COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 134/CR/Dec07
(008482)

In the matter between:

THE COMPETITION COMMISSION	Applicant
and	
SOUTH AFRICAN BREWERIES	1st Respondent
AFRICA'S BEER WHOLESALERS (PTY) LTD t/a VREDENDAL BEER DISTRIBUTORS	2nd Respondent
BOLAND BEER DISTRIBUTORS (PTY) LTD	3rd Respondent
ERMELO BEER WHOLESALERS (PTY) LTD	4th Respondent
GREYTOWN BEER DISTRIBUTORS (PTY) LTD	5th Respondent
MAKHADO BEER DISTRIBUTORS (formerly LOUIS TRICHARDT BEER WHOLESALERS (PTY) LTD	6th Respondent
MIDLANDS BEER DISTRIBUTORS (PTY) Ltd	7th Respondent
MKUZE BEER WHOLESALERS (PTY) LTD	8th Respondent
SOUTHERN CAPE BEER DISTRIBUTORS (PTY) LTD	9th Respondent
STEFQUO (PTY) LTD t/a BETHSAB BEER WHOLESALERS	10th Respondent
VRYHEID BEER DISTRIBUTORS (PTY) LTD	11th Respondent
MADADENI BEER WHOLESALERS (PTY) LTD	12th Respondent
WESTONARIA BEER DISTRIBUTORS (PTY) LTD	13th Respondent
THOHOYANDOU BEER DISTRIBUTORS (PTY) LTD	14th Respondent

Panel	:	Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Merle Holden (Tribunal Member)
Heard on	:	22 - 31 July 2013, 01 - 13 August 2013, 02 -03 September 2013, with last submission from SAB received on 01 October 2013
Order issued on	:	24 March 2014
Reasons issued on	:	24 March 2014

DECISION

INTRODUCTION

1. This case concerns the distribution system of South African Breweries Limited ("SAB"), a manufacturer of clear beer products. SAB has agreements with the second to fourteenth respondents whom we will refer to from now on as the "Appointed Distributors" ("ADs") which grant them exclusive territories to distribute its product and for which they receive a distribution fee. Other firms also distribute SAB products, but with minor exceptions, are not eligible to receive a fee or a discount from SAB to perform this function. One of these firms lodged a complaint with the Competition Commission ("Commission") and this has led to the present case.

2. The essential theory of harm advanced by the Commission is that the arrangements lessen intra-brand competition for SAB products. [1] This is important, as the case does not concern inter- brand competition, although at one stage in these protracted proceedings the Commission attempted to bring such a case against SAB as well.

[1] Intra-brand competition refers to competition by firms that compete to perform some function e.g. distribution in respect of the same brand hence intra-brand. Inter-brand competition refers to competition between brands.

3. Both the Commission and SAB called a number of factual and expert witnesses.[2]

4. The Commission called the following witnesses to testify at the hearing:

(i) Mr. Nico Pitsiladi[3] ("Pitsiladi"), Director of the Big Daddy's Group ("Big Daddy's"). Big Daddy's is a customer of SAB.

(ii) Mr. Henderson Mpumelelo Mabanga ("Mabanga"), a former manager/shareholder of an AD in Alice in the Eastern Cape since defunct.

(iii) Mr. Simphiwe Chiliza ("Chiliza"), the owner of Madadeni Beer Wholesalers an AD and the 12th respondent in this matter.

(iv) Mr. Peter Neil Dodson ("Dodson"), Chief Executive Officer of Metcash Trading Africa (Pty) Ltd ("Metcash"). Metcash is a customer of SAB.

(v) Mr. Gerrie Mohale Mofokeng ("Mofokeng"), owner of Gerrie's Liquor Warehouse ("Gerrie's Liquor"). Gerrie's Liquor Warehouse is a customer of SAB.

(vi) Mr. Darron Swersky ("Swersky"), Managing Director of Picardi Rebel ("Picardi"). Picardi is a customer of SAB.

(vii) Dr. Simon Roberts, ("Roberts"), the Commission's economic expert, who at the time was the Commission's chief economist.

5. SAB called the following witnesses to testify at the hearing:

[2] The AD witness was initially going to be Mr. Gordon Hubert Tobin, Managing Director of Boland Beer Distributors (Pty) Ltd. However, counsel for the ADs, namely Mr. Wilson, indicated that due to the direction in which the case was going Mr. Tobin they had decided not to call him.

[3] Mr. Pitsiladi's son, namely, Mr. Peter Nicolas Pitsiladi – Financial Director of the Big Daddy's, was also called to give evidence at the hearing. (Transcript p 1234).

(i) Mr. Petrus Johannes Wessels ("Wessels"), SAB's Distribution Services Manager: Distribution and Financial Modelling.

(ii) Mr. Norman Joseph Adami ("Adami"), SAB's Chairman and Managing Director.

(iii) Mr. Stephan Malherbe ("Malherbe"), SAB's economic expert from the firm Genesis.

HISTORY OF THE PROCEEDINGS

6. It's nearly ten years since the complaint in this matter was lodged with the Commission and nearly seven years since it was referred to the Tribunal by the Commission. There are a number of reasons that account for the length of this litigation most relating to skirmishes over procedural issues and then a lengthy hiatus caused by an unsuccessful attempt by SAB to get the case quashed; an attempt that ultimately failed on appeal. We set out below some of the more important events in the chronology of the case.

7. On 20 December 2007 the Commission referred the complaint against SAB and the AD's. The referral was filed after the Commission had received and investigated a complaint lodged by Mr Pitsiladi of the Big Daddy's Group[4] on 25 November 2004. In that complaint, Mr. Pitsiladi alleged *inter alia* that SAB's pricing of beer to the distribution/wholesale channel was the same as pricing to the retail channel, thus making it impossible for distributors/wholesalers to make any margins on beer distribution.

[4] Big Daddy's Group is a group of liquor outlets located primarily in the Eastern Cape. It comprises of 3 entities, namely, Big Daddy's, Prestons and the South African Fine Wine and Spirit and Ale Merchants ("SAFWSAM"). Big Daddy's and Prestons are liquor stores and have provincial liquor licences. SAFWSAM is similar to a depot and has a national liquor licence (Transcript pp. 60 – 65).

8. In the original referral the Commission had, *inter alia*, brought a case in terms of section 8(c) and 8(d)(i) of the Act, alleging that SAB had engaged in conduct designed to induce retailers not to deal with its competitors. For technical reasons which we need not consider here SAB objected to these allegations forming part of the present referral which was premised on the complaint from Big Daddy's. We have previously referred to these allegations as the 'inducement' case and the present case which we decide in this decision as the 'distribution' case.

9. We upheld the objection and on 13 May 2010 we ordered a separation of the distribution case from the inducement case.[5] The Commission elected to commence with the distribution case and advised that the inducement case would be referred at a later date, once the distribution case was finalised. At the time of this decision the Commission has not yet referred the inducement case.

10. The trial for the distribution complaint then commenced on 11 August 2010 and continued until 01 April 2011, when SAB and the ADs launched an application to set aside the complaint on jurisdictional grounds.[6] On 07 April 2011 the Tribunal upheld the application and set aside the complaint against SAB and the ADs.[7] The Commission appealed the Tribunal's order to the Competition Appeal Court ("CAC") and on 14 November 2012, the CAC upheld the Commission's appeal.

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[5] See *South African Breweries Ltd and SAB's Appointed Distributors (2nd – 14th respondents) v Competition Commission, case no: 134/CR/Dec07 (011148)* for our reasons for this decision.

[6] When the trial stopped on 01 April 2011 the Commission had already led all its factual witness and was only left with the leading of the evidence of its expert witness.

[7] See our decision - case no: 134/CR/Dec07 (012302).

11. Following the CAC's decision, the trial recommenced and ran from 22 July to 13 August 2013, with closing argument on 02 and 03 September 2013.[8] After the end of closing argument we received further written submissions from the parties on the issue of appropriate penalties. SAB also filed an additional submission on certain aspects of the Commission's argument on 06 September 2013. The last submission was received from SAB on 01 October 2013.

HISTORY OF THE LEGISLATION

12. In order to understand this complaint it is necessary to explain the history of liquor regulation and then understand how SAB's distribution system works. Liquor regulation and apartheid have been inextricably linked. These features are still prevalent in how the industry is organised today.

13. Up until the late 1950's sales of liquor to blacks were illegal. From 1960 sales were permitted, but only at registered outlets, typically halls where drinking took place. Unsurprisingly places sprang up where liquor was sold illegally. These premises, known as shebeens, remain part of the landscape of liquor distribution today, despite the de-racialisation of liquor laws.[9] SAB estimates that approximately 40% of its sales of beer are sold in shebeens.[10]

14. In 1997 the government embarked on the first post-apartheid review of liquor policy. The Department of Trade and Industry published a policy document in that year in which it set out its future intentions to use licencing as a means to restructure the liquor industry. The policy document stated:

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[8] The trial recommenced with the leading of the Commission's expert witness, i.e. Dr. Simon Roberts.

[9] According to The American Heritage Dictionary of the English Language, (Fourth Edition, Houghton Mifflin) a shebeen is "*... an unlicensed drinking establishment especially in Ireland, Scotland and South African. Irish Gaelic seibin, a measure of grain, grain tax, bad ale....*

[10] Adami: Transcript p 3360, also exhibit 107, p 4.

"In order to promote economic empowerment, create sustainable jobs and promote small business development and competition, the liquor industry must be restructured. A very limited number of companies have virtual monopolies over the manufacture and distribution of all types of liquor in South Africa. Consistent with government's emerging approach to competition policy, new liquor legislation will require these assets to be unbundled in ways which will achieve the objective of economic empowerment of historically disadvantaged sector of our society. This should apply especially to those traders who earn a living by trading in liquor, but who have been marginalised and criminalised in the past".[11]

15. The Department of Trade and Industry, decided that the liquor industry restructuring could be achieved by vertically separating it into three tiers; manufacturing, distribution and retail.[12] Each separate tier of activity would require a separate licence. The important aspect of this policy as it affects this case was that it was proposed that no firm could hold more than one licence.[13] If the legislation had been implemented in this form then SAB, as long as it remained a manufacturer, would have been precluded from distributing its own product. As we shall see this created expectations amongst distributors in particular that they would gain business opportunities previously not available to them because if manufacturers were excluded from distribution then a massive scope for expansion awaited distributors.

