms in dominant positions, conditionally or unconditionally, provided that the agreement or practice contributes to the promotion of: exports; the ability of small businesses controlled or owned by historically disadvantaged persons to become competitive; the change in productive capacity necessary to stop decline in an industry; or to the economic stability of any industry designated by the Minister of Trade and Industry.

2.1.4 Restraint of trade agreements

When a business is sold, or shares in a company are sold, it is common for the new owners to include restraint of trade clauses in the agreement so as to prevent the previous owners from competing with them.

It is possible for a restraint of trade agreement to result in a group of manufacturers or suppliers fixing prices and restricting future competition. However, a restraint of trade clause

27 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 (3) SA 400 (CAC).

contained in a sale of business or shareholders' agreement will not necessarily be considered anti-competitive, provided that it is designed to protect the value of the investment and not designed to limit competition.[28]

Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission (CAC)[29]

DCH held 49% of a joint venture company, and wanted to increase its shareholding to 100%. A non-competition clause in the shareholders' agreement included provisions that restricted Dawn from ever manufacturing certain piping in competition with the joint venture company for however long DCH held shares in it.

DCH argued that the agreement was simply a normal restraint intended to protect its investment.

The Commission decided the restraint was unreasonable because it was not one of commercial necessity; the duration was too long and it operated against the buyer as opposed to the seller.

The Competition Appeal Court held that restraint clauses should not be viewed in isolation, but in context of the entire business transaction and the circumstances of the parties when making the agreement. Objective 'necessity' was too strict a requirement; instead, the court considered whether the main agreement (excluding the restraint) was contrary to any part of competition law; and, if so, was the restraint reasonably required; and, if so, was the restraint reasonably proportionate to the requirement? As the shareholders' agreement was not objectionable, the restraint was ancillary and in the ordinary course of business necessary to protect proprietary confidential information; it was also proportionate as it operated for the period that DCH was a shareholder.

2.2 Mergers

Merger is the direct or indirect acquisition or establishment of control by one or more firms over the whole or part of the business of another firm. The term 'firm' includes a person, partnership or trust. A merger may be achieved in any way, including through the purchase or lease of shares, an interest or assets of the other firm in question; and amalgamation or other combination with that other firm.[30]

The Competition Court of Appeal has given the term 'control' the widest possible meaning so as to allow the relevant competition authorities to examine a wide range of transactions. Control may be achieved by the purchase or lease of shares, interest of a member, or assets, or by the amalgamation or combination with that competitor, supplier, or customer.

The parties to a merger that exceeds certain combined asset or turnover thresholds established by the Competition Act may not implement the transaction without first obtaining the approval of the competition authorities.[31]

2.2.1 Categories of merger

There are three categories of merger: small, intermediate or large. The merger will fit into one or the other category based on thresholds prescribed by the Minister of Trade and Industry.

28 Jukuda, U, Not all restraints of trade fall foul of the Competition Act, *De Rebus*, Pretoria: Law Society of South Africa, October 2018 p 45.

29 *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* (CAC) (unreported case no 155/CACOct2017, 4-5-2018) (Rogers JA) (Davis JP and Boqwana JA concurring).

30 Competition law, *Business and Investment in South Africa*, Sandton: Cliffe Dekker Attorneys May 2005.

31 Ibid.

A 'small merger' occurs where the combined assets or turnover of the acquiring firm and the target firm are below R200 million or the target firm's assets or turnover are below R30 million.[32]

The merger is classified as an 'intermediate merger' if either of the South African assets or annual South African turnover of the target firm is not less than R100 million and:

- The combined annual turnover in South Africa of the target and acquiring firms is not less than R600 million; or
- The combined assets in South Africa of the target and acquiring firms is not less than R600 million; or
- The combination of the South African assets of the acquiring firm together with the annual South African turnover of the target firm is not less than R600 million; or
- The combination of the South African assets of the target firm together with the annual South African turnover of the acquiring firm is not less than R600 million.

The merger is classified as a 'large merger' if the South African assets or annual South African turnover of the target firm is not less than R190 million and:

- The combined annual turnover in South Africa of the target and acquiring firms is not less than R6.6 billion; or
- The combined assets in South Africa of the target and acquiring firms is not less than R3.5 billion; or
- The combination of the South African assets of the acquiring firm together with the annual South African turnover of the target firm is not less than R6.6 billion; or
- The combination of the South African assets of the target firm together with the annual South African turnover of the acquiring firm is not less than R6.6 billion.

