

## **OPENING SPEECH FOR CC/CT/MANDELA INSTITUTE CONFERENCE**

My task is to welcome you to this day-long conference hosted by the Competition Commission, the Competition Tribunal and the Mandela Institute. I want to share some reflections with you on the conference and, in general, on the state of competition enforcement in this country.

We have held several conferences before but this differs in important respects from those previous efforts. Let me highlight two of these differences:

Firstly, we have never before co-hosted the conference with an academic institution. Some may believe this to be of little significance. I would not agree. I think that it reflects the insertion of competition law into the teaching and research agenda of the university that will, in its time, significantly enhance the quality of enforcement and the legitimacy of the entire competition project. This association between the Mandela Institute and the competition authorities demonstrates that the University's concern with the competition project has moved away from a narrow focus on training competition lawyers for the private bar towards, as befits a publicly funded institution, the development of a public resource which will be drawn upon and strengthened by an association with both the public and private sectors. I have no doubt that competitive dynamics in the tertiary education market will see this replicated on other campuses. An important remaining task is to spread this to the economics faculties of universities. Again I have little doubt that this will be done – one needs only look at the increasingly high quality of economic research and analysis that South African economists, both inside and outside the Commission, are injecting into the work of the competition authorities, to realize that this will have a positive feedback on the economics teaching and research.

Secondly, our previous conferences have tended to focus on international experiences in competition enforcement. This represented our attempt to learn from more experienced jurisdictions than our own. While these attempts have borne considerable fruit, it is significant that this conference is clearly focused on our own Act, on our own enforcement regime, and on our own decisions. This too reflects the maturing of our competition regime and the quality of its outputs. The fact is that in the relatively short space of eight years the CC and the CT have created an enforcement regime and an associated jurisprudence whose efforts merit the attention of a conference of this quality. It is a source of some concern that the overwhelming majority of the conference papers will be presented by those who are not, by virtue of their employment, predisposed to search for means of strengthening competition enforcement – certainly future conferences should try and draw more on the work of competition officials and relatively independent thinkers in the universities – but this does not detract from my essential point that the character of this conference represents one measure of the impact that the competition authorities have had in the society. I understand perfectly well that it is not the competition authorities alone who are responsible for the quality of our competition regime – certainly the work of the Tribunal and the quality of its decision making benefits from the sophistication of our legal and, increasingly, economics professions, but in the end the quality of a regulatory regime will be as good as those charged with administering it. I think this conference concretely demonstrates that we have a world class statute with world class institutions in a vitally important area of considerable technical

complexity where the forces that would undermine our best efforts are both well-resourced and determined.

This is not at all meant to suggest that there is not considerable room for critical reflection and change. There is and this conference is one amongst several efforts to provide that reflection. In President Mbeki's state of the nation address earlier this year he committed government to strengthening the competition authorities. I think that the precise direction that this strengthening might take could derive much from the experience of competition enforcement to date. For example, my reading of the progress of the banking enquiry is that the power to conduct market enquiries of this sort should be formalized in the legislation - that is to say the Commission should be granted the full extent of its investigative powers in undertaking enquiries of this sort and a role for the Tribunal in hearing the outcome of those investigations should be considered. When I see what is happening in the area of cartel enforcement, it is not difficult to conclude that the corporate leniency programme which appears to be bearing considerable fruit needs to be placed on a firmer statutory basis and our remedial powers in the area of hard-core cartelization need to be strengthened.

There is much, of course, that we in the authorities can do without legislative amendment. Speaking from the perspective of the adjudicative body, I would like to see the Commission developing more effective methodologies for gathering and placing before us evidence derived from consumer surveys and studies. I appreciate that gathering this data is resource consuming but it will add much to the quality of our system when dealing with matters, as we have done, in areas like furniture and other retail, liquor, bread and milk. It will also enhance the Commission's standing as an advocate of competition and competition as a friend of the consumers. Possibly the next conference should be one that focuses more on the economics of competition investigation and adjudication including ideas on the gathering of appropriate evidence.

For our part I would like to find ways of reducing the scale and duration of hearings in contested mergers. Anyone who has been involved in the discovery and hearing processes in mergers like Medi-Clinic/Afrox or Sasol/Engen will appreciate what I mean. But I think that this will not happen until the merging parties are more forthcoming in their engagement with the Commission, until, in other words, they begin to treat the Commission's requests for information as they would a discovery process. If they don't, they invite intervenors - with their inevitably complex motives - into the investigatory and adjudicative process. And we will continue to rely on intervenors because as tedious as the massive, essentially adversarial, discovery processes have proved to be, I am the first to acknowledge that they have produced a quality of evidence that has been invaluable to the process of adjudication.

I think that one element of the system that has yet to fully mature is the relationship of the two bodies who are co-hosting this conference - the Commission and the Tribunal - to the appeal process. Let me try and characterise my concerns here. It's a funny business the practice of the law, and especially so for someone like me who is privileged to have participated in it at such a high level without growing up in it so to speak. It's characterized by the most cut-throat, vicious engagements, but they are couched in the language of the most obsequious respect particularly towards those institutions and persons of higher rank in the system - terms like 'learned leader', 'honourable tribunal', 'with the greatest respect', and all the rest of the bowing and scraping take some getting

used to especially when they preface or qualify an attempt to demonstrate that the views that you have just expressed are completely idiotic. I confess though that, as one begins to understand or at least tell oneself that it is, to some extent, a necessary part of the adjudicative system, one can get to like it all too much.

