THE JUDICIAL REVIEW OF ECONOMIC EVIDENCE: A SOUTH AFRICAN PERSPECTIVE

BY SHA'ISTA GOGA[1]

1 Director, Acacia Economics, Member, Competition Tribunal of South Africa and Research Fellow, Centre for Competition, Regulation and Economic Development at the University of Johannesburg. The views expressed in this piece are those of the author and are not the views of Acacia Economics or the Competition Tribunal.

CPI ANTITRUST CHRONICLE JULY 2023

TWO-FOLD DEFERENCE AT THE RULE OF REASON'S THIRD STEP
By Hon. Milan D. Smith, Jr.

JUDICIAL REVIEW OF ECONOMIC EVIDENCE IN EU COMPETITION LAW: READY FOR THE RIDE?
ByJesper Svenningsen, Gwenael Muguet-Poullennec & Benjamin Cheynel

THE ROLE OF AN ECONOMIST AT THE COMPETITON APPEAL TRIBUNAL
By Michael Waterson

EXPERT ECONOMIC EVIDENCE IN AUSTRALIAN COMPETITION LAW: "ECONOMIC ASSESSORS – TIME TO ADOPT ADMIRALTY PRACTICE?"
By Sarah C. Derrington AM

ELBERT GARY & BILL GATES: A STUDY IN ANTITRUST CONTRASTS
By Kenneth G. Elzinga & L. Jackson Howell Jr.

***DAUBERT'S* MYSTERY SURCHARGE: THE HEAVY EXCLUSION OF ECONOMIC EXPERT TESTIMONY IN ANTITRUST LITIGATION**
By Melanie Stallings Williams

THE REVIEW OF ECONOMIC EVIDENCE IN COMPETITION CASES: SOME INSIGHTS FROM SOUTH AFRICA
By Bongiwe Mkhize & Liberty Mncube

THE JUDICIAL REVIEW OF ECONOMIC EVIDENCE: A SOUTH AFRICAN PERSPECTIVE
By Sha'ista Goga

CPI Antitrust Chronicle July 2023
www.competitionpolicyinternational.com

THE JUDICIAL REVIEW OF ECONOMIC EVIDENCE: A SOUTH AFRICAN PERSPECTIVE

By Sha'ista Goga

Economic concepts are integral to competition analysis and to economic regulation but as a specialist field economics (and competition and regulatory economics, in particular) is often challenging for judges or legal experts with little economic training or experience. This paper highlights the need for economic evidence and interpretation as well as associated challenges. We further discuss some of the themes related to judicial review of economic evidence and how it has been approached in the South African context including management of conflicting views, the role of ex post facto evidence and the role for economic evidence to assist in the challenges of weighing up economic evidence outside of the traditional framework.

I. INTRODUCTION

Economic concepts are integral to competition analysis and to economic regulation but as a specialist field economics (and competition and regulatory economics, in particular) is often challenging to grapple with for judges or legal experts who have little prior economic training or experience and are not based in specialized courts or tribunals. This is particularly as expert economic advice is often subject to interpretation rather than based on a set of agreed upon facts within the profession and can therefore often verge on argumentative as opposed to definitive.

A. When is Economic Evidence Relevant?

Economic evidence becomes an important factor in the assessment of competition and regulatory processes in various circumstances.

Firstly, economic evidence can provide substance to definitions in the legislation. Competition legislation often has very specific economic definitions embedded in it. For example, the South African Competition Act for example, is replete with economic definitions, including but not limited to average avoidable cost, average variable cost, essential facility, excessive price, exclusionary act, horizontal and vertical relationship, margin squeeze, market power, predatory prices, restrictive horizontal practice, restrictive vertical practice.[2] Even cases that are typically based on factual and documentary evidence such as cartel cases may require what is intrinsically an economic assessment, for example, to ascertain that parties to an agreement are "horizontal competitors."

Secondly, economic evidence assists in situating factual evidence within a theoretical framework. While factual witnesses can attest to specifics of an industry and how it works, and provide testimony on what transpired in the time period around a contested issue, economists can present these facts within an economic framework to assist with a regulatory determination. The Competition Appeal Court of South Africa for example, noted the role for economic evidence to assist in situating evidence (in this case, evidence that was circumstantial) in a cartel case, stating *"[c]ircumstantial economic evidence, on the other hand, includes conduct evidence of an economic nature. This requires cogent economic reasoning, and often this is where the evidence of an expert can assist."* [3]

Thirdly, economic evidence is important in quantifying economic concepts. This is particularly important in abuse cases where evidence is required to meet a particular standard, for example, showing that prices are below or above a certain benchmark, or calculating a rate of return for a regulator. It can also be used in an effects-based assessment to show that a particular action has had an effect on competition through an analysis of the impact.