2.2.2 Role of the Competition Commission

Small mergers may be implemented without approval from the Competition Commission. Where the Competition Commission has been notified of a small merger, it will assess it and may either approve it with or without conditions, or prohibit it, or prohibit its implementation if it has not been implemented.

The Minister of Trade and Industry is not permitted to participate in proceedings relating to small mergers. No filing fee is payable in respect of small mergers.

The Competition Commission must be notified of the proposed agreement to merge where the merger is intermediate or large. Notice must also be given to a representative trade union or representatives of the employees. Parties to a notified merger must wait for regulatory approval before they can implement the merger.

'Gun-jumping' refers to the actions that merging companies may take before their merger has become final in order to facilitate the merger and to speed up the integration of the companies. Typically they may include co-ordination or imposition of mutual restrictions on prices, allocation of customers or markets, sharing of competitive information, or closure of operations. While certain pre-merger co-ordination may be acceptable in certain circumstances, what gun-jumping seeks to prevent is the implementation of a merger until approval has been given. Disregarding this rule undermines the purpose of the regulatory authority assessing the merger and determining its likely effect on competition.[33]

32 *Government Gazette* 41124 of 15 September 2017.

33 Chabeli, M, Gun-jumping in South Africa – Diminishing the spoils of the prize, *De Rebus*, Pretoria: Law Society of South Africa October 2005.

Filing fees for intermediate and large mergers are R165 000 and R250 000 respectively.

The failure to notify a merger to the competition authorities will be penalised, even when the failure is based on a mistaken interpretation of the law. They may take an innocent motive into account when determining an appropriate sanction.

Extensive co-ordination by parties pursuant to a merger that was not notified could increase the likelihood of a higher fine. If parties to a merger are uncertain about their obligation to notify, they should seek early guidance from the Competition Commission, and not simply decide that they do not have to notify.[34]

***Competition Commission and The Tiso Consortium and others*[35]**

New Africa Investments Limited (Nail), announced a sale of its media assets. The bidders were Tiso Consortium (TC) and Kagiso Consortium (KC). KC's bid stated that it was subject to approval by the competition authorities, while TC's stated that its bid was not subject to such approval, based in their view that the transaction was not notifiable to the competition authorities. Because of the perceived absence of regulatory hurdles that the TC offer promised, its offer was accepted unconditionally by Nail. KC applied to the Competition Tribunal to interdict the implementation of the merger.

The Competition Commission investigated the premature implementation of the merger by TC and Nail. A settlement was reached under which TC agreed to pay an administrative fine of R500 000.

The Competition Commission is required to approve or prohibit a small or intermediate merger notified to it within 20 business days after the parties have fulfilled all their notification requirements in the prescribed manner. However, the Competition Commission may extend this period itself by a further period of 40 business days. If it has not prohibited the merger on expiry of that additional time period, the merger will be deemed to have been approved.

The Competition Commission is required to complete its investigation in the case of large mergers and make its recommendation to the Competition Tribunal within 40 business days, but the Tribunal may grant the Commission extensions of not more than 15 days at a time. The overall period within which a large merger must be approved or prohibited by the Tribunal has no limit.

The Competition Commission may approve the merger, with or without conditions, or prohibit implementation of the merger by the issue of a certificate. Reasons for the decision must be provided and a notice published in the *Government Gazette*.

If the Competition Commission prohibits a merger, or approves a merger subject to any conditions, an aggrieved party may request the Competition Tribunal to reconsider the conditions or prohibition.

The Competition Tribunal then will consider whether the merger:

- Is likely to result in any technological, efficiency, or other pro-competitive gain which will be greater than the effects of the lessening of competition.
- Is likely to prevent or lessen competition. It does this by considering the actual and potential level of import competition in the market; the ease of entry into the market,

34 Chabeli, M, Gun-jumping in South Africa – Diminishing the spoils of the prize, *De Rebus*, Pretoria: Law Society of South Africa October 2005.

35 *Competition Commission and The Tiso Consortium and others* (case 82/FN/Oct 2004).

including tariff and regulatory barriers; the level, trends of concentration, and history of collusion in the market; the degree of countervailing power in the market; the likelihood that the acquisition would result in the merged firm having market power; the dynamic characteristics of the market, including growth, innovation, and product differentiations; the nature and extent of vertical integration in the market; and whether the business or part of the business of a party to the merger has failed or is likely to fail.
- Can be justified on public interest grounds. It does this by considering the effect of the merger on a particular industrial sector or region; employment; the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets.

Within 30 days of the decision of the Competition Tribunal, any aggrieved person may appeal against the decision to the Competition Appeal Court, which may confirm, amend, or set aside the decision.

