

# Competition Commission appeals against tribunal's SAB decision



By [Leana Engelbrecht](#)

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On 24 March 2014 the Competition Tribunal dismissed all charges against South African Breweries Limited (SAB) and its authorised distributors in a matter that has been on-going for ten years.



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The ruling by the Tribunal was a land-mark decision relating to the relationship between suppliers and their distributors and instances where such a relationship, due to a lack of sufficient independence between the parties, cannot be characterised as the type of conduct which the legislature intended to prohibit as collusive conduct in terms of section 4(1)(b) of the Act. The Tribunal further dismissed charges against SAB and its authorised distributors relating to vertical restrictive practices, resale price maintenance and prohibited price discrimination.

## Grounds for appeal

On 14 April 2014 the Competition Commission appealed this decision by the Tribunal to the Competition Appeal Court on, amongst others, the following grounds:

- The Tribunal erred in its conclusion that SAB and its authorised distributors could not be understood to be competitors as contemplated in section 4(1)(b) of the Act relating to per se prohibited horizontal restrictive practices;
- Section 4(1) of the Act does not envisage or require an analysis of whether the firms are sufficiently independent in order to stand in a horizontal relationship and the only defence in this regard is a single economic entity defence in terms of section 4(5), which the Tribunal acknowledged was not raised by the respondents and the respondents, in any event, do not satisfy;
- That the SAB and its authorised representatives, in fact, are competitors (or at least potential competitors) and the conduct engaged in by constitute market allocation in contravention of section 4(1)(b)(ii) of the Act;
- There was sufficient evidence to prove a substantial lessening or prevention of competition in respect of the complaint if vertical restrictive practices in terms of section 5(1) of the Act as the arrangements between SAB and its authorised distributors, amongst other reasons, are harmful to consumer welfare, limit competition between authorised distributors, the exclusive territories granted in terms of the arrangement between SAB and its authorised distributors provide these authorised distributors with a captive consumer base and an opportunity to charge monopoly prices and to operate inefficiently;
- The transactions between SAB its authorised distributors and independent distributors are equivalent transactions and the Tribunal erred further considering the charge of prohibited price discrimination in contravention of section 9(1) of the Act and should have concluded that SAB engaged in price discrimination with reference to its relationship with its authorised distributors and independent distributors;
- For resale price maintenance to be proven, the presence of intention is irrelevant and the Tribunal should have

concluded that SAB transgressed section 5(2) of the Act by engaging in resale price maintenance, which the Commission argues it did intentionally.

The Commission seeks an administrative penalty against SAB to the total amount of R1,856,320,000 including certain behavioural remedies should its appeal in respect of all the charges against SAB succeed.

## ABOUT LEANA ENGELBRECHT

Leana Engelbrecht is a senior associate in the Competition Practice at Baker McKenzie.

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