COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019315

In the matter between:

INVENSYS PLC	**First Applicant**
INVENSYS SYTEMS (UK) LIMITED	**Second Applicant**
EUROTHERM LIMITED	**Third Applicant**
and	
PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	**Respondent**

In re

The Complaint referral between:

PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	Applicant
and	
INVENSYS PLC	First Respondent
INVENSYS SYTEMS (UK) LIMITED	Second Respondent
EUROTHERM LIMITED	Third Respondent
EOH HOLDINGS LIMITED	Fourth Respondent
EOH MTHOMBO (PTY) LIMITED	Fifth Respondent

Panel : Yasmin Carrim (Presiding Member)

Anton Roskam (Tribunal Member)

Fiona Tregenna (Tribunal Member)

Heard on : 05 August 2014

Order issued on : 13 August 2014

Reasons issued on : 03 September 2014

REASONS: EXCEPTION APPLICATION

Introduction

[1] On 16 April 2014 the First to Third Applicants raised a number of objections to the complaint referral brought by the Respondent, Protea Automation Solutions (Pty) Ltd.[1] The applicants had not raised these objections prior to filing their answering affidavit[2] but sought instead to raise them in their answering affidavit as 'points *in limine*', on the basis of which they sought a dismissal of the complaint referral. It was agreed at a prehearing[3] that the Applicants' 'points *in limine*' would be heard on 05 August 2014.

[2] After hearing the matter the Tribunal upheld the application in relation to those points still persisted with by the Applicants at the time. However, the Tribunal decided not to dismiss the matter but granted the Respondent an opportunity to amend its complaint referral.[4] These are the reasons for that decision.

Background

[3] For ease of convenience the Applicants are referred to as "Invensys" or "Invensys Group" and the Respondent as "Protea". The matter between the parties has a long and convoluted history. For the sake

---

[1] The matter was referred to the Tribunal on 24 April 2013 date in terms of section 51(1) of the Competition Act, 1998.

[2] See AA dated in the complaint referral

[3] The pre-hearing was held on 17 June 2014.

[4] See the Order dated 13 August 2014 attached hereto as annexure A.

of brevity we deal only with the salient facts relevant for purposes of this application.

[4] Subsequent to the issuance of a certificate of non-referral by the Competition Commission ("the Commission") on 20 March 2013, Protea referred its complaint ("the referral") to the Tribunal in terms of s51(1).[5] In its referral Protea alleges that the Invensys Group and the Fourth to Fifth Respondents ("EOH Mthombo") contravened various provisions of the Competition Act 89 of 1998 ("the Competition Act"), namely sections 4,5(1), 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), 8(d)(v) and 9(1).

[5] The Invensys Group of companies is responsible for the management of sales and distribution of components used in industrial automation and control systems worldwide which componentry is produced by entities within the Invensys Group. Eurotherm Limited ("Eurotherm"), which also falls within the Invensys Group of companies, manufactures control and automation componentry branded under the Eurotherm brand. These automation systems are utilised in the provision of industrial solutions and distributed internationally.

[6] Protea is part of the Protea Group of companies which markets, installs and maintains certain equipment in the oil and gas, pharmaceutical, food and beverage, and power utility sectors throughout Sub-Saharan Africa. The Protea Group is also an electronic communications solutions provider, focusing on broadcast, multimedia, communications and measurement solutions for the telecommunications, military and regulatory sectors.

[7] From 1947 until very recently, Protea was the sole supplier of Eurotherm and Foxboro products in South Africa. Its business, conducted under an exclusive distribution agreement with Invensys,

[5] Protea lodged the complaint with the Competition Commission on 12 September 2012.

included the marketing, selling, distribution, installation, maintenance and upgrading of these products for end-users as well as providing related technical support services.

[8] During 2010, Invensys notified Protea that it intended to re-arrange its business model and would terminate its exclusive distribution agreement and did in fact do so on 01 March 2011. Invensys then concluded an exclusive agreement with EOH Mthombo (Pty) Ltd ("EOH Mthombo").[6] EOH Mthombo is the current sole and exclusive distributor of Foxboro and Eurotherm products and services in South Africa, and is also a competitor to Protea Automation Solutions (Pty) Ltd ("Protea") in the supply and distribution of Foxboro and Eurotherm products and services. However, Invensys seeks to retain certain customers in South Africa exclusively for itself by virtue of clause 5.4 of the distribution agreement concluded between Invensys and EOH Mthombo (herein referred to as the "representation agreement"). Protea, who still provides support services to the customers it has serviced to date, is now only able to access Foxboro and Eurotherm products from EOH Mthombo and cannot do so directly from Invensys.

