COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018507

In the matter between:

NORMANDIEN FARMS (PTY) LTD **Applicant**

And

KOMATILAND FORESTS (PTY) LTD **Respondent**

Panel : Dr Takalani Madima (Presiding Member)

: Prof Imraan Valodia (Tribunal Member)

: Anton Roskam (Tribunal Member)

Heard on :15 April 2014

Order issued on :16 April 2014

Reasons issued on :04 June 2014

Reasons

Introduction

[1] The applicant brought an application for interim relief in terms of section 49C of the Competition Act 89 of 1998 as amended ("**the Act**"). The respondent filed its notice of intention to oppose but failed to file its answering affidavit timeously. The applicant then filed for default judgment and the respondent applied for condonation.

[2] On 16 April 2014 the Competition Tribunal ("**the Tribunal**") granted the condonation application and dismissed the applications for default judgment and for interim relief. The reasons for the aforesaid follow hereunder.

Background

[3] The applicant is Normandien Farms (Pty) Ltd ("**Normandien**"). Normandien is a sawmill owner in Mpumalanga province involved in the business of processing and selling structural timber.

[4] The respondent is Komatiland Forests (Pty) Ltd ("**Komatiland**"). Komatiland is a timber plantation owner.

[5] On or about 21 April 2012 the applicant and respondent concluded a long term supply agreement ("**the Supply Agreement**") in terms of which the respondent would supply the applicant with 50 000m^3 of sawlog per annum at a price ascertainable by reference to the "open market price" as at 1 April each year.

[6] The 'open market price' is essentially arrived at through an auction structured as follows: the respondent stipulates a price at which it plans to sell its sawlogs from each particular pool. Prospective buyers then place bids stipulating the quantity they wish to subscribe for at the price specified. If a pool is oversubscribed (demand exceeds supply) the respondent increases the price whereas if a pool is undersubscribed (supply exceeds demand), the price may be reduced. At this revised price, a second round of bidding is then held. This process of adjusting prices in accordance with demand may occur numerous times until demand and supply are roughly in equilibrium. The figure ultimately arrived at (i.e. the price which the respondent finally elects to sell at) is referred to as the open market price.

[7] The relationship between applicant and respondent then is a fairly simple one; the respondent supplies the applicant with a specified amount of sawlog in return for payment of an ascertainable price.

[8] It is necessary to note here that in addition to the 50 000m^3 of sawlog the applicant sources in terms of the Supply Agreement, it requires additional sawlog for its mills to operate at capacity. The applicant purchases this

additional sawlog on the open market from both the respondent and other plantation owners.

The alleged price manipulation:

[9] During the 2013 open market bidding process the applicant placed a bid for a certain amount of sawlog from a pool belonging to the respondent, namely Pool 2. The respondent informed the applicant that Pool 2 was oversubscribed and that, in accordance with general practice, the price would be increased in round two. In light of this price increase, the applicant, along with certain other round one bidders, elected not to bid in round two. Further, so the respondent alleges, an unexpected fire caused additional sawlog from Pool 2 to be felled and become available. This additional sawlog coupled with the reduced demand subsequent to the price increase resulted in Pool 2 being undersubscribed and the respondent was left with a surplus of Pool 2 sawlog.

[10] At roughly the same time as the bidding for Pool 2 was occurring, the applicant successfully bid for sawlog from Pool 6 (a pool in which the sawlog was significantly cheaper than in Pool 2). In light of the aforementioned Pool 2 surplus, instead of reducing the price and holding a third round of bidding, the respondent elected to satisfy some of the applicant's Pool 6 bid with sawlog from Pool 2. Doing so was expressly permitted in terms of the Supply Agreement.

[11] The applicant disputes that Pool 2 was ever oversubscribed and submits that the respondent merely stated this to artificially inflate the price. The applicant terms this conduct "price manipulation" and alleges that numerous competition law contraventions flow from this.

[12] The respondent is further alleged to have unilaterally varied a term of the Supply Agreement relating to the rebates the applicant receives depending on its Broad Based Black Economic Empowerment ("BBBEE") credentials.

