

Competition law and consent agreements, closing the door on civil damages?

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For the last three months of 2021 through to January 2022, the Competition Commission (“**Commission**”) was hard at work and entered into several consent agreements to close out investigations into anti-competitive behaviour. Companies from a wide array of industries were dealt with, amongst others, outdoor digital advertising, supply of school uniforms, original equipment manufacturing, pathology services, supply of diagnostic sets, transportation services and the grocery market.^[1]

There is a commonality with most of these consent orders in that there is a “*no admission*” clause meaning that despite being investigated by the Commission, the companies that were investigated and entered into the consent agreement, did not admit to any wrongdoing and did not admit liability for any wrongdoing.^[2] The Commission’s reasons for accepting this outcome, appear to be almost carbon copies across the consent agreements that were concluded based on no admission of liability. These reasons were that –^[3]

- the respondent is a small firm;
- the respondent is a first-time offender and has not contravened the Competition Act 89 of 1998 (“**Competiton Act**”);
- the effects of the respondent’s conduct were insignificant in nature; or
- the quantum (for example, a tender) was too small.

Concluding a consent agreement

There are many reasons why a company under investigation for a contravention of the Competition Act would opt into concluding a consent agreement. For example, consent orders are a mechanism in terms of which the Commission and respondent can expeditiously settle a matter and avoid often protracted and costly litigation.^[4] It is also important to mention that once a consent agreement has been concluded, it is referred to the Tribunal to be approved as a consent order, thereby giving it the same status as an order of the High Court.

Since the inception of the Competition Act, consent agreements have increasingly played a significant role and are being extensively used to resolve disputes. During the 2020 – 2021 financial year alone, the Commission concluded 59 (fifty-nine) settlement agreements and levied R23 571 849.95 in penalties.^[5]

The effect of the above “*no admission*” clause to a consent agreement is important.

Section 65(6) of the Competition Act speaks to the finality of consent orders and bars the subsequent award of damages if a person has been awarded damages in terms of a consent order. The Tribunal has pronounced on this finality. In *Competition Commission v AECl Limited & others*^[6] it was held that –

*“Since, as observed, the agreement provides for a final settlement of the complaint, it is not surprising that the respondents would be eager to consent to a remedy, which has no serious impact on their business and **does not result in a penalty or the possibility of civil damages.**”* [Emphasis added]

Transgressions of the Competition Act

There can be no dispute in terms of competition law that anti-competitive practices negatively impact and harm the competitive functioning of markets and the economy in general. But import also is that transgressions of the Competition Act harm consumers and other firms alike.

The Competition Act acknowledges the fact that anti-competitive behaviour can result in harm, otherwise damages. Therefore, its provides that those that have been negatively impacted and that have suffered damages as a result of an anti-competitive practice can claim compensation, civil damages.

The Tribunal is empowered in terms of section 49D to confirm consent orders that contain damages awards. But it is a civil court that can award damages suffered by private litigants as a result of contraventions of the Competition Act. Also, a civil court will rely on the determination of the Competition Tribunal or Competition Appeal Court, in assessing the damages claim. In line with the Competition Act, a civil court is not tasked with reconsidering the merits of the anti-competitive conduct and assessing whether a contravention of the Competition Act occurred.

What is required is that a civil court will assess the remaining elements necessary for a successful damages action, being the elements of causation and the extent of damage caused^[7]. Where a consent agreement has been entered into based on no liability, it will be up to the claimant to demonstrate liability for anti-competitive behaviour in civil damages claim.

Penalties and sanctions, including potential civil damages claims, are aimed at deterring companies from contravening the Competition Act and causing harm to the economy and other firms or individuals. In contemplating compliance or non-compliance with the Competition Act, companies must be aware that their actions could have a negative impact on their own financial position, both in terms of administrative penalties and civil damages. It also ensures that those suffering harm will be protected.

So, the question at this stage is, what are the rules for liability in the eyes of the Commission now. And even more so, to what extent does the current approach by the Commission make it difficult or then impossible for those that have suffered harm, to claim civil damages, if the Competition Commission agrees to a consent order that states no one is liable?

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^[1] Please refer to the consent agreements concluded with Denso Corporation, Drs Dietrich, Voigt, Mia & Partners and Dr WJH Vermaak Incorporated (PathCare); BMS Medical CC, PNM Shorthauliers (Pty) Ltd, Insight Outdoor (Pty) Ltd, McCullagh and Bothwell (Hyde Park) (Pty) Ltd; McCullagh and Bothwell (Pty) Ltd and DRRW Investments (Pty) Ltd, Pathcare, Mokgatshelwa and Monnye and Khomo Construction.

^[2] The “*no admission*” clause is usually along the following lines –

*“Nothing in this Consent Agreement amounts to or should be construed as an **admission of any facts, conduct, liability or wrongdoing on the part of...**”* [Emphasis added]

^[3] *Ibid.*

^[4] See *Foskor (Pty) Ltd v Competition Commission and Others* (CO037Aug10/VAR240Feb16) [2019] ZACT 85 (18 December 2019).

^[5] See the Annual Report 2020-21 of the Commission, available at https://www.compcom.co.za/wp-content/uploads/2021/12/Competition-Commission-2020_21-Final-Annual-Report.pdf, accessed on 18 January 2022.

^[6] CT Case No: CO204Oct17.

^[7] *American Natural Soda Corporation v Competition Commission 2003 5 SA 633 (CAC) 639-640*



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