COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 49/1R/Jul02

In the matter between:

Nkosinauth Ronald Msomi T/a Minnie Cigarette Wholesalers	1st Applicant
Marian Cigarette Wholesalers	2nd Applicant
Cigarette City (Pty) Ltd	3rd Applicant
Singh's Cigarette Distributors	4th Applicant
PTH Investments (Pty) Ltd	5th Applicant
South Coast Cigarette Agency	6th Applicant
Courtesy Wholesalers (Pty) Ltd	7th Applicant
I.H. Randeree	8th Applicant
Jamadars Wholesale	9th Applicant
Everlast Cigarette Distributors	10th Applicant
Noorgat Wholesalers	11th Applicant
and	
British American Tobacco South Africa (Pty) Ltd	Respondent

Reasons for Tribunal Decision

---

1. This in an interim relief application, which we heard on the 31st July on the basis of urgency. The applicants, all distributors of the respondent's

products, seek relief to prevent the respondent from terminating the existing distribution agreement and replacing it with a new agreement which the applicants maintain constitutes a prohibited practice.

2. On the 31st July 2002 we dismissed the application. Our reasons for that decision follow.

INTRODUCTION

3. The applicants are eleven firms, based in KwaZulu Natal, engaged in the business of distributing cigarettes for the respondent, the dominant cigarette producer in the country. [1]

4. All of them have entered into distribution agreements with the respondent's predecessor, Rothmans International of South Africa, or its associates[2]. Although we were advised that the agreements differ in some respects we were informed that for the purpose of this application their material terms are the same as those contained in annexure NRM 2. (For convenience we will refer to this class of agreement as the 'old agreement'.)

5. In May 2002, the respondent advised its distributors that it intended giving notice to terminate the old agreements as of the end of June 2002 and to replace them with a new agreement.[3] (For convenience we refer to this class of agreement as the 'new agreement'.) After consultation with some of its distributors this period of notice was extended until the end of July 2002. [4] The respondent requires its distributors to enter into the new agreement if they wish to distribute its products after 31 July 2002.

6. The new agreement has changed the manner in which distributors are compensated and reduced the margin of compensation for some distributors. The applicants contend that certain terms of the new agreement contravene sections 5(1), 5(2) and 8(c) of the Competition Act. For this reason they have approached us by way of urgency to restore the

[1] The applicants more formally describe themselves as wholesalers and distributors of cigarettes and allied products.
[2] According to the applicants the respondent merged or acquired the entire shareholding of Rothmans. It is not disputed that the respondent is the correct party to be cited in this matter.
[3] This is to be found in the Record at page 285, Annexure AS 13 to the answering affidavit of Mr Schenk. The applicants had attached as annexure NRM 3 the new agreement, but according to the respondent this was an earlier draft and the AS 13 is the most recent draft. Nevertheless, the distinction between the versions has not been relevant for our purposes.
[4] In terms of the agreement the respondent can cancel the agreement by giving a distributor 30 days notice. See annexure NRM 2 paragraph 4.1.

status quo prior to the expiration of the notice period.[5] By agreement with the parties we heard this matter on the 31st July, the last day of the notice period.

RELIEF SOUGHT

7. The applicants seek the following relief:

   That the respondent:

   be interdicted and restrained from giving effect to its notice of intention to cancel the distributorship agreements concluded by the Applicants with Rothmans International of South Africa (Pty) Ltd or its associate companies ("existing agreements");
   be directed to continue trading with the applicants on the terms and conditions set out in the existing agreements.[6]

8. During the course of the hearing the applicants indicated that they would in the alternative agree to relief being granted in a more restrictive form. As the concession was relevant only to whether the relief sought in its original form was overbroad and not to whether any form of relief is competent, which we have found it is not, it is not necessary for us to analyse it any further. [7]

9. The respondent opposed the granting of relief contending that the applicants had not met any of the requirements for interim relief in terms of section 49 C. The amended form of relief offered at the hearing did not cure its objections.