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[11] See Government Gazette number 18135 dated 11 July 1997; page 18 for the policy and sections 2, 3 and 8 of the draft legislation for the manner the policy was to be implemented.

[12] There was a fourth category for special events, but given its ad hoc nature this was not relevant to the restructuring of the industry that the policy paper was trying to effect.

[13] The policy document used the term 'registration' rather than 'licencing', but it meant the same thing. On this aspect the policy document stated, *"Four types of registration will be provided for: manufacturers, wholesalers, retailers and special events. A person holding an interest in any one type of registration may not acquire an interest in any of the other types of registration."* Ibid paragraph 2.2.2.1

16. Constitutional complications affected the implementation of this policy; liquor licencing is in terms of Schedule 5 of the Constitution, an area of exclusive provincial legislative competence. Unsurprisingly this led to a constitutional challenge to the proposed Liquor Bill. The matter eventually came before the Constitutional Court which held that:

> *"...if the exclusive provincial legislative competence regarding "liquor licences" in Schedule 5 applies to all liquor licences, the national government has made out a case in terms of section 44(2) justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade. No case has however been made out in regard to retail sales of liquor, whether by retailers or by manufacturers, nor for micro-manufacturers whose operations are essentially provincial. The Minister has to this extent failed to establish that Parliament had the competence to enact the Liquor Bill and it is therefore unconstitutional".*[14]

17. This led to a redrafting of the Act. It is not clear to us whether this was solely a result of the court decision or also embodied a reconsideration of the prior policy. However, the outcome of the redraft was that the National Liquor Act now provided for two classes of licence, manufacturing and distribution leaving retail licencing to provincial legislation. But significantly, there was no longer a prohibition on a firm from holding both classes of licence at the same time. In an apparent reversal of the policy, SAB could now both manufacture and distribute its products if it obtained the necessary licences.

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[14] *Ex Parte the President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill, case no: CCT 12/19* at para 86. Note that section 44(2) of the Constitution provides for an exception to Schedule 5, by allowing Parliament to legislate over matters falling within the exclusive competence of provinces provided it can be shown that the legislation is necessary for one of the purposes set out in that section.

18. There was also no bar on distributors holding retail licences, albeit that the latter had to be obtained from the province where the retail outlet existed. Retail licencing was now a provincial matter.

19. The policy change in government had major consequences for industry. Liquor wholesalers, as we noted earlier, had expected new opportunities to come their way given that manufacturers, if they were precluded from distribution, would have to outsource this function. This no doubt explains the following remark we find in Mr Pitsiladi's complaint statement:

> *"Recently (during the course of this year), SAB has changed their operations and as a result of the fact that they are now registered as a manufacturer and a distributor, they are selling as distributors, beer products to retail outlets at the same price that they are selling beer products to wholesale outlets which has the effect that all wholesale outlets within the Republic of South African cannot compete with SAB as no retailer would purchase a beer product from a wholesaler if effectively it is able to purchase the product directly from the dominant wholesaler (SAB) at a cheaper price".*[15]

20. But as we go on to examine, SAB had not changed its policy; the government had.[16] Doubtless the change in policy was devastating for wholesalers and this must have fuelled resentment against the AD system from which they were excluded.

NATURE OF SAB DISTRIBUTION SYSTEM

21. Several years before the new Liquor policy was made public and indeed preceding the new constitution, SAB began major changes to the manner in

[15] Bundle 1, p 456.

[16] We put this question directly to Norman Adami when he testified and he denied that there had been any change in policy. Rather he explained, the distributors were expecting to win business from newly licenced shebeens, but were disappointed when this business went to the AD's. See Transcript pp 3393 – 3396.

which it distributed liquor. Sensing a weakness in its system of getting alcohol to areas that lay far away from its breweries and major metropolitan areas, the company embarked on a strategy of outsourcing its distribution in limited areas.

22. The key policy document in this respect was written in 1994.[17] The rationale for the new approach set out there states as follows:

> *"Under liberated liquor retail licensing conditions, where a large number of small customers needs to be effectively serviced, SAB Beer Division as a large corporate entity would have significant difficulty in competing sustainably with a localised owner-managed competitor, who operates in close proximity with the market, is highly responsive and flexible and can develop long term relationships with the local retail trade. In other words, under those market conditions SAB would find it extremely difficult to add more value to local customers and consumers. Therefore, to the extent that SAB can establish a network of highly motivated, focused, committed, entrepreneurial and astute distributors, who can provide customers with an effective service while supporting brand development, SAB needs to progressively divest itself from its wholesaling operation".*

23. The quote above is susceptible to two contrary readings. A pro-competitive one suggests that the passage indicates no more than that SAB wants to improve its distribution service. A second, but opposite reading, is that SAB feared that strong local distributors would outperform SAB's own distribution function and that SAB saw this as a threat to itself. This latter reading is also fortified by a further remark in the same document.

> *"The distributorship shall offer a full delivery service to all licenced customers in its franchised or allocated territory, which is free within a prescribed free delivery zone."*

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[17] Bundle 5, p 1761.

"This service effectively provides a strategic service advantage and provides a barrier to entry for competitors".[18] (Our emphasis.)

24. Then in a more confusing paragraph the following is stated in the context of why SAB must set the maximum selling price:

    "The absence of competition in its exclusive territory would leave the distributorship free to recover its own inefficiencies and to exploit the relatively captive market. The current pricing policy is aimed at increasing barriers to entry, achieved through the economies of scale in production and distribution, and needs to be supported by the distributorship".[19]

25. As we discuss later, the Commission relies on this latter reading to suggest an overall anticompetitive strategy on SAB's behalf with regard to these distributors. On this approach these paragraphs demonstrate two aspects of SAB's anticompetitive intentions; fears that independent distributors will be more efficient than SAB's own system (hence a threat to intra-brand competition) and fears that strong independent distributors could lower barriers to entry and hence become an opportunity for SAB's manufacturing rivals to expand in the market (hence a threat to inter-brand competition.) Since this case as finally formulated is not about inter-brand competition we do not need to consider this aspect further.

26. This leaves the question of whether the reading of the documents which may suggest an intent to suppress intra-brand competition is the correct one.

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[18] Bundle 5, p 1763.

[19] Ibid paragraph 5.1 p 1771.

However it is not sufficient to rely on a particular reading of an ambiguously worded document to found a case. The document can also be read to suggest the remarks are no more than urging the organisation to pull up its socks if it wishes to improve its distribution performance. Further that if SAB sets the maximum price for beer, the AD's despite being regional monopolists, would not have pricing power to exploit their customers in their areas. The correct reading is the one that is best borne out by the facts of how the system works in practice. This is what we now go on to examine.

27. Much about the AD system is uncontroversial. The ADs operate in terms of a contract. Two models existed; one was a form of wholesale agreement, the other a franchise but their essential features insofar as they are relevant to this case are similar and hence this distinction in legal form is not an issue in this case.

28. The ADs were restricted to distributing only SAB beer products. They were paid a fee for doing their distribution. The fee was in the form of a discount on the retail price. The contract imposed upon them certain restrictions including restricting them to a geographic region and requiring that they serve all customers of SAB in that region who ordered above a prescribed minimum quantity. They were also subject to strict performance and reporting requirements.

29. SAB also distributed products through its own wholly owned depots, but the depots did not compete with the AD's but supplied different areas.

30. Nothing prevented SAB from selling product to firms who performed a distribution function and who competed for the same customers as did the AD's. However these non-preferred distributors did not receive the same fee for distribution that the ADs did. According to the complainants and the Commission this amounts to unlawful price discrimination – according to SAB it is not, because the distribution functions performed were not equivalent.

31. The Commission also alleges that the ADs compete with SAB in the distribution of its products and the arrangement effects a market division between them in contravention of section 4(1)(b). Alternatively, to the extent that SAB is their supplier, the relationship with its territorial carve outs amounts to a vertical restrictive practice in contravention of section 5(1). The Commission also charged SAB with resale price maintenance alleging that the arrangement with the ADs prevented them selling their products for less than the price stipulated by SAB.[20]

SAB'S DISTRIBUTION SYSTEM

32. SAB operates seven breweries[21] in South Africa and each of these breweries is licensed to manufacture and distribute beer. [22] SAB distributes its beer to approximately 34 000 customers. (Note customers here are some form of retail outlet not the final consumer). To reach the customer from its breweries SAB has set up a distribution channel that consists of a primary and secondary leg.

Primary Distribution

33. Primary distribution involves the distribution of beer from SAB's seven breweries to its 40 wholly owned depots as well as to its 13 ADs i.e. the 2nd to 14th respondents.

34. Approximately 90% of SAB's beer production is distributed through its wholly owned depots and the rest (approximately 10%) is distributed through the ADs.

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[20] A further charge that SAB was imposing resale price maintenance on retail customers was brought by the Commission but not persisted with. We discuss this further below.

[21] These breweries are located in Alrode (Gauteng), Chamdor (Gauteng), Rosslyn (Gauteng), Port Elizabeth (Eastern Cape), Newlands (Western Cape), Polokwane (Limpopo) and Prospection West (Kwa-Zulu Natal).

[22] In terms of the Liquor Act, 59 of 2003.

