

Intellectual Property Rights vis-à-vis Competition Law Principles

Intellectual property rights (IPRs) in South Africa, as in most other countries, are regulated by statutes, such as the Patents Act, 1978; the Trade Marks Act, 1993; the Copyright Act, 1978; the Designs Act, 1993. These statutes provide for the creation and subsistence of, and the enforcement of, IPRs in the form of exclusionary rights affording the right holder the exclusive right, for a prescribed period of time, to exclude all others from commercially using or benefitting from the subject of the IP.

By reason of the exclusionary nature of IPRs, there is a potential for conflict through the exploitation of these rights with the basic principles of free competition, and particularly a risk of contravening of some of the provisions of the Competition Act. This conflict may be illustrated with reference to the operation of a franchise network.

- An agreement between parties in a **vertical relationship** is prohibited if it has the effect of substantially lessening competition in a market, unless there is a technological, efficiency or other pro-competitive gain.

Inasmuch as a franchise agreement will exclude third parties from doing business in accordance with the franchised format, and will only permit accredited franchisees and not third parties to use the trade marks, trade secrets and other IPRs of the franchisor, it may be argued that competition is lessened. However, because of the quality control and other standardised features of the products or services, an efficiency gain may be argued to exist in many cases and as such the proviso is applicable.

- The practice of minimum resale price maintenance in a **vertical relationship** is prohibited.

Where the franchisor and franchisees agree on a certain price structure to be adhered to by franchisees, it may be argued that the prohibition on resale price maintenance is contravened.

- An agreement between, or a concerted practice by, firms in a **horizontal relationship** is prohibited if it has the effect of substantially lessening competition, unless there is a technological, efficiency or other pro-competitive gain.
- Inasmuch as franchisees follow and practise and give effect to the parameters of the franchise agreement in terms of which only accredited franchisees are permitted to do business in accordance with the franchise concept and format, including the use of the IPRs, whilst third parties are excluded from doing so, it may be argued that competition is lessened and the prohibition contravened. Again the existence of efficiency gains may be argued to exist.
- An agreement or concerted practice between firms in a **horizontal relationship** is prohibited if it directly or indirectly fixes a purchase or selling price on other trading conditions; or if it divides markets such as by allocating territories, suppliers, etc.

By the very nature of a franchise operation, where different franchisees are allocated and operate within different geographical areas, and where the trading conditions and service / product delivery is standardised, it may be argued that these prohibitions are contravened. Once again, however, there may be efficiency gains.