B. Challenges in the Judicial Review of Expert Evidence

While expert evidence plays an integral part of judicial review in competition and regulation it poses several challenges. These predominantly stem from a mismatch in the training and experience of the judiciary in economic analysis. This includes the following:

1. Interpreting complex or data-intense economic models: Interpretation can be challenging in instances in which sophisticated models are presented to a court, particularly where the court has limited resources and expertise to assess the model structure, parameters, data, and evidence directly.
2. Assessing the validity of contrasting and differing views from economists and deciphering contrasting expert reports: Where different experts provide reports and evidence for opposing parties the reports can often be quite contradictory. This is particularly when the models or theories flow from different underlying assumptions or data. For a judge to disentangle different specialized economic models or differing theories can be complex, particularly in instances in which each party presents data and evidence in a manner most suitable to their case. This may be especially concerning when there are concerns over experts being biased and suspicions that there are "sleight of hand" data manipulations focused on proving a particular point on behalf of a party.
3. Dealing with evolving economic theories in the context of static legislation: Statutes, regulations, and policies, particularly those that are written in a prescriptive manner that specifies a particular test or methodology can differ from economic best practice or theoretical developments in the field. In this instance there may be a discrepancy between the required legal approach and the best approach from an economic perspective.

2 South Africa Competition Act 89 of 1998.

3 Competition Appeal Court of South Africa, Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa (190/CAC/DEC20) [2021] ZACAC 1; 2023 (2) SA 182 (CAC); [2023] 1 CPLR 3 (CAC) (17 December 2021)

4.Assessing economic concepts in the absence of theory or precedent: A further challenge can be for a court to understand how to measure or assess economic concepts in law that have not been adequately ventilated in terms of precedent or that do not fit closely to established theory used within courts.

The extent to which these issues are managed depends on a range of factors including the composition of the prosecuting agency, the composition of the tribunal or court, the composition of any tribunals or courts used in an appeal process and the extent to which external panels of experts are or can be consulted.

In this paper I consider a few themes that have emerged in the judicial review of economic evidence in South Africa from my perspective as an economist involved in both competition and regulatory cases. Firstly, challenges related to conflicting economic evidence and how certain authorities have developed processes to deal with it. Secondly, the role for economic experts to provide information to assist in regulatory review on an *ex post facto* basis. Thirdly, the role for economic evidence in public interest and other areas which do not have a based in established economic theory.

C. The Use Of Economic Evidence In Judicial Review In South Africa

As a background to the assessment, it is worth outlining the structure of the South African legal system. In South African, the competition authorities include a specialist investigative and enforcement body (the Competition Commission) staffed by both legal and economic experts and the Competition Tribunal, an adjudicative body also comprised of a mix of legal and economic expertise. In any hearing a panel of the Tribunal is made up of three members with a mix of legal and economic expertise. Further the Tribunal is assisted by case managers and research staff which also includes economists and lawyers. The varied expertise on a Panel allows for the analysis and consideration of both economic and legal aspects of a case. Appeals are taken to the Competition Appeal Court, is a specialist appellate court. However, in contrast to the other competition authorities the Competition Appeal Court does not have any economic experts but is comprised solely of Judges. Further appeals go through the judicial system where they are heard by non-specialists courts (the Supreme Court of Appeals and the Constitutional Court). In South Africa most large merger filings and representations related to prohibited practices include economic reports and economic experts regularly provide evidence in large and contested matters.

Sectoral economic regulation in South Africa (for example, for communications and energy markets) is largely enforced by sectoral regulators. These bodies also typically have a mix of legal, economic, and other skills (such as engineering). Decisions taken by these bodies are reviewed by the High Court, which is a non-specialist court and appealed through the court system. While this is appropriate and provides administration law expertise the High Court may be less well placed to consider whether a decision is reasonable from the perspective of an economic regulator. This is in contrast to countries such as the UK where reviews of economic regulation falls to a specialist Competition Appeal Tribunal.

As such, the mix of skills and abilities in terms of economic analysis varies significantly at decision-making level and at the level of review, and further differs across competition and regulation.

II. DIVERGENCE OF ECONOMIC VIEWS

Expert economic reports often are contradictory and diverge considerably. The divergence of expert views in cases in South Africa has led to discomfort in some quarters, with a few judgements that suggest, unease and even a sense of discomfort with the airing of divergent views by different economic experts.

For example, in the regulatory space a recent case related to whether tariffs approved by the energy regulator were cost reflective, in alignment with a pricing policy. Being able to assess costs and the methodology used for assessing cost reflectivity is an area in which economic evidence would typically be instructive. However, the result was a range of expert opinions on various aspects, which the Court ultimately did not use.

