

PERFORMANCE INFORMATION

April – September 2022

PORTFOLIO COMMITTEE ON TRADE, INDUSTRY AND COMPETITION

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Chairperson of the Competition Tribunal

07 March 2023



competitiontribunal
SOUTH AFRICA

Outline

- About the Tribunal
- Competition Amendment Act
- Half-Year Performance on Annual Performance Plan 2022/23
- Case Performance Highlights – April – September 2022
- Financial Performance – 2022/23
- Conclusion

The Competition Tribunal

- ❖ The Competition Tribunal (Tribunal) is an independent adjudicative body established in terms of section 26 of the Competition Act, No. 89 of 1998 (Act)
- ❖ The Tribunal has jurisdiction throughout the Republic of South Africa
- ❖ The Tribunal is one of three independent authorities established in terms of the Act, these are:
 - a) The Competition Commission (Commission), which is the investigative and enforcement authority
 - b) The Tribunal, which adjudicates on matters referred to it by the Competition Commission, and
 - c) The Competition Appeal Court (CAC), which considers appeals or reviews against Tribunal decisions.
- ❖ Section 34 of The Constitution of the Republic of South Africa, 1996 states that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”

Legislative Mandate

- ❖ The Tribunal derives its legislative mandate from the Competition Act and its purpose is to promote and maintain competition in the Republic in order to:
 - a) promote the efficiency, adaptability and development of the economy;
 - b) provide consumers with competitive prices and product choices;
 - c) promote employment and advance the social and economic welfare of South Africans;
 - d) expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
 - e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;
 - f) promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and
 - g) detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.

Tribunal Strategic Outcomes

The Tribunal has two strategic outcomes:

Responsive and reliable adjudication
(8 targets)

Transparent, Accountable and
Sustainable Tribunal (15 targets)

National Policy Alignment

- ❖ The National Development Plan (NDP) 2030
 - ❖ The Tribunal's outcomes are aligned with the NDP
 - ❖ The NDP sets out the long-term vision for the country and provides a broad strategic framework to guide government choices and actions required to transform the economy and society

- ❖ The Economic Reconstruction and Recovery Plan (ERRP) 2020
 - ❖ The Tribunal has aligned its outcomes with the ERRP
 - ❖ The ERRP was developed by government in response to the Covid-19 pandemic in order to stimulate equitable and inclusive growth in the economy

- ❖ The Tribunal contributes to the dtic's three over-arching joint/integrated outputs that address the dtic portfolio contribution to outcomes such as inclusive growth, job creation, combating poverty and dealing with inequality are as follows:
 - a) Industrialisation - opportunities to grow the domestic market through localisation, sector partnerships (Masterplans), Green economy initiatives, investment expansion/promotion, African and Global exports
 - b) Transformation - opportunities to promote BEE, worker empowerment, addressing economic concentration and SME promotion
 - c) Delivery/Capable State - initiatives to build entity staff and governance capacity and quick response, participate in the shared services of the dtic and undertake internal business processes improvements

Competition Amendment Act

- ❖ The Competition Act has undergone several changes which have affected the Tribunal's mandate and functions
- ❖ Some key amendments
 - ❖ *Abuse dominance*
 - ❖ Introduces buyer power and margin squeeze provisions
 - ❖ Strengthens excessive pricing and price discrimination provisions
 - ❖ Clarifies the predatory pricing provision
 - ❖ *The new dominance provisions have led to an increase in the demand for the Tribunal services and increased complexity of the cases*
 - ❖ For example, prior to these amendments only two excessive pricing complaints (Sasol and Mittal) had been prosecuted by the Commission before the Tribunal (Sasol was overturned by the CAC while Mittal was remitted back to the Tribunal (and was settled between the parties))
 - ❖ However, in the three years post the amendments the Tribunal has heard about 50 cases in terms of the new excessive pricing provisions in relation to COVID-19 cases

Competition Amendment Act (Cont'd)

❖ *Merger control and public interest*

- ❖ Strengthens factors that are relevant to determining the public interest effects of a merger
- ❖ Clarifies the role of competition and public interest matters in a merger
- ❖ Adds an additional public interest criterion to the law
 - ❖ Four criteria prior to the amendments: impact on a sector or region; employment; impact on small and medium businesses; and ability of national industries to compete in international markets
 - ❖ Fifth criteria added: The amendments provide for *the promotion of a greater spread of ownership, particularly by black South Africans, including workers*
- ❖ The Amendment Act strengthens that the authorities should consider impact of a merger on medium businesses (in addition to small businesses); and introduces a new test: the ability of SMEs and black-owned firms to effectively enter into, participate in and expand within the market
- ❖ *The amendment of the merger control regime has increased the demand for the Tribunal services and added complexity in cases before the Tribunal*
- ❖ *For example, Burger King and Imperial Logistics*

