COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number: 52/IR/Sep01

In the matter between:

South African Fruit Terminals (Pty) Limited	Applicant
and	
Portnet	First Respondent
Capespan (Pty) Ltd	Second Respondent
International Harbour Services (Pty) Ltd	Third Respondent
Fresh Produce Terminals (Pty) Ltd	Fourth Respondent

REASONS AND ORDER

INTRODUCTION

This is an application for interim relief brought by South African Fruit Terminals (Pty) Ltd in respect of a complaint lodged by it with the Commission on 19 September 2001, against Portnet, Capespan, and its related companies. The applicants allege that the respondents are engaged in practices prohibited by Chapter 2 of the Competition Act, 89 of 1998. More specifically, the applicants allege that the respondents are contravening the provisions of sections 5(1), alternatively 5(2)[1], alternatively 8(b), alternatively 8(c), alternatively 8(d)(ii), alternatively 8(d) (iv), alternatively 9 of the Competition Act.

[1] It appears that the allegation of a section 5(2) contravention was made in error.

The Parties

SAFT

The applicant is South African Fruit Terminals (Pty) Limited ("SAFT"), a company incorporated in South Africa, which provides agency and logistical services for the export of citrus and deciduous fruit from South Africa. SAFT is controlled by SAFT Europe BV in Rotterdam, the Netherlands. The ultimate controlling shareholders are Seabrex Rotterdam BV of the Netherlands and the Sea-Invest Group of Belgium.

Portnet (Transnet)

The first respondent is cited as Portnet, ("Portnet") and is merely an operating division of Transnet Limited ("Transnet"). It is the latter which is the registered owner and/or operator of all port facilities in the ports of the Republic of South Africa, specifically, Durban, Cape Town and Port Elizabeth. Transnet had no objection to the incorrect citation and we allowed the applicant to amend the citation. Transnet was formed in terms of the Legal Succession to the South African Transport Services Act No. 9 of 1989 and became the legal successor to the South African Transport Services ("SATS"). It thus inherited all its rights and obligations vis-à-vis existing agreements as well as those under the old harbour regulations in terms of which SATS controlled the ports. It further acquired ownership of all movable and immovable property previously owned by SATS. Transnet is specifically designated as the port authority in terms of various Acts. It owns, controls, manages, maintains and exploits the harbours of Table Bay, Durban and Port Elizabeth. For convenience all the parties herein have throughout the proceedings referred to Transnet as Portnet and we, likewise, adopt this approach in this decision.

Capespan

The second respondent is Capespan (Pty) Ltd ("Capespan"), the largest export agent and logistics service provider in the fruit export market. It has been trading since 1999 when it acquired the operations of Unifruco and Outspan and their associated subsidiaries. The latter two companies are now Capespan's principal shareholders, each holding 34.29% of its issued share capital.

IHS

The third respondent is International Harbour Services (Pty) Ltd ("IHS"). IHS was originally incorporated under the Companies Act No. 61 of 1973, its entire issued share capital being registered in the South African Co-operative Deciduous Fruit Exchange Limited (which later became known as "Universal"). It was brought into existence to handle deciduous fruit exports at arm's length from the

Deciduous Fruit Board ("DFB"). [2] When Unifruco took over the position of marketing agent for deciduous fruit from the DFB in 1991, Universal sold and transferred its entire shareholding in IHS to Unifruco, which became a wholly-owned subsidiary of Unifruco. The shares in IHS were subsequently transferred to Capespan on 1 January 1999.[3]

IHS is entitled to conduct certain cargo operations, including handling of fresh fruit at Table Bay Harbour, by virtue of an agreement concluded with Transnet in 1993.

FPT

The fourth respondent is Fresh Produce Terminals (Pty) Ltd ("FPT"), a subsidiary of Capespan, held via an intermediate company, Fleurbaix (Pty) Ltd. At present, FPT operates as the managing agent of Capespan and IHS.[4]

By virtue of the sharing of premises and certain common directorships between the various companies, the applicant contends that the second to fourth respondents constitute one economic entity. They therefore refer collectively to all the respondents as "Capespan". Portnet concedes that Capespan, IHS and FPT are in effect one and the same economic unit or "combined respondents".[5] Capespan contends that although Capespan, IHS and FPT conduct their businesses as part of the Capespan group, they do not form one economic entity. Nevertheless, it has been accepted by all parties that "Capespan" be used to refer to the three respondents for the sake of convenience[6]. We will also follow this approach throughout these Reasons.