The relief sought

[13] The applicant seeks an order that the respondent be:

12.1 interdicted from effecting any price increases on the price it charges the applicant;

13.2 interdicted from manipulating prices through the unilateral variation of certain terms of the Supply Agreement;

13.3 interdicted from discriminating against the applicant in terms of the price the applicant has been charged for goods;

13.4 ordered to supply and deliver to the applicant the applicant's contractual volume at 2012/2013 prices;

13.5 ordered to reinstate the applicant certain rebates provided for in the Supply Agreement relating to BBBEE credentials;

13.6 ordered to desist from any further anti-competitive vertical practices; and

13.7 ordered to desist from unilaterally exerting certain conditions in relation to the Supply Agreement on the applicant.

[14] Following an attempt to bring the applicant's submissions in line with specific provisions of the Act, it appears that the applicant alleges contraventions of sections 8(a), 8(c) and 9(1)(c). In addition, the respondent is alleged to have "unilaterally varied" a contractual provision; however, it is unclear under which section of the Act the applicant wishes this to be assessed. The applicant also alleged a contravention of section 8(b), but it appears to have elected not to pursue this point further during the course of these proceedings. Broadly then, the applicant alleges excessive pricing, general exclusionary conduct, price discrimination and breach of contract. Each of these alleged contraventions shall be discussed in turn below, bearing in mind the centrality of section 49C in light of the fact that this is an interim relief application.

Section 49C Requirements

[15] Section 49C(2)(b) of the Act provides that the Tribunal may grant interim relief if doing so is "reasonable and just" having regard to:

i. the evidence relating to the alleged *prohibited practice*;
ii. the need to prevent serious or irreparable damage to the applicant; and
iii. the balance of convenience.

[16] The standard of proof in section 49C proceedings is the same as in High Court interim relief applications[1] and this was so held in the case of *York Timbers v South African Forestry Company Ltd*[2] to mean the test of a *prima facie* right.

Evidence of the alleged prohibited practice

[17] When applying this *prima facie* test to section 49C proceedings, the Tribunal has established the following approach:

> "...we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a *prima facie* right. We do this by taking

[1] Section 49C(3) of the Act
[2] Case No: 15/IR/Feb01 at para 62

the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute and consider whether, having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice.

If the applicant has succeeded in doing so we then consider the 'doubt' leg of the enquiry. The doubt leg comprises asking whether the facts set out by the respondent in contradiction of the applicant's case raise serious doubts or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt, the applicant cannot succeed."[3]

i. The unilateral variation of contractual provisions

[18] The applicant contends that the respondent "unilaterally varied" certain terms of the Supply Agreement relating to the BBBEE rebates payable to the applicant. It was submitted further that this somehow constituted a competition law contravention. It serves to address this allegation prior to the others since it demands only cursory consideration.

[19] While certain conduct can conceivably constitute both a breach of contract and a prohibited practice in terms of the Act, they are certainly not dependent on one another. One cannot assume that a breach of contract necessarily constitutes a competition law contravention and *vice versa*. The Tribunal has previously held that this nexus between competition and contract has to be proven.[4]

[20] The conduct of the respondent may amount to breach of contract, it may even amount to fraud but what the Tribunal requires is that it amounts to a contravention of the Act.[5] The Tribunal is not competent to pronounce on an issue which smacks of a contractual dispute in the absence of the applicant having done more to bring its case within the ambit of the Act. We find that the allegation in relation to the unilateral variation of the BBBEE rebates falls well outside the scope of the jurisdiction of the competition authorities; it follows that it must necessarily fail and it is hereby dismissed.

ii. Section 8(a)

[21] Section 8(a) prohibits a dominant firm charging an *excessive price* to the detriment of consumers. The respondent allegedly contravened section 8(a) in that it manipulated the open market sales process when determining the 2013 prices under the Supply Agreement.

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[3] *York Timbers, supra* at para 64- 65
[4] *York Timbers supra* at footnote 25
[5] *Nyobo Moses Malefo & Others v Street Pole Ads (SA) (Pty) Ltd*, Case No: 35/IR/May05 at para 35

[22] "Excessive price" is defined in section 1 of the Act as "*a price for a good or service which bears no reasonable relation to the economic value of that good or service.*" Even a cursory glance at this definition reveals that determining the economic value of the product in question is critical to any excessive pricing allegation.

