



COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE No: 020552

In the Stay Application between:

ALLENS MESHCO (PTY) LTD

First Applicant

HENDOK (PTY) LTD

Second Applicant

WIRE FORCE (PTY) LTD

Third Applicant

AGRI WIRE (PTY) LTD

Fourth Applicant

AGRI WIRE NORTH (PTY) LTD

Fifth Applicant

AGRI WIRE UPINGTON (PTY) LTD

Sixth Applicant

CAPE WIRE (PTY) LTD

Seventh Applicant

FOREST WIRE (PTY) LTD

Eighth Applicant

INDEPENDENT GALVANISING (PTY) LTD

Ninth Applicant

ASSOCIATED WIRE INDUSTRIES (PTY) LTD

Tenth Applicant

t/a MESHRITE

and

THE COMPETITION COMMISSION

Respondent

CAPE GATE

Second Respondent

In re:

The complaint referrals between:

THE COMPETITION COMMISSION

Applicant

and

CAPE GATE (PTY) LTD	First Respondent
ALLENS MESHCO (PTY) LTD	Second Respondent
HENDOK (PTY) LTD	Third Respondent
WIRE FORCE (PTY) LTD	Fourth Respondent
AGRI WIRE (PTY) LTD	Fifth Respondent
AGRI WIRE NORTH (PTY) LTD	Sixth Respondent
AGRI WIRE UPINGTON (PTY) LTD	Seventh Respondent
CAPE WIRE (PTY) LTD	Eighth Respondent
FOREST WIRE (PTY) LTD	Ninth Respondent
INDEPENDENT GALVANISING (PTY) LTD	Tenth Respondent
ASSOCIATED WIRE INDUSTRIES (PTY) LTD t/a MESHRITE	Eleventh Respondent
CONSOLIDATED WIRE INDUSTRIES (PTY) LTD	Twelfth Respondent

Panel	:	Anton Roskam (Presiding Member)
		Andreas Wessels (Tribunal Member)
		Fiona Tregenna (Tribunal Member)
Heard on	:	22 January 2015
Order issued on	:	22 January 2015
Reasons issued on	:	6 March 2015

REASONS: STAY APPLICATION

INTRODUCTION

- [1] On 14 January 2015 the first to tenth applicants filed an application in which they sought to have the complaint proceedings referred by the Competition Commission (“the Commission”) to the Competition Tribunal (“the Tribunal”) stayed and postponed *sine die*, pending judgment in a review application brought by them in the North Gauteng High Court under case number 31044/2013. For the sake of convenience, we shall refer to the first to tenth applicants as the Allens Meshco Group (“AMG”).
- [2] In the review application’s Notice of Motion the AMG seeks to review and set aside the Commission’s decision not to grant them leniency for their involvement in cartel activity in terms of the Commission’s Corporate Leniency Policy (“CLP”). The High Court heard the review application on 15 September 2014 and judgement is still pending.
- [3] The application to stay was opposed by the Commission and Cape Gate (Pty) Ltd (“Cape Gate”), the first respondent in the complaint proceedings.
- [4] We heard oral submissions from the respective parties on 22 January 2015 and on the same day issued our order dismissing the stay application.
- [5] We set out below our reasons for dismissing the stay application.

BACKGROUND

- [6] Before dealing with the stay application itself, it is important to set out the events leading up to the stay application.
- [7] The complaint proceedings against the AMG and Cape Gate concern two related complaint referrals.

THE FIRST COMPLAINT

- [8] On 19 December 2003 a complaint was submitted to the Commission by the following firms: Barnes Fencing Industries (Pty) Ltd (“BFI”), F&G Quality

Tubes (Pty) Ltd (“F&G”) and Dunrose (Pty) Ltd (“Dunrose”) (“the complainants”).

- [9] According to the Commission’s referral affidavit¹, the complainants are customers of a steel product called low carbon wire rod (an essential input raw material required in the production of wire and various wire products) which is manufactured by Iscor Ltd (“Iscor”).²
- [10] The complaint was made against the following firms: Iscor, Allens Meshco (Pty) Ltd (“Allens Meshco”), Wireforce Steelbar (Pty) Ltd (“Wireforce”), Hendok (Pty) Ltd (“Hendok”), Independent Galvanising (Pty) Ltd (“Independent Galvanising”) and Associated Wire Industries (Pty) Ltd t/a as Meshrite (“the respondents”).
- [11] In the complaint the complainants alleged that the respondents (other than Iscor) had organised themselves under a group, i.e. AMG and had, with the assistance of Iscor, allocated different geographic locations to various firms in the group. According to the complainants, these firms then allocated the supply of two products, nails and galvanised wire, in their respective geographic areas (specifically the Cape area and Gauteng).
- [12] Following its investigation the Commission on 15 January 2007 referred the complaint against the AMG to the Tribunal for determination. In the referral, the Commission alleged that the AMG had fixed prices of these products: galvanised wire, galvanised wire products, nails, wire and various wire products during the period 2000 to 2007 in contravention of section 4(1)(b)(i) of the Competition Act 89 of 1998 (“the Competition Act”).
- [13] In its answering affidavit to the referral, the AMG denied all the allegations made by the Commission against them.