10. The respondent also took an in limine point that relief in its original form imposed upon the respondent a contractual relationship with the applicants in circumstances where the contractual relationship had been terminated. This, the respondent contends, offends against common law principles.[8]

---

[5] Note that in the normal course an applicant for urgent relief does not have to establish grounds for urgency. It is only when the applicant seeks to shorten the time periods for hearing an interim relief application, from those set out in the Tribunal 's Rules, that the basis for 'urgent circumstances' needs to be alleged. (See Rule 28(3) of the Tribunal Rules.)
[6] The applicants asked that the order apply until the complaint has been finalised or for a period of 6 months, whichever occurs earlier. (See page 31 of the Transcript)
[7] See page 33 of the transcript. The applicants' concession related to the fact that they would have no objection to the respondent removing any distinction between the various categories of distributor, provided for in the old agreement, which we discuss more fully below.
[8] See Shenk's affidavit paragraph 6, Record page 155.

REQUIREMENTS FOR INTERIM RELIEF

11. In terms of section 49 C (2)(b) the Tribunal:

> *"...may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*
>
> *The evidence relating to the alleged prohibited practice;*
> *The need to prevent serious or irreparable damage to the applicant; and*
> *The balance of convenience.*

12. In an application in terms of section 49 C, an applicant is required to make out a prima facie case of a restrictive practice. As we observed in the York Timbers [9] case:

> *"Applying this analysis to our Act means that 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 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 at the hearing of the complaint referral.*
>
> *If the applicant has succeeded in doing so we then consider the "doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicant's case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed."*[10]

13. In this matter we have found that the applicants have not made out a "prima facie case though open to some doubt". It is therefore not necessary for us to deal with the remaining requirements of section 49C viz. irreparable harm and the balance of convenience or to decide the in limine point.

EVIDENCE OF A PROHIBITED PRACTICE

Introduction

14. In brief, the applicants' case is that the new agreement contains requirements, not present in the old agreement, that alter the manner in

[9] See York Timbers v SA Forestry Company Ltd: Tribunal Case No 15/IR/Feb01.
[10] See paragraphs 64-65 of the York Timbers decision.

which distributors are compensated for their services by the respondent in such a way as to both reduce their margins and to raise their costs. In short the pro-competitive status quo will be transmogrified into an anticompetitive one under the new agreement.

15. The applicants are all in business as distributors of cigarettes and tobacco products. For several years they have all distributed the respondent's products in terms of the old agreement or an agreement that for our purposes was materially the same.

16. Crucial to this agreement was the manner in which distributors were compensated for their services. Under the old agreement the distributor was entitled to certain rebates and discounts on the respondent's listed wholesale price. The largest part of this form of compensation comprised the so-called "service fee". This fee was determined by the categorization of the distributor in question, irrespective of the service levels or performance of the distributor. Three categories of distributors were created namely specialists, general wholesalers and cash and carry operations.

17. The highest form of compensation was paid to specialist distributors who were defined as firms who derived 80% of their income from cigarette and tobacco sales. Six of the applicants were classified as specialist distributors.

18. The respondent seeks in the new agreement to eliminate these distinctions, which it argues are outmoded.[11]

19. The respondent justifies moving to the new system on the basis, firstly, that there were flaws in the old system and, secondly, that the environment in which it operated had changed.

20. According to the respondent:

> *".. since 1995 annual cigarette consumption in South Africa has fallen by some ten billion cigarettes, or 30%. This fall could be ascribed to the following:*

[11] The reason that specialist distributors received this preferred form of compensation is testimony, not to the bargaining power of these firms at the time the old agreements were concluded, but to the way the distribution function has changed. The applicants point out that it was the respondent who created the specialist category of distributor because at the time it wanted to encourage dedicated specialist distributors of its products. As stated earlier the applicants at the hearing sought to amend their relief in a manner that would allow the respondent to eliminate this distinction, as they had no objection to that part of the respondent's justification for the new agreement.