In certain circumstances, the beer is distributed from the brewery directly to customers. This, however, only happens when the customer is large enough to get delivery from a 30 pallet truck and has the necessary equipment and labour to handle direct deliveries. These direct deliveries are, however, not significant and only account for approximately 2.6% of SAB's total distribution volume.[23]

Secondary Distribution

35. Secondary distribution is the movement of beer from depots and ADs to customers.[24]

SAB owned depots

36. SAB currently has 40 depots which distribute about 90% of its beer production. The depots are allocated non-overlapping areas of responsibility and a depot may not deliver outside its designated geographical area (although customers may place and collect orders with any depot – so called "call-and-collect-customers").[25] Whilst these depots vary in size they are far larger in scale than their AD counterparts. (Note from now on we will refer to the SAB owned depots simply as depots and AD owned depots as AD's or AD depots.)

Appointed Depots

37. SAB's appointed distributor system (i.e. the ADs) was introduced in the early 1980s when SAB foresaw an opportunity to grow sales by increasing the quality of its service in the more rural parts of South Africa. SAB's use of the

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[23] See Wessels' witness statement paragraph 15. During Wessels' re-examination he indicated that this figure has increased to approximately 5% (transcript p. 3330).

[24] See exhibit 107, p. 24, prepared by Adami for a depiction of this movement.

[25] Wessels' witness statement, para 32.

ADs has largely focused on rural areas, with Westonaria Beer Distributors (the 13th respondent) being the only AD located near a metropolitan area.[26] Although improving its distribution footprint outside the major metropolitan areas was the major rationale for establishing the ADs, SAB later recognised that they could also serve a secondary objective and contribute to its Black Economic Empowerment ("BEE") program.

38. SAB did so in the early 2000's with a project called Honey BEE. Anticipating, as it happened over optimistically, that 120 000 shebeens would get retail licences and hence be converted from illegal to legal retail outlets, SAB decided to promote black ownership amongst some of the AD's.[27] Three were selected; (i) Madadeni Beer Wholesalers (Pty) Ltd ("Madadeni"), Westonaria Beer Distributors (Pty) Ltd ("Westonaria") and Thohoyandou Beer Distributors (Pty) Ltd ("Thohoyandou"). These three distributors are referred to as the Honey BEE ADs.[28]

39. The difference between the Honey BEE ADs and the other ADs is that with the Honey BEE ADs, SAB gave assistance in the form of skills transfer, funding and financing.

40. According to SAB, the cost of establishing an AD of the size required by SAB is about R20 – 30 million.[29] Some of the ADs owners had prior interests and/or ownership in the liquor industry, for example ownership of bottle stores within

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[26] Wessels' witness statement para 41.2 and 41.6.

[27] In the transcript this project is referred as Project Enterprise and at times as Direct Store Delivery strategy (e.g. p 3170 of Transcript). We were also informed by Wessels that the licensing of shebeens was not as successful as envisaged.

[28] Wessels informed us at the hearing that the reason why SAB only has 3 Honey BEE ADs is that the liquor authority refused to grant it any further distribution licences (Transcript p. 3302).

[29] Wessels: Transcript pp 2813 – 2818.

or close to their respective territories. These AD owners however had to sell their businesses to independent third parties as any other involvement by them in the liquor industry (except acting as SAB ADs) was considered by SAB as a conflict of interest.[30]

41. From the mid1980s until the early 2000s there have been about 24 distribution centres established by SAB across the country.[31] There are instances where some of these centres failed and in these instances SAB would either continue to run those centres as separate legal entities or convert them into SAB depots.[32] For example the distribution centres in Giyani and Alice closed down. Of the remaining 22 centres 14 operate as ADs as of June 2013.[33]

Nature of the relationship between SAB and the ADs

42. SAB has concluded long-term wholesale and franchise agreements with its ADs. The wholesale agreements have been concluded between SAB and the 2nd to the 11th respondents and the franchise agreements with the 12th to the 14th respondents – Honey BEE ADs as indicated above. The difference between these two types of agreements is that an AD holding a franchise agreement (i.e. 12th– 14th the respondents) is not required to fund the business, i.e. gets funding from SAB, can buy equity over time and the agreement has an initial term of 10 years.

43. The ADs perform the same functions as those performed by SAB depots.[34] The function of the ADs is to accept orders placed by customers in their respective distribution areas, receive beer from the relevant brewery, stock the beer in a specially insulated warehouse, deliver the beer to customers, provide

[30] Wessels' witness statement para 40 and Transcript pp 2825 - 2827.

[31] Wessels indicated in Exhibit 100 that the word "centre" refers to both SAB depots and ADs alike.

[32] Wessels: Transcript p. 2831.

[33] Wessels: Exhibit 100 – this exhibit replaces para 37 – 39 of his witness statement.

[34] Adami's witness statement, para 34.

for customers to call and collect beer from their premises and to interact with SAB sales team in the relevant area.[35] The ADs deliver quantities from 10 cases of beer upwards and they do so (at least) once a week to customers in their respective areas.[36] AD's are also obliged to deliver to all customers in their allocated area who order above the minimum size regardless of where they are situated. This is referred to as a universal service obligation.

44. Approximately 80% of an AD's business comprises of mainstream quarts[37]. On average the size of truck required to perform these deliveries is one that can transport 18-pallets.[38] This is a large vehicle. The original agreements that SAB had concluded with the ADs stipulated that the ADs had to exclusively stock SAB products. However, this contractual obligation was removed in around 2000 when the competition legislation came into effect. The ADs, however, have never attempted to stock any other brand of beer, or even soft drinks from Coca Cola, a subsidiary of SAB. The reason for this is that they are at capacity with SAB beer.[39]

Pricing by the ADs

45. The ADs purchase beer from SAB at the price which appears on SAB's price list. The ADs then sell the beer to customers at the recommended selling price but are not allowed to sell at a price which exceeds the recommended selling price. The reason the ADs are restricted from exceeding the recommended selling price is so as to prevent them taking advantage of the special position they enjoy on account of their exclusive territories and raising prices to the detriment of consumers. According to SAB they are allowed to sell below the

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[35] Adami's witness statement para 35.

[36] Wessels: Transcript p.3285.

[37] These are 750 ml returnable bottles (Wessels: Transcript p. 3191).

[38] We were informed that a pallet of beer is the equivalent of 77 cases of beer and that an 18-pallet truck is around 13 to 14 metres long. See Wessels: Transcript p. 2995 and pp 2906 – 2907.

[39] Wessels: Transcript pp 2879 – 2880.

recommended selling price but this is a contested issue in this case which we discuss more fully when we deal with the section 5(2) count.

46. SAB remunerates the ADs for performing secondary distribution on its behalf by way of "handling"[40] and "delivery"[41] fees. In addition to the handling fee and delivery fee the ADs receive a small fee to compensate for missing and broken bottles. This fee is calculated as the value of one case of beer for every 30 pallets of beer received.[42]

How SAB calculates the cost of distribution

47. A core issue in this case is the system SAB uses to calculate the costs of distribution. This is where the distinction between primary and secondary distribution becomes vital. SAB costs.

48. Primary distribution costs are the costs of distributing beer from breweries to depots or to ADs. SAB also makes a distinction between a national base depot or AD and a non-base depot or AD. National base depots/ADs are those that are situated in the same geographical area or nearby where SAB's major breweries are, i.e. Gauteng, Durban and Cape Town.

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[40] The fee is expressly described in the franchise agreement as a "handling" fee while the wholesale agreement uses the term "wholesale discount". Wessels has confirmed that the term wholesale discount in the wholesale agreement is the same as the term handling fee in the franchise agreement. (Wessels' witness statement, para 59.1).

[41] The franchise agreement expressly describes the delivery fee as such while the wholesale agreement refers to it as the "delivery compensation rate". These different terms are used to describe the same concept. (Wessels' witness statement, para 59.2).

[42] Wessels' witness statement, para 63.

49. Wessels also explained that the closer a depot/AD is to a national base brewery, the lower its costs are and conversely, the further a depot/AD is from a national base brewery, the higher its costs become.[43]

50. Secondary distribution costs are the costs of distributing beer from the depots/ADs to retail customers. When SAB calculates these costs it splits the costs up into two parts, i.e. distribution to customers that are within a 50 kilometre radius (referred to as the free delivery zone) and those are beyond 50 kilometre radius. Beyond the free delivery zone there are further zones where distribution costs increase incrementally with the distance the trucks are required to travel. Wessels gave the following example: When the Newlands brewery in Cape Town sells beer to Boland Beer Distributors it will sell to them at R80.02.When Boland sells the beer to customers within a 50 kilometre radius it will sell at the same price i.e. R80.02. However, when Boland sells to customers that are beyond the 50 kilometre radius it will sell to them at R80.72 – the 70c that is added is aimed at recovering Boland's secondary distribution costs.[44]

51. Wessels explained that SAB does not try to recover all its distribution costs – it seeks to recover those costs in the non-base areas and then only to some extent. He also indicated that SAB needs to keep prices in rural areas low because consumers in these areas are poor and hence more price sensitive.[45]

52. Thus SAB does not claim nor could it that its system leads to a correspondence between what it charges for distribution and what it costs it to do so. It makes no more of the fact that the correspondence is reasonably proximate and that if anything as the journey gets longer so it is undercompensated for its cost; thus allowing SAB to make the claim that those of its consumers in outlying areas, whom it presumes to be the poorest, pay

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[43] Wessels: Transcript pp 3045 - 3046.
[44] Wessels: Transcript p 2840.
[45] Wessels: Transcript pp 3007-3008.

the least for the costs of distribution and are hence subsidised by the urban consumer.[46]

53. This highly centralised system of costing was the basis of the Commission's economic critique of the system of dividing territories. Roberts suggested in testimony, with no doubt a sense of irony, that SAB was substituting the virtues of competitive outcomes with centrally planned ones. What he meant was that if the distribution system was opened up for competition between ADs on the one hand and between ADs and independents on the other, the resulting competition would lead to lowered costs for distribution for some customers. This critique is analysed more fully later in these reasons.