[9] This re-arrangement by Invensys sparked a flurry of legal actions on the part of Protea, one of which was the lodging of a complaint to the Competition Commission, and subsequently, a referral under s51(1) to the Tribunal.[7]

[10] The gravamen of Protea's referral is that these arrangements, as between Invensys and EOH Mthombo, on the one hand, and between EOH Mthombo and itself, on the other, has an on-going effect of substantially preventing or lessening competition by contravening

[6] EOH Holdings Limited and EOH Mthombo (Pty) Limited form part of the EOH group of companies. Although EOH are respondents in the main matter, they were not parties to the current exception application that was brought before the Tribunal

[7] Legal action is still pending between the parties in the High Court.

4,5(1), 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), 8(d)(v) and 9(1) of the Competition Act.

Current Application

[11] In its answering affidavit to the referral, Invensys alleges that –

- Protea's reliance upon section 4 of the Act is completely misplaced as EOH Mthombo and Invensys are not in a horizontal relationship,
- Insofar as Protea relies on alleged contraventions by Invensys and EOH Mthombo of sections 5, 8 and 9 of the Act, and seeks relief based on such alleged contraventions, Protea has failed to provide sufficient material facts and details to support its claim that Invensys is dominant in any market. Furthermore, it has failed to define the relevant market or markets with sufficient particularity to support a contravention of any of the sections of the Act as alleged; and,
- Protea has failed to proffer any material facts as to how the distributor arrangement between Invensys and EOH Mthombo substantially prevents or lessens competition.
- There is a misjoinder of the Invensys holding company. The holding company was not a trading company and no factual basis had been alleged by Protea to support it seeking to impute liability for contraventions of the Act against this entity.

[12] At the hearing, Invensys did not persist with seeking a dismissal on the basis of *lis alibis pendens* or vexatious litigation which objections it had also raised in its answering affidavit. It submitted that the Tribunal ought to dismiss Protea's complaint referral because the above listed deficiencies demonstrated that Protea's prospect of success were low. In addition, it submitted that we should have regard to the fact that Protea had had ample opportunity in this forum to formulate its case against Invensys. Protea opposed this, arguing that its referral reflected a *prima facie* case to which Invensys has elected to file an

answer. In the alternative, it submitted that should the Tribunal find otherwise, it ought to be given an opportunity to amend its referral.

Approach to Exceptions

[13] Exceptions to pleadings[8] can contribute to the expedition of a trial through a clarification of the issues between the parties. However, unlike the approach in the High Court, the Tribunal's general approach to such applications has been to decide each case on its own merits and circumstances and not adopt an overly technical approach.[9]

[14] Our approach has been informed by three central considerations. First, complaint proceedings in the Tribunal are *sui generis* and consist of elements of both motion and trial proceedings in the High Court. Complaint referrals are brought on Notice of Motion, together with a supporting affidavit.[10] At this stage all that the complainant is required to do is to provide "*a concise statement of the grounds of the complaint and the material facts or the points of law relevant to the complaint and relied upon by the complainant*".[11] A respondent is permitted to file an answer to this and the complainant a reply. Thereafter parties are entitled to exchange documents through a process of discovery and to file expert and factual witness statements.

[15] Second, the subject matter of our proceedings involves the intersection of law and economics, often requiring complex economic analyses of the facts to advance a theory of harm. It is often the case that a particular set of facts could be seen through the lens of more than one section of the Act. For example, a difference in price might be assessed by a complainant as a contravention of section 9(1), but might in fact be ultimately assessed by the Tribunal as a refusal to

[8] The pleadings typically consist of the complaint together with the founding affidavit, the answering affidavit and the replying affidavit.
[9] See *Rooibos Ltd and the South African Competition Commission*, Case No.: 129/CR/Dec08, *Coolheat Cycle Agencies and the Competition Commission*, Case No.: 015438.
[10] Referred to sometimes as the founding affidavit or the referral affidavit
[11] See Tribunal rule 15.

deal or a contravention of section 8. Likewise, what may at times appear as a vertical agreement, could in fact be a horizontal one effected through hub and spoke arrangements. And what may appear to be a pure point of law may, in fact, require an entire factual matrix in order for it to be decided. Sometimes, as happened in *Senwes*[12] an expert witness might, relying on the same conduct, articulate a theory of harm differently to what was initially alleged by a party.