A sharp rise in the real retail price of cigarettes principally due to increased excise duties on tobacco.
Progressively tighter regulation and prohibition of tobacco advertising.
Regulation of smoking in the workplace and public spaces.
Concerted campaigns to educate the public about the long-term health risks associated with smoking tobacco.[12]

21. The respondent, which was formed as a result of the merger in 1999 between the tobacco interests of the Rembrandt Group and those of British American Tobacco, is the largest cigarette manufacturer in the country with, by its own admission, 93,3% of the market. Its nearest rival, Japan Tobacco International which makes Camel cigarettes locally, has only 4,6% of the market.[13]

22. In 2000 the respondent launched a two-year study of what it describes as its 'secondary supply chain' i.e. the supply from the manufacturer to the distributor. According to the respondent it is this study that led to the redesign of its distribution system that now finds legal form in the new agreement.

23. It is certainly common cause between the experts of both sides that trends in logistics have resulted in a major shake up of how manufacturers of fast moving consumer goods distribute their products.

24. Manufacturers now demand more of their supply chain than simply getting their product from the factory warehouse to the retailer's shelf. It is these new imperatives, not a desire to reduce competition among its distributors that has, according to the respondent, informed its decision to terminate the old agreement and require its distributors to enter into the new one.

25. The applicants retort is that the respondent's pro-competitive justifications for the new system, which range from claims from improved efficiencies, promoting empowerment of Black business to ensuring the integrity of the tax system, are a superficial attempt to mask its real intentions – to squeeze an extra R92 million from the distribution system for itself.[14] The cost of doing, they maintain, is to make the distribution system less competitive.

---

[12] See Report of Malherbe, Annexure AS 2 to the respondent's answering affidavit, Record page 220.
[13] See Report of Malherbe, Record page 221.
[14] See page 347 and 380 of the record where the Applicant expresses the hope that the Respondent will explain to the Tribunal why it is necessary to retain an amount of R92 million per year in order to make a once-off payment of R16.7 million for an empowerment program. In its heads of argument the respondent concedes *"It is also plain that the respondent stands to profit financially from the new structure."* (See respondents' heads of argument paragraph 7)

Content of the agreements

26. In terms of the old agreement the distributors were paid a fee depending on what category of distributor they fell into and the category of product that they were distributing.[15] This fee can be broken down according to the applicants as follows:

A service fee of –	15.00
An EFT[16] incentive of –	0.60
Settlement discount of –	3,83
Total	19,43 [17]

27. According to the applicants on average about half of this amount, R 9,72, which amounts to a discount of 2,5% of the wholesale price, is passed on to retailers who in turn pass about 1 % of that on to the consumer. The respondent denies that the discount is passed on to the consumer and claims that prices remain unaffected at retail level.

28. According to Mr. Schenk, the respondent's marketing director:

> *"The benefits of discounted price to retailers are, accordingly not passed to consumers and, save for increased profits to retailers, no efficiency is achieved from this discount and the resources are entirely wasted."* [18]

29. The new agreement has altered the mode of compensation in two ways. Firstly it reduced the fee to the distributor and secondly it changed the way the distributor is paid for its services. Under the new system the distributor is rewarded incrementally on the basis of complying with the respondent's prescribed requirements.

30. The new system will reward a distributor for the following performances by paying a performance reward of:

---

[15] Answering affidavit paragraph 37.4.
[16] EFT stands for Electronic Funds Transfer. This method of payment entails that the distributors deposit the payment they receive from retailers into their own accounts and then transfer the funds electronically to BATSA's account. Under this system the bank charges for cash deposits, accrue to the distributor not the respondent. Apparently a high proportion of the distributors' customers pay in this form making the costs of this system not insignificant for small businesses.
[17] See Annexure NRM 4 PG 124. This is the fee for the specialist distributor. The respondent attached a different document Annexure AS 7 in which the settlement discount is higher, R 4.19 giving a total of R 19,79. Nothing turns on this difference however and as the respondent used NRM 4 to make its arguments we shall stick to those figures.
[18] See answering affidavit paragraph 37.5.2

1) R1.34 - per thousand cigarettes for warehousing, taking into account storage, security and logistically efficient receiving and dispatch of product.
2) R2.15 - per thousand cigarettes for complying with BATSA's requirements regarding stock inventory to be held at a given time.
3) R4.92 - per thousand cigarettes for timeous payment by electronic fund transfer (EFT) of accounts.
4) R4.39 - per thousand cigarettes for delivering a minimum of 100 delivery customers per week.
5) R0.39 - per thousand cigarettes for using the BATSA's information system to which BATSA must have access.

