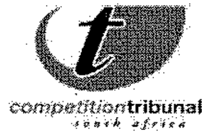


COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 31/IR/A/Apr11

In the matter between:

INVENSYS PLC	First Applicant / Respondent
INVENSYS SYTEMS (UK) LIMITED	Second Applicant / Respondent
EUROTHERM LIMITED	Third Applicant / Respondent

and

PROTEA TECHNOLOGY (PTY) LTD	First Respondent / Applicant
PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	Second Respondent / Applicant
PROTEA ELECTRONICS (PTY) LIMITED	Third Respondent / Applicant
EOH HOLDINGS LIMITED	Fourth Respondent

Panel	:	Norman Manoim (Presiding Member)
		Andiswa Ndoni (Tribunal Member)
		Lawrence Reyburn (Tribunal Member)
Heard on	:	07 November 2012
Order issued on	:	21 November 2012
Reasons issued on	:	21 November 2012

Decision and order

Introduction

[1] The Applicants have made an application for a costs order against the First to the Third Respondents ("the Respondents") in terms of Rule 50(3) of the Competition Act, 1998 ("the Act"). The Fourth Respondent is cited simply because it has potential interests in the matter. The application comes to us after the withdrawal of a direct complaint referral by the Respondents against the Applicants under Section 51(1) of the Act, and a simultaneous withdrawal of an interim relief application under Section 49C brought by the Respondents against the Applicants in relation to the facts underlying that complaint.

Background

[2] The Applicants form part of the Invensys group of companies, which is an international group, which *inter alia* manufactures control and automation componentry branded under the Eurotherm name, utilized in the provision of industrial automation solutions and distributed worldwide.

[3] The Respondents form part of the Protea group which is a South African group that *inter alia* markets, installs, and maintains equipment in the oil, gas, food, beverages, 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.

[4] The Respondents are former distributors of the Applicants' products in South Africa. The Respondents are aggrieved at the manner in which their former role in the distribution chain of the Applicants' products came to an end and they allege that the termination of that role represented an abuse of the Applicants' dominance and a contravention of the Act

[5] The Respondents have also brought High Court proceedings against the Applicants, alleging that conduct of the Applicants in relation to the termination of the former distribution arrangements amounted to the delict of unlawful competition. The Respondents' withdrawal of proceedings before the Tribunal referred to above took place shortly before a hearing of the matter in the High Court was due to take place.

[6] The Respondents lodged their complaint with the Competition Commission ("the Commission") against the Applicants and the Fourth Respondent on 11 April 2011. The Respondents' interim relief application was made on the same date. The

Applicants filed an answering affidavit in response to the interim relief application on 10 May 2011. No replying affidavit was filed and the Respondents took no steps to set the matter down for a hearing.

[7] On completion of its preliminary investigation, the Commission issued a notice of non-referral on 05 August 2011. Following that notice, the Respondents filed their direct referral on 02 September 2011. The Applicants then filed an exception on 24 October 2011. The Respondents proceeded to file a notice of withdrawal of both the interim relief application and the direct referral on 29 November 2011.

[8] No tender to pay costs was contained in the notice of withdrawal and the Applicants reacted by bringing an application for costs. This is the matter we now consider.

ARE THE APPLICANTS ENTITLED TO COSTS?

[9] The only provision expressly dealing with costs in the Act is Section 57, which states the following:

> *(1) Subject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.*
>
> *(2) If the Competition Tribunal –*
>
> > *(a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 51(1); or*
> >
> > *(b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51(1).*

[10] Rule 50(3) of the Tribunal's rules deals with the issue of costs following the withdrawal of matters. This rule reads as follows:

Subject to section 57 –

> *(a) a Notice of Withdrawal may include a consent to pay costs; and*

(b) *if no consent to pay costs is contained in a Notice of Withdrawal the other party may apply to the Tribunal by Notice of Motion in Form CT 6 for an appropriate order of costs.*

[11] The Applicants rely on Rule 50(3) of the Tribunal's rules, quoted above, which they submit is perfectly clear about costs in the circumstances of this case. Since the Respondents withdrew the interim relief application as well as the direct referral without tendering costs, the Applicants argue that they are entitled to apply to us for an order compelling the Respondents to pay their costs in both proceedings

[12] The Respondents' attorney was present throughout the hearing but for reasons not known to us the Respondents' case was argued by a director in the Protea group, Mr Johnston, who was the deponent to the Respondents' answering affidavit in this matter. Mr Johnston explained that he was a practising engineer with a qualification in accounting and a degree in business science and claimed that he was familiar with legal matters.

