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THE COMPETITION COMMISSION OF SOUTH AFRICA

Case No: 11/CR/Febr04

In the matter between:

The Competition Commission	**Applicant**
And	
Telkom SA Ltd	**Respondent**

Panel:	**N Manoim (Presiding Member)**
	Y Carrim (Tribunal Member)
	M Mokuena (Tribunal Member)
Heard on:	**19 November 2010**
Order Issued on:	**14 December 2010**

Reasons for Decision

Introduction

[1] In this application the Commission has sought to amend its pleadings to include an additional contravention. We heard the matter on 19 November 2010 and on 14 December issued an order dismissing the application. The order stated:

a. *After having heard the parties, the Tribunal orders that the Commission's amendment application in terms of Rule 18(1) of the Competition Tribunal Rules is dismissed on the grounds that the proposed amendments do not contain sufficient particularity to enable the respondent to answer a margin squeeze case in terms of section 8(c).*

[2] We did not give reasons at the time we made our order. We do so now.

Background

[3] The Commission's amendment application seeks to introduce a margin squeeze complaint against the respondent Telkom Limited ("Telkom"). The amendment comes very late in the day in the history of a much delayed case. At present in this case the complaints relate to excessive pricing (section 8(a) and price discrimination (section 9(1)). The Commission also relies on section 8(c).

[4] This complaint referral was filed with the Tribunal on 24th February 2004. But the complaint referral is an amalgam of complaints laid by various complainants dating back to May 2002.

[5] One of the reasons this litigation has taken so long is an unsuccessful jurisdictional challenge brought by Telkom which was finally rejected by the Supreme Court of Appeal on 27 November 2009.

The margin squeeze objection

[6] We held in *Senwes* that a margin squeeze comprises the following elements:

> *"1) The supplier of the input (or translated into our jurisprudence the dominant firm) is vertically integrated;*
>
> *(2) The input in question is in some sense essential for downstream competition;*
>
> *(3) The vertically integrated dominant firm's prices would render the activities of an efficient rival uneconomic;*

(4) There is no objective justification for the dominant firm's pricing arrangements." [1]

[7] The CAC has essentially affirmed this approach on appeal.[2]

[8] In this case the Commission has pleaded only that: [3]

> "12.7.5. *By the differential pricing, and by charging the higher prices as set out above, Telkom engages in a margin squeeze strategy that serves to strengthen its position in the downstream market, in which it competes against the private VANS licensees, at the expense of the private VANS licensees. The result of the pricing strategy is that the private VANS licensees and/or their customers pay significantly more than Telkom's customers of VANS and/or competing services/products. This results in the private VANS licensees suffering negative margins over the complaint period such as to make it difficult for them to expand in the downstream market, so as to effectively compete against Telkom downstream.* "

[9] The remaining paragraphs sought to be inserted by the amendment have not been quoted as they contain legal conclusions that take the matter no further.

[10] It is clear that paragraph 17.2.5 lacks the necessary averments which would at minimum make the pleading comply with our rule 15(2) when measured against the *Senwes* requirements.[4]

[11] In order for the amendment to overcome the objection it needs to set out these elements. It would not be sufficient to simply to regurgitate them in a rote manner. They require some flesh in particular the elements set out in points 2 and 3. In relation to the fourth requirement however, the pleader need

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[1] See Tribunal decision in *Competition Commission v Senwes Ltd Case No 110/CR/Dec06* at paragraphs 139 and 146

[2] See CAC decision in *Senwes Ltd v The Competition Commission Case No: 87/CAC/Feb09* at paragraphs 65 and 66.

[3] Par 17.2.5, Record page 12

[4] Tribunal Rule 15(2) states *"Subject to Rule 24(1), a complaint referral must be supported by an affidavit setting out in numbered paragraphs- (a) a concise statement of the grounds of the complaint; and (b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant as the case may be."*

do no more than aver that there is no objective justification. It will be for the respondent to allege such justification if it exists.

[12] The Commission argued that because in the *Senwes* case a margin squeeze count had been upheld even though it did not appear in the pleadings, it was not necessary for it to make any further assertions. However the *Senwes* decision was not relevant to the adequacy of pleadings. It was common cause that the margin squeeze had not been pleaded. *Senwes* related to whether at the end of the case, the Commission could still proceed with a margin squeeze not pleaded and whether the respondent had been prejudiced. The tribunal, upheld by the Court, decided that it could. This has no relevance to the facts of this case and the question of the adequacy of the pleaded amendment now.