BACKGROUND

History of the Litigation

On 19 September 2001 the Applicant lodged a complaint with the Competition Commission against the respondents.

Simultaneously, on the 19 September 2001 the applicant launched an application for interim relief against the respondents. Lengthy papers were filed by all the parties and the matter was only set down for hearing on the 13 December 2001. The hearing lasted one day and was then resumed on 1st and 2nd February 2002 and again on the 4th and 5th March 2002.

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[2] Second to Fourth Respondents' Answering Affidavit p 410
[3] Record page 398.
[4] The parties state that Capespan wishes to restructure all its port assets by vesting them in FPT and to attract an overseas investor thereto. Negotiations are underway between Capespan and Portnet to assign the requisite rights and obligations to FPT under existing agreements.
[5] Record page 27.
[6] Capespan first set of Heads p 4.

The issues in the case

South Africa currently exports approximately 1.4 million pallets of deciduous, citrus and sub-tropical fruits per annum. [7] Historically, the export of South African fruit was controlled by the Deciduous Fruit Board and the Citrus Board. South African fruit was marketed abroad by agents of the various Control Boards. Capespan is the effective successor to one such control board that was the single channel marketer of the SA fruit industry. As the only company acting as a marketing agent for South African fruit, it enjoys long lease agreements with Portnet in respect of the various South African ports.[8]

In particular, Capespan is the inheritor of a long lease in respect of the Cape Town port. It is entitled to use the leased premises, as well as B, C, and D berths on a long-term basis. In return, it pays a market related rental to Portnet for the quayside and existing sheds. [9]

Both SAFT and Capespan provide logistical services for the export of citrus and deciduous fruit to overseas markets. In its capacity as export agent, Capespan acts as middleman between producers and foreign fruit purchasers and provides agency services in this regard. It however also provides logistical and other service functions to itself and other export agents. SAFT only provides logistical services to export agents and in this regard, is the competitor of Capespan. This entails logistical (chain) management of the entire export process. SAFT has been in existence for approximately 3 years and allegedly has a 30% market share of the logistic services market. [10] There are no other competitors other than Capespan and SAFT which provide this specialised service.

The citrus and deciduous fruit market can be broken down into two segments, sterilised ("steri") and non-sterilised ("non-steri"). The distinction comes about, not because of any intrinsic difference in the products, but because of the health requirements of the country to which the fruit is exported. Countries whose phytosanitary health requirements place them in the sterilised fruit market, are distinguished by the fact that they impose a more rigorous control regime on the exporting country (which has to certify fruit as being of the sterilised category), in the language of the industry, "to ensure the integrity of the cold chain."

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[7] Page 16. A pallet comprises one ton of fruit, packed into cardboard boxes.

[8] There was much dispute in the matter as to where certain of these leases now reside, as due to restructuring within Capespan, certain of these leases held historically by other related entities are now in the process of being ceded to it. For the purpose of our decision, however, the present location of the leases is not pertinent.

[9] Just before the commencement of the first set of hearings, the applicants procured a Deed of Cession by and between Unifruco and Capespan executed by Unifruco on 22 January 2001 and by Capespan on 23 November 2000 and approved by Portnet on the 5th May 2001. In terms of this Deed of Cession, all rights, title and interest of Unifruco in the Cape Town quayside cold storage facility were ceded, assigned and transferred to Capespan. (Record page 870).

[10] Record p 154

The practical effect of the distinction for the purpose of this case, is the different manner in which the fruit is handled at the ports by logistic service providers. Fruit that meets the sterilised fruit standard has to be loaded from a cold storage facility located at the quay; non–sterilised fruit may be stored in a cooling facility that is located away from the quay and, as is the case with the applicant, this facility need not be located on the port premises i.e. the property controlled by Portnet.