<u>TOTAL</u> 13,19- per thousand cigarettes [19]

31. According to the respondent the philosophy behind the new system is that distributors are rewarded in relation to specific efficiencies that they introduce to the system. [20]

32. The applicants maintain that the respondent is intent on eliminating their ability to pass on discounts to retailers. They rely for this proposition on not only the operational effect of the new system, but also a statement in a document emanating from the respondent, which explains its motives for the introduction of the new system. In this document the respondent states:

> *"The current operating environment has resulted in the wholesale industry offering retail discounts and rebates off the established pricing structure. Wholesalers have been competing on their pricing ability and service levels have suffered as a result. The discount element will therefore be removed from the pricing structure between British American Tobacco South Africa and the wholesaler."* [21]

33. According to the applicants:

> *"…the decreasing of the performance rewards in order to render it impossible for distributors to allow discounts is per se anti-competitive."* [22]

---

[19] The R 13,19 per thousand cigarettes is highest total performance reward that a distributor could qualify for.
[20] The approach to rewarding efficiencies is not entirely consistent as not all requirements are rewarded. See Malherbe report page 231 – which indicates that some efficiencies are treated as contractual pre-requisites e.g. the requirement of minimum purchase of 100 000 cigarettes per order, and are not rewarded, whilst others are rewarded by the agreement. The contract also indiscriminately rewards some variable and some fixed costs
[21] See page 121 of the Record.
[22] See Paragraph 29.1 of the complaint Record pg 49.

34. The respondent does not deny its intention to inhibit discounting, but denies that this is anticompetitive. On the contrary it argues that distribution will become even more competitive as distributors will be competing on performance and not on discounts given to retailers out of their service fee. [23]

35. The respondent goes on to argue that under the new system the distributors will be better off as they will pocket the entire distribution fee of R 13,19, assuming of course that they qualify for the maximum fee, instead of the R9, 72 [24] that they received under the old system because they gave away half their fee to the retailers.[25] This conclusion should be treated with a healthy degree of scepticism, as no doubt the applicants would not be at our door if they saw their self-interest being furthered in the same way. Certainly the specialist distributor who was privileged under the old system will be worse off under the new.[26]

36. Another important change brought about by the new agreement is the reduction in the wholesale price that the respondent charges to the distributors for its products. Under the old system a distributor was in the position of a classic wholesaler who would buy from the respondent at the wholesale price less an effective fee/ discount on the wholesale price, part of which would be passed on to the retailer. Since the wholesale price was known to retailers they would expect at the very least to be offered the wholesale price or something less than that by the distributor. The distributor would utilise the difference between the wholesale price and the de facto discount it received on it, to bargain with the retailer.[27] On average for the specialist distributor, who received a "service fee discount of 37%" more than other wholesalers performing the same service[28], this worked out to R9,72 given a margin of R19.43 per 1000 cigarettes.

37. By lowering the discount and decreasing the distribution fee[29] (for which we read discount) the respondent has narrowed the distributor's room to manoeuvre in its negotiations with retailers. Since under the new system retailers will also be aware of the revised wholesale price they will again

---

[23] See paragraph 37.8.2 of the respondent's answering affidavit, Record page 187and the report of the respondent's expert paragraph 75, page 446.
[24] The assumption is based on a specialist distributor.
[25] See paragraph 37.82 of the respondent's answering affidavit, page 187.
[26] See applicants replying affidavit par 81(c) page 378.
[27] In this case under the old system it appears that distributors received a flat fee although it is commonly understood and referred to by both parties as a discount because the fee approximated at least on the applicants version to a certain percentage of the wholesale price See paragraph 23 of the applicants complaint page 46.
[28] The monetary difference between the discount of a Specialist and that of a "Cash and Carry" distributor was R5.95 per 1000 cigarettes.
[29] In the old system this was called a service fee.

have expectations that they will pay at most the wholesale price for the respondent's products. The likely outcome is that distributors will cease discounting to the retailers and sell at the revised wholesale price keeping the reduced distribution fee for themselves - this seems to be the outcome that the respondent seeks.