[16] Third, the Tribunal enjoys inquisitorial powers and is required to exercise these in its truth seeking functions. In this it also enjoys a wide discretion to conduct its proceedings.[13] Hence, the approach taken by the Tribunal is not an overly-technical one and each case is decided on its own merits and circumstances. The guiding principle for our approach is that of fairness.[14]

[17] The usual remedy for exception applications brought on the basis of vague and embarrassing or failure to disclose a cause of action (lacking sufficient material allegations to show a cause of action) is to grant the offending party an opportunity to amend its pleadings. In certain circumstances, such as when the exception concerns a pure point of law which might be determinative of the matter, dismissal of the case might be an appropriate remedy. Invensys' application, however, was not brought on the basis of a pure point of law, but consisted of a mix of law and facts.

[18] Mr Gotz, who appeared on behalf of Invensys, submitted that Protea's affidavit does not disclose a cause of action due to the deficiencies identified by it in its answering affidavit and listed above. He argued for a dismissal of the case on the merits because the prospects of

[12] Competition Commission of South Africa vs. Senwes Limited: Case no: CCT 61/11[2012] ZACC 6.)
[13] See section 55, rule 55 and Competition Commission of South Africa vs. Senwes Limited: Case no: CCT 61/11[2012] ZACC 6.)
[14] See Rooibos Ltd and the South African Competition Commission, Case No. 129/CR/Dec08 et al paragraph 5 page 2.

success were low and Protea had "ample opportunity to formulate its case". This latter claim was seemingly made on the basis that Protea had, prior to filing this current referral, filed an Interim Relief application and a complaint referral which it had withdrawn. Both Invensys and EOH Mthombo have been awarded their wasted costs and those applications are not before us.[15] Mr Gotz relied heavily on three cases in support of seeking a dismissal of the merits of the case, namely *East Cape Property Guide*,[16] *Phutuma Networks*[17] and *Coolheat.*[18]

[19] However, this reliance was misplaced because in *Eastern Cape Property Guide* the Tribunal had granted the applicant numerous opportunities to amend his papers before dismissing the case on the merits, and then only after it had exercised its inquisitorial powers and afforded Mr Page an opportunity to explain his case in a hearing. Likewise in *Phutuma Networks* the complainant had been afforded a number of opportunities to clarify his case beforehand. In *Coolheat*, while the Tribunal expressed the sentiment that exceptions aid in cases where it is clear that there is no legal prospect of success and can thus be useful in curtailing proceedings, the relief granted in that case was not a dismissal but an opportunity to amend.[19]

[20] The Tribunal would not readily reach for a dismissal of a matter on the merits of a case without first satisfying itself that the prospects of

[15] See the Costs decisions Invensys PLC & Others vs. Protea Technology (Pty) Ltd & Others: case no: 015297 and EOH Holdings Limited & Others vs. Protea Automation Solutions (Pty) Ltd, Case No. 018725, 018283, 018267 (016584).
[16] Independent Newspapers Proprietary Limited & Others vs. EL Page: Case number: 017913.
[17] See Phuthuma Networks (Proprietary) Limited and Telkom SA Limited: Case no: 37/CR/July10.
[18] Coolheat Cycle Agencies and the Competition Commission: Case no: 015438.
[19] See for example Tribunal decisions: BMW South Africa (Pty) Ltd v Fourie Holdings Case no: 97/CR/Sep08; Competition Commission vs. South African Airways (Pty) Ltd Case No. 18/CR/Mar01; Telkom SA Limited and the Competition Commission of South Africa and Another Case No. 55/CR/Jul09, 73/CR/Nov09, 78/CR/Nov09.

success for a complainant are low and without first providing a party with an opportunity to clarify its case.[20]

[21] This does not mean that the Tribunal would never, depending on the facts of the case, reach for a dismissal prior to granting a party an opportunity to amend. Each case must be decided on its own facts. Having said that, we find that in this case, dismissal is not an appropriate remedy.

[22] While the objections raised by Invensys in its answering affidavit were termed points *in limine*, thereby suggesting that these were pure points of law which would be determinative of the referral, the arguments made by Invensys at the hearing[21], and the paragraphs of the referral relied upon in support thereof, suggests that none of these could be decided by the Tribunal without regard to some factual evidence.

