MORE RUMBLINGS IN THE RETAIL SECTOR: RETAIL SECTOR TO BE RIGOROUSLY INVESTIGATED WITH RENEWED VIGOUR

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LEGAL BRIEF
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Following an authorisation by Mr Ebrahim Patel, Minister of Economic Development, the Competition Commission (“Commission”) will soon be publishing its terms of reference to launch a market inquiry into parts of the retail sector involving large supermarket chains, grocery stores and small retail outlets like spaza shops. In his budget vote speech presented to the National Assembly on 12 May 2015, Mr Patel announced that the investigation “will consider the structure of the industry including retail outlets in townships, the tenancy arrangements in shopping malls that seem to squeeze small players out and the impact of the growth of large retail chains on competition, jobs and small business development … and it’s intended to ensure that we’ve got a competitive but also inclusive retail sector.”

This announcement comes after the commencement of a new investigation on 7 October 2014 and the receipt of several complaints in relation to long-term exclusive lease agreements.

COMMISSION’S SUPERMARKETS INVESTIGATIONS: ROUND TWO

On 24 January 2014, the Commission announced that it had concluded its investigation into exclusive lease agreements entered into between supermarkets and property developers, owners and managers of shopping malls. The Commission found that long-term lease agreements providing for a level of exclusivity between property developers and anchor tenants raised barriers to entry into grocery retailing. However, it found insufficient evidence as to a contravention of the Competition Act 89 of 1998 (“Competition Act”) and anticompetitive effects of exclusive lease agreements could not be demonstrated conclusively. The evidence before the Commission at that stage did not meet the tests required in order to prosecute the firms involved in terms of the Competition Act and therefore the Commission issued a notice of non-referral.1

On 7 October 2014, just over a mere 8 months since it concluded its investigation into long term exclusive leases, the Commission released a media statement announcing that it would again investigate long-term leases by supermarkets after receiving a complaint from South African Property Owners Association (“SAPOA”). SAPOA requested the Commission to consider the issue of exclusive clauses providing for amongst others the exclusion of competing supermarkets or a café or delicatessen which sells fresh fish or meat as SAPOA members are of the opinion that these exclusive clauses “give rise to considerable competition concerns and could amount to substantial prevention or lessening of competition in violation of the Competition Act”.2

1 Media Release, “Commission non-refers supermarkets investigation”, issued by the Competition Commission on 24 January 2014
2 Media Release, “Commission re-opens supermarkets investigation”, issued by the Competition Commission on 7 October 2014
The latest investigation came with little surprise as, despite its notice of non-referral, the Commission explicitly stated that it remained concerned about the barriers to entry into the grocery retailing industry and the potential dampening effects of exclusive long-term leases on competition.

**TENANCY ARRANGEMENTS IN SHOPPING MALLS: LONG TERM EXCLUSIVE LEASES**

In the context of shopping malls in South Africa, there are property developers, property owners, property managers and leasing agents (collectively “landlords”) and tenants. Tenants can be categorised into anchor tenants and ancillary tenants. Anchor tenants are usually the leaders in occupying space in a new development whereas the ancillary tenants follow the anchor tenants and do not ordinarily generate a lot of footfall by themselves. It is, in almost all circumstances, a prerequisite that an anchor tenant (who is usually a food retailer) provides a lease commitment before the shopping centre can be financed by banks. Banks, in the normal course of business, usually require that a groceries anchor commit to a lease for at least the term of the loan which is typically 10 years. This allows for the anchor tenant to exercise leverage over the landlord because, without the anchor tenant, the landlord may not be able to secure finance for the development.

Whilst one can recognise the significant commitment made by anchor tenants and how this will be beneficial for smaller businesses in terms of exposure, the question is whether there is any harm posed by the long-term exclusive leases. The clauses in the long-term exclusive lease agreements usually preclude landlords from allowing competing supermarkets; a store whose primary business is the sale of foodstuffs; a coffee shop or delicatessen which sells coffee or meat; a grocery; fresh fish shop; butchery; bakery or fruit and vegetable shop to enter a shopping mall. In addition, these agreements provide that approval of the anchor tenant will have to be sought in order for an ancillary or other grocery anchor to enter the particular shopping mall.

