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**Interlocutory Applications *In re* The Competition Commission of South Africa v Bank of America Merrill Lynch International Ltd & 22 Others CR212Feb17**

**Competition Tribunal partially upholds several grounds of exception raised by respondent banks to the Competition Commission's (Commission) 'Forex Exchange' cartel referral.**

In its order, released today, the Competition Tribunal has rejected the respondent banks call for the referral against them to be dismissed, ordering rather that the Commission redraft its referral in 40 days, requiring that it confine its case against the respondent banks to one of a single over-arching conspiracy, providing more detail on such a conspiracy, and limiting the relief sought against those respondent banks without a presence in South Africa to a declaratory order.

It additionally ordered that certain paragraphs of the previous referral, those related to the conduct of a J.P Morgan entity, should not be included in the amended referral.

The Tribunal deferred the question as to whether the Commission could join certain additional banks until it had filed the above-mentioned amended referral and dismissed one of the respondent banks' (Investec Limited) application for an order declaring the conduct of the Commission in prosecuting the referral to be vexatious and unreasonable.

***Background***

In February 2017, the Commission filed a referral with the Tribunal against eighteen banks in which it was alleged that traders related to the banks had colluded in the market for the exchange of currency, specifically between the US dollar and South African Rand ('forex referral'). This referral was supplemented a further three times. In the final supplementation, the Commission sought to join a further five banks to the referral.

All of the respondent banks thereafter filed applications exception to the referral. The grounds of exception were broadly that the Tribunal lacked jurisdiction over certain of the respondents, that the commission had failed to plead sufficient facts in its referral to sustain a cause of action and that the joinder of the additional parties should not succeed. A majority of the parties sought the dismissal of the referral in its entirety.

In addition to the exception applications, Investec sought an order from the Tribunal declaring that the Commission's conduct in bringing the referral was vexatious and unreasonable.

JP Morgan sought an order striking out of certain parts of the Commission's referral.

***Jurisdiction***

In its reasons, the Tribunal found there to be three broad categories of respondent banks: local, local *peregrini* and pure *peregrini*. No issue of jurisdiction was raised in relation to the local banks.

The pure *peregrini* banks were those international banks which had no presence in South Africa. The Tribunal, in line with common law precedent, found that it did not have jurisdiction to issue an order requiring the foreign banks to pay any administrative penalty as such an order would not be effective. It therefore constrained the Commission, in relation to these banks, to seek an order declaring the conduct of these pure *peregrini* to be anti-competitive. Regarding those foreign banks which have a presence in South Africa, the local *peregrini*, the Tribunal found that because an order requiring the payment of a penalty against such banks could be enforced, the Commission could seek to extract an administrative penalty, but only to the extent that such a penalty was calculated on the turnover of the representative in the country.

The Tribunal found that, in both of these instances, the Commission would still need to allege that the conduct of the respondent banks had an effect in South Africa, that met the internationally recognised threshold of being direct or immediate, and substantial before the Tribunal could assert its jurisdiction in making any order.

### ***Further particulars***

In determining the various grounds of exception, the Tribunal took the pragmatic approach of assessing whether: (i) there was a deficiency in the Commission's pleading; (ii) if there was, whether such could be rectified by further pleading; and (iii) even if it might, should the Commission be given the opportunity, or (iv) should the case be dismissed.

The Tribunal found that the deficiency in the Commission's pleading was located in its unwillingness to commit itself unequivocally to a particular formulation of its case, which caused a lack of focus and consistency throughout the various iterations contained in the referral and subsequent supplementary documents.

The Tribunal found that this lack of focus had ramifications on, among other things, its ability to determine the question as to whether the complaint against several of the respondent banks had prescribed.

It found that the relationship between the traders responsible for the allegedly collusive conduct and the firms themselves was unclear.

To remedy the defective pleadings, the Tribunal ordered that the Commission file an amended referral, confining its case to that of a single overall conspiracy and established a list of averments that need be made to ensure that the respondent firms understood the case as it was made out.

### ***Joinder of new parties***

The Tribunal deferred the question of whether to join the additional respondents, finding that a determination of the joinder would require much of the information it was requiring that the

Commission address in its revised referral. The Tribunal did however hold that its finding on jurisdiction would impact the nature of the orders that the Commission could seek against those parties it sought to join.

### ***Further matters***

The Tribunal found that the Commission's inclusion of a settlement reached between a JP Morgan entity and an Authority in the United States was unfair and should not be included in the revised draft.

### ***Investec Declarator***

The Tribunal dismissed t Investec's application for a declarator over the Commission's conduct in prosecuting the banks, finding that making such an order would be overly broad and further, at the current stage of proceedings (i.e. prior to the Tribunal ruling on the guilt or lack thereof by the parties) such an order would be premature.

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