CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 90/18

Date of hearing: 22 November 2018

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 Thursday, 22 November 2018 at 10h00, the Constitutional Court will hear 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.

Predatory pricing refers to pricing of a product by a dominant firm that is below the cost incurred in producing that product. Such pricing will occur over a limited period of time and will force, or be likely to force, competitors to exit the market as they cannot compete with the low prices and recover the costs necessary to operate their business. This strengthens the dominant firm's share in the market and reduces competition. Once competitors have left the market, the dominant firm will raise their prices exponentially to recover the losses that they previously incurred and this is to the detriment of consumers.

The Competition Act prohibits predatory pricing in two sections. One section contains a specific prohibition against pricing below two particular pricing thresholds. The second section is a catch-all provision that prohibits all behaviour that impedes or prevents a firm from entering the market or expanding in the market.

The matter concerns a complaint against Media24 in relation to its pricing behaviour in the Welkom newspaper market. An original complaint was lodged against Media24 by their competitor, Gold Net News, with the Competition Commission for investigation. Between 1999 and 2009, Media24 owned two newspapers that were distributed in the Welkom area: Vista and Forum. Media24 had dominant control of the newspaper market

but there also existed a competitor newspaper, Gold Net News, which catered to about a quarter of the market. All three newspapers were distributed for free in the Welkom area and made money by selling space in the newspapers to advertisers. Between 2004 and 2009 Media24 drastically cut the rates that Forum was charging advertisers. Gold Net News argued that the prices were so low, that they amounted to pricing below the cost of producing the paper. In January 2009, Gold Net News was forced to exit the market as it could no longer compete with the low prices being charged by Media24. Nine months later, Media24 closed down Forum leaving Vista as the only newspaper in the market. After its investigation, in October 2011, the Competition Commission referred a complaint of predatory pricing on the part Media24 to the Tribunal.

Before the Tribunal, the Commission argued that Media24 had retained Forum as an active newspaper and used it to charge prices to advertisers that were below cost. It was argued that because Forum was run by a large multi-company enterprise – Media24 – it could be run at a loss and this would simply be covered using the profits of Media24's other newspapers. The Commission alleged that this pricing behaviour amounted to predatory pricing prohibited by the Competition Act.

The Tribunal held that Media24's pricing was not below either of the price standards contained in the section of the Competition Act that specifically prohibits predatory pricing. However, the Tribunal held that Media24 had contravened the catch-all section of the Act that prohibits exclusionary acts. The Tribunal accepted that a good pricing threshold that courts could have regard to in determining predatory pricing, was whether the price charged was below the average total cost of producing a product. The Tribunal held that Media24 had priced below its average total costs for the complaint period but acknowledged that this alone was not enough to prove predatory pricing. However, it concluded that Media24 was guilty of predatory pricing because it priced advertising in Forum below the average total cost of producing Forum and it had the intention to perform a predatory act.

The Tribunal's decision was appealed to the CAC. The CAC overturned the Tribunal's finding for two key reasons. First, it 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 Court held that the price threshold supported by the Tribunal was inappropriate. The CAC observed that there might be rational business reasons for pricing below the total cost of producing a product and consequently, it cannot be an accurate measure of whether predatory pricing has occurred. The CAC instead relied on a different price threshold and held that Media24 had priced above this and therefore had not participated in predatory pricing.

The Commission now seeks leave to appeal to this Court against the CAC's findings. They submit that this Court must determine the appropriate cost threshold to be used by courts in determining whether low prices constitute predatory pricing. The Commission contends that the CAC's findings are contrary to the purpose and objectives of the Competition Act. The Commission also argues that the Tribunal was correct in its approach because it assists small and medium sized businesses to hold large multi-

product businesses accountable for predatory acts. Conversely, Media24 argues that the CAC was correct in its approach to a pricing threshold because the test for predatory pricing should be focused on conduct and not the intention of the parties. Media24 further submits that predatory pricing should be established using a threshold which establishes the price at which a firm recovers all of the costs incurred in producing a specific product, without looking at total costs that might be inflated by other factors.