It could be argued that the restrictions that flow from the long-term exclusive leases affect consumers’ choices in terms of product range, quality and ultimately does have an impact upon competition. At the same time, one should consider upfront investment and the ability as well as time frame in order to recoup such investment.

**CONTINUOUS RECEIPT OF COMPLAINTS BY THE COMMISSION**

The Commission started seeing an increase in the number of new complaints received in late 2013 and in the second half of 2014. The fact that the Commission still receives complaints in relation to the retail industry, and specifically long-term exclusive leases, highlights that there remains deep concerns in the retail industry notwithstanding the Commission’s previous investigation, its advocacy efforts and its intervention in merger proceedings.

Since October 2013 the Commission has received various complaints as follows:

- **Massmart Holdings Limited v Shoprite Checkers and Others (October 2014)**

  Massmart alleged that Shoprite, Pick n Pay and Spar entered into exclusive lease agreements with landlords of different shopping malls. Massmart further alleged that such exclusive leases impede competition from new market entrants at a time when competition ought to be fostered. These effects have been particularly acute in the case of foreclosure against one of Massmart’s subsidiaries, Game, a competitor with the potential to introduce competition at a national level. Massmart further alleged that the conduct of the Respondents renders smaller rivals vulnerable and places them in a position that makes them ineffective competitors.

- **Mr. Walter Hlophe v supermarket chains – Shoprite Checkers; Pick n Pay; Spar; and Game (December 2014)**

  Mr Hlophe alleged that the Respondents demand exclusive lease agreements with various landlords at various shopping centres. The conduct is allegedly denying Mr Hlophe the opportunity to open and operate a liquor store at various malls in Gauteng.

  Whilst it should be borne in mind that an anchor tenant has the ability to attract more people to a shopping mall and is therefore of crucial importance to the ancillary tenants, ancillary tenants should not be barred from entering into malls. It is submitted that a balanced approach, taking into account the interests of all roleplayers – consumers, anchor tenants, ancillary tenants and landlords – is the way forward in order to propagate a competitive and inclusive retail sector.
THE RETAIL SECTOR INVESTIGATED

According to Minister Patel, the retail sector market inquiry will “involve big supermarket chains, grocery stores and small retail outlets.” The examination of “the tenancy arrangements in shopping malls, the growth of township enterprises (such as) small shops, spaza shops” is reflective of the Commission’s concern, consideration and commitment to applying the inclusive growth and transformation principles, as embodied in the preamble of the Competition Act.

CONCLUSION

It has been suggested by the Commission that consideration should be given to the approach adopted in other international jurisdictions for assistance on how to resolve its concern with long term exclusive lease agreements, for example Australia\(^1\) and the UK.\(^2\) These jurisdictions made use of their respective market inquiry mechanisms to deal with concerns in the grocery retail market in a holistic manner.

From a practical point of view - it is expensive, resource intensive and time-consuming to investigate and bring complaint proceedings in respect of each lease agreement. The launch of a market inquiry would alleviate these impracticalities and allow for research-based evidence and a detailed analysis of the competitive state of the retail sector as a whole.

1 It is expected that the terms of reference of the inquiry will be announced by the Commission within the next four weeks.\(^3\)

\(^1\) The ACCC held a public inquiry into the competitiveness of retail prices for standard groceries in 2008

\(^2\) The UKCC Grocery Inquiry was held in 2005 and considered a number of issues in the grocery retail industry.

Ahmore Burger-Smidt specialises in Competition Law and Data Privacy. She has extensively advised clients in relation to both competition law as well as data privacy-related matters; including clients in numerous African countries. She advises on all aspects of competition law including applications for leniency and for exemption from the Competition Act.

She has significant expertise in the competition-related aspects of mergers and takeovers and in dealing with complaints of alleged anti-competitive conduct. She also undertakes compliance audits and programmes and is the principle driver of the Werksmans competition law risk assessment and e-Learning tools. Prior to joining private practice, Ahmore was Deputy Commissioner and headed the Enforcement and Exemptions Division of the South African Competition Commission. She assists clients in relation to data privacy compliance program development and implementation.

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