38. Assuming then, at best for the applicants, that the scheme under the new agreement leads to:

- less price competition between distributors and thus retailers;

- the elimination of certain distributors who are no longer profitable under the new system; and /or

- the likelihood that the respondents' wholesale price will be 'maintained', that is, that it will be the minimum price at which the distributors will uniformly sell to retailers, bar some exceptions.[30]

39. We then have to ask the question whether those outcomes amount to contraventions of the Act by the respondent in the manner alleged or merely the reflection of the respondent 's ability to exercise its leverage over the supply chain to its best advantage? Put another way, to borrow an expression used by respondent's counsel, does utilising one's dominance to squeeze, amount to utilising one's dominance to abuse?

40. We will now consider this in relation to each of the prohibited practices alleged by the applicants.

Section 5(1)

41. Section 5(1) states:

> *An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*

42. It is common cause that the applicants are in a vertical relationship with the respondent. According to the applicants the relevant market is the market for the distribution of cigarette products. The applicants' complaint is that the new agreement, because of the cumulative effect of the features, which we referred to earlier, substantially lessens or prevents competition in the relevant market in that:

[30] The respondent alleges that in some places such as Mpumalanga retailers purchase above the recommended wholesale price. See page 183, par. 37.3.1 of the Record.

(a) it will make it impossible for them as small traders to remain in the market and a fortiori, with fewer participants, the market will become less competitive; and/or

(b) it will eliminate price and service competition amongst distributors.

43. We will examine each of these propositions separately.

44. In order to succeed with the first proposition, the applicants need to demonstrate that the new system will lead to the elimination of distributors and secondly that this reduction in the number of competitors will lessen competition. Whilst typically competition is premised on a plurality of competitors there is no optimum number of participants in a market and indeed an efficient market often leads to the culling of inefficient competitors.

45. The respondent has made much of what they see as a concession by the applicants' expert that under the new system there will be intense competition amongst wholesalers.[31] This concession, if it amounts to that, is coupled with the expert's observation that the smaller and specialist wholesalers will be detrimentally impacted. This perhaps goes to the heart of the applicants' theory in this case – viz. that competition law is there to protect competitors and hence any scheme that could have as its effect the elimination of competitors is therefore anticompetitive. This is not so. It is trite law, as was observed by the United States Supreme Court in the Brown Shoe case, and has since then been elevated to a sacred mantra by competition authorities universally, that competition law is there to protect the competitive process not competitors.[32] Whilst markets function properly if they ensure competitive prices and services, they also function properly if they eliminate inefficient players. The applicants seek to sacrifice the latter requirement on the altar of the former.

46. Nevertheless the first proposition is not supported by the applicants' own figures. In Annexures "SR 2"/4 to SR4/6 [33] the applicants show that the new agreement is not viable for small distributors who distribute less than 100 cases of cigarettes per week. However, distributors who distribute 400 cases are profitable provided that they do not pass on any portion of their fee as a discount. Distributors who distribute 1000 cases per week were profitable even if they passed on a discount of 1,5 % although not a discount of 2%. Indeed for this class of distributor the applicants' figures show that if the firm did not pass on a discount it would earn R75 570 under the new system as opposed to R53 290 under the old.

[31] See report of Mr Moodley pg 446.
[32] See Brown Shoe Co v US 370 US 294, 320 (1962).
[33] See page 461 of the Record.

47. However their figures show that the small distributor[34] is also not viable under the present system i.e. the old agreement. It therefore cannot be said with any certainty on these facts that the new system will lead to a greater reduction of distributors than would the old system, and even if it would, the applicants have failed to indicate how much the market would be foreclosed as a result. Indeed as we have observed elsewhere the applicants have provided no evidence of the extent of the market for which they account, or indicated which of the applicants is less likely to survive the new regime. As the respondent's have argued, we cannot assume that all the applicants are in the same commercial position. What little evidence of distinction between them that we have is that of the eleven, six are specialist distributors and the others are not.[35]