> *[129] Each of the parties commissioned economic experts to analyse the Record of Decision and to determine whether it could be said that the tariffs were cost reflective. [130] Based on the final decision this Court eventually reached, in this application, on the common cause facts, it was not necessary for the Court to make use of the reports of the experts which are, in any event, <u>based on divergent opinions</u>.*[4] (emphasis added)

4 *Casting, Forging and Machining Cluster of South Africa (NPC) and Others v. National Energy Regulator of SA and Others* (92792/2019) [2022] ZAGPPHC 927 (November 25, 2022).

In a seminal case in gas regulation a key issue became whether the expert economic advice provided was appropriate.[5] The Supreme Court judgement in this case highlights both the discomfort of the judiciary from the range of contrasting opinions raised stating *"Unfortunately, the papers in the review application became unduly lengthy, with opinions being filed from experts who locked horns on a vast array of issues."* (emphasis added)

It can be noted that many regulatory cases before the High Court are argued using written evidence and there is therefore little ability to cross examine expert witnesses which further limits the extent to which differences in assumptions and theories can be uncovered through cross-examination.

In contrast to the High Court, at the Competition Tribunal there appears to be a greater level of comfort with managing economic evidence and divergent views from experts. This is likely due to the focus on economic related issues, the Tribunals structure as a specialist body with economic expertise, the inquisitorial role of the Tribunal and the fact that most contested hearings are in person with oral evidence.

Over time the Tribunal has used more novel means to assess economic evidence. For example, in the 2017 *Timrite/Mining Bag Division* merger what is colloquially known as *"hot tubbing"* of experts was used for the first time in South Africa (though it had at this time been used in other jurisdictions).[6] Experts testified simultaneously and were able to question each other. This process as well as similar processes of getting experts to narrow the scope of disagreement has subsequently been used in a range of contested mergers and prohibited practice cases.[7] This includes instances in which experts are asked to meet prior to or outside of a hearing and provide the Tribunal with a schedule of matters in which they agree and matters in which they do not agree or to prepare a joint statement. For example, in the Imerys/Andalusite merger[8] the Tribunal suggested that the economic experts for the merging parties and Commission meet and narrow the issues in dispute.

As a result, they developed an economic framework for the possible counterfactual scenarios and agreement over the likely competitive impact of the scenarios (e.g. If Scenario 1 arises, there are likely to be unilateral effects, if Scenario 2 arises there are unlikely to be unilateral effects) allowing the Tribunal to decide on which scenario was likely.[9] Narrowing the scope of expert dispute limits the spent traversing economic evidence by limiting it to the areas on which there is clear disagreement between the experts and allowing the experts to very clearly define the common economic principles and areas in which factual differences underlie the disagreement.

Going forward, it seems possible that one of the means of assisting judges with the review of economic evidence in other matters in which economic evidence is required is encouraging oral testimony and cross examination instead of assessment on the papers, as well as using concurrent evidence and other means of getting experts to engage with each other to narrow the grounds of disagreement. If this is used in court system, a judge would be better able to understand what conclusions follow from different assumptions (if the difference between experts is based on differing assumptions)and where other disagreements occur.

III. *EX POST FACTO* JUSTIFICATIONS

Economic experts can often play an important role in providing an economic assessment of whether a decision made is appropriate from an economic perspective, by analyzing whether a decision taken follows the legislative requirements (where they require economic interpretation) or is aligned with particular policies or legislation. However, there are some challenges that may arise when independent experts, retained on behalf of a regulator to provide an independent assessment and response to litigation, were not the actual decision makers involved in the regulatory decision. In this instance a concern arises that such experts may be susceptible to engaging in ex post analysis.

In *PG Group and Others/NERSA*,[10] a case related to gas pricing, the Supreme Court of Appeals had concerns over the issue of what they termed to be "*ex post facto*" justifications or justifications that did not emerge in the record of the decision. In discussing the economic issues raised by experts it describes experts disagreeing.

---

5 *PG Group & others v. NERSA* (150/2017) [2018] ZASCA 56 (May 10, 2018).

6 Competition Tribunal of South Africa, *Timrite/Mining Bag*,Case No: IM100Jul17.

7 Competition Tribunal of South Africa, *MIH/WeBuyCars*, Case No: LM183Sep18.

8 Competition Tribunal of South Africa, *Imerys/Andalusite*, Case no: IM013May15.

9 *Ibid*. paras. 175-179,

10 *PG Group & others v. NERSA* (150/2017) [2018] ZASCA 56 (May 10, 2018).