RELEVANT MARKETS

54. In a case in which most aspects were contested, surprisingly, market definitions, usually the focus of dispute in most competition cases, were not. The market definitions are simple. SAB manufactures beer. It is overwhelmingly the largest beer producer in the country if one assumes, as the Commission does, that the market is for clear beer, as opposed to clear beer and sorghum. If the upstream market is clear beer, then SAB dwarfs it nearest rivals with a market share which the evidence suggests ranges between 89-90%[47]. Its nearest rival is Brandhouse, a joint venture company that includes in its repertoire of brands, Amstel and Heineken, both of which had previously been manufactured by SAB under licence.[48]

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[46] Wessels: Transcript pp 3018-3019.

[47] This was conceded in the testimony of Norman Adami the chief executive of SAB at the relevant time and now the chairman of its South African operations (Transcript p 3487).

[48] Brandhouse features prominently in this case although it was not a complainant nor did anyone from Brandhouse testify.

55. The upstream market thus defined is not a matter of dispute although it would be more correct to describe SAB's approach as not contesting rather than conceding this fact. [49]

56. SAB's share of the beer market is relevant to two issues in this case. In the first place the section 9 case requires the discriminating firm to be dominant as a jurisdictional fact. Non-dominant firms cannot be guilty of price discrimination. The second aspect of relevance attaches to the section 5(1) case. As we noted the Commission's theory of harm is about a lessening of intra-brand competition. Intra-brand competition is typically not of concern unless the firm concerned has a very high market share. That 89-90% of the market held over a considerable period is a high market share seems uncontroversial. Therefore, at least on this aspect, the Commission's concerns are correct. Intra-brand competition given the over whelming dominance of SAB in the clear beer market is a legitimate concern for the regulator to assess.

57. But this case is not about beer manufacturing but about distribution of SAB's products. The downstream market for distribution is where the Commission's concerns lie. The Commission defines the downstream market not as the beer distribution market but the market for liquor distribution. This is because firms that are engaged in distribution are required to have a licence to do so and the licence entitles the firm to distribute all types of liquor. As it happens the protagonists in this case are the complainant and similarly situated firms who distribute all types of liquor products and the second to fourteenth respondents who by contract with SAB limit themselves to distributing only the latter's beer products.

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[49] Genesis which was the economic consultancy that represented SAB in this case in its report stated that it accepts that SAB is dominant if the market is defined as a beer market although it cautiously adds the caveat that it did not assess this itself (Transcript p 3955).

58. The Commission defined the downstream market as one for the distribution of liquor. Whilst by no means the only firm distributing liquor, SAB's large share of the beer market and beer's large volumes relative to other forms of liquor, have meant that SAB has the largest share of this market in the complaint period. The Commission has not estimated the size of this market presumably because its case on competitive harm is now about a series of spatial monopolies that are enjoyed by the ADs.[50] However, SAB's experts Genesis have put up figures both on share of volume and share of value. Recall that although quarts, the predominant product in this dispute, are by definition high volume, they are not high value, especially when compared to spirits.[51] Thus as a share of volume, Genesis estimates SAB's market share as 70%. As a share of revenue, on their estimate, this figure drops to 45%.[52]

59. If this were an inter-brand case this size share of the liquor distribution market would be a significant factor in the analysis of any foreclosure strategies that might be embarked on. However as we noted earlier it is not about inter-brand but intra-brand competition. Therefore what is relevant is whether 1) intra-brand rivalry is a factor worthy of consideration in the clear beer market given SAB's overwhelming dominance and 2) if it is, whether the distribution of SAB products on a competitive basis would foster intra-brand rivalry leading to lower prices and improved service and thus be of benefit to consumers.

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[50] Professor Roberts slide presentation. Exhibit 63 slide 23. See also slide 12 of the same exhibit, where Roberts refers to a national market for liquor distribution but with "*local sub-markets*".

[51] The Commission estimates that quarts constitute 80% of the beer supply market. (Exhibit 63 p 10).

[52] See Exhibit 120 page 2. This in turn is sourced from AC Neilson figures which were contained in Exhibits 75- 76. See also Malherbe's testimony on this, transcript pp 3734 - 3735. Note Genesis attempts to dilute this figure by attributing to independent distributors SAB's volumes to shebeens. But if volumes to shebeens are collected not distributed in the ordinary sense by the vehicles of the distributing firm then this statistic is meaningless as the Commission suggests. However this is not an issue we have to decide in this case.

60. The answer to the first question seems a clear yes; the answer to the second question is less clear and is what this case is all about.

Section 4(1)(b)

61. Section 4(1)(b), in its essential elements, makes it a contravention of the Act for competitors to agree amongst themselves to divide markets.[53]

62. Section 4(1)(b), as we have noted before, provides for a *per se* offence.[54] What this means is that once a respondent's conduct meets the requirements of the section, no defence of justification is allowed, unlike with section 4(1)(a), where it is.[55] It is tempting for this reason for prosecutors to rely on it, but it also carries pitfalls. Whilst the terms of an agreement may on the face of it seem to satisfy the essential elements of section 4(1)(b),this may not be the end of the matter.

63. In hard cases counter intuitive outcomes may flow from an uncritical and rigid application of a *per se* provision. In the United States courts have had to decide whether conduct involving potential horizontal restrictions on competition should be evaluated under a rule of reason standard and hence permitting of a defence of justification, the equivalent of our section 4(1)(a), or

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[53] Section 4(1)(b) states "(1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship and if* –

(a)...

(b) it involves any of the following *restrictive horizontal practices*:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services;* or

(iii) collusive tendering.

[54] See for instance *Johan Venter v Law Society of the Cape of Good Hope and 2 Others, Case No: 24/CR/Mar12 (014688).*

[55] See *Ansac American Natural Soda Ash Corporation CHC Global (Pty) Ltd v Competition Commission of SA and 3 Others, Case No: 554/03* (para 43).

a *per se* standard, in which no defence of justification is permitted, the equivalent of our section 4(1)(b). In the leading case of *Broadcast Music, Inc. v Columbia Broadcasting System, Inc ("BMI")*[56] the Supreme Court decided that unless the courts had sufficient experience of a form of conduct as being clearly without justification, the courts should first embark on an exercise it termed "characterization", to determine whether conduct should be decided according to a *per se* or rule of reason standard.

64. What the Court cautioned against was what it termed "literalism" by which it meant that the superficial appearance of an arrangement should not necessarily condemn it to *per se* analysis and hence inevitably liability.

> *"To the Court of Appeals and CBS, the blanket license involves "price-fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price-fixing" is a shorthand way of describing certain categories of business behavior to which the* ***per se*** *rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services, they are literally "price-fixing," but they are not* ***per se*** *in violation of the Sherman Act.*
>
> *... Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behaviour to which we apply the label "per se price-fixing." That will often, but not always, be a simple matter".*[57]

[56] *Broadcast Music, Inc. v Columbia Broadcasting System, Inc., – 441 U.S. 1 (1979).*
[57] BMI, ibid, para A.

65. Thus a complex set of arrangements to sell recording rights as a bundle was deemed worthy of rule of reason, not *per se* analysis.

66. This approach commended itself to our Supreme Court of Appeal ('SCA') in the *Ansac* case.[58] The SCA had to decide whether evidence should be led in a case that might ordinarily be thought to justify an arrangement when the respondent was charged under section 4(1)(b) in other words in terms of the *per se* standard.

67. The SCA explained characterisation thus:

> "*...It is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry*".[59]

68. What characterisation means in practice is not the subject of any clear doctrine that one can apply in other cases.[60]

69. Presumably this is because the cases where the necessity for characterisation arises are rare and dissimilar.

70. In *BMI* the Supreme Court suggested that the characterisation enquiry must focus on whether:

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[58] *American Natural Soda Ash Corporation and one other versus Competition Commission of South Africa and three others, case no: 554/03.* See paragraph 50 of the decision where the parts of the passage we cite from BMI is quoted with approval by the SCA.

[59] Ansac decision ibid, para 47.

[60] In Ansac the Court made clear that: "*We are not called upon in this application to give meaning to the prohibition and indeed it is not permissible for us to do so.*" See Ansac ibid, para 59.

"... the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less competitive".[61] (Our emphasis).

71. Whilst this comment is made at a high level of principle, considering whether a practice leads to an increase or decrease in output is instructive. We go on to conduct such an exercise after we have considered the arguments advanced by the Commission in more detail.

72. The Commission's section 4(1)(b) case is on the face of it very simple. SAB has agreements with all the AD respondents. Some are in the form of franchise agreements and others are licence agreements. However, regardless of their particular nature, the essential elements of the agreements relevant to the section 4(1) case are the same.

73. SAB gives the AD an exclusive territory in which to distribute its products. Provided it does so, the AD will be given a monopoly in that area. SAB undertakes to ensure that no other AD supplies into that territory. In turn the AD agrees not to *"...solicit any orders for the products from customers situated outside the territory nor deliver or knowingly sell the products directly or indirectly to customers located outside of the territory."*

74. Note that the ADs do not contract between themselves. The agreements are all between the respective ADs and SAB. In this sense we have what is termed a hub and spoke arrangement. A series of identical vertical arrangements is used to achieve a horizontal arrangement between firms, without the firms having reached direct agreements inter se.

75. However SAB does not only have a vertical arrangement with the ADs to achieve a horizontal outcome between them. It is also a distributor of its own

[61] *BMI*, ibid, para C.

products through its own wholly owned depots located at various places around the country.

76. SAB gives a reciprocal undertaking to the ADs in respect of its wholly owned depots and goes on to state that it will not *"...make its pricing outside the territory so attractive that it encourages the Wholesalers' (the AD) customers to purchase products from SAB"*.[62]

77. Since it is not contested that these are the terms of the agreements, the Commission considers that it has established all the elements of the contravention. To some extent they are correct. If fourteen firms divide territories and customers between themselves using one firm (SAB) as the hub through which the arrangement is concluded, even though they do not have separate self-standing agreements between themselves, a clear violation would have been established. Further they each separately contract with SAB qua distributor not to effect a division of territories between them and the SAB depot operation.