[23] For example, it was suggested that it was not competent in law for Protea to allege a contravention of section 4 of the Act because "Invensys and EOH Mthombo" were not in a horizontal, but a vertical arrangement. Similarly, it was argued that because the Invensys holding company was not a trading company it was not competent for Protea to join it as a respondent in the complaint and the matter, as against the holding company, ought to be dismissed.

[24] As pointed out by counsel on behalf of Protea, clause 5.4 of the representation agreement contemplated that Invensys and EOH Mthombo could potentially enjoy such a horizontal arrangement. And that the factual basis for joining the holding company stems from the long standing relationship between the Invensys Group and Protea.

[20] See Sasol Chemical Industries (Pty) Ltd and the Competition Commission & Others Case No. 45/CR/May06, paragraph 27 page 9.

[25] From Protea's founding affidavit, read with the representation agreement, we are able to discern that a distribution agreement of long duration existed between Invensys and Protea (vertical relationship),[22] that this had changed recently with EOH Mthombo (vertical relationship) ostensibly replacing Protea,[23] that Invensys had retained some customers in South Africa for itself (potential horizontal relationship) and that Protea could continue providing support services to its existing customers by procuring products from EOH Mthombo (horizontal and vertical relationship).[24] We also know that there are two markets, an upstream product manufacturing market and a downstream aftermarket consisting of support and related services.[25]

[26] This does not mean that the objections raised by Invensys are without merit as to *adequacy* of pleading. For example, it is not clear from the documents, although this could be inferred, that Protea wishes to make the case that Invensys competes in the upstream market with other manufacturers but is dominant in the downstream market once its products have been purchased by customers. Similarly, it was not clear from the reading of the documents as a whole whether the section 4 complaint was directed at Invensys or at EOH Mthombo or both.

[27] It is also not clear what the impugned conduct consists of – is it the mere fact of cancellation of the agreement or the requirement that Protea access its products only from EOH Mthombo or a combination of these two events. While it is claimed that EOH Mthombo is engaging in some exclusionary conduct the details of that are not provided.[26] Pricing information is scant, as are the details on how

[22] See paragraphs 23.2 and 31 of Protea's complaint referral; also see paragraphs 35-36 of Protea's complaint referral.
[23] See paragraph 15 of Protea's complaint referral, as well as paragraph 40 of Protea's complaint referral.
[24] See paragraphs 40.3.2 and 40.3.3.2 of Protea's complaint referral.
[25] See paragraph 27 of Protea's complaint referral.
[26] See paragraphs 60-61 of Protea's complaint referral, and para 1.1-1.2 of Protea's complaint referral.

competition has been adversely affected. The factual basis for joining the holding company, while offered from the bar, is not set out in the referral affidavit.

[28] Protea argued that it is now trite law that the "pleadings" in Tribunal proceedings do not necessarily consist of the entire case against a respondent and that further details will be provided in witness statements. Much reliance was placed on the *Senwes* case in support of this. However, this reliance was also misplaced. In *Senwes*, the conduct that was being complained about had already been pleaded, as was the relevant section of the Act. All that had happened was that the Commission's expert had subsequently framed that conduct as a "margin squeeze". Senwes was aware at least as early as the filing of the expert witness statement that the Commission would run a margin squeeze case against it. The matter eventually resolved around the issue of fairness. The Constitutional Court found that it was permissible, on the facts of that case, that the Tribunal could make a finding of margin squeeze, as a species of section 8(c), against Senwes. However, that case cannot be interpreted to establish a precedent that a complainant is entitled to say as little as possible in its founding affidavit and to be excused from giving further particulars about the case it wishes to bring.

[29] Invensys argued that it seeks to prevent incurring the cost of a lengthy trial and has sought to bring this application to curtail proceedings. While having some legitimate basis for raising these objections and its apparent desire to clarify or curtail proceedings, it itself has neglected to put Protea on terms to do so through a simple cost effective Request For Further Particulars prior to it incurring the cost of preparing its answering affidavit or in bringing this application. Had it done so and had it not received any more clarity pursuant to that request, it might have been on firmer grounds to argue a case for a dismissal of the complaint.

[30] Protea on the other hand, instead of opposing this application, could have saved unnecessary costs by filing an amendment to its founding affidavit to meet the objections raised by Invensys in its answering affidavit.

[31] Fairness requires that a party ought to be placed in a position to know the case it has to answer. Even though Invensys has already filed its answering affidavit, given that the dispute between the parties has now stretched over a number of years, we find it would be preferable for both sides, as well as for the Tribunal's convenience, for Protea to clarify its case at this stage for purposes of certainty and expedition of the proceedings.