"…a vast array of issues many of which appear to have played no part in NERSA's decision, but were relied upon in an ex post facto attempt to either justify or condemn it. The criticism by counsel for the appellants that the 'expansive attempts' by the experts employed by NERSA to justify its determination of maximum prices 'range far and wide but have precious little to do with the considerations that actually motivated' the decision, is by no means unmerited. The dust of this conflict seems to have obscured what was a relatively straightforward issue that fell to be decided on certain elementary and undisputed principles of economics, the common cause facts and the reasons NERSA set out when it gave its decision in October 2011. Any further reasons are irrelevant to the task at hand."

This judgement created some concern over the role of independent experts who assist regulators in instances in which their decisions are reviewed, given that in many cases economic experts are brought in after the fact to assess the record and to provide their independent assessment of the processes taken and the conclusion reached, as opposed to making the decision.

However, the Constitutional Court had a contrary view of the matter to that of the Supreme Court, and their judgement delineated the role of an expert report as one that has explanatory value as follows.

[39] I disagree. It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful. However, a report by an expert will not necessarily constitute ex post facto (after the fact) reasons; it may merely explain the rationale of the reasons that were provided prior to the making of the decision. Economics is a specialist field and, to the extent that the reports provide explanations for the process followed by NERSA in coming to the decision, this Court can benefit from the explanations advanced. Moreover, the respondents submitted economic reports in order to challenge NERSA's decision. Significantly, the reports the applicants rely on are meant to fend off the alleged faulty analyses and conclusions found in the reports the respondents rely on." [11]

As such, the Constitutional Court recognized two benefits of expert economic reports, that occur after a decision has been made, namely providing explanations for processes and for rebutting faulty analysis, thereby resuscitating the potential for economic experts to provide evidence in such matters.

IV. CHALLENGES FOR ECONOMIC EVIDENCE GOING FORWARD IN SOUTH AFRICA

Economic evidence in competition and regulation typically leans heavily on the existing body of industrial organization literature. Historically, economists practicing in South Africa have largely utilized conventional economic theory and international case precedent and practices as a starting point. However, the policy and legislative environment in South Africa has evolved in a manner that reflects the changing emphasis of the government and authorities and the maturation of authorities who are developing new areas of focus. The incorporation of additional considerations in the assessment of competition such as "public interest" in South Africa, but similarly environmental or other considerations that have may have emerged elsewhere, can complicate economic assessment and judicial review. This means that new tools may be required to align economic considerations with legislation.

In South Africa, public interest considerations (both economic and non-economic) provide complexities in weighing economic evidence in competition assessments. For example, in the case of mergers public interest considerations have to be assessed separately to competition. This includes factors such as the effect the merger will have on *"the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market,"* the impact on employment, impact on a particular industrial sector or region and *"the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market."* [12]

The challenge in terms of economic evidence in this context is twofold. Firstly, there is the need to develop new tools and methodologies for assessing these factors or repurpose existing ones from other areas of economics. Secondly, there is the requirement to weigh up these factors alongside a traditional competition assessment.

For example, precedent and regulations have not yet defined what a greater spread of ownership entails and how to measure it. How would one weigh up the purchase of a company held by disparate individuals without other businesses by a single large conglomerate that is

11 *National Energy Regulator of South Africa and Another v. PG Group (Pty) Limited and Others* (CCT131/18) [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) (July 15, 2019).

12 Competition Act No 89 of 1998, as amended by Competition Amendment Act, No. 18 of 2018.

owned by historically disadvantaged individuals but that owns many companies across industries? How does the incorporation of, for example, an employee share ownership scheme as a condition change this? Are there new indices and models that are required to consider a spread of "ownership" distinctly from market concentration and how should they be incorporated into analysis? Are there models that can be borrowed?

Furthermore, there is no framework that allows the judiciary to weigh up these considerations against the typical competition considerations. To what extent can a merger that is anticompetitive be redeemed by an increase in the spread of ownership, increases in employment or a benefit to an industry in international markets? Is there potential for economic evidence to assist? Could economists borrow from impact assessment models such as social accounting matrices, for example? Going forward, the extent to which economic evidence can assist has to be considered and tested.

V. CONCLUSION

Economic evidence plays an integral role in particular areas of regulation, which makes it a key part of decision-making and thereby also makes it susceptible to judicial review. While grappling with the details of economics is challenging, it is important for tribunal members and judges to understand the role of economic evidence and to developing approaches to dealing with complex matters and diverging views rather than disregarding it entirely. Utilizing cross-examination, concurrent evidence, and the development of joint statements are all means of better extracting the core arguments and disagreements. There is also value to utilizing independent economic evidence developed after the event to the extent that it assists courts in understanding rationale for the decisions of economic regulators. Going forward, there may be scope for economic tools and evidence to be used more broadly to assist in assessing non-traditional aspects of competition regulation.