Takeover, offers and fundamental transactions are dealt with in this text in chapter 27: '*Corporations*'.

2.2.3 Role and powers of the Competition Tribunal

The Competition Tribunal may confirm a consent agreement as an order of the Competition Tribunal, which may include an award of damages to the complainant; or may make an appropriate order in relation to a prohibited practice:
- Order an interdict of any prohibited practice.
- Order a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice.
- Impose an administrative fine, which may not exceed 10% of the firm's annual turnover in South Africa and its exports during the preceding financial year.
- Order divestiture: The party may be ordered to sell any shares, interest, or other assets it has acquired pursuant to the merger. A time can be set for compliance.
- Declare the conduct of a firm to be a prohibited practice.
- Declare the whole or any part of an agreement to be void.
- Order access to an essential facility on any terms reasonably required.

Any decision, judgment, or order of the Competition Commission, the Competition Tribunal, or the Competition Appeal Court has the same effect as an order of the High Court.

2.3 Remedies

2.3.1 Civil remedies[36]

If a merger is implemented in contravention of the Competition Act the Competition Tribunal may impose a penalty of up to 10% of a firm's annual turnover; order divestiture of a firm's assets, or any shareholder's shares; or declare void any provision of a merger agreement.

36 Competition Act, *Business and Investment in South Africa*, Johannesburg: Cliffe Dekker Attorneys 2004.

The Competition Tribunal may make an appropriate order in relation to a prohibited practice, including:[37]

- Interdicting any prohibited practice.
- Ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice.
- Imposing an administrative penalty of up to 10% of a firm's annual turnover.
- Ordering divestiture of assets or shares if the prohibited practice cannot adequately be remedied in terms of another provision of the Competition Act or is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.
- Declaring conduct of a firm to be a prohibited practice in terms of the Competition Act.
- Declaring the whole or any part of an agreement to be void.
- Ordering a firm to allow access to an essential facility on terms reasonably required.

***Competition Commission v Pioneer Foods*[38]**

The Competition Tribunal found that four companies contravened the Competition Act by engaging in cartel arrangements. There had been collusive conduct across the country. During 1999 they agreed to divide markets among themselves. Between 2003 and 2004 they fixed the selling price of bread – entered into a 'gentlemen's agreement' in terms of which, during the period of bread price increases, they would not allow their customers to switch suppliers. During 2006 three of the companies fixed the selling price of bread; none of them would supply new distributors or hire the others' former employees.

The Tribunal found Pioneer guilty of price fixing and market allocation for bread, and an administrative penalty of R195.7 million was imposed.

The Competition Commission filed a notice of appeal to the Competition Appeal Court to have the penalty revised upwards.

Pioneer paid the penalty and reached a settlement in respect of additional cases being investigated. Pioneer paid an additional penalty of R250 million; donated R250 million to create an agricultural competitiveness fund to promote employment and business development in the industry; reduced the price of its bread so that its margin was R160 million lower; and promised co-operation with the Competition Commission in other ongoing investigations.

The Competition Tribunal may grant interim relief in the form of an interdict, after giving the respondent a reasonable opportunity to be heard, if it is reasonable and just to do so, having regard to the evidence relating to the alleged prohibited practice; the need to prevent serious or irreparable damage to the applicant; and the balance of convenience.[39]

After the Competition Tribunal has found that a firm has engaged in a prohibited practice, a party wishing to claim damages must do so in the civil courts. The Competition Act makes it clear that the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and the awarding, of damages arising out of a prohibited practice.

37 Competition Act, *Business and Investment in South Africa*, Johannesburg: Cliffe Dekker Attorneys 2004

38 *Competition Commission v Pioneer Foods* (Competition Tribunal) (unreported cases nos 5/CR/Feb07 and 15/CR/May/08, 3-2-2010).

39 Makhubele, D, Fighting over breadcrumbs – Cartels and the Competition Act 89 of 1998, *De Rebus*, Pretoria: Law Society of South Africa March 2014.

2.3.2 Criminal offences

It is a criminal offence to contravene or fail to comply with an interim or final order of the Competition Tribunal or Competition Appeal Court or to engage in certain conduct, for example, doing anything to influence the Tribunal or the Commission improperly. A fine of up to R500 000 can be imposed, or up to ten years' imprisonment, or both.