Competition Amendment Act (Cont'd)

❖ *Penalties*

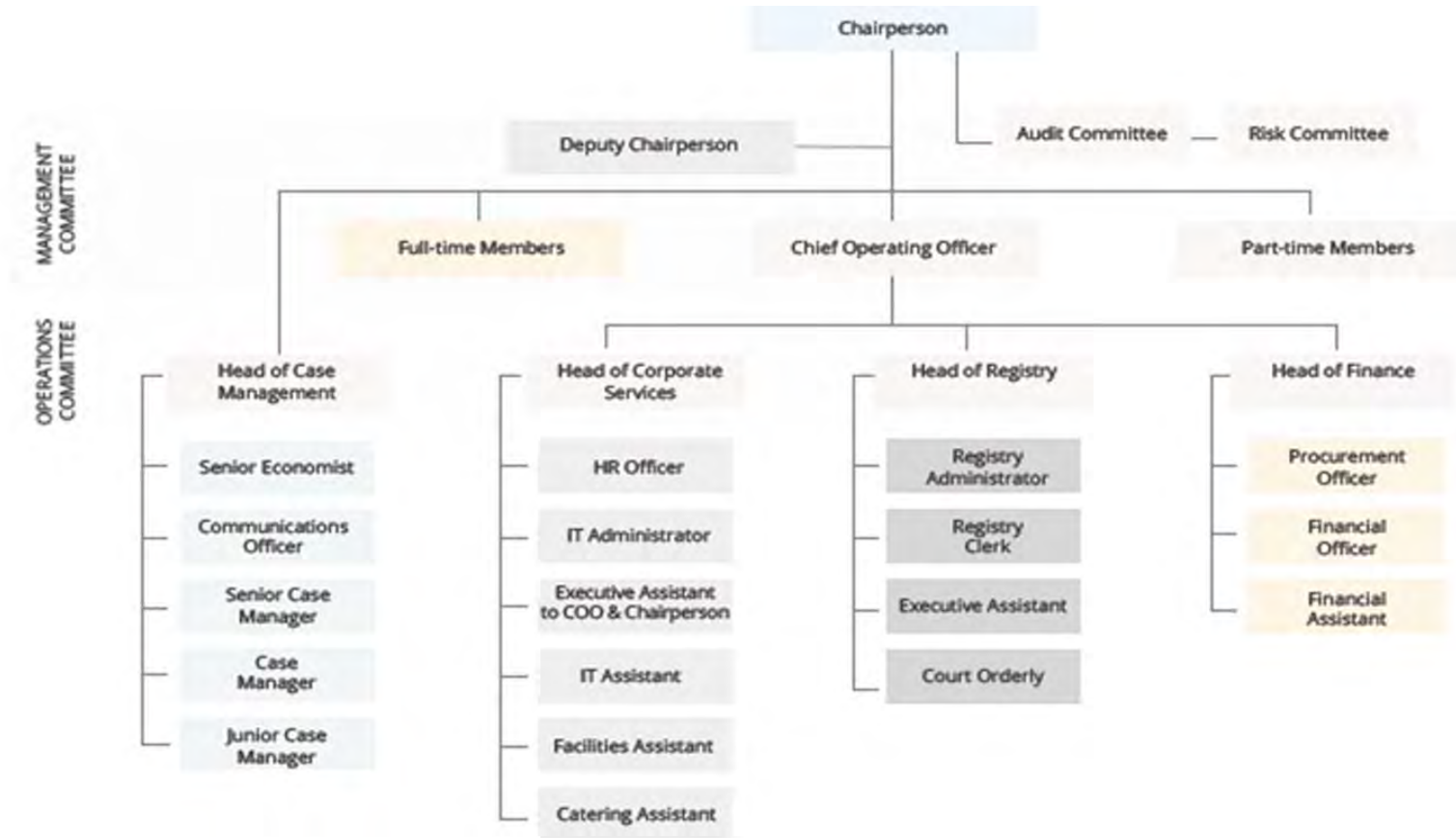
- ❖ The amendments remove “yellow-card” provisions
 - ❖ The amendments introduce tougher penalties for repeat offenders: provide for a higher penalties for repeat offences up to a maximum of 25% of annual turnover
 - ❖ The Amendments introduce penalties for controlling companies: provide the Tribunal with the power to extend the penalties to companies who control a respondent firm if they knew or reasonably ought to have known about the offence; and introduces joint and several liability
- ❖ *The tougher penalty regime (compounded by the complexity of cases) has increased the resolve of private parties (with deep pockets and more resources) before the Tribunal to fight cases*

