# Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and another

**Dennis Martin Davis**

The South African Competition Act of 1998 (the 'Act') created specialist institutions to vindicate the ambitious promises of competition law for South Africa: (1) the Competition Commission, an investigative body; (2) the Competition Tribunal, in effect a court of first instance; and (3) the Competition Appeal Court, designed to accommodate the right of aggrieved parties to appeal decisions of the Tribunal.

The drafters, cognisant of the need for expeditious resolutions of competition disputes, thought they had achieved their objective through the manner in which the Act was structured. The Competition Appeal Court, save for constitutional disputes that might have arisen, was to be the court of final instance.

That ambition was decisively ended when, in *National Union of Metalworkers of South Africa and others v Fry's Metals*,[1] the Supreme Court of Appeal held, by reference to section 168 of the Constitution,[2] that it 'may decide appeals in any matter' and that it is the highest court of appeal except in constitutional matters.

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1 2005 (5) SA 433 (SCA) paras 6, 14 and 25.

2 Act 108 of 1996.

On the strength of this constitutional provision, the Court held that a constitutional provision superseded both statutory and common law sources of jurisdiction. Hence, the Supreme Court of Appeal's appellate powers could not be circumscribed by the Competition Act.

This position was changed through the Constitution's 17th Amendment Act in 2012. The amendment provided that the Supreme Court of Appeal may decide an appeal in any matter arising from the High Court or a court of similar status *except in respect of labour or competition matters to such extent that may be determined by an Act of Parliament*. From that date, the Supreme Court of Appeal ceased to play any substantive role in the adjudication of competition appeals.

However, at the same time, the amendment enhanced the Constitutional Court's jurisdiction beyond the sole adjudication of constitutional matters, to any other matter that the Constitutional Court grants leave to appeal on the grounds that it raises an arguable point of law of general public importance that ought to be considered by that Court. It followed that the Constitutional Court was now able to hear appeals from the Competition Appeal Court in matters where the Constitution played no role at all.

For some years, the Constitutional Court appeared reticent to hear appeals in matters encroaching upon complex economic disputes relating to the Competition Act. But, in the past few years, the Court has increasingly been willing to hear such appeals, of which its agreement to hear the appeal from the Competition Appeal Court in the *Mediclinic* case[3] is a luminous example.

The case concerned a merger in the private healthcare sector involving hospitals in relatively small towns – Mediclinic Potchefstroom and two multi-disciplinary hospitals in Klerksdorp called Wilmed Park Private Hospital and Sunningdale Hospital. The towns of Potchefstroom and Klerksdorp are roughly 50km apart.

## The Competition Appeal Court decision[4]

In a monumentally careful judgment, on behalf of the majority of the Competition Appeal Court, Judge Owen Rogers found that because medical care in Potchefstroom and Klerksdorp did not fall within the same local market, the merger did not give rise to the problem of a substantial lessening of competition in relation to the local market as set out in section 12A(1) of the Competition Act.

In other words, if the merger was implemented, the market structure in the Klerksdorp market would be unaffected. Targeted hospitals would simply have a different owner who would enjoy no greater market power within the Klerksdorp

3 [2021] ZACC 35: Judgment delivered on 15 October 2021.

4 *Mediclinic South Africa (Pty) Ltd and another v Competition Commission* [2020] JOL 47398 (CAC).

market than did the present owner. It followed that any post-merger price increase in the target hospitals could not be a consequence of the proposed merger.

When it had disallowed the merger, the Tribunal had found that the acquiring party, Mediclinic, would have regional dominance that it could exploit, even though pricing negotiations took place at national level.

There was no evidence to suggest – according to Judge Rogers – that the issue of regional dominance could be justified as a self-standing competition concern. In the first place, almost all medical schemes, including low costs options, were based nationally. Further, taking the entire market for these services in Klerksdorp and Potchefstroom together would only account for approximately 3.5 per cent of the national market.

A further question arose as to whether a price increase, resulting from the merger, could justify a prohibition of the merger as a matter of public interest; in particular, whether in terms of section 12(3)(a) of the Act, the merger had a detrimental effect on a particular industrial sector or region.