78. Thus the agreements prima facie exhibit a territorial divide in contravention of section 4(b)(ii) between distributors on the one hand (albeit indirectly through the medium of SAB), and between distributors and SAB insofar as the latter is also a distributor of its products from its depots. If we were to concede to literalism i.e. simply take the agreements at face value, then there has been a contravention.

79. But, argue SAB and the ADs, there is more to this arrangement than simply the text of the agreements. Hence we move into the realm of characterisation.

Analysis

80. There is little doubt that shorn of economics, the horizontal case looks a straight-forward violation of section 4(1)(b)(ii). But a closer economic analysis suggests otherwise.

[62] Clause 4.3 of the wholesalers' agreement. See pleadings p 18.

81. Legally the ADs are firms separate from SAB and one another. But this case raises the question of whether one views the 'firm' for the purpose of the Act, solely as a self-standing legal entity or whether it has to be additionally, a self-standing economic unit.

82. Prominent US antitrust commentator Phillip Areeda has written that:

> *"The existing business firm – whether a single person or many persons joined together is assumed to be the basic economic unit competing with other economic units. The classic concern of antitrust law has been to preserve competition among such firms by preventing them from joining together to achieve for themselves the fruits of monopoly".*[63]

83. The fundamental characterisation question to address in this case is whether the ADs constitute the basis economic units contemplated in classic antitrust law or whether they constitute something less than this. Here the focus is not on the content of the agreements but the relationship between the parties to those agreements. Can they be understood to be competitors as contemplated by section 4(1)(b)(ii)?

84. In European Union case law, agents are not regarded as capable of conspiring with their principals, albeit that they are legally separate firms. Neither SAB nor any of the ADs raised an agency defence nor did they rely on the unique provisions of section 4(5) of the Act, which provides that agreements between firms which form part of a single economic entity do not contravene section 4(1). We therefore need not consider whether the ADs fit into either of these boxes since they have not asserted that they do.

85. But that still leaves unanswered the fundamental question of whether the ADs are basic economic units independent of SAB, even if as a question of law,

[63] Areeda p 187.

they cannot be categorised into some box as agents or single economic entities.

86. There is no single categorical rule or set of rules that we have been referred to in case law that would identify where this boundary between a single and basic economic unit occurred. We have been referred to the seminal writings of Ronald Coase on the boundaries of the firm, but these writings answer the question of why a firm's boundaries might extend, but not when they are deemed to do so.

87. This decision will not advance any doctrine on this subject either. What we have concluded is that the ADs do not comprise a single economic entity with SAB; but we also conclude that they are not sufficiently independent of SAB in the manner that would make them its competitors in distribution of its products nor competitors of one another, in the sense that competitors are a requirement for section 4(1)(b) to apply. Because such a holding may seemingly allow contrived structures to evade section 4(1)(b) we have not come to this conclusion lightly. We have considered a number of factors in reaching this conclusion. None, taken on their own would justify the conclusion, but taken cumulatively, and with supporting contemporaneous evidence we conclude that such a far reaching assessment is reasonable.

88. These factors are:

(i) The ADs as we noted earlier were not created autonomously but were the creation of SAB in response to a need to better supply outlying regions with an improved system of delivery. Expressed differently, but for SAB, the ADs would not have come into existence. This was in the language of *BMI*, an output increasing decision;

(ii) At no time during the course of their existence have ADs operated autonomously. Whenever an AD has failed, SAB has resumed operations or found a new owner. When SAB has been unhappy with an incumbent owner/

franchisee they have been in a position to remove the person as happened in the case of Mabanga, a Commission witness and former AD owner;

(iii) No mergers or sales of business have taken place except with the concurrence of SAB;

(iv) The ADs have never sold any product other than that of SAB. Although at some stage, where it seems this litigation may have been anticipated, a decision was made to remove the prohibition from the ADs' contracts, none ever did. Proof that the economic relationship prevailed over the absence of contractual restriction;

(v) All key business decisions that impact on competition are reserved for SAB to undertake or when not, require its approval. Notably pricing, marketing and allocation of customers are determined by SAB, not by the ADs and when market conditions have changed, it has been SAB, not the ADs which has responded to them, by changing the size of a territory or re-allocating customers;

(vi) Each AD has SAB staff sitting in its premises, whose function is largely to handle marketing, perhaps the key business aspect indicative of an independent firm. Having surrendered this function to SAB this detracts in a large part from the autonomy of the AD business;

(vii) SAB's model ensures that informational asymmetries are exploited to the benefit of SAB and undermine the ability of ADs to operate autonomously. In short SAB has all information, both national and regional, whilst at best an AD has information about its own region, but has no knowledge, unless SAB shares this with it, of future production and marketing decisions that SAB, their sole supplier, intends to make;

(viii) SAB controls the financial pipeline to the ADs sufficiently closely to ensure that none become too profitable at the former's expense. ADs are rewarded for diligence not entrepreneurship. ADs thus have limited capital to expand operations beyond what SAB intends them to be;

(ix) There is no evidence, as we discuss more fully in the following section dealing with the vertical case, that suggests that the arrangement exists to increase prices, normally a hallmark of a collusive arrangement. On the contrary the

arrangement seems designed to ensure lower prices to outlying areas and to prevent arbitraging by intermediaries to less favourably located customers;

(x) Further to the above point the arrangement was premised on increasing and improving supply to less favourably located customers. An increase in supply is typically the antithesis of a collusive outcome;

(xi) If the restrictions were removed SAB's response was that they would close down the ADs and do the distribution themselves. Whilst threats of this nature must be treated with caution when made by an accused party, it is wholly probable, given that SAB distributes 90% of its product itself and already has extensive tentacles into the businesses of all the ADs. The likelihood of the threat becoming a reality is highly probable; and

(xii) In short there is very little daylight between the economic operation of a depot – a wholly owned SAB operation – and an AD from a competition perspective.

89. We conclude that for these reasons the ADs cannot be considered autonomous economic actors independent of their supplier which but for the agreements in question would otherwise be in a competitive relationship with one another. They cannot be considered autonomous actors now nor were they ever since their conception.

90. If they are not autonomous or separate basic economic units then this exercise in characterisation determines that at least for the purpose of section 4(1)(b) they cannot be characterised as basic economic units independent of SAB and thus capable of conspiring not to compete with it and with one another. To repeat the words of the SCA in Ansac after conducting this exercise in characterisation we find that *"...the character of the conduct complained of does [not] coincide with the character of the prohibited conduct".*

91. Had this case decided that the arrangements fell under section 4(5) i.e. SAB and the ADs constituted a single economic entity this would have ended our consideration because the 4(5) defence is available for both sections 4(1)(b and 4(1)(a). But we have made a less categorical finding that although the

relationships between the ADs and SAB are akin to one of a single economic entity in many respects they are still not the same. Our finding is that after characterisation such conduct should not be assessed on a *per se* standard, in other words adjudged as an arrangement falling into the provisions of 4(1)(b).

92. This does not mean that it should not still be considered under the rule of reason standard. Characterisation is conducted to avoid the error of being categorical about denying the defence of justification to arrangements of which one has less experience. It would similarly be an error to not consider the legality of such arrangements under section 4(1)(a).

93. Although the *Ansac* decision does not provide guidance on this point, because it did not need to consider it, this is the approach taken by the US Court in *BMI* a decision that as we noted, influenced the SCA approach in *Ansac*.

94. In *BMI* the Court held:

> *"With this background in mind ......, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may ultimately not survive that attack, but that is not the issue before us today".*[64] (On this basis the case was remanded back to the Court of Appeals for rule of reason analysis.)

95. We note that in this case the Commission has not charged the respondents under section 4(1)(a) as an alternative count. Had they done so, rule 15(3) of the Tribunal Rules would have applied.[65] This rule states that a complaint referral may allege alternative prohibited practices based on the same facts.

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[64] See BMI, ibid. III E.

[65] More formally the Tribunal rules are known as the Rules for the Conduct of Proceedings in the Competition Tribunal.

96. It might have been an objection in this case to considering the conduct under section 4(1)(a), if as a matter of fairness, the respondents, not alerted to this possibility, had failed to raise any defence which they might otherwise have under that section. However, the case relied on under section 5(1), as an alternative, alerts the respondents to raise the same defences, as the language of the two provisions in this respect is the same. Thus the respondents had the opportunity to raise the defence that the Commission had not established an anticompetitive effect (a requirement for both) and a defence of justification (a requirement for both). Indeed, in this case in defending themselves in response to the 5(1) count, the respondents did both.

97. We therefore go on to consider whether the arrangements contravene section 4(1)(a) because it would not be unfair to do so. Since both enquiries under section 4(1)(a) and section 5(1) require, as a threshold issue, as we noted, the existence of an anticompetitive effect we will examine this issue first, but combine the enquiries. [66]

98. Before we do so, we must briefly examine the Commission's case as formulated under section 5(1).

Section 5

99. The Commission's case under section 5(1) evolved; initially its case was that the arrangement, by preventing competition across borders, kept prices higher within AD areas. After the receipt of the economic report of its experts the case became more confined. The Commission's theory was that the territorial allocations prevented cross-border arbitrage at the boundaries of territories and thus customers were deprived of supply from the best located and hence the lowest cost ADs.

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[66] Anticompetitive effect is a shorthand for language which more formally stated in both sections 4(1) and 5(1), as agreements that have the "*...effect of substantially lessening, or preventing competition in a market*".

Was there an SLC under section 4(1)(a) or 5(1) ?

100. In an ideal situation each AD would be located at a point that is nearer to its allocated customers than any other AD is. However, the best SAB can do is to allocate ADs as close as possible to the bulk of their customers, not to all. The reasons are practical. The geography of a region, availability of suitable property for a depot and the location of customers, mean that optimal placing is more idealised than realised.