Competition Amendment Act (Cont'd)

❖ *Market inquiries*

- ❖ The amendments provide for market inquiries to be conducted by the Commission on the general state of competition in a market and to make recommendations on its findings (may include, in depth investigations, referrals to the Tribunal, and recommendations to the Minister)
- ❖ The amendments expand the use of market inquiries to deal directly with economic inclusion and economic concentration; and provides the competition authorities with the power to take action to remedy any adverse effects
- ❖ Appeals may be brought against decisions:
 - ❖ Of the Commission, to the Tribunal
 - ❖ Of the Tribunal, to the CAC
- ❖ Appeals may be brought by
 - ❖ Any person materially and adversely affected by a decision of the Commission
 - ❖ the Minister
- ❖ *Market inquiries are likely to increase the demand for Tribunal services: Since market enquiries have to date taken a long time to conduct, it is likely that the record in such cases will be lengthy and intricate and will require a proportionate amount of resources*

Current Tribunal Organisational Structure - (September 2022)



Staff Compliment: 35 Person Headcount

Filled Positions: 27 Employees

Three – Full-time members

Seven – Part-time members

***The Competition Act provides for a maximum of 15 Members

Responsive and Reliable Adjudication

1. Effective Case Management Procedures to ensure Hearing Set Down within Legislated Time-frames

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
% of mergers set down for a hearing or pre-hearing within 10 business days of filing.	80%	90%

2. Effective and Timeous Issuing of Orders, and Reasons

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
% of merger orders issued to parties within 10 business days of last hearing date.	85%	100%
% of reasons for mergers issued to parties within 20 business days of order being issued.	75%	92%
Ongoing evaluation of competition and public interest considerations in mergers in terms of the Competition Act, in line with the dtic three joint/integrated outputs: Delivery/Capable State; Economic Transformation; Industrialisation.	Quarterly reports sent to the dtic	2 reports

Responsive and Reliable Adjudication

2. Effective and Timeous Issuing of Orders, and Reasons

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
Reasons for prohibited practice cases are issued to parties within 140 business days of the last hearing date.	75%	0%
% of procedural matter orders issued to parties within 45 business days of last hearing date.	65%	89%
% of orders for consent orders and settlement agreements issued to parties within 10 business days of the last hearing date.	80%	100%
% of reasons in interim relief matters issued to parties within 30 business days of last hearing date.	65%	0%

Transparent, Accountable and Sustainable Tribunal

3. Effective Communication and Information Sharing

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
% press releases of final merger decisions communicated within 3 business days of order date following finalisation of confidentiality claims.	90%	98%
% press releases of prohibited practice decisions communicated within 3 business days of order date following the finalisation of confidentiality.	90%	100%
Biennial update and publication of jurisprudence handbook.	Handbook updated and published	N/A

Transparent, Accountable and Sustainable Tribunal

4. Improvement in clients using the entities services

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
The outcomes of the review of processes, including forms and procedures for simplicity and necessity	1 process improvement per quarter	1 workshop held with SMMEs.

5. Sound Governance

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
Percentage of prior financial year audit (internal and external) findings resolved in terms of agreed timelines with auditors.	100%	N/A
At least one meeting held annually to inform the Tribunal employees of stated APP performance targets.	One meeting	N/A

Transparent, Accountable and Sustainable Tribunal

6. Effective Financial Management

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
Percentage variance on expenditure against budget	-10%	-10%
Obtain an unqualified audit opinion from the AGSA.	Unqualified audit opinion	N/A
Monitor the levels of B-BBEE suppliers in order to promote transformation in procurement practices.	70% of expenditure spent on suppliers between the B-BBEE levels 1-4, 20% of which will be on women, youth or PWDs.	N/A

Transparent, Accountable and Sustainable Tribunal

7. Transformation, Capacity development, retention and training

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
85% of performance assessments conducted at least twice a year (by end September & end March)	85% of performance assessments conducted	56%
Percentage staff retention.	80%	N/A
Continuous training opportunities to staff and Tribunal Members.	Training on ESOPs; Competition law basic training (Case Managers); Concentration and participation in the South African Economy: levels and trends; Competition for structural transformation in the global south (Case Managers); Writing skills (Case Managers & Tribunal Members).	Competition law basic training held over two days. Concentration and participation in SA Economy: levels & trends