48. The first proposition is therefore not sustainable.

49. To sustain their second proposition the applicants have attempted to make out a case that the new system will lead to a reduction in discounts that the distributors will pass on to retailers and hence retailers will not be able to pass on lower prices to consumers. Now it is a widely accepted in competition law that a reduction in intra-brand competition is not ordinarily a matter of concern unless there is a reduction in inter-brand competition.[36] This is not the case that the applicants have sought to make on the papers although it can be inferred from some of the evidence that they have adduced. Certainly given the pervasive presence of the respondent in the cigarette manufacturing market and its size relative to that of its competitors, we can conclude that inter-brand competition is weak and hence their should be a heightened concern about intra-brand competition. Even if we accept that prima facie the applicants have a persuasive case for claiming that one of the effects of the new agreement is that discounts to retailers will be eliminated, especially in the face of the respondents stated intention to achieve this, the evidence of a lessening of competition is hardly compelling. On their own version the best that the applicants can show is that retailers may no longer pass on to consumers the discount of 1%. This is too trivial a figure to amount to meet the requirement of "substantiality" laid down in section 5(1).

50. What seems more likely on the facts is that this is about a margin squeeze and not about a lessening of competition.

---

[34] A small distributor buys approximately 100 cases per week. See page 459 of the record.

[35] See applicants replying affidavit par. 81(d), page 378 of the Record (The applicants refer to *"six out of twelve applicants"*, we assume this is an error as there are only eleven applicants.)

[36] See Competition Tribunal Case No: 44/LM/Jul01, DaimlerChrysler SA (Pty) Ltd and Sandown Motor Holdings (Pty) Ltd where we discuss inter- versus intra-brand competition, as well as *Competition Law* by Richard Wish, fourth edition, Butterworths, page 541-542 where he considers the interplay between inter-brand and intra-brand competition concluding that a restriction of intra-brand competition is likely to raise concerns only where inter-brand competition is weak.

51. Accordingly the second proposition also fails and hence the complaint in terms of section 5(1) has not been established.

Section 5(2)

52. Section 5(2) states:

The practice of minimum resale price maintenance is prohibited.

53. The applicants at the outset correctly concede that the new agreement does not amount to a legal imperative from the respondent imposing minimum resale price maintenance. Rather they argue the cumulative effect of the new agreement is such that, de facto as opposed to de iure, the distributors will be forced to resell at the same price, namely the respondents wholesale price and that this is a minimum price and hence we have minimum resale price maintenance.

54. Whilst the argument that a minimum resale price may be unlawfully maintained, even in the absence of a legally enforceable obligation, may be correct, we do not need to decide this point. At best for the applicants the case law suggests that there must be some evidence of coercion on the reseller in order for it to be a suggestion that a price is being maintained.[37] On the facts there is nothing to prevent the distributors from discounting the wholesale price. [38] Certainly they have less largesse to

---

[37] In Carlson Machine Tools, Inc. v American Tool 678 F.2D 1253; 1982 U.S. App. (1982) the Court of Appeals summarised the decisions taken on suggested list prices as follows: "In United States v Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed.992 (1919) the Court said that "The mere suggestion of list prices by a manufacturer, however, is not enough to establish the existence of resale price'". Resale price maintenance occurs "when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price …(resale price maintenance) must involve making a meaningful event depend on compliance or non-compliance with the "suggested" or stated price". - Aladin Oil, supra, 603F.2d at 1117-18. In Yentsch v Texaco, Inc., 630 F.2d 46, 53 (2d Cir. 1980) the Second Circuit of the US Appeals Court said 'Evidence of exposition, persuasion, argument, or pressure on the part of the manufacturer is insufficient, without more, to establish coercion required for resale price maintenance'."
The European Court of Justice held in Pronuptia de Paris v Pronuptia de Paris Irmgard Schillgalis [1986] ECR 353, [1986] 1 CMLR 414 that the recommendation of prices would not, in itself, infringe Article 81(1). In the Commission's *Guidelines on Vertical Restraints*, (2000/C291/01) paragraph 47, it notes: "However, RPM (resale price maintenance) can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level."

[38] There was some evidence that the respondent's employees enforced a system of maximum resale price maintenance but that is not a contravention of the Act. See page 373 of the record where Randeree says that at one stage the Respondent's sales representative called him and

spread, given the austerity of their new form of compensation, but there is nothing preventing the distributors from doing so. The applicants' figures which show increasing returns to higher volume distributors suggesting that some distributors will be able to continue to discount even with the thinner margins of the new system.