Capespan is active in both these markets. It, or entities it controls, have long term leases with Portnet at Cape Town and Durban harbours which have enabled it to construct a quayside storage facility at both harbours from which it handles both sterilised and non-sterilised fruit. This location means that it is able to handle sterilised fruits, an advantage none of its rivals has.

In relation to non-sterilised fruits, its arrangement with Transnet is also different to that of its rivals, in that it can load its non–steri from its quayside facility thus obviating the necessity to have to enter into an extensive arrangement with Portnet for access to the quayside and use Portnet labour. It does however pay a royalty to Portnet at R7.83 per pallet in Cape Town and R1.93 in Durban.

As mentioned, SAFT presently competes against Capespan in the non-steri market for the provision of logistic services to export agents and has been doing so since 1999 when it entered the market.[11]

SAFT does not compete in the steri market although it wishes to do so. At the moment it claims it is unable to do so because it does not have access to quayside cold storage facilities, which it alleges is an essential pre-requisite to enter this market.

It states that in order to enter the market either of two things needs to happen –

1. Portnet should lease it appropriate space at the quayside so it could have an arrangement similar to that of Capespan; or

2. Capespan should be required to lease it part of its existing facilities .

It alleges that neither has been willing to enter into such an arrangement and that each has pointed a finger at the other as the cause of the applicant's predicament . For this reason SAFT seeks relief in the form of temporary access to an essential facility against Capespan. (Prayer 6.1 in the original Notice of Motion, prayer 3.1 in the amended notice of motion)

As ancillary relief it seeks the excision of certain clauses in the leases that provide for the exclusive use by the respondents of the quayside cold storage facilities.

[11] Record page 16.

It further complains that it is not able to compete on an equal footing with Capespan in the non-steri market because Portnet's arrangement with it is less favourable than the arrangement it has with Capespan. This discrimination raises SAFT's costs in comparison to that of Capespan. It alleges that Capespan's response has been to lower its fees in the non-steri market, to a level where SAFT cannot make a return and has cross-subsidised this by increasing its fees in the steri market, where it is not subject to competition.

Portnet, as a dominant provider of quay loading facilities, is obliged to treat it in a non-discriminatory fashion – it has not done so and hence SAFT argues that it is entitled to the relief sought under the heading quayside services. These prayers for relief are designed to level the playing fields so that it can continue in the market.

The relief sought by SAFT against both Capespan and Portnet in respect of access to the cold storage facilities has undergone a major shift during the course of this case. Prayers sought primarily against Portnet in respect of access to the multipurpose terminals have also evolved, although less dramatically. For this reason it is convenient to set out below the changes in the relief sought, and when they were sought, as the evolution is relevant as becomes apparent later on, especially when it comes to the issue of costs.

The Nature of the Relief Claimed

The applicant, in its original Notice of Motion, sought an order in the following terms:-

1. *that Portnet allow SAFT to conduct its own Quayside services against payment by SAFT to Portnet of a royalty of R7.82 or such other royalty payment currently paid by any of the other respondents to Portnet for such right;*

2. *that all provisions in the Lease Agreements and other relevant agreements between Portnet and the other respondents which expressly, tacitly or by implication reserve or provide for the exclusive use by any of the respondent of the Quayside Cold Storage Facilities in all the relevant ports of South Africa be varied and/or expunged from these agreements;*

3. *that Portnet makes available to SAFT an area constituting at least 30% of the Quayside Cold Storage Facilities in all the ports in South Africa*[12] *for the purpose of arranging, managing and/or exporting produce to foreign destinations on behalf of its clients;*

[12] All claims were abandoned with respect to Durban and Port Elizabeth as explained above.