[23] Counsel for the respondent submitted that the applicant attempts to equate the economic value of sawlog from Pool 2 with that of Pool 6. We are uncertain as to whether in fact the applicant made this submission but if it did, doing so was wholly incorrect. This approach is flawed since each pool of sawlog is subject to different dynamics, all of which affect economic value. Factors such as supply and demand, quality and proximity to sawmills are directly relevant to economic value and the applicant in its heads of argument appears acutely aware of this fact.

[24] Alternatively, if the applicant has failed to adduce any evidence as to the economic value of the good in question, this too falls well short of the test for excessive pricing laid down in *Mittal Steel South Africa v Harmony Gold Mining Co Ltd.*[6]

[25] For the applicant's failure to even attempt to determine the economic value of the good or service in question and its blatant disregard for the *Mittal* test, the excessive pricing allegation falls at the first hurdle and is dismissed.

iii. Section 8(c)

[26] Section 8(c) provides that "*it is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d)…*" Exclusionary act is defined in the Act to mean "*an act that impedes or prevents a firm entering into, or expanding within, a market.*"

[27] On this definition then, for us to find against the respondent on section 8(c), the applicant was required, at a minimum, to depict the way in which it was being impeded or prevented from entering into or expanding within the market (however that market was to be defined).

[28] It is of assistance here to refer to the case of *York Timbers*[7] in which this tribunal established a useful test in determining whether dominance (once established) has in fact been abused. This tribunal elected to follow Areeda and Hovenkamp and found that "*the question is whether the dominant firm has attempted to use or abuse its dominant position to extend or preserve that position.*"[8]

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[6] Case No: 70/CAC/Apr07 at para 32

[7] *York Timbers supra* at para 95

[8] P. E. Areeda and H. Herbert- *Antitrust Law*- Vol IIIA (Little, Brown and Company) 1996 at 172

[29] In the case of *Competition Commission v South African Airways*[9] we remarked that an exclusionary act is "*conduct which excludes or impedes the growth of rivals in a market.*" The applicant has however not even sought to establish that the respondent is impeding their ability to expand at all.

[30] Viewed in the best possible light, the applicant has depicted that a single player in a market may have been negatively affected (for example by having to pay a higher price). It does not follow necessarily that this translates into a substantial prevention or lessening of competition in the market as a whole. For such a finding to be reached, (leaving market definition aside for the moment), it would have to be found that because of the negative effect on the applicant and the applicant's size/relevance in the defined market, there has in fact been a substantial prevention or lessening of competition in the market as a whole. This has certainly not been shown and the section 8(c) allegation is accordingly dismissed.

[31] It is necessary to note further that the relief sought by the applicant in respect of the section 8(c) allegation may in fact have been final relief and thus incompetent in interim relief proceedings. However, the fact that the section 8(c) case is dismissed on its failure to depict a substantial prevention or lessening of competition in the market as a whole renders a determination on the competency of the relief sought unnecessary.

iv. Section 9

[32] Section 9 of the Act prohibits price discrimination by a dominant firm. It is trite that at an absolute minimum, the party alleging price discrimination is required to show the existence of a price differential. In other words, it must be shown that the respondent is charging the applicant more than it charges others operating in the same market (however that market might be defined).

[33] Further, the applicant was required to depict that the transactions to which it refers in its section 9 allegation are "equivalent".

[34] Firstly, the applicant has not referred the Tribunal to any evidence depicting that it is paying more for the product in question than its competitors. The applicant in fact concedes that it is unable to adduce such evidence since the respondent considers such information to be confidential. This is the first flaw in the section 9 allegation.

[35] Secondly, it appears as if the applicant founds its price discrimination case on the basis that the respondent sells sawlogs to a sawmill named Ringkink Sawmills CC ("**Ringkink**") on terms which favour it over the applicant. However, on the evidence before us, the respondent does not in fact sell to

[9] 18/CR/Mar01

Ringkink, it merely pays Ringkink a fee for processing the sawlog which remains, throughout this process, the property of the respondent.