101. What this means is that once SAB decided to create exclusive territories with exclusive customers to be served in them, it was impossible to ensure that the AD depot was closer to each of its allocated customers than any other depot.

102. As a result, on the outskirts of territories, some customers are more closely located to a depot in an adjacent territory, to which they have not been allocated, than to the one to which they have been allocated. The kernel of the Commission's case on this aspect is that if the territorial exclusivity were removed, depots would logically serve the customers to whom they were the most optimally located . Since depots would then compete to serve customers located at the periphery, the most optimally located or efficient distributor would win the customer, passing on the lower distribution costs to the customer. As Roberts suggested in his testimony, we would expect a competitive system to prove superior to a centrally planned one.[67]

103. To give practical support to this theoretical argument the Commission performed tests in certain territories located in the Western and Eastern Cape. We will not burden this decision by mentioning them all – as in no example did the Commission prove its allegations. One example suffices.

[67] Roberts: Transcript p 2044.

104. Henderson Mabanga who ran the now defunct AD in Alice in the Eastern Cape alleged that he was obliged to serve the town of Whittlesea from his AD in Alice, because it was part of his allocated territory. He testified that Whittlesea could have been serviced at lower cost from an SAB depot in Queenstown - about a third of the distance away, compared to his depot in Alice. Moreover he alleged the geography of the area meant that the journey was less problematic from Queenstown than it was from Alice.[68] Wessels however disputed this testimony. Not only he said had Mabanga exaggerated the distances from Alice to Whittlesea – making out the journey was 23 kilometers longer from Alice than it in fact was, but he had failed to take into account the costs of primary distribution. Once primary distribution had been factored into the costs of distribution, Wessels alleged that it was still cheaper to distribute from Alice not Queenstown and hence the allocation was efficient.[69] The outcome was similar with several other examples put forward by the Commission. Ostensible irrational allocations, when based solely on distance of secondary distribution, were shown to be rational when primary distribution costs were added to the costs.[70]

105. One example which did not rely on disputes over distance calculation involved the AD at Madadeni. The Madadeni depot is an AD situated 16 kilometers away from Newcastle. Despite this proximity SAB served Newcastle from its depot in Ladysmith 100 kilometers away. The Commission cite this as a further example of irrational allocation. SAB concedes that Madadeni now

[68] Mabanga: Transcript pp 266-268.

[69] According to Wessels distributing from Alice cost R 260 per pallet, distributing via Queenstown would have cost R 273 per pallet. Wessels: Transcript p 2954.

[70] Other examples relied on by the Commission included; Sedgefield – allocated to an SAB depot in Knysna but which the Commisson alleged was closer to the AD in George, and Swellendam - which is supplied from an SAB depot in Bellville rather than an AD in Worcester. Again the answer was that once primary distribution from the nearest brewery was factored in the allocation was optimal despite the difference in secondary distribution legs.

serves Newcastle. It alleges that supplying it from Ladysmith was a "legacy" issue. What it means by this euphemism is presumably an apartheid legacy issue. Madadeni is white Newcastle's black township. However the legacy issue has since been overcome. More convincingly SAB explains that Madadeni was originally a cash and carry depot and did not deliver at that time.

Analysis

106. As we have seen, what the Commission did was to calculate the distance by road from an AD to a customer area to see, if using SAB's distance costing calculations to that area, it was optimally located in respect of its allocated AD. Having done this measurement and found that in several instances the customer was more closely located to another AD or depot to which it had not been allocated, the Commission drew the inference that the allocations were arbitrary and inefficient. If on the other hand territorial allocation was removed the optimal outcomes would be reached with the ADs competing at the boundaries ('the frontier areas') finding the cheapest route to customer.

107. Most of the evidence in this case involved SAB's attempts to refute this thesis. The SAB defence comprised several planks:

(i) The Commission's analysis of the logistics was incorrect as the Commission had failed to correctly cost the transport at frontier areas, as it took into account only secondary and not primary distribution costs. Once the more expensive primary distribution was included in the calculation, SAB using several examples, contended that its allocations remained the cheapest option;

(ii) SAB was not inflexible about borders and changed them when necessary as was shown in Newcastle/ Madadeni history;

(iii) Even if the Commission was correct that permitting arbitrage might lead to lower prices in some areas, the Commission had not demonstrated how much lower prices would be and how wide the effect. In essence this was an argument that price discrepancies through the system were *de minimis;*

(iv) The core defence was that if territorial exclusivity was threatened the counter factual was that the edifice of the arrangement would be destroyed leading to inefficiencies in a highly planned logistical system that would lead to higher prices. In short a system that depended on central planning to ensure that the right amounts were supplied to the right places would be replaced by one subject to arbitrariness, uncertainty and inefficiency, with a consequent increase, not decrease in the costs of the total supply chain. Here SAB gave its figure as to the costs of R729 million and R1 billion. In SAB's conception the distribution system is a holistic system with information running from ADs to the central office and back; in essence a continuous feedback loop where disruptions to any part thereof compromise the entire system. This it argued outweighed any slight benefit in price to some customers in frontier areas;

(v) In short, far from competition leading to lower prices for consumers, the AD system effectively meant that less favoured customers paid less for the transport costs of their quarts of beer than did their urban equivalents; and

(vi) Finally, and most crucially, SAB asserted that if it was not allowed to use the ADs in an exclusive territory system it would not remove the restrictions but simply end the system and replace ADs with wholly owned depots.

107. All this occupied a significant amount of hearing time. After the Commission had made its case, SAB revisited each journey again, with its witnesses claiming errors in the Commission's approach. The record is littered with tables of calculations, tables in refutation of those tables and tables refuting the refutations.

108. It is simply too burdensome to labour this decision with all the arcane detail that we had to sit through. The issues can be crisply set out as follows.

109. The Commission bears the onus under both 4(1)(a) and 5(1) of showing that the arrangement had a substantial anti-competitive effect. In order to succeed it would need to establish that the arrangement with the ADs restricted them from competing with one another and that this restriction leads to a substantial lessening or preventing of competition in the market for the distribution of SAB's products.

110. It is common cause that the arrangement prevents AD's competing for customers in the territory of other AD's. It is not common cause that this necessarily leads to an anticompetitive outcome.

111. Let us examine some of the contested evidence more closely.

112. The Commission, as we have seen, has sought to make a case on logistics, but it has not, as SAB points out, led a logistics expert. Neither of course did SAB. But it does not bear the onus and it led the evidence of one of its own employees, Wessels, who can at least make some claim to expertise in that area, albeit that he is not an independent witness.

113. The Commission, once all the evidence on logistics had been exhausted, was not able from any of its examples – bar Newcastle – to establish that the SAB chosen depot, was not the optimal supplier to the retail outlets allocated to it. In a large part the reason for this was that the Commission had confined itself to the costs of secondary distribution and not taken into account the costs of primary distribution. Recall that primary distribution is the journey from brewery to depot; secondary distribution the journey from depot to customer.

114. The examples relied on by the Commission were all calculated taking only secondary distribution costs into account. SAB's evidence was that once both legs were taken into account the Commission's contentions foundered. Primary distribution is more expensive as it requires larger trucks. For this

reason SAB seeks to shorten this leg even if this means extending the secondary leg. To properly arrive at the total cost, the distribution costs of both primary and secondary legs must be added. Once this was done the Commission was not able to refute SAB's contention that it was taking the cheapest route to the customer.

115. But even if the Commission was correct in respect of some customers – although it wasn't on the examples put up - it was not able to show quantitatively how many customers were affected or whether the differentials in cost were significant. Given that the affected customers were 'frontier customers' the likelihood is that they did not represent a significant number of customers for a particular AD, as if they did, SAB would have recreated the boundaries of the AD, as we know they did in Newcastle. The evidence was that SAB uses a sophisticated software system to plot the boundaries of its ADs and that based on this system, the boundaries are, within reason, optimal. Further, SAB is entitled in terms of the arrangements to alter boundaries and hence re-allocate customers when the need arises.

116. We find that the Commission has not established that SAB's distribution costs are significantly higher than they would have been had arbitrage been permitted. There is thus no evidence of a lessening of price competition from this arrangement.

Non- price competition

117. Part of the case is that the arrangements also affect non-price competition. By preventing competition between the ADs, service levels to customers are compromised. The most important of these was that customers would be faced with less deliveries and deliveries at sub optimal times. The Commission made out this case largely in theory. No evidence was led from any retail customer as to the deterioration of service levels under the AD

arrangements. Nor was it clear that if ADs competed there would be a change in service levels from those currently provided by the AD's under contract.

118. The only complaint about poor service came from Mr Pitsiladi. It's not clear given the hybrid nature of his business – the Big Daddy's group comprises both retail and wholesale outlets - whether his complaint was qua retailer or wholesaler. Nevertheless Pitsiladi alleges that SAB did not collect all the empty bottles he had at his premises thus prejudicing his business. It was put to him in cross examination, however, that the empties he had were empties he had from his own customers which he collected and were not required to be collected by SAB in terms of the contract they had with him. This is an isolated incident and insufficient for us to draw any conclusions from this evidence.

119. SAB contended strongly, as it had in relation to the price competition issue, that if the complex edifice of the AD system was tampered with, it would lead to higher costs for the distribution channel and compromised service levels. The basis for this argument is that the AD system is centralised and highly planned from SAB head office. ADs receive just enough supply that they need to hold and delivery schedules are complex models with carefully planned routes with the right volumes to the right people at the right time.

120. We do not need to consider this defence in any detail as the Commission again fails on its first leg – there is no evidence that the AD system has led to a compromise to non- price competition from what it might otherwise be.

121. The Commission has failed to establish that the arrangement with the AD will lead to a substantial lessening of either price or non-price competition. As a result it fails to make out a case either under section 4(1)(a) or 5(1) and it is not necessary to consider the pro- competitive defence of SAB.

