

August 2015

*"Success is nothing more than a few simple disciplines, practiced every day".  
- Jim Rohn*

## **BEWARE: YOU MAY BE SQUEEZING YOUR COMPETITORS OUT OF THE MARKET!**

According to section 9(1) of the Trust Property Control Act ("**Act**") *a trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*

In the matter of the Competition Commission v Senwes Ltd the Competition Tribunal (the "Tribunal") recognised the notion of Margin Squeeze as a distinct abuse of dominance and in contravention of Competition Act.

Margin Squeeze similar to a constructive refusal to deal. It is an exclusion of downstream competitors by a dominant, vertically integrated undertaking which controls access to an essential input. Essentially the dominant firm uses its upstream dominance to exclude competition at the downstream level.

A Margin Squeeze may arise in the following circumstances:

1. A vertically integrated firm with dominance upstream also operates in a competitive market downstream;
2. The dominant firm controls access to an essential input upon which downstream competitors rely to compete in the downstream market; and / or
3. The dominant firm leverages its dominance upstream by raising the access price charged to downstream competitors.

The cumulative effect of these factors is that downstream competitors are unable to earn a sufficient margin to survive and are gradually "squeezed out" of the market. The elimination of downstream competition inevitably leads to higher prices, lower output and the thwarting of any incentive to innovate.

*Law & Laughter*

Santa Claus, the tooth fairy, an honest lawyer and an old drunk are walking down the street together when they simultaneously spot a hundred dollar bill. Who gets it?  
The old drunk, of course, the other three are fantasy creatures.

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# SELECTIVE DISMISSALS AND RATIONALITY

On 27 August, the Labour Appeal Court (LAC) delivered judgment in the matter of Gemalto South Africa (Pty) Ltd v CEPPWAWO obo of Louw and Others. The appellant, Gemalto, appealed against a finding of the CCMA in which the latter directed Gemalto to pay compensation to 23 workers who had been dismissed for gross insubordination constituted by a refusal to undergo polygraph testing. The workers were part of a group of 189 who so refused, but were singled out as their contracts of employment contained a clause compelling them to undergo polygraph testing. The agreements of the remainder of the group either did not contain such a clause or the annexure containing the clause was missing.

The purpose of the polygraph testing was to aid in an investigation surrounding theft. Other means of investigation either did not succeed or were dismissed by Gemalto for other reasons, such as being too expensive. The workers refused to take part in the testing as they felt that they could not be compelled to do so and as they were of the view that there was no theft.

The 23 workers who were dismissed took the matter to the CCMA and argued that they had been singled out as their contracts contained the clause relating to polygraph testing, while a larger group refused to take the test in the same manner they did.

The LAC found that the dismissals were substantially unfair as, for among other reasons, the polygraph testing could not be rationally linked to its purpose, aiding in the investigation. The court's reasoning was that testing a small number (23) of employees could not have revealed those behind the alleged theft. Although the employees' contract contained the clause mentioned above and refused to adhere thereto constituted insubordination and breach of contract, the enforcement of the contract in the circumstances was deemed to be unfair, as was the singling out of the group of employees.

The LAC therefore stressed the importance of the rationality of enforcement of an agreement and the unfairness of selective disciplining of workers.

The full judgment can be found here:  
<http://www.saflii.org/za/cases/ZALAC/2015/36.html>

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