Thus, the enquiry turned to whether the merger would cause hospital prices at the targeted hospitals to be higher under Mediclinic control than would be the case under current control. According to Judge Rogers, the evidence indicated that Mediclinic's greater efficiency would more than counter any possibility that the consumer would pay higher prices following the merger.[5]

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5 Judge Bashier Vally took a different approach and dissented from the majority judgment of Competition Appeal Court. It is regrettably difficult to understand his reasoning with regard to non-price effects of the merger; in particular the following:

> 'There can be little doubt that the Tribunal's conclusion is an inference drawn from the very limited evidence at its disposal. I am not convinced that it is a correct conclusion given the meagre and insubstantial evidence that was placed before it. There was however evidence (again in the form of inference drawn from the fact that the proposed merger would doubtlessly [sic] increase the market power of Mediclinic), that apart from the possibility of increased prices for patients, there would be a concomitant decrease in the incentive to improve patient experience or even the quality of the healthcare once Mediclinic secures dominance. This is so especially since the patient experience and quality of care it provides has been found not to match that of Wilmed. It is not an illogical inference, but in my view, not much weight should be attached to this.' (para 259)

Regarding the question of the price effects, Judge Vally rejected the argument that cost savings would reduce the ultimate costs imposed upon consumers. Other than concentrating on the costs of surgical expenditure, little justification or conclusion for differing from the carefully factually based reasoning of Judge Rogers was offered.

There is thus little justification to be found on the evidence as to why Judge Vally could conclude at para 281:

> 'The Tribunal came to the conclusion that the proposed merger would result in a substantial reduction in competition in the provision of healthcare services in the MaJB area, which (i) in all likelihood would cause serious and possibly irreversible harm to patients in that area, (ii) could harm patients in other areas where Mediclinic's market power was not substantial. There is coherence and consistency in the logic of the Tribunal.'

## The Constitutional Court

In keeping with its newly found enthusiasm for competition law, the Court agreed to hear the appeal from the Competition Appeal Court.

The majority of the Constitutional Court rejected the argument that there was not one market for medical services in both Klerksdorp and Potchefstroom. Central to this finding was the conclusion that the merger had to be evaluated in terms of one market for both towns. One searches in vain for any reasoning that can deny the following conclusion reached by Judge Rogers:

> 'Ultimately one must take a practical and common-sense view of the matter. It strikes me as quite unrealistic to conclude that a modest decline in the quality of ancillary hospital care at the hospitals of a hypothetical monopolist in Klerksdorp, unaccompanied by any decline in the standard of care provided by the doctors in those hospitals, would cause Klerksdorp residents to seek admission to hospitals in Potchefstroom, at considerable inconvenience and cost to themselves and their treating doctors, or at any rate to do so in sufficient numbers to deter the monopolist.'[6]

The only evidence to justify a finding that overruled the majority of the Competition Appeal Court was a reference to Mediclinic's own internal strategic document to the effect that it considered Klerksdorp and Potchefstroom's private multi-disciplinary hospitals to be competitors.

This was no more – as Judge Rogers pointed out – than puffery in a sales document and hardly constituted sufficient evidence to gainsay the logical conclusions reached by the Competition Appeal Court.

There was a further argument that for 'the overwhelming majority of South Africans, regard being had to our acute economic inequalities, even a 1% fuel or bread price hike probably constitutes a threat to their presumably shallow pockets and survival. And to the vulnerable group of uninsured patients it is even more so with the predicted percentage hike for health care services.'[7]

This observation omits the fact that 95 per cent of the market are insured. Further, it conflates the determination of a geographic market with the question of a price hike, which is dealt with separately in the findings about price savings to which the Competition Appeal Court arrived.

Much of the reasoning of Chief Justice Mogoeng concerned a commendable reference to the implications of section 27 of the Constitution – namely the right to health and that, in general, scant attention has been paid to the Preamble and Purpose clauses of the Act and thus the constitutional implications of competition

6 Para 66 op cit note 3.
7 Para 61 op cit note 1.

law in a medical case. This emphasis on the role that the Constitution must play in the interpretation of provisions of the Act is to be applauded.