122. Since the case under section 4(1)(a) fails and we have found the case under section 4(1)(b) does not properly meet the requirements of that section, it follows that no case of a horizontal or a vertical restrictive practice has been made out by the Commission.

Section 9(1) case

123. Section 9 (1) states:

(1) An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if –

(a) it is likely to have the effect of substantially preventing or lessening competition;

b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(c) it *involves discriminating between those purchasers in terms of –*

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) payment *for services provided in respect of the goods or services.*

124. The Commission's case is that SAB discriminates between the ADs and other customers of SAB who perform a distribution function, because the ADs receive a discount from the retail price to distribute, whereas the latter do not. Effectively SAB treats all its customers other than the ADs as retail customers with some exceptions for independents who distribute in urban areas to specific retail outlets such as hotels, restaurants and pubs.

125. The Commission contends that as a result the independent distributors perform a distribution function for SAB for which they receive no compensation as they earn no margin on the liquor they distribute by way of a discount on the retail price which the latter contend they are entitled to.

126. The evidence of the Commissions' witnesses on this aspect was that if the independent distributors sell SAB products at a premium to the retail price they will lose their business, as retail customers can get SAB products supplied to them at the retail price from their local AD. This means in effect that if independent distributors want to retail SAB products they must subsidise these sales from the margin they make on the liquor products of non- SAB liquor, as they are not compensated for the costs of distribution plus a fair margin for performing this function.

127. The Commission argues that absent this discount the independents cannot effectively compete with ADs in distributing SAB products and that they have lost and continue to lose contracts to the ADs and that as a result the *"... likely effect is a substantial lessening of intra-brand competition".*[71] Independent distributors who compete with ADs, and in SAB parlance are referred to as informal redistributors ("IRDs"), have SAB products constituting about 30% of their volumes. This figure would be lower in terms of value. For urban based independent distributors, what SAB terms urban redistributors ("URDs"), SAB products would be less significant both in terms of value and volume but we do not have a reliable figure of this because URD businesses differ considerably.

[71] Complaint referral, Pleadings file, p 39 para 11.10.

128. SAB's primary defence is that the transactions are not equivalent. This, as we have noted earlier, is a requirement of section 9(1)(b). It is this defence that we go on to consider.

129. SAB throughout the case characterised the remuneration received by the ADs not as a discount, but as a fee. It argued that the ADs receive the fee as quid pro quo for the obligations imposed upon them which are not imposed on any other firm that may distribute its products. These obligations, SAB contends, and the ADs unsurprisingly echo, are onerous and hence compensation is proportionate and appropriate. Inter alia these obligations comprised, meeting service and performance level requirements, providing a universal service to all customers whose orders exceeded a certain level, an obligation to stock all SAB products and an obligation to sell at not more than the recommended price.

130. Much time was spent in evidence examining the different business models of the ADs and the independents. They differed in several respects. Nor were independents a uniform category either. Two of the witnesses represented independents whose businesses combined both retail and a distribution function. Big Daddy's, Pitsiladi's business, retailed liquor through its Prestons operation but distributed liquor through its SAFWASM operation. Metro's operations were even more integrated with one door of an outlet selling wholesale and the other retail.

131. SAB is reluctant to give these hybrid firms the ability to buy at a discount *qua* wholesaler and then to sell the discounted goods *qua* retailer. No doubt a system could have been devised to circumvent this problem had SAB so desired.

132. The reality is that SAB does not offer the independents a distribution discount because from a business point of view it does not need to. It can reach the doors of its retail customers without needing to compensate the independents, because its own and the AD networks are strong enough for it

to do so. Where it is not able to do so, it offers discounts to those who perform this function. This is apparent from the way it treats so called URDs. URDs are firms of independent liquor distributors who distribute liquor in the major metropolitan areas. Their client base, however, does not include taverns despite the fact that the latter are also located in urban areas. Rather the URDs have inherited a market comprising traditionally, although of course no longer exclusively so, white areas.

133. Their customers are bars, restaurants and hotels, whose patrons' liquor preferences differ markedly from those of taverns. These patrons do not drink beer in quarts. Rather their beer preferences come in cans or smaller sized bottles than quarts. They also have a preference for what is termed premier brands. Nor is beer as ubiquitous a product as it is in taverns with these patrons having a preference for a variety of alcohol products which an outlet needs to be able to stock to satisfy demand. Not surprisingly, SAB products do not feature as significantly in these venues as they do in the quart focussed environment of the tavern and shebeen.

134. Deliveries to these outlets are smaller but more frequent and so require smaller sized vehicles in their fleets. For this reason SAB's distribution to these outlets has been weak. In order to improve its presence in these outlets it has more recently incentivised the URDs by way of distribution discounts. In other words SAB treats this species of independent distributors differently to those who seek to distribute to the tavern market.

135. Why then does SAB reward some independents for distributing its products whilst refusing to do the same for others? The short answer emerging from the testimony of Adami is that of pragmatism. They don't need to pay the independents whose efforts would replicate those of SAB's own depots or the carefully controlled ADs because they don't need them for distribution. Conversely, in the heartland of the URDs where SAB's market power in retail

is weaker and correspondingly so is its distribution footprint, it needs the URDs and so it pays them for this service by way of a wholesale discount.

136. Since SAB is a dominant firm in the market for the manufacture of liquor products – a common cause fact - does this amount to unlawful price discrimination by a dominant firm?

137. All this hinges in the first place on what is understood by the term "... *equivalent transactions*". The Commission approaches this issue by advancing first a textual and then a policy argument. The textual argument is to suggest that equivalence does not amount to something that is the 'same'; the test is less demanding; all that is required it argues is that they are '*comparably sensible when regard is had to their essential economic features*'. The policy argument is to favour interpreting section 9(1) as one there to protect small businesses from price discriminating behaviour by dominant firms towards larger favoured clients.

138. So how does one approach the task of 'comparing sensibly' the essential economic features of a transaction? The Commission answers this question in the negative. Not it says by comparing differences between customers. Customers' respective efficiencies it argues are irrelevant and embarking on this approach risks introducing through the backdoor an efficiency enquiry. Note that unlike other sections in the Act (4(1)(a), 5(1) and 8(c and d)), section 9 does not make express provision for an efficiency enquiry and appears to limit the classes of defences to those expressly enumerated under section 9(2).

139. SAB rely on the distinction between contractual obligations imposed on ADs and on independents to found the equivalence argument. The Commission counter that this does not account for the discounts given to URDs.

Analysis

140. We take a different approach to both although ours is closer to that of the SAB approach. In *Nationwide Poles*[72] we held that transactions were not equivalent if -

> *"Thus transactions may be functionally equal – one business class seat or one telephone call between Cape Town and Johannesburg may be functionally equal to another business class seat or telephone call, but they may not be equivalent (a call or a flight made in peak time as opposed to one made during a non-peak period) in the sense that their economic effect is different and hence the legislature, recognising this, chose not to bring 'non-equivalent' transactions under the rubric of prohibited price discrimination despite the fact that in other respects they may be regarded as equal."*

141. The case did not decide what these economic issues would be as defining them in categorical terms would be difficult and lead to rigidity. In this case again we do not need to embark on that exercise either, as for the reasons explained below, the reasoning why the transactions are not equivalent, does not require us to embark on a more complex enquiry, but rather one that deconstructs the underlying nature of the respective transactions.

142. When SAB contracts with ADs it is, in economic terms, engaged in two separate transactions, one as a seller of goods, and the other, as a purchaser of distribution services. When it acts as a seller, it is selling beer to its customer the AD. In the second transaction, it is purchasing distribution services from the AD for which it pays as a buyer of that service, by way of the discount afforded. The fact that these transactions take place simultaneously does not detract from this fact. Nor does it matter that the fee is paid for distribution before the distribution service

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[72] *Nationwide Poles and Sasol (Oil) (Pty) Ltd – case no: 72/CR/Dec03 –* para 132.

is rendered and at a time when the sale transaction is concluded. It might have mattered had not ADs been tied into a series of obligations which in effect meant that every quart sold is ultimately distributed to a retail customer.

143. Granted some might be call and collect customers for whom no distribution service is rendered but such customers are few and far between and every effort is made in the arrangement to disincentivise this form of purchase and ensure that the bulk of customers are those who receive their orders delivered to their premises.

144. Because SAB does not need to buy distribution services from the independents (with the exception of some) it does not afford them a discount and treats them as ordinary purchasers of its goods, not sellers of distribution services. In effect although these firms are licenced as distributors and want to act as such, SAB does not need to use them for this function and chooses not to do so. SAB is thus selling beer to them but not buying distribution services from them.

145. Thus, if there was any competition concern about this behaviour it would be a concern whether this amounted to a refusal to deal with the independents as distributors i.e., a potential section 8 offence. SAB has not been charged under this section and presumably this is because refusal to deal cases in distribution are not easy to prove.

146. The impugned transactions are therefore not equivalent and hence section 9(1) is not of application. It is not necessary therefore to consider any other defences raised by SAB.

Section 5(2)

147. The Commission had initially alleged that SAB practices resale price maintenance ("RPM") at both the wholesale and retail levels of its distribution

chain.[73] However, during its closing argument the Commission informed the Tribunal that it was no longer persisting with the allegations of RPM at the retail level, i.e. its submissions on RPM were only in relation to the wholesale level.[74] We therefore need only deal with the RPM case at wholesale level, a case which is confined to its wholesaling in respect of the ADs.

148. The wholesaling case relates to the manner in which SAB imposed a software program on ADs that limited their ability to set their own prices. This, alleges the Commission, constitutes the practice of RPM, as it prevented ADs from setting lower prices for their goods if they so wished.