[13] In the Respondents' answering affidavit and in argument Mr Johnson maintained that the Tribunal is jurisdictionally barred from granting the costs order sought in relation to the interim relief application.[1]

[14] His argument was that section 57 provides a general rule that in Tribunal proceedings each party pays its own costs. The only exception to this rule is that contained in section 57(2) which states that in complaint proceedings brought by a complainant in terms of section 51(1) the Tribunal may award costs. However since the interim relief application was not a section 51(1) proceeding the exception does not apply and hence the Applicants are not entitled to costs. Rule 50(3), he argued, takes the matter no further, as the rule is made subject to section 57.

[15] In relation to the costs of the Applicants in the complaint referral under Section 51(1), Mr Johnston conceded that the Tribunal was authorised to award these costs to the Applicants but he contended that as awards of costs are within the discretion of the Tribunal, the Tribunal should not exercise its discretion in favour of the Applicants in

---

[1] Record pages 82 and 83, paras 14 to 20.

view of their conduct in relation to the termination of the Respondents' distributorship of the Applicants' products[2].

[16] The Tribunal's power to award costs in proceedings before it where private parties (and not the Commission) are the contestants, and the relationship between Section 57 and Rule 50(3), have already been examined by the Tribunal and the Competition Court of Appeal ("the CAC") in a number of decided cases. It suffices to refer to a few of them.

[17] In Omnia Fertilizer Ltd v The Competition Commission (CAC case no. 77/CAC/Jul08) the CAC held that Section 57(1) is subject to two limitations on the general rule that in proceedings before the Tribunal each party should bear its own costs. The first limitation is encompassed by Section 57(2) (quoted above) and the second is represented by the Tribunal's rules. At par 16 of this decision the CAC noted that "... the Tribunal's authority to order costs is not limited to the circumstances contemplated by section 57... the Tribunal is entitled to make a costs award in terms of rule 50(3) of the Competition Tribunal Rules..." This principle had been discussed at some length by the Tribunal in the case of Mainstreet 2 Limited & Others v Novartis Limited & Others case no: 25/IR/A/Dec99

[18] Despite the difference in circumstances between the Mainstreet 2 case and this case, paragraph 19 of the decision in the Mainstreet 2 case is in point in this matter:

[18.1] *"The final question is even if we have the authority to order costs now should we exercise our discretion to grant costs at this stage or wait until the complaint has been finally decided. The applicants urge us to follow this latter course as they say only then will we know whether applicants' failure to file on time was justifiable. This argument might have had merit if the applicants hadn't themselves withdrawn their application. Having done so, as the respondents correctly argue, these extension proceedings have been finally disposed of and the respondents are entitled to their costs. Nothing will emerge in the final hearing of the complaint which will have any bearing on the fate of an application since withdrawn."*

More recently *In Londoloza vs. Bonheur 50 General Trading (Pty) Ltd & Others, case no: 80/AM/Oct04*, the Tribunal held the following:

[2] See answering affidavit, par. 22, pp. 22-23 of the record.

[18.2] *The meaning of the words "Subject to subsection (2) and the Competition Tribunal's rules..." in section 57(1) was the focus of much debate. The applicant argued that the words must be interpreted to mean that the circumstances in which costs could be awarded can be expanded beyond the section 51(1) stipulation in s57(2) by the rules of the Tribunal. Hence if the rules of the Tribunal provided for a tender or an award of costs upon a Notice of Withdrawal, as did rule 50(3), this expanded the tribunal's power to impose costs in such circumstances. "*

[18.3] The Tribunal went further to state in the Londoloza case that:

[18.4] *"A similar argument was made by the applicant in the Omnia case. Given that the matter has already been decided by the CAC, we find it unnecessary to repeat the debates and arguments canvassed in that case and to make any further remarks on the jurisdictional point.*

[19] Although Londoloza was a merger case and Omnia a restrictive practice case there is no reason not to apply the same reading of the provisions in respect of interim relief cases. There is indeed precedent for the award of costs by the Tribunal in interim relief cases where the applicants have withdrawn their applications.