55. We thus find that there is no evidence that the new agreement amounts to the imposition of minimum resale price maintenance in contravention of section 5(2).

Section 8(c)

56. Section 8(c) states:

> *It is prohibited for a dominant firm to-*
>
> > *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain;*

57. In order to succeed with this allegation the applicants need to show that the new agreement will be exclusionary in that it either excludes competitors of the respondent from the market or the applicants themselves. The applicants have not relied on the former and therefore we only need consider the latter. In passing we observe, in relation to the former, that all distributors, including the applicants, distribute the products of the respondent's competitors.

58. The applicants argue that the reduction of their margins and the increased costs of complying with the new system will prevent them from expanding in the cigarette distribution market and similarly that these requirements will prevent new entry into the market.[39]

59. As we stated in our analysis of the section 5(1) claim, it may be a consequence of the new agreement that certain firms will no longer be viable in the market. The reduction in the number of distributors does not on its own amount to evidence of an exclusionary act. An exclusionary act is defined in the Act as one *"that impedes or prevents a firm entering into, or expanding within, a market"*. [40] It cannot mean that every harshly imposed commercial term by a dominant firm constitutes an exclusionary

---

informed him to stop selling products to retailers at 20 cents a carton more than the recommended wholesale price.

[39] See Applicants Heads of Argument paragraphs 34.2-3.

[40] Section 1(1)(x) of the Act.

act because it makes life more difficult for the firm imposed upon. As we stated in York Timbers[41]:

> " *It is not enough to show that a given practice is a product of market power. It must also be shown that the act complained of actually extends that power or creates new sites of power."*

The evidence in this case is that the dominant firm wants to squeeze its distribution network not to destroy it. On the contrary even though it does some of its own direct distribution[42] it intends because of the vast scale of its distribution system to maintain independent distributors. What is changing is its method of distribution, which will affect some firms more than others because they were privileged by the old system. On the evidence before us there is nothing to suggest that they are seeking to engage in an exclusionary strategy.

60. In relation to new entrants to the market the evidence that the new requirement will inhibit new entry is unconvincing. The respondent has shown that firms already acting as general distributors of consumer goods will be better placed than they were under the old agreement to enter the cigarette distribution market by virtue of the cessation of the privileged position of the specialist distributors. The respondent is also embarking on a program of encouraging a new class of empowerment distributors with favourable financing conditions. [43]

61. This evidence suggests that whilst the profile of the cigarette distribution industry might change, entry barriers have not been raised indeed it is more probable that they have been lowered.

62. We find no evidence that the new agreement amounts to an abuse of a dominant position by the respondent and accordingly this complaint also fails.

Conclusion

63. In view of the fact that the applicants have failed to make out a prima facie case that the new agreement will have - an anticompetitive effect, for the purpose of section 8(c), or cast in the language of section 5(1) - substantially lessen or prevent competition, it is not necessary for us to consider the respondent's claims that the new agreement has

---

[41] See York Timbers Ltd and South African Forestry Company Ltd, Tribunal Case No: 15/IR/Feb01, par. 99 of the decision.

[42] See page 199, par. 41.7.2 of the Record.

[43] Here we refer to what the respondent calls its Independent Distributor Project, described as an investment in small to medium business enterprises owned or controlled by historically disadvantaged persons. See Annexure AS 8 and AAS 9 to the respondent's answering affidavit, Record, pages 256-264.

technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect.

64. Nor as we stated earlier have the applicants succeeded in establishing their complaint in terms of section 5(2).

65. The application is accordingly dismissed.

ORDER

66. We make the following order:

1) The application for interim relief is dismissed.
2) The Applicants, jointly and severally are responsible for the respondent's costs on a party and party basis including the costs of two legal representatives.

30/08/2002

N. Manoim **Date**

Concurring: D. Lewis, F. Fourie

For the applicants: Adv CJ Pammenter and RG Reddy

For the respondents: M van der Nest and Mr Snyckers