4. *that SAFT pays to Portnet 30%, or a proportionate equivalent, of the sum currently paid by the respondents to Portnet for the use of and access to each of the Quayside Cold Storage Facilities in the relevant ports of South Africa;*

5. *that Claimant pays to the relevant respondent/s, on a monthly basis, 25% of the cost incurred by such respondent/s in regard to the running expenses of the various Quayside Cold Storage Facilities , alternatively a sum to be determined by the Tribunal which will adequately reimburse the respondent/s for such running costs;*

ALTERNATIVELY TO PRAYERS 2 TO 5

6.1 the second to fourth respondents be compelled to allow SAFT access to at least 30% of the Quayside Cold Storage Facilities in all the ports in South Africa for the purpose of arranging, managing and/or exporting produce to foreign destinations on behalf of its clients; and

6.2 that SAFT pays to either of the second to fourth respondents 30%, or a proportionate equivalent, of the sum payable by such respondent/s in respect of its leases of such Quayside Cold Storage Facilities with Portnet; and

6.3 that SAFT pays to second to fourth respondents , on a monthly basis, 25% of the costs incurred by such respondent/s in regard to the running expenses of the various Quayside Cold Storage Facilities , alternatively a sum to be determined by the Tribunal which will adequately reimburse the respondent/s for such running costs.

7. Costs of the Application; and

8. *Further and/or alternative relief*.

At the first hearing, it transpired that SAFT was only requiring use of the cold storage facility situate at Berth D in Cape Town. The respondents took the view that they could not proceed with their arguments until they (the respondents) received clarity on the relief which was being sought by SAFT. The Tribunal accordingly requested SAFT to reformulate its prayers specifically with regard to the access point. The matter was accordingly adjourned until February 2002 to enable SAFT to file a supplementary affidavit reformulating its prayers for relief, which it duly did.

In its Notice of Intended Amendments to Prayers, filed on 14 January 2002, the Applicant requested an order in the following terms[13]:

[13] Record page 895.

QUAYSIDE SERVICES

1.1 that Portnet allow SAFT to conduct its own Quayside services against payment by SAFT to Portnet of a royalty payment as is currently made by either Second and/or Third and/or Fourth Respondent to SAFT for the same right.

1.2 that SAFT be ordered to pay to Portnet in addition to such royalty, an amount per pallet, alternatively an amount per square metre, as the Tribunal deems reasonable, for the intermittent and non-exclusive use of the Quayside area adjacent to the Quay Apron required by SAFT for the effective provision of logistic services.

1.3 In the alternative to 1.1 and 1.2 above, the Tribunal orders that Portnet reduces its charges to SAFT, current R50 per pallet in Cape Town and R52,50 in Durban, to a level which , in the view of the Tribunal, is non-discriminatory, fair and reasonable in the circumstances.

2. LEASE AGREEMENTS

2.1 that all provisions in the Lease Agreements and other relevant agreements between Portnet and the other respondents which expressly, tacitly or by implication reserve or provide for the exclusive use by any of the respondents of the Quayside Cold Storage Facilities in all the relevant ports of South Africa be varied and/or expunged from these agreements.

3. ACCESS TO AN ESSENTIAL FACILITY

3.1 that First Respondent and/or Second Respondent and/or Third Respondent and/or Fourth Respondent allow SAFT effective access to an area constituting at least 30%, ***or, alternatively, such percentage as the Tribunal deems appropriate,*** *of the Quayside Cold Storage Facilities in all the ports in South Africa for the purpose of arranging, managing and/or exporting produce to foreign destinations on behalf of its clients; and*

3.2 SAFT pays to Second or Third Respondent a proportionate equivalent (commensurate to the rights attached to and period of time of such access) of the lease payments currently incurred by Second or Third Respondent having regard to the square metre area of the Quayside Cold Storage Facility to which access is awarded by the Tribunal, alternatively an appropriate sum determined by the Tribunal for such access; and

3.3 That SAFT pays to Second or Third Respondent on a monthly basis 25% of the aforesaid lease payment determined in paragraph 3.2 above, in order to reimburse Second or Third Respondent for any other cost it may incur in respect of the area to which access is awarded by the Tribunal to

SAFT (in terms of paragraph 3.1 above) during the period of access of such area by SAFT; alternatively a sum to be determined by the Tribunal which will adequately reimburse the relevant Respondent /s for such costs; and

3.4 Such other terms and conditions of access as the Tribunal deems appropriate.

4. Costs of this Application.

5. Further and/or alternative relief.

The nature of the relief claimed changed yet again on the final day of hearing. SAFT abandoned its claims against Capespan contained in prayer 3, with the exception of prayer 3.4. and the question of costs. It therefore requested the Tribunal to make an order in terms of prayer 3.4 only. SAFT made a proposal as to how we should formulate this relief which we deal with more fully below when we consider the case against Capespan. What is relevant to note at this stage is that SAFT did not propose a formal amendment of the notice of motion arguing that this could be accommodated in terms of the existing prayer 3.4. As against Portnet, it abandoned its prayer 2 but persisted with prayer 1, in respect of the quayside services at the multipurpose terminals. [14]

It is common cause that we may confine ourselves to the relief sought by SAFT on the final day of argument.