¹ Founding Affidavit, record page 4, para 9.

² Iscor is now called ArcelorMittal South Africa.

THE SECOND COMPLAINT

- [14] On 15 July 2008 Scaw South Africa (Pty) Ltd ("Scaw") applied to the Commission for a marker³ in terms of the CLP on behalf of Consolidated Wire Industries ("CWI").⁴ In the marker application, Scaw submitted that CWI had concluded agreements with its competitors, i.e. the AMG in contravention of section 4(1)(b) of the Competition Act.
- [15] On 29 July 2008 CWI applied to the Commission itself for leniency. The Commission granted it conditional leniency on 28 August 2008.
- [16] Following CWI's leniency application, the Commission conducted its own investigation and on 07 September 2009 referred the second complaint against eleven respondents. These respondents included the five respondents in the first referral together with the following six respondents: Cape Gate (Pty) Ltd ("Cape Gate"), Agri Wire (Pty) Ltd ("Agri Wire"), Agri Wire North (Pty) Ltd ("Agri Wire North"), Agri Wire Upington (Pty) Ltd ("Agri Wire Upington"), Cape Wire (Pty) Ltd ("Cape Wire") and Forest Wire (Pty) Ltd ("Forest Wire").
- [17] In the referral the Commission alleged that the respondents had (i) fixed prices of wire products; (ii) allocated customers; and (iii) collusively tendered for contracts to supply cable armouring wire between 2001 and 2008 in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act.
- [18] In its answering affidavit to the Commission's referral, Cape Gate did not dispute the Commission's allegations – it admitted that contraventions took place between itself, the AMG and CWI, the leniency applicant. However, Cape Gate has disputed certain aspects of the Commission's referral and in particular the period or periods in which the Commission has alleged that the

³ A "marker" is a mechanism which allows a firm to establish where it is in line and to reserve its place in line to give it time to collect all the necessary information to submit to the Commission should it ultimately decide to submit a leniency application.

⁴ Scaw at the time held 50% plus one share of the issued share capital of CWI.

contraventions took place as well as the administrative penalty that it is required to pay for its involvement in the cartel.⁵

- [19] While the AMG denied that it had contravened section 4(1)(b) as alleged by the Commission, it also indicated in its answering affidavit that it had filed a review application in the High Court in which it challenged the Commission's authority to grant leniency to CWI in terms of the CLP.⁶

THE AMG'S FIRST REVIEW APPLICATION

- [20] AMG filed its first review application on 8 February 2010. In essence this application challenged the legal validity of the Commission's corporate leniency regime.

- [21] Pending the outcome of this review application, the AMG applied to the Tribunal for an order to stay the complaint proceedings. The Tribunal granted the stay on 28 March 2011.

- [22] On 5 July 2011 the High Court dismissed the AMG's review application and found that the Commission had the power to grant leniency. The AMG then appealed the High Court's decision to the Supreme Court of Appeal ("SCA"). The SCA dismissed the appeal on 27 September 2012 and found that the Commission was empowered to grant leniency under the CLP. AMG subsequently applied for leave to appeal to the Constitutional Court, which dismissed the application for leave to appeal on 1 November 2012.

THE AMG'S SECOND REVIEW APPLICATION

- [23] Following the unsuccessful first review application, on 16 May 2013 the AMG returned to the High Court again regarding the issue of leniency. This time, AMG's contention was that the Commission had unlawfully refused to grant it leniency. The review application was heard on 15 September 2014 and

⁵ Answering Affidavit, record, pages 70 and 75.

⁶ Answering Affidavit, record page 95, para 6 and page 118, para 74.2.

judgement is still pending. This pending judgement is the reason the AMG filed the current stay application.

[24] On 31 March 2014 the parties attended a pre-hearing meeting at the Tribunal. At this conference the parties agreed to a timetable with regard to the process of discovery, the filing of witness and expert statements and the compilation of trial bundles. In the Tribunal's written confirmation of the directions arising from this pre-hearing nothing is recorded about the AMG's second review application.

[25] On 19 November 2014 a further pre-hearing meeting took place at the Tribunal in which directions were given to the parties and the matter was set down from 22 to 28 January 2015 and 30 January to 4 February 2015. Again in the Tribunal's written confirmation of the directions arising from this pre-hearing nothing is recorded about the AMG's second review application.

[26] The stay application was lodged approximately five days prior to the commencement of the trial.