[36] As aforesaid, the applicant was required to depict that the transactions (i.e. the alleged sale from the respondent to Ringkink and the sale from the respondent to the applicant) were "equivalent". These transactions are not even alleged to be equivalent, let alone proven to be so. These transactions are certainly not equivalent since the respondent in fact retains ownership of the sawlog at all times and there is thus no sale at all to Rinkgkink.

[37] Assuming for the argument that the applicant had established that it was paying more than its competitors and that the transactions were in fact equivalent (neither of which we believe are established on the papers) we may find then that the applicant is being prejudiced. However, a finding of prejudice alone is greatly insufficient for a positive finding on price discrimination. Counsel for the respondent referred us to the case of *Sasol Oil (Pty) Ltd v Nationwide Poles CC*[10] in which the Court assessed what was required to satisfy the "substantially prevent or lessen competition" factor in section 9 and it was held that "*evidence which goes no further than suggesting one competitor may be prejudiced is insufficient to bring the impugned conduct within the scope of section 9.*" The court also remarked that "*competition law does not protect the competitor, it protects competition*" We find this to be just such a case.

[38] As aforesaid, all that is required by the respondent in response to the applicant's allegations in an interim relief application is to raise serious doubt (and avoid mere contradiction). Each allegation by the applicant has been dealt with in turn above and our serious doubt in relation to each allegation has been set out. The facts set out by the respondent in fact go well beyond raising serious doubt about the applicant's case.

[39] Assuming both that the conduct of the respondent was contemplated in the Act, and that the applicant had depicted a *prima facie* prohibited practice, the enquiry then turns to determine whether in the absence of interim relief, serious or irreparable damage will be suffered by the applicant.

Serious or Irreparable Damage and Balance of Convenience

[40] "Serious or irreparable damage" was interpreted in the case of *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd*[11] to mean the "*evidence must demonstrate that, on the face of it, absent the granting of interim relief, the ability of the applicants to remain viable competitors within the market is seriously or irreparably threatened.*"

[10] Case No: 49/CAC/April05 at page 40
[11] Case No: 68/IR/JUN00 at para 147

[41] The applicant however states that the harm it suffers as a result of the allegedly anticompetitive conduct of the respondent is that, in essence, it is required to pay more than it wishes for a certain product. At no point does the applicant seriously allege that the conduct of the respondent threatens its continued existence or calls into question its viability. Rather, what the applicant complains of is commercial harm and, as aforesaid, that is entirely insufficient. On the most favourable reading of the applicant's case, the harm it suffers is paying more than it might otherwise pay. In light thereof, the balance of convenience favours the respondent.

Conclusion

[42] Throughout this application the applicant has failed to adequately substantiate the wide-ranging anti-competitive allegations it levelled against the respondent. It has failed to depict why an apparently contractual issue deserves determination by a competition authority and it appears to assume that having to pay more for a product than it would like to axiomatically constitutes a competition law contravention.

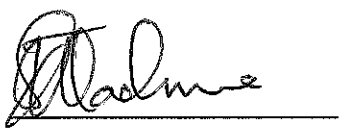
[43] For the above reasons, I conclude that the applicant has failed to make out a case for interim relief and the application is accordingly dismissed.

Costs

[44] The applicant is awarded the costs incurred both in relation to the default application it brought and the wasted costs occasioned by the postponement of the matter on 26 March 2014. However, costs ordinarily follow the outcome of a case, and the applicant is thus liable for the respondent's costs in relation to the interim relief application on a party-and-party scale, including the costs of one counsel.

04 June 2014

DATE



Dr Takalani Madima

Mr Anton Roskam and Prof Imraan Valodia concurring

Tribunal Researcher:	Shannon Quinn
For the Applicant:	Adv C Hattingh instructed by Vinnicombe and Associates
For the Respondent:	Adv J Wilson, Adv L Sisilana and Adv N.L Dandadzi-Dyirakumunda instructed by Roestoff and Kruse Attorneys