CONSTITUTIONAL COURT OF SOUTH AFRICA

Competition Commission of South Africa v Media 24 (Pty) Limited

CCT 90/18

Date of hearing: 22 November 2018
Date of hand down: 3 July 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 3 July 2019 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Competition Appeal Court (CAC), which overruled a decision of the Competition Tribunal (Tribunal) relating to predatory pricing.

The application concerned the jurisdiction of the Constitutional Court in relation to Media24's pricing behaviour in the Welkom newspaper market. The original complaint that gave rise to this matter was lodged with the Competition Commission (Commission) by Media24's competitor, Gold Net News. Between 1999 and 2009, Media24 owned two newspapers that were distributed in the Welkom area, namely Vista and Forum. Media24 was dominant in this newspaper market while Gold Net News had about a quarter of the market share. Vista, Forum and Gold Net News were distributed for free in the Welkom area and made money by selling advertising space in the newspapers. Between 2004 and 2009, Media24 drastically cut the rates which Forum was charging for its advertisements. Gold Net News argued that the lowered prices were below Forum's costs. In January 2009, Gold Net News exited the market. Nine months later, Media24 closed down Forum, leaving Vista as the only newspaper in the market. After its investigation, the Commission referred a complaint regarding Media24's alleged predatory pricing to the Tribunal.

The Tribunal held that Media24's pricing was not below either of the price standards contained in the Competition Act's prohibition against predatory pricing. The Tribunal, however, found that Media24 had contravened the catch-all provision of the Act which prohibits exclusionary acts. The Tribunal accepted that the average total cost of producing a product constituted an appropriate pricing threshold for the determination of predatory pricing. The Tribunal held that Media24 had priced below its average total costs for the complaint period. This, together with Media24's intention to perform a predatory act, was held by the Tribunal to imply that Media24 was guilty of predatory pricing.

On appeal, the CAC overturned the Tribunal's finding for two key reasons. First, the CAC held that predatory pricing can only be proven through evidence of specific exclusionary conduct, and not evidence of the intention with which that conduct was committed. Second, the CAC held that the average total cost threshold advanced by the Tribunal was inappropriate.

The Commission sought leave to appeal in the Constitutional Court against the CAC's judgment and order. The Commission argued that the CAC's findings were contrary to the purpose and objectives of the Competition Act. The Commission also requested clarification from the Constitutional Court regarding the appropriate cost threshold for the determination of whether low prices constitute predatory pricing. Conversely, Media24 supported the CAC's approach to the determination of predatory pricing.

The first judgment, penned by Goliath AJ, and concurred in by Mogoeng CJ and Dlodlo AJ, held that the application raised both a constitutional issue within the Constitutional Court's jurisdiction and an arguable point of law of general public importance that ought to be considered by this Court. On the merits, the first judgment found that the decision of the CAC limits the prosecutorial powers of the Commission and wrongly disregards all evidence of a dominant firm's predatory intention as being irrelevant. The first judgment further found that the Commission should be empowered to plead whatever costs benchmark best suits the facts of the case. According to the first judgment, this should include the average total cost standard when there is sufficient additional evidence which illustrates that pricing was lowered by a dominant firm for no rational reason besides to force the exit of its competitor. The first judgment would have upheld the appeal.

A second judgment penned by Froneman J, Cameron J and Khampepe J, and concurred in by Petse AJ, found that it was not in the interests of justice for the Constitutional Court to engage in the enquiry regarding predatory pricing benchmarks. The second judgment held that this application did not raise a purely legal issue, but rather one of mixed fact and law. According to the second judgment, the appropriate benchmarks for predatory pricing under the Competition Act

inevitably depended on an assessment of the relative merits of expert evidence. The second judgment held that this assessment fell beyond the functional competence of this Court. For that reason, the second judgment held that this Court cannot exercise its jurisdiction as it does in those rare instances where purely legal issues of interpretation arise in the work of the Tribunal and the CAC. The second judgment would have dismissed this application for leave to appeal.

A third judgment, penned by Theron J and concurred in by Basson AJ, found that although this matter did not raise a constitutional matter, it did raise an arguable point of law of general public importance that ought to be considered by the Constitutional Court. According to the third judgment, the application raised a point of law regarding whether it is appropriate to determine if prices are predatory by considering the average total cost standard and the intention of a dominant firm to predate. As for the merits of this matter, the third judgment held that the average total cost standard is an inappropriate measure for assessing predatory pricing. The third judgment held that the interpretation of the Competition Act adopted by the first judgment is contrary to the objectives of the Act and may severely undermine price competition and in so doing harm consumer welfare. The third judgment also found that predatory intent is irrelevant to the objective, outcomes based assessment of predation. The third judgment would have dismissed the Commission's appeal.

In a further judgment, Mhlantla J concurred with the first judgment on the merits of this matter and with the third judgment on the issue of jurisdiction and leave to appeal.

The effect of these four judgments is that six members of the Constitutional Court held that this application raised an arguable point of law of general public importance within this Court's jurisdiction and granted leave to appeal against the judgment and order of the CAC. On the merits, six members of this Court did not uphold the appeal. There was thus a majority decision that the application raised an arguable point of law of general public importance within this Court's jurisdiction, that leave to appeal should be granted, and that the appeal must be dismissed with costs.