THE APPLICANT'S REASONS FOR THE STAY APPLICATION

[27] In support of its application the AMG argued that were it successful in the review in its second review application, this would have a profound effect on the complaint proceedings before the Tribunal. The reason was that the Commission would be then required to consider its leniency application, and if it were granted, it would no longer be necessary for it to defend the Commission's allegations. The AMG further argued that proceeding with the referrals absent finalisation of the review application would serve to irreparably prejudice its rights as well as result in wasted time and costs for all parties involved.

THE COMMISSION'S RESPONSE

[28] The Commission's reasons for opposing the stay application were based on two main grounds. The first was that the AMG has disqualified itself from the

grant of leniency. The second was that the AMG's application constituted an abuse of the Tribunal process.

[29] In relation to the first ground the Commission submitted that the position adopted by the AMG (i.e. contesting under oath that it has contravened section 4(1)(b) of the Competition Act) was inconsistent with an entitlement to leniency under the CLP. According to the Commission, this is so because paragraph 3.1 of the CLP states that “[t]he CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.” (Emphasis added) Therefore, the Commission argued, a genuine and qualifying leniency applicant is one that self-confesses participation in cartel activity with the object of cooperating fully with the Commission to prosecute the remaining cartel members, unlike the AMG, which had come before the Tribunal on oath denying liability and participation in cartel activity.

[30] In relation to the second ground the Commission argued that since the AMG had denied a contravention of section 4(1)(b) of the Competition Act, in direct conflict with a stance adopted by a party seeking leniency, the stay sought by it would achieve nothing more than a delay of the complaint proceedings. According to the Commission, it would not be in the public interest to the delay the proceedings for no reasonable purpose other than a delay. The Commission therefore submitted that the stay application should be dismissed.

CAPE GATE'S STANCE

[31] Although Cape Gate had not filed any papers regarding the stay application, it submitted at the hearing that it was in a position to carry on with the proceedings and a stay would be inconvenient, as it would mean that the amount of time it had taken in order to put itself in position to proceed would be completely wasted. Cape Gate further submitted that a tender for wasted

costs by the AMG would go some way in addressing the prejudice it would suffer due to the stay.⁷ AMG made no such tender.

REASONS


- [32] The granting of a stay in the proceedings is always a matter of discretion.⁸ That discretion must be exercised sparingly and in exceptional circumstances⁹.
- [33] As noted above, the Commission referred the second complaint as far back as 07 September 2009. The AMG then, unsuccessfully, challenged the legality of the CLP regime which delayed the proceedings for years, i.e. from 8 February 2010 when the first review application was made to the High Court to ultimately taking the matter to the Constitutional Court that dismissed the application for leave to appeal on 1 November 2012.
- [34] This stay application evinces a peculiar situation where, in one forum, the Tribunal, the AMG adopts a position on oath that it was not part of cartel activity, and in another, the High Court, that the Commission should reconsider giving it corporate leniency thereby indicating that it is a self-confessed participant in cartel activity. Mr Geach, who appeared for the AMG, submitted on behalf of his client that there was nothing wrong with this apparently contradictory approach. We disagree.
- [35] Therefore, in the light of the delays in the prosecution of these complaints to date, the fact that the possibility of this stay application was raised only a few days before the hearing was to commence, the inconsistent approach of the AMG to the question of its involvement in cartel activity, which includes its denial in the papers filed at the Tribunal that it had contravened section 4(1)(b)

⁷ Transcript pages 26 – 28.

⁸ *Southern Metropolitan Substructure v Thompson* 1997 1 All SA 571 (W) 577; 1997 2 SA 799 (W); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet* 1996 8 BCLR 1071 (W); 1997 2 SA 636 (W); *Williamson v Schoon* 1997 3 SA 1053 (T); *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* 1999 2 All SA 446 (C) 452; 1999 3 SA 832 (C); *Western Cape Housing Development Board v Parker* 2006 3 All SA 84 (C); 2005 1 SA 462 (C).

⁹ *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd* 1999 JOL 5498 (T); 1999 4 SA 1039 (T) 1048H–I; *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* 2009 3 All SA 491 (SCA) overruling *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* 2009 3 SA 305 (W).

of the Competition Act, we were of the view that there were insufficient circumstances justifying the stay notwithstanding that it could possibly be successful in its second review application. It would, in our view, be inappropriate, not be in the public interest and a denial of justice to grant the stay application.



Mr. Anton Roskam

6 March 2015
Date

Professor Fiona Tregenna and Mr. Andreas Wessels concurring

Tribunal Researchers	: Ipeleng Selaledi and Caroline Sserufusa
For the Allens Meshco Group	: Adv. BP Geach SC instructed by Roestoff and Kruse Attorneys
For Cape Gate	: Adv. John Campbell SC instructed by Bowman Gilfillan Attorneys
For the Commission	: Adv. Hamilton Maenetje SC instructed by the State Attorney