Transparent, Accountable and Sustainable Tribunal

7. Transformation, Capacity development, retention and training

OUTPUT INDICATOR	ANNUAL TARGET	QUARTER 1-2 ACTUAL
Undertake one annual capacity building workshop for Case Managers and Tribunal Members.	One annual capacity building workshop	N/A
Provide access to interns in the Case Management division to work opportunities	2	2
Maintain 75% of employment equity representation of employees from designated groups.	75%	N/A

Case Performance Highlights

- The Tribunal decided a total of 82 matters from April to September 2022. This included the following:
 - 47 mergers were heard, 46 decided and 18 of these were approved subject to conditions.
 - 2 complaint referrals were decided
 - 14 consent orders/settlement agreements were confirmed

Case Performance Highlights

Case performance breakdown: 46 Mergers decided

- ❖ 46 Large Mergers
- ❖ 0 Intermediate Mergers
- 2 Contested cartel cases
- 14 Consent Orders/Settlement Agreements:
 - ❖ 3 failure to notify a merger;
 - ❖ 10 cartel conduct;
 - ❖ 1 abuse of dominance
- 18 Procedural Matters (access to confidential information, exception applications, extension applications, intervention applications, review of CC decisions and variation orders)
- 2 Interim Relief Matters

Merger Cases - Highlights

Ardagh Group S.A. and Consol Holdings Proprietary Limited

In April 2022, the Tribunal approved with conditions the large merger wherein Ardagh Group S.A. (Ardagh) acquired 100% of the issued shares in Consol Holdings (Pty) Ltd. Having considered all submissions in from all parties in totality the Tribunal approved the proposed transaction subject to conditions relating to, among others, Broad-Based Black Economic Empowerment (B-BBEE) and worker ownership; employment; investment in capacity; glass recycling; the production of dining glassware and the manufacture of food jars.

Sasol Pension Fund and Luvon Investments (Pty) Ltd; PHG Property Holdings (Pty) Ltd, and Park Road Trading 7 (Pty) Ltd in respect of the target property known as Ferndale on Republic

In July 2022, the Tribunal conditionally approved the large merger wherein the Sasol Pension Fund acquired an interest in the target property known as Ferndale on Republic from Luvon Investments (Pty) Ltd, PHG Property Holdings (Pty) Ltd and Park Road Trading 7 (Pty) Ltd (“Park Road”). Ferndale on Republic is a mixed-use development with both retail and office space in Randburg, Gauteng. The Tribunal approved the transaction subject to the removal of exclusivity. This exclusivity was likely to impact on the ability of small and medium businesses or firms controlled or owned by HDPs to effectively enter, participate in or expand within the rentable retail market. The Tribunal further enhanced the condition to provide for the merging parties to advertise, by giving notice in relevant publications, of the availability of retail space in the Target Property to ensure that potential new entrants are informed.

Complaint referrals - Highlights

The Tribunal decided two complaint referrals during the reporting period:

Competition Commission and Tsutsumani Business Enterprises CC

In April 2022, the Tribunal found that Tsutsumani charged the South African Police Service (SAPS) excessive prices for the urgent supply of 500 000 face masks during the COVID-19 pandemic in April 2020. This was in contravention of section 8(1)(a) of the Act read with Regulation 4 of the Consumer Protection Regulations. This was the first excessive pricing case referred to the Tribunal in the context of a tender process during the Covid-19 pandemic. The Tribunal ruled that Tsutsumani must pay an administrative penalty of R3.4 million within 30 days.

CC and Esorfranki

In May 2022, in a cartel case involving construction and engineering companies, the Tribunal found that Esor Ltd, Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd (collectively referred to as “**Esorfranki**”) colluded with competitors to fix prices and allocate customers and that they engaged in bid rigging through cover pricing. The Tribunal ordered the three firms to jointly and severally pay an administrative penalty of R15 700 000. Meanwhile, the case against another accused firm in the matter, Diabor (Pty) Ltd was dismissed by the Tribunal. The matter relates to construction projects in the markets for geotechnical services including piling, lateral support, grouting and geotechnical drilling investigation services.

Consent orders/settlement agreements - Highlights

The Tribunal decided 14 consent orders / settlement agreements during the reporting period. Below, two are highlighted:

CC v Automatic Sprinkler Inspection Bureau (Pty) Ltd and 17 Others

In May 2022, the Tribunal considered and confirmed nine settlement agreements where nine installers of automatic fire sprinklers, implicated in a cartel case, each separately concluded settlements with the Commission. This, after the firms were afforded an opportunity by the Tribunal to settle the matter with the Commission which was prosecuting the case. In terms of the nine settlement agreements, the firms did not admit that they contravened section 4(1)(b)(ii) of the Competition Act, that is, dividing markets, of which they were accused. However, they agreed to pay separate administrative penalties, collectively totalling more than R2 million.