It is also an offence in terms of the Act for any person to:

- Improperly disclose confidential information about a firm obtained in carrying out any function or initiating any complaint in terms of the Act.
- Obstruct or unlawfully influence any person performing a duty in terms of the Act.
- Fail to attend any hearing, fail to be sworn in, or fail to produce any book, document, or item ordered to be produced.
- Fail to answer any question fully and to the best of their ability, or give false evidence knowing it to be false.
- Fail to comply with an order of the Competition Tribunal or the Competition Appeal Court.
- Do anything calculated to influence the Competition Tribunal or the Competition Appeal Court improperly.
- Knowingly provide false information to the Competition Commission.
- Defame a member of the Competition Tribunal or the Competition Appeal Court.

Convictions of any of the above offences carry maximum penalties of a fine not greater than R2 000, or up to six months' imprisonment, or both.

3 Trade Practices Act

The Trade Practices Act[40] prohibits ambush marketing of sponsored events. It is also an offence to make, publish or display any false or misleading statement or advertisement, which suggests an association between that person and a sponsored event or the person sponsoring the event. It is also an offence to cause such statement or advertisement to be made, published or displayed.

'Ambush marketing' occurs when major public events, like rock concerts or sporting events, are targeted by sellers of products and services in order to promote their goods and services. They generally do not have any sponsorship or other contractual association with the organisers of the event, nor do they pay any licence or sponsorship fees to the organisers, but seek to take advantage of the high media profile of the event. This dilutes the commercial value of an event for both the sponsor and the organiser of an event and poses a threat to the long-term future of the idea of the commercial sponsorship of events.[41]

The Act defines an advertisement as any written, illustrated, visual or other descriptive material or oral statement, communication, representation or reference distributed to members of the public or brought to their notice in any manner whatsoever and which is intended to (a) promote the sale or leasing of goods or encourage the use thereof or draw attention to the nature, properties, advantages or uses of goods or to the manner in, conditions on or prices at which goods may be purchased, leased or otherwise acquired; or

40 Makhubele, D, Fighting over breadcrumbs – Cartels and the Competition Act 89 of 1998, *De Rebus*, Pretoria: Law Society of South Africa March 2014.

41 Dean, O, *Handbook of South African Copyright Law*, Cape Town: Juta 1987; Dean, O, Ambush marketing and protected events, *De Rebus*, Pretoria: Law Society of South Africa November 2003.

(b) promote or encourage the use of any service or draw attention to the nature, properties, advantages or uses of any service or the manner in, conditions on or prices at which any service is rendered or provided.[42]

The important feature of the prohibition in the Act is that there is no requirement for the statement to be false or misleading in 'material' respects. An advertisement will be misleading if it implies or even suggests a contractual or other association between the advertiser and the event or the sponsor.

It is, however, doubtful whether the Act is sufficient to counteract more ingenious forms of ambush marketing, such as the placing of a banner among the crowd at an event or flying an advertising message over a stadium or displaying a message on mobile billboards prominently in the vicinity of an event.

The Act provides only criminal sanctions. The search and seizure provisions of the Criminal Procedure Act[43] can be invoked where necessary and the suspect can be arrested and charged with a statutory offence under that Act. The matter must be dealt with like any other criminal case.

Penalties in the case of a first conviction are a fine or imprisonment of up to two years or both such fine and imprisonment. In the case of a second or subsequent conviction, an offender can receive a fine or a prison sentence of up to five years or both such fine and imprisonment.

THIS CHAPTER IN ESSENCE

1 Common-law forms of unlawful competition include passing off; misappropriation of advertising value, confidential information, trade secrets or a rival's performance; spreading of disparaging and untrue allegations about a rival's goods, services, or business; harassment of a rival's customers, suppliers, or employees; or instigation of a boycott against a rival.
2 The Trade Practices Act prohibits ambush marketing of sponsored events. It is also an offence to make, publish or display any false or misleading statement or advertisement, which suggests an association between that person and a sponsored event or the person sponsoring the event.
3 The purpose of the Competition Act is to provide consumers with competitive prices and product choices; expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa; and ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the economy.
4 The Competition Act regulates mergers, which are the direct or indirect acquisition or establishment of control by one or more firms over the whole or part of the business of another firm. Mergers may be small, intermediate or large. If a merger is implemented in contravention of the Act the Competition Tribunal may impose various penalties, including up to 10% of a firm's annual turnover; order divestiture of a firm's assets, or any shareholder's shares; or declare void any provision of a merger agreement. In addition, a fine of up to R500 000 can be imposed, or up to ten years' imprisonment, or both.
5 In addition, the Act prohibits restrictive vertical practices, restrictive horizontal practices and abuse of dominance.

42 Dean, O, Ambush marketing and protected events, *De Rebus*, Pretoria: Law Society of South Africa November 2003.
43 Criminal Procedure Act 51 of 1977.