[20] In *Hayley Ann Cassim and other v Virgin Active SA (Pty) Ltd*, case no. 57/IR/Oct01, the Tribunal considered whether costs should be awarded against applicants for interim relief who had not proceeded to file a direct complaint under Section 51(1) after the Commission had issued a notice of non-referral following an investigation into a complaint made to the Commission. The complainants had neither proceeded with their interim relief application nor withdrawn it. The Tribunal awarded costs against them, saying that *"if they choose to avail themselves of this additional remedy they must be mindful of the consequences[3]."* The Tribunal pointed out, however, that a complainant who abandons or loses an interim relief application may be able to demonstrate that there are special circumstances for the Tribunal to refrain from making an adverse award of costs.

[21] We regard the principles stated in the above-mentioned cases to be settled law and we see no reason why they should not be followed in this case. Mr Johnston's contentions about the law which govern the costs in a withdrawn interim relief

[3] See page 5 of decision.

application are simply wrong. Moreover he fails to appreciate that for the purposes of the Act a complaint brought under section 51 as a direct referral begins and ends with that complaint referral, and no other. If a complaint is withdrawn, that for all practical purposes ends the case which it set in train, and the costs of that case must be considered in association with the outcome of that complaint, seen as a discrete item of litigation. Whether the underlying factual disputes give rise to later items of litigation is irrelevant in the context of the costs of the first item.

[22] At the hearing it emerged that the Respondents have filed a fresh complaint with the Commission alleging abuse of dominance by the Applicants on the basis of conduct following the above-mentioned termination of the Respondents' distributorship of their products, and have also initiated fresh interim relief proceedings. From discussion at the hearing about this fact the question emerged whether the filing of the fresh complaint could be regarded as a special circumstance justifying the Tribunal in refusing the Applicants their costs in the withdrawn complaint referral and interim relief application since the fresh litigation would demonstrate that the facts underlying the original complaint are still being processed by the machinery set up by the Act.

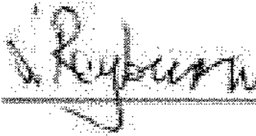
[23] Our conclusion is that this is not such a special circumstance as contemplated in the Cassim case. What the costs order is directed at is the costs incurred by the Applicants in dealing with a complaint which required their attention and justified their engagement of legal representation. They were put to the trouble of considering the merits of the complaint referral and responding to it, in this instance by preparing and filing a notice of exception. In the case of the interim relief application they had to peruse the papers filed by the Respondents, and prepare and file a considered answer. This again represented the time and attention of legal representatives. The associated expenditure was incurred and, in the light of the Respondent's withdrawal of their application, was justifiably incurred, regardless of the eventual outcome of any later litigation which may take place.

[24] The Applicants in our view are entitled to their costs now.

[25] The Respondents further submit that the only reason they withdrew the two cases from the Tribunal was a misrepresentation by the Applicants in their submissions to the Commission as well as in their answering affidavit in response to the interim relief

application[4]. Our answer to this submission is that the Respondents will, if they proceed with diligence in the fresh litigation, have their day in court to attempt to prove their case, be it through the new interim relief application or through the new complaint before the Commission, should it result in a referral to the Tribunal.

[26] We accordingly make the following order: The First, Second and Third Respondents are jointly and severally ordered to pay the Applicants' costs on the party and party scale in the withdrawn complaint referral under Section 51(1), in the withdrawn interim relief application under Section 49C, and in this application. The costs awarded are to include the costs of one counsel.



LAWRENCE REYBURN

21 November 2012

Date

Andiswa Ndoni and Norman Manoim concurring.

Tribunal Researcher:	Caroline Ssenufusa
For the Applicants:	Adv Anthony Gotz instructed by Glyn Marais Inc
For the 1st to 3rd Respondents:	Gary Johnston together with Duncan Okes Attorneys
For the Fourth Respondent:	Botoulas Krause Inc

[4] Heads of argument of Respondents, pages 12-13.