But where it gets really complicated is when, in the midst of all the hand-wringing respect that the lower ranks are expected to show their superiors, one learns that an equally important part of the system is the necessary deference that higher bodies must, in key instances, show towards lower ones. I know this because I recall being told recently, in no uncertain terms, albeit with the greatest respect of course, of the duty of deference owed by the Tribunal to the Commission. This concerned a merger that put the seal on a restructuring of the holdings of the Netcare Group, a loyal customer of ours, in which I was absolutely convinced – probably incorrectly as it so happens but that’s not the point - that the Commission had had the wool pulled over its eyes and had assumed jurisdiction over two intermediate mergers notified to it that should have been notified as a single large merger and so properly subject to the scrutiny of the Tribunal. The panel, and I in particular, cast around for arguments that would have allowed us to assume jurisdiction over the transactions in question and, potentially, to overturn the decisions of the Commission. I got a very firm, albeit respectful, lecture from Netcare’s counsel on the necessity to show deference to the Commission’s right to take the decision in question, a lesson that, at the time, I didn’t particularly want to hear but that I had to acknowledge was correct and important, one of those rare occasions when I went back into the transcript, extracted the speech in question and put it in a very small file that I have of important lessons that I will need constantly to remind myself of.

I did though find myself wondering whether the same Counsel had raised the question of deference at the hearing at which he persuaded the CAC hearing to overturn our decision to prohibit the *Medicross-Primecure* merger. I suspect not. I suspect that rather what was stressed by him on that occasion was the duty of the higher body to supervise the doings of the lower body. I say this because no deference was shown us whatsoever. A Tribunal panel had heard days of oral testimony, read a voluminous record and had arrived at a market definition – a purely factual finding – with some considerable difficulty in a new market where there is very little precedent to draw on. And the Appeal Court, on the basis of a few hours of argument, simply overturned our findings. I have no idea why they arrived at that decision. There was no question of law involved and hence no possible error of legal interpretation. There were no conceptual issues in economics that were involved. There were no factual or policy issues in which the Court possessed a superior expertise – it does not have any particular expertise, and nor is it expected to have, in healthcare markets. There was simply our interpretation of the evidence that was placed before us in the many volumes of documents that were filed and by the witnesses that submitted many hours of oral testimony. And it was on the basis of the courts rejection of our interpretation of this evidence that we were overturned. However, the court did not point to evidence that we had ignored, or to any logical inconsistency or irrationality in our assessment of the facts before us. I glean from the decision that the Court felt that the Tribunal had erred in identifying the competitors of Primecure, that we had defined the range of competitors, and, hence, the relevant market, too narrowly. Yet it is not clear from the decision how we erred. Did we fail to consider relevant evidence or did we rely upon irrelevant evidence – this is not revealed. And if we did, is the proper approach not to remit the decision back to us for further consideration.

The irony is that the *Medicross* judgment cites an extract from an earlier decision of the CAC – the *Sasol-Schumann* matter in which a similar lack of deference was demonstrated – in which the learned JP of the CAC, who, incidentally, sat on the *Medicross* bench, stated and I quote:

*The approach which this Court adopts to an appeal against the decision of the Tribunal in respect of a merger should take cognizance of the composition and role of the Tribunal as a specialist body which consists not only of lawyers but also of members possessed of the necessary financial and economic knowledge and thorough grasp of the relevant policy issues required in those kinds of deliberations.*

Thus, continues Judge Davis:

*In its decision as to whether to set aside, amend or confirm the decision of the Tribunal, this Court must be cautious before imposing its own conception of the policy considerations upon the decision adopted by the Tribunal.*

The Court then clearly recognizes the importance of deference but appears reluctant to give concrete expression to it. I can point to several other instances, one in which we were overturned on the basis of evidence submitted at the appeal stage but not to the Tribunal. I raise these points not simply because I dislike being overturned. Nor do I do so from a conviction that, in those instances where we have been overturned, we were right in law and/or fact, and the Court was wrong. Had I wanted to make this latter point – namely, that we sometimes get it right where the Court gets it wrong - I could have chosen a clearer illustration than the truly complex *Medicross* matter. But that doesn't concern me – I am happy to accept that all of us, including truly learned judges, occasionally make mistakes. I raise the point about deference because where no deference is shown to the factual findings of what in this instance is the trial court, the trier of fact, then there can be no reasoning behind a decision to appeal and there can be no predictability in the outcome of an appeal. Parties who lose before us do not, in order to mount an appeal, have to find mistakes in law, or errors in the manner of our consideration of the evidence. They simply have to persuade the Court to arrive at a different conclusion. And this is not helpful to the administration of competition law – it makes a lottery of the decision to appeal.

But these are still early days. My plea is that just as the Commission must and does show us respect, so must and do we show the CAC respect, so must and does the CAC show the SCA respect. And just as the SCA will doubtless defer on appropriate occasions to the CAC, so must the CAC defer to us where appropriate, and we to the Commission. That way respect becomes deeply ingrained in the system and is not simply the product of form and hierarchy.

So there are some thoughts, humbly offered for your consideration. One final word: when you consider today how the practice of competition law and even the statute itself should be changed, bear in mind that the President, no less, has committed his government to *strengthening* the competition authorities. I think that something very clear is brought across here. Some elements in business may think that the competition authorities are guilty of over-enforcement and I have no doubt that their clever lawyers will repeat this here. I think the evidence clearly show this not to be the case. As important, it is clearly not a view shared at the highest level of government and in other strata of society, where it is thought, rightly or wrongly, that *under*-enforcement is the problem and

that we, consequently need strengthening. I think that it would save a lot of hot air if that simple nettle were grasped and informed your deliberations today.