

competition appeal court overturns competition tribunal decision on excessive pricing

mittal steel south africa limited, macsteel international holdings bv and macsteel holdings (proprietary) limited

The Competition Appeal Court ('CAC') today upheld an appeal by Mittal, Macsteel International and Macsteel Holdings* against the decision of the Competition Tribunal regarding the alleged excessive pricing by Mittal in the sale by it of flat steel products in the South African market**.

The Tribunal Findings

In March 2008 the Tribunal found that Mittal had contravened section 8(a) of the Competition Act, 89 of 1998 (the 'Act'). Section 8(a) proscribes the charging by a dominant firm of a price for a good or service which is higher than, and bears no reasonable relation to, the reasonable value of that good or service (defined by the Act as an 'excessive price') where the price charged is to the detriment of consumers.

The Tribunal declined to grant the order sought, namely that Mittal's practice of employing Import Parity Pricing ('IPP') in the domestic flat steel market constituted an abuse of dominance. The Tribunal instead made an order declaring that Mittal's practice of reducing the supply of flat steel products in South Africa through the imposition of resale conditions constitutes the charging of an excessive price in contravention of section 8(a) of the Act. Specifically, the Tribunal identified only one arrangement pursuant to which domestic volumes were ostensibly reduced, namely the arrangement between Mittal and Macsteel International ('MI') in terms of which MI exports, *inter alia*, flat steel products on behalf of Mittal (and may not resell same into the domestic market).

**ENS acts for Macsteel International Holdings BV and Macsteel Holdings (Proprietary) Limited in this matter.*

***Much of the text of this newsflash is derived directly from the decision of the CAC.*

Critically, the Tribunal found that the finding of excessive pricing did not require an analysis of price levels. Nonetheless, it seems, as identified by the CAC that the Tribunal formed the view that the domestic price was higher than it would have been if resale conditions had not been imposed on MI (and others to which discounts had been given). The Tribunal described the imposition of the resale conditions as a 'segmentation' of the market which led to a reduction in the volume of steel available domestically and, as a result, an increase in domestic prices. Put differently, the Tribunal, in the words of the CAC, found that *'Mittal shorts the domestic market by ensuring that (its) excess production is not available in South Africa at a lower price than its own domestic price'* and ruled further that *the arrangement between Mittal and MI was the 'essential ancillary conduct... whereby Mittal SA abuses its structural advantage to maintain its pre-selected price level'*. And Mittal's structural advantage arose, according to the Tribunal, from Mittal's 'super dominant' position as an 'uncontested firm in an incontestable market'. Such 'super dominance' is, according to the Tribunal, a prerequisite for a finding of excessive pricing.

The Tribunal found, on the basis of the above, that it is required to assess whether the price in question is the result of 'cognisable competition considerations' or simply the result of 'the pure exercise of monopoly power'. In the latter instance, the price will automatically bear no reasonable relation to economic value.

After an examination of the actual prices charged by Mittal and the resale conditions (particularly *vis-à-vis* MI) imposed by it, the Tribunal concluded that *'Mittal was abusing its position of super dominance and charging a price in the domestic market that is not the product of cognisable competition'*. The Tribunal found, therefore, that the prices charged by Mittal could never bear a reasonable relationship to their economic value because those prices were the maximum monopoly price, achieved through the exertion of market power to reduce supply in the domestic market, and therefore, by definition, were not determined under conditions of competition – which would always have produced a lower price. The Tribunal held that in light of the above it was not necessary for it to consider the evidence regarding the actual pricing and its relation to the 'reasonable value' of the steel.

The CAC's judgement

The CAC engaged with various aspects of the Tribunal's decision, including the proper role of foreign jurisprudence for South African decisions. This newsflash will identify only some of the more critical aspects of the judgement for the business in South Africa generally.

The CAC initially criticised the Tribunal for applying *'its prior view of the role of a competition authority, that its 'conceptual approach' to almost the complete (exclusion) of an engagement with the legislative texts'*. In this regard the CAC stated that the Tribunal is bound to apply the Act... *'The words chosen by the legislature when enacting section 8(a) (and the definition of 'excessive price') clearly and unambiguously indicate that what is prohibited is the 'charging' of an excessive 'price', not so-called 'ancillary abusive conduct' designed to take advantage of a particular market structure'*. The CAC concluded on the point by saying that *'a court is required to engage with the text and the language employed therein... It may not eschew the text to promote its own theory, however attractive...'*

The CAC thus found that:

- the Tribunal's concept of 'super dominance' finds 'no support' in the Act;
- the wording of section 8(a) requires:
 - first, the determination of the actual price charged;
 - second, the economic value of the good or service;
 - third, if the actual price exceeds the economic value, whether the difference between them is unreasonable; and
 - if so, if the charging of the excessive price is to the detriment of consumers.

The CAC concluded that the Tribunal had *'misconstrued its powers and came to a conclusion that cannot be justified by the words of the Act'*.

Moreover, the Tribunal found that the hearing (in light of the Tribunal's orders) had not, *vis-a-vis* MI and Macsteel Holdings, been conducted in accordance with the principles of natural justice. This is so, as MI and Macsteel Holdings had no reason to, and did not participate in the proceedings before the Tribunal and yet their interests were potentially materially prejudiced by the orders of the Tribunal.

The CAC declined to determine, on the basis of its interpretation of section 8(a), whether Mittal's prices were excessive. Instead, recognising the specialist administrative function of the Tribunal, it ordered that the matter be remitted to the Tribunal. It ordered the Tribunal to hear additional evidence from MI and Macsteel Holdings and then to determine, on all of the evidence before it, whether Mittal's prices were excessive.