[32] Accordingly we have decided to grant the application but have required Protea to file a supplementary founding affidavit clarifying aspects of the allegations it has lodged against Invensys, as set out in our order dated 13 August 2014.

_____ 03 September 2014

Ms YASMIN CARRIM **Date**

Mr Anton Roskam and Prof. Fiona Tregenna concurring.

Tribunal Researcher: Caroline Sserufusa

For the 1st -3rd Applicants: Adv A Gotz instructed by Craig Smith Incorporated

For the Respondent: Adv MJ Engelbrecht instructed by Duncan Okes Inc

competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019315

In the matter between:

INVENSYS PLC	**First Applicant**
INVENSYS SYTEMS (UK) LIMITED	**Second Applicant**
EUROTHERM LIMITED	**Third Applicant**
and	
PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	**Respondent**

In re

The Complaint referral between:

PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	Applicant
and	
INVENSYS PLC	First Respondent
INVENSYS SYTEMS (UK) LIMITED	Second Respondent
EUROTHERM LIMITED	Third Respondent
EOH HOLDINGS LIMITED	Fourth Respondent
EOH MTHOMBO (PTY) LIMITED	Fifth Respondent

Panel	:	Yasmin Carrim (Presiding Member)
		Anton Roskam (Tribunal Member)
		Fiona Tregenna (Tribunal Member)
Heard on	:	05 August 2014
Order issued on	:	13 August 2014

ORDER: EXCEPTION APPLICATION

Having heard the parties in the above matter, the Competition Tribunal makes the orders set out below. For ease of convenience the Applicants are referred to as "Invensys" and the Respondent as "Protea".

1. Those points *in limine* brought by Invensys in paragraph 46 of its answering affidavit (which are in the nature of exceptions to the pleadings of Protea) are upheld.

2. Protea must amend its complaint referral under case number 016584, by filing a Supplementary Founding Affidavit within 10 business days of the date of this order.

3. The Supplementary Founding Affidavit must set out clear and concise statements of the material facts upon which Protea relies for its claims with sufficient particularity to enable the other parties to reply thereto;

4. Without limiting the generality of paragraph 3 the Supplementary Founding Affidavit must set out the following:

    4.1. the basis for the joinder of Invensys PLC as a Respondent to the main matter;

    4.2. in respect of section 4 of the Competition Act 89 of 1998 ("the Act"):

4.2.1. the nature of the alleged horizontal relationship between Invensys and EOH Mthombo (Pty) Ltd ("EOH");

4.2.2. the manner in which section 4 has been contravened;

4.2.3. the relevant product market in which this contravention took place;

4.2.4. the manner and extent that this alleged contravention has on competition in any relevant market or markets;

4.3. in respect of section 5 of the Act:

4.3.1. the nature of the alleged vertical relationship between Invensys and EOH;

4.3.2. the manner in which section 5 the Act has been contravened by this relationship;

4.3.3. the relevant product market in which this contravention has taken place; and

4.3.4. the manner and extent the contravention has affected competition in any relevant market or markets; and

4.4. in respect of section 8 and 9 of the Act:

4.4.1. the relevant product and geographic market or markets in which it is alleged that Invensys is dominant;

4.4.2. the basis of competition in those product and geographic markets;

4.4.3. the basis upon which the alleged dominance of Invensys is computed;

4.4.4. Invensys' and its competitors' relative market share;

4.4.5. the manner in which Invensys is alleged to have exercised its market power;

4.4.6. the manner in which Invensys has contravened sections 8 and 9 of the Act; and

4.4.7. the manner and extent that these contraventions have affected competition in any relevant market or markets.

5. Invensys and any other respondent must file its Supplementary Answering Affidavit, if any, within 10 business days of Protea having filed its Supplementary Founding Affidavit.

6. Protea must file its Supplementary Replying Affidavit, if any, within five business days of receiving any Supplementary Answering Affidavit.

7. Protea must pay Invensys's costs in respect of the points in limine, such costs to include the cost of one counsel.

13 August 2014

Ms YASMIN CARRIM **Date**

Mr Anton Roskam and Prof. Fiona Tregenna concurring.

Tribunal Researcher: Caroline Sserufusa

For the 1st -3rd Applicants: Adv A Gotz instructed by Craig Smith Incorporated

For the Respondent: Adv MJ Engelbrecht instructed by Duncan Okes Inc