CC v Computicket (Pty) Ltd & Shoprite Checkers (Pty) Ltd

In June 2022, the Tribunal considered and confirmed a settlement agreement between the Commission, Computicket and Shoprite, thus ending protracted litigation between the parties relating to alleged abuse of dominance for their exclusive arrangements with inventory providers regarding outsourced ticket distribution services in the entertainment industry. In terms of the settlement agreement, Computicket agreed to pay an administrative penalty totalling R11 317 000.

Interim Relief - Highlights

The Tribunal decided two interim relief applications during the reporting period:

eMedia Investments (Pty) Ltd v Multichoice (Pty) Ltd

In May 2022, the Tribunal dismissed an interim relief application by eMedia in which it sought an order for Multichoice to be interdicted from removing the E.tv Extra, eToonz, eMovies and eMovies Extra channels from the DStv platform. eMedia sought the interim relief for a period of six months or pending the final determination of its complaint lodged with the Competition Commission (“the Commission”) against Multichoice, whichever occurs first. The Tribunal found, on the evidence before it, that eMedia had not established, prima facie, that a prohibited practice under section 8(1)(d)(ii) or 8(1)(c) had occurred i.e. abuse of dominance. The Tribunal concluded that it was not reasonable and just to grant interim relief in favour of eMedia. The Competition Appeal Court (CAC) since overturned the Tribunal’s decision.

Sekunjalo Group v The Banks

In September 2022, the Tribunal granted interim relief to the Sekunjalo Group, preventing three banks from closing their bank accounts and ordering five others to reopen bank accounts that had already been closed. The interim relief is for a period of six months or pending the conclusion of an investigation by the Commission into a complaint regarding restrictive practices filed by the Sekunjalo Group against the banks (whichever occurs first). In determining whether it was reasonable and just to grant interim relief to the Sekunjalo Group, the Tribunal considered (i) whether there was prima facie evidence of a prohibited practice; (ii) the need to prevent serious or irreparable harm; and (iii) the balance of convenience. In doing so, the Tribunal applied a transformative, constitutional and context-sensitive approach consistent with the scheme of the Act which seeks to ensure, inter alia, equitable participation in the economy, particularly by small and medium sized businesses and black owned businesses, as heeded by the CAC in the abovementioned matter involving eMedia and MultiChoice.

Financial Performance 2022/23 - Q2

- The Tribunal recorded a net operating surplus of R6.58m before capital expenditure as at 30 September 2022
- The total revenue had exceeded the budgeted target by 8% which is mainly due to the increase in the case activity over the financial year
- Operating expenditure was below budgeted expenditure by 10% due to current vacancies. The main contributor to this is the Tribunal member vacancies of which recruitment processes are underway (*Some appointments of members were concluded in Q3*).

Financial Performance 2022/23 - Q2

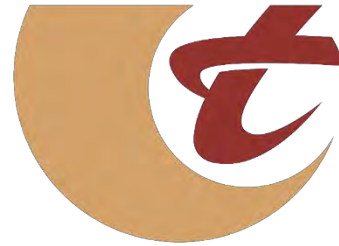
Category	Annual Budget	Budget YTD	Actual YTD	Variance	% Variance
Total Revenue	59,686,000	29,843,000	32,293,193	2,450,193	8%
Less: Total Expenditure excl. capex	58,988,496	28,663,305	25,716,202	(2,947,103)	-10%
Net Operating Surplus/(Deficit) excl. capex	697,504	1,179,695	6,576,991	5,397,296	458%
Less: Capital Expenditure	697,504	661,448	600,254	61,194	9%
Operating Surplus/(Deficit) incl. capex	-	518,247	5,976,737	5,458,490	1053%

Conclusion

- The Tribunal continues to strive to be a responsive and reliable adjudicative body that is accountable for its actions, transparent in conducting its affairs and sustainable in its operations.
- Within the context of the 2019 Amendment to the Competition Act where little or no precedent exists, the Tribunal is committed to interpret the law in a clear, consistent and predictable manner.
- Some member appointments took place in Q3 to bolster capacity of the Tribunal in light of the increased demand for Tribunal services.
- An organisational review process was initiated in Q2 and is currently being concluded with a view to enhance the capacity of the Tribunal at all levels

Thank You

Questions and Answers



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