It will doubtless influence the interpretation of the Act in future litigation. The problem in this case is that section 27 is not a jurisprudential war cry. Its application must still depend on the facts of the case. If there is no single market and if prices are not predicted to increase, nor quality of service to decline, there then seems to be very little role for section 27 of the Constitution to play in such a case. There is no interpretive challenge posed by this dispute.

There are at least two other fundamental problems with the majority judgment. The judgment proceeds on the basis that the Competition Appeal Court misdirected itself by requiring that a price increase post-merger be shown through the result of the market share changing; that is what the Competition Appeal Court referred to as 'enhancement of market power'.[8]

Chief Justice Mogoeng insisted that this is not the test required by the significant lessening of competition test set out in section 12. Regrettably, a strong grasp of competition law would direct that the central problem with a proposed merger is to determine, in a probabilistic manner, whether a merger would be likely to trigger either unilateral or coordinated effects; that is, empower one firm with enhanced market power post the merger to dictate terms in the market or, as a competitor would be eliminated, the remaining firms could more easily coordinate their conduct to the detriment of consumers. It is regrettable that so elementary a competition law mistake can be made by the Constitutional Court – a reminder that it has limited expertise in this area and should have trodden cautiously in a fact-based dispute.

That brings us to the final problem to which this article must refer. Again and again, Chief Justice Mogoeng refers to the expertise of the Tribunal and concludes that the Competition Appeal Court owes it a wide deference in adjudicating appeals from its decisions. Emphasising the expertise of the Tribunal and conveniently forgetting that the Competition Appeal Court was itself designed to be an expert appeal court, Chief Justice Mogoeng concludes that the test to trigger the exercise by the Competition Appeal Court of its power to interfere with the Tribunal's findings is not merely that the latter 'erred', but that 'the Tribunal must have misdirected itself or rendered a decision that is clearly wrong.'[9]

In short, the majority judgment has effectively eviscerated the jurisdiction of the Competition Appeal Court for which the Act provided. The Competition Appeal Court's power, sourced in the Competition Act, is to adjudicate appeals from the Tribunal. This has been now elided over, so that the only power granted to the Competition Appeal Court is that of a review court; that is, to set aside a decision of the Tribunal which is clearly wrong or where there has been a material misdirection.

8 Para 53 op cit note 1.

9 Para 63 op cit note 1.

This finding raises the possibility that either there will be no point in appealing to the Competition Appeal Court in circumstances where a party considers that a decision of the Tribunal has been wrongly decided, or it invites the Competition Appeal Court to find that any decision, where it overturns the Tribunal, was clearly wrong or that there has been a material misdirection.

## Conclusion

While the majority must be commended for emphasising the significance of the Constitution in general and particularly section 27 in the case of medical cases, the manner in which this was set out in the majority judgment will now invite the Commission to use the Constitution as a proverbial 'vibe'. In other words, provided it can find a constitutional basis for justifying a complaint against a firm, there will be almost no need to rely on a cause of action predicated on the wording of the Competition Act.

The minority judgment of Justice Theron is far preferable. It correctly noted that the appeal from the Competition Appeal Court turned on three fundamental questions: the relevant market; whether the post-merger market would cause a substantial lessening of competition; and whether the merger would cause prices at the target hospitals to increase or the quality of service to decrease. Not only did the minority judgment find that section 27 of the Constitution had been taken into account by Judge Rogers, particularly when the Judge engaged in prices for uninsured patients and its finding that the implementation of Mediclinic's efficiency initiatives would result in lower costs, but the balance of its decision was factually based.

Thus, the appeal turned on findings of a kind which should not have been heard by the Constitutional Court. There was no legal question in dispute and the matter was a factually based case of a kind that should not have engaged the jurisdiction of the Constitutional Court as set out in the Constitution.

Sadly, Justice Theron penned a minority judgment. The majority judgment invites the Competition Commission to invoke the Constitution, almost without fetter, and to reduce the Competition Appeal Court's jurisdiction considerably to render the Competition Commission far less accountable than should be the case in a dispensation based on the rule of law.

## Author biography

**Dennis Martin Davis** is an honorary professor at the University of Cape Town, University of the Witwatersrand and University of the Western Cape, where he teaches competition law among other courses. He was appointed to the bench in 1998, and as Judge President of the Competition Appeal Court in 2000 from where he retired in December 2020.