Remaining objections

[13] Although the application has been dismissed because we found that the pleadings do not contain sufficient averments, as this is something the Commission can rectify, should it choose to do so, we therefore need to consider the remaining two objections. The first relates to prejudice allegedly to be suffered by Telkom if the amendments are allowed at this stage and secondly whether the amendment would lead to a duplication of charges with subsequent complaint referral the Commission has brought against Telkom. We deal with these issues separately.

Prejudice suffered

[14] Telkom complains that the amendments have been brought late without acceptable explanation from the time when the outcome of the SCA decision on jurisdiction was known until the date the amendment was filed - a period of several months. This has occasioned prejudice in respect of discovery and the possible loss of hearing dates. The latter arises because the amendment has been sought after the pre-hearing at which the hearing and discovery dates were determined.

[15] First, it is not clear that the hearing dates will have to be lost. Secondly, if they do it hardly avails Telkom to now urge an expeditious hearing given its own approach to the litigation in this matter has led to several years of delay.

[16] It is also difficult to have much sympathy for its complaint in respect of discovery. Telkom claims that is has already discovered in respect of this matter and that this was a burdensome and time consuming task as records were hard to find given the effluxion of time. The real reason for its burden in relation to discovery was the length of time of the jurisdictional challenge which was self-created. By the time discovery took place many years had elapsed so no doubt the process was difficult but this was a risk Telkom took in bringing its challenge if it failed. The amendment does not bring about the prejudice and to the extent it may present an added burden – although no specifics are given, this seems more like a rote complaint than one of substance. The discovery that should have been furnished in relation to the existing complaints of excessive pricing and price discrimination are sufficiently overlapping in nature to that of the margin squeeze as not to pose too great an additional burden.

Duplication of charges

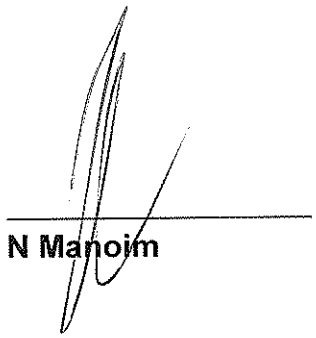
[17] There was much debate in the hearing as to whether the amendment is a duplication of the charges contained in another matter proceeding against Telkom which for convenience we refer to as the 2009 referral.[5] This referral which was made in 2009 also contains allegations that Telkom has perpetrated a margin squeeze in respect of leased lines for internet access. The complaint period in respect of this referral is described as being between 2007 and 2009. In the present referral the complaint period is a matter of dispute. Telkom is of the view that the complaint period ends on the date of referral which would end it at 24 February 2004. The Commission in its replying affidavit asserts that facts subsequent to this period are relevant as the Commission considers the conduct of a continuing nature. Indeed for this reason the Commission seeks interdictal relief.

[5] The Competition Commission v Telkom SA Ltd Case No's: 55/CR/Jul09, 73/CR/Oct09 and 78/CR/Nov09

[18] At first it was suggested by the Commission that there was no duplication as there was no product overlap in the referrals, but the Commission later conceded that there was, but nevertheless maintained that there was no duplication as the complaints' time periods did not overlap.[6] Telkom asserted the opposite. We do not need to decide this point either. Assuming for Telkom that there is duplication, the appropriate moment to address that is not now, but when the second matter is set down for hearing. In this respect the Commission has correctly argued that this is how courts' treat objections about duplication and we see no reason to depart from this practice in our procedures.[7]

Conclusion

[19] The only objection that we find to have substance is the one concerning the adequacy of the pleading. We have for this reason dismissed the amendment application, but we have given directions to the Commission on how to rectify this deficiency should it choose to do so.



N Manoim

17 January 2011

Date

Y Carrim and M Mokuena concurring.

Tribunal Researcher:	Rietsie Badenhorst
For the Applicant:	NH Maenetje instructed by Gildenhuys Lessing Malatji
For the Respondent:	A Cockrell SC instructed by Mothle Jooma Sabdia

[6] See transcript pages 84 and 107.

[7] Footnote ref *Whitehead and Others v The State [2008] 2 All SA 257 (SCA)* para 10