149. Much about this aspect of the case is common cause. SAB utilised a computer system which set prices centrally for ADs. The ADs were by contract obliged to utilise this system. The manner in which this software operated prevented the ADs from providing a discount to customers in their accounting system because the recommended price was programmed into it in a manner which prevented this. SAB purchased this system from a third party supplier which had this limitation programmed into the system and thus it was not a creation by SAB nor inserted at its request.[75] SAB, however, in March 2008 corrected this problem and since then the computer system allows discounts to be accounted for as part of the program.

150. What is not common cause is whether ADs were still able to discount notwithstanding this system. Again the witness to provide the key evidence here for the Commission was Mr. Mabanga, the former owner of an AD in Alice. Mabanga has since fallen out with SAB in an unrelated dispute. His testimony was that the system was inviolable – you could not adjust the software to discount and so he did not. He denied propositions from SAB's

[73]The Commission's resale price maintenance ("RPM") case against SAB is set out in its founding affidavit from para 9.

[74]Transcript p 4321.

[75] Strictly speaking this was not a common cause fact but the Commission never sought to refute SAB's contentions in this regard so we will treat it as such.

counsel that one could still achieve a discount by providing customers with free beers or improving payment terms.

151. This in fact was the version put forward by Mr. Chiliza, who was at the time of his evidence, the owner of an AD in Madadeni. He alleged that not only was it possible to "discount" off the system in this manner, but that he did so and never received any threat or criticism from SAB for doing so. However, no details of how much or how often he did so were forthcoming.

152. No SAB witness gave any oral testimony on this issue. However, in his witness statement, Wessels indicated that although the IT system did not permit a downward reduction in prices, below the prices recommended by SAB prior to March 2008, this was not a business decision on the part of SAB, but an unintended consequence of the control measures implemented by the IT department. He also indicated that the ADs were not contractually prevented from reducing prices and in fact did so on occasion.[76]

Analysis

153. Section 5(2) prohibits in terse terms what it describes as the practice of minimum resale price maintenance. However, section 5(3) contains a proviso in the following terms:

> *(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
>
> *(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*
>
> *(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price.*

[76] Wessels' witness statement, para 66.

154. Its seems clear on the facts that we are not here concerned with section 5(3) as a defence, because there is no evidence that SAB complied with either (3)(a) or (b). We are also not concerned with the period after March 2008 when the program was rectified as ADs could freely use the system to account for discounted prices if they so wished.

155. The question is then whether they 'practised' resale price maintenance in the period up until March 2008?

156. SAB argue that the unintended consequence of the computer system does not amount to the practice of RPM. No ancillary conduct accompanied the provision of the system which would suggest this. The Commission contend that imposing a system of RPM on the ADs without indicating that they could discount the price amounted to the imposition of RPM. The response by SAB to change the system, the Commission argues, vindicates it's (i.e. the Commission's) position.

157. We do not think that any inference can be drawn from the SAB decision to change the system. It may well be that the decision was made because of legal uncertainty and that SAB did not wish to expose itself to unnecessary further liability. It would be unfair to draw an adverse inference against a firm that takes precautionary steps to ensure its conduct is not found unlawful.

158. There is also no evidence to suggest that SAB intentionally imposed the computer system on its ADs in order to enforce a system of RPM. It may well be that this, as they contend, was an unintended consequence of a program supplied by a third party.

159. The question that we have to decide is whether these facts are sufficient to show that SAB was engaged in the practice of RPM as required by section 5(2).

160. In the only case that has been considered thus far on this point the Competition Appeal Court in *Federal Mogul*[77] considered what a 'practice' meant and held as follows:

> *"The drafters of the Act clearly regarded resale price maintenance as an egregiously anti competitive activity and wished to state so in terse and clear terms. The wording of the section indicates that to establish a contravention thereof, it suffices to produce evidence which shows that a supplier has imposed on its distributors a price at which its goods are to be resold and distributors are thereby induced to comply with this minimum price on pain of sanction for non-compliance."*

161. There is little doubt that by imposing the package of software on the AD's which made accounting for discounted prices impossible unless the distributor provided discounts "off the books" SAB created a system where RPM was effectively implemented, albeit absent an express intent to do so. However there was no evidence, even from Mabanga that SAB would impose sanctions for non-compliance.

162. Mabanga testified that he believed he could not discount but was not able to substantiate this with any experience he had had of being induced. Chiliza's evidence was that he understood that he could discount and that he did, without invoking any sanction for doing so. Given that they were both called as Commission witnesses, on this inconsistent record we have to conclude that the element of inducement was missing and that it seems equally probable that SAB's use of the software was unintended. The paucity of evidence on this issue is not surprising. Given the structure of the AD areas they faced no competition from other ADs and their price advantage meant they faced little competition from independents - there was therefore no need

[77] *Federal Mogul Aftermarket Southern Africa (Pty) Ltd and the Competition Commission and the Minister of Trade and Industry- case no: 33/CAC/Sep03* – p 8.

for ADs to discount on the recommended price – their customers had no alternative. Hence unsurprisingly the Commission did not have available to it any evidence beyond Mabanga that AD's were induced not to charge below the recommended price.

163. The Commission suggests that once the software was configured as it was, SAB had a positive duty to inform distributors that they could still discount, and that a failure to do so should make SAB still liable. The Commission also points out that the elaborate reporting mechanism imposed on ADs required them to account for quantities sold and prices – effectively inhibiting ADs from freely taking the unorthodox steps suggested to effect discounts.

164. Expressed differently, having created a situation where RPM was likely, given that discounting became more difficult and less practical, when one couples the software constraints together with the reporting duties and the consequences for non-compliance, SAB had a legal duty to inform the ADs that they could still discount and having not done so, they must be deemed to have induced the practice of RPM. On this argument, the threat to cancel a contract for non-compliance was a sufficient sanction for non-compliance in the manner contemplated in *Federal Mogul.*

165. This is an interesting argument and one which we may have to consider on another occasion, but given the evidence of Chiliza as to his understanding of the latitude allowed to him, and considering that he was a Commission witness, there appears to be a dispute of fact on what was communicated to ADs, and given the onus is on the Commission to prove the existence of a 'practice' we have to accept Chiliza's evidence that there was such an understanding and hence on the facts this point need not be decided now. Further the rights to cancel the agreements for breach are not directly linked to a sanction for discounting, and hence this power to cancel albeit a powerful sanction is not directly linked to the practice of RPM on the facts of this case.

166. For this reason there is insufficient evidence to find that SAB engaged in resale price maintenance in respect of its sales to the AD's.

Conclusion

167. The case against the second to fourteenth respondents in respect of section 4(1)(b)(ii) and 5(1) is dismissed. These were the only charges these respondents faced.

168. The case against the first respondent (SAB) is dismissed in respect of sections 4(1)(b)(ii), 5(1), 5(2) and 9(1). These were all the charges it faced.

Problems with Commission's case

169. If the Commission's prosecutorial inclination for bringing this case was the generally held view that intra-brand competition is only an issue of concern where inter-brand completion is weak, then certainly SAB's dominance as a seller of clear beer particularly to the tavern/ shebeen market would be a legitimate issue of concern.[78] However, in the distribution market where the alleged prohibited practice takes place the Commission makes no case against 90% of SAB's distribution – those that it distributes through its own depots. Once one is left with a case concerning only 10% of its distribution, two things become immediately obvious; (i) no remedy is likely to have a great impact

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[78] For instance see *Motta* page 347: "The main conclusion of this section is therefore that vertical restraints which affect only intra-brand competition do not raise many welfare problems; certainly they are not worth investigating when firms that adopt them do not have high market power" – (Massimo Motta Competition Policy: Theory and Practice, 2004). See also *Whish et al* page 625 who state "As a general proposition competition law has less concern with restrictions of intra-brand competition than with restrictions of inter-brand competition". They go on to indicate that these concerns only arise when inter-brand competition is weak – (Richard Whish & David Bailey, Competition Law, Seventh Edition, 2012).

given its restriction to 10% of SAB's distribution; (ii) even if a remedy was imposed abolishing territorial exclusivity, why would SAB not, as it says it will, move that 10% to its own depots or buy them out when this form is not under attack from the Commission.

170. The other fault-line in the Commission's case is the lack of a counterfactual. In this case there is no history of the independents having been given a discount for distribution which was then removed from them in favour of the AD's. Had there been such a practice and the efficiency of independents in keeping prices lower than those offered through the AD chain could be demonstrated, the Commission may have had something of a case on effects. Without this past history its case on effects had to be speculative. The independents may not now be more efficient than the AD's, but would be if they got the volume and invested in distribution was the Commission's final position. This might be so, but might is not good enough when a case has to be made out on a balance of probabilities. Given the two fault-lines in this case it had to ultimately fail and so it did.

COSTS

171. The respondents contended that on the special circumstances of this case they were entitled to costs. The legal position on this issue is now clear and respondents are not allowed costs as against the Commission in complaint referral proceedings. The fact that this case took as inordinately long as it did is as much due the manner in which the respondents conducted their defence in this case as it was due to the efforts of the Commission.

172. Even if we had the discretion to award costs this would not have been the case to do so. The Commission had received a complaint from industry players against a dominant firm and was entitled to prosecute, if at the time it thought fit to do so. That we have disagreed with it on some issues does not transform this

prosecutorial decision into one for which the sanction of a cost order would be appropriate.

ORDER

1. The case in respect of the first respondent is dismissed in respect of all counts it faced.
2. The case in respect of the second to fourteenth respondents is dismissed in respect of all counts they faced.
3. There is no order as to costs.

Mr. Norman Manoim

24 March 2014
Date

Ms. Yasmin Carrim and Professor Merle Holden concurring

Tribunal researcher : Ipeleng Selaledi

For the Commission: Anthony Gotz and Richard Mkhabela instructed by Mkhabela Huntley Adekeye Inc.

For SAB : David Unterhalter S.C., Alfred Cockrell S.C. and Lwandile Sisilana (and earlier Paul McNally S.C.) instructed by Bowman Gilfillan

For the ADs : Jerome Wilson instructed by Norton Rose Fulbright.