EVALUATION

Legal Issues

Standard of proof required for an interim relief application

Section 49C(3) of the Act states:

> *'In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict."*

It is important to note that the section mandates the application of the common law "standard of proof", for an interim interdict, but not the common law requirements for an interim interdict. [15]

[14] Pages 16-18 Transcript 5 March 2002. This latter change casts doubt on whether SAFT did in fact abandon relief in relation to the ports of Durban and Port Elizabeth.
[15] York Timbers Limited and SAFCOL 15/IR/Feb01

The requirements for an interim interdict in terms of section 49C are set out in section 49C(2)(b) and are similar to the requirements for an interim interdict at common law:

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

The standard of proof required is less exacting than the civil burden of a balance of probabilities. [16]

Factual Issues

SAFT claims Portnet is discriminating unfairly against it in respect of the multipurpose terminals ("MPT")[17] it uses, relative to those charges levied against Capespan in respect of the leased quayside facilities that it uses. While not abandoning a claim under section 9, it frames its case primarily under section 8(c) since there is some legal doubt as to whether this case, where the services being compared are not equivalent transactions, could be sustained under section 9, which envisages classic price discrimination between like services. [18] The MPT through which the cargo handled by SAFT is shipped are the E and F berths in Cape Town and L and M berths in Durban.

We have been mindful about how we should decide the matter. We have been faced not only with the considerations of section 49D of the Act, but a veritable minefield of other points either taken in limine or as part of the consideration of the merits.[19] We have decided to approach our decision by deciding as limited a range of issues as are necessary for us to come to a conclusion on whether it would be competent to grant interim relief. The matter may well be referred to us for final relief on a more extensive record and it would thus be inappropriate for us to express a view on factual or legal issues that are not necessary for us to decide at this stage. Because of this we decided to approach the matter from the end rather than the beginning.

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[16] York Timbers Limited and SAFCOL 15/IR/Feb01 paragraph 43.
[17] Defined as all berths, quay aprons and adjacent areas under Portnet from which different commodities, including fruit, are exported. (Record page 11).
[18] Transcript 4 March page 142. We need not decide this, as will be explained later.
[19] The respondents took a number of in limine points at the commencement of the proceedings. These included objections with respect to jurisdiction; non-joinder; locus standi; retrospectivity and expropriation.

We have found that SAFT has not made out a case for interim relief and accordingly relief is denied against all the respondents. Our reasons for this follow. Because it is convenient to do so, we have dealt separately with the relief sought against Portnet and Capespan.

CAPESPAN

The relief sought against Capespan is now limited to prayer 3.4:

> "*Such other terms and conditions of access as the Tribunal deems appropriate."*

As stated above, the precise nature of the relief claimed was never formally framed in terms of an order, nor did SAFT request an amendment thereof. SAFT, in its oral address to us, asked, in terms not entirely clear to us, for an order that Capespan be required to deal with it on a non-discriminatory basis and on terms no less favourable than those granted to its most favoured customers. The shift in relief from that claimed in the original notice of motion and the amended notice of motion is profound - SAFT instead of seeking to be Capespan's sub-lessee, seeks to be its customer, treated on most favoured customer terms.

SAFT does not claim that Capespan is refusing to deal with it – rather that it is only prepared to deal with it on terms that SAFT says would make it uncompetitive in the steri market. The issue is the manner in which Capespan calculates volume-based discounts to its customers. The discount structure does not distinguish between steri and non-steri produce and offers a discount based on the aggregate of both. SAFT states that its steri volumes will never reach the level at which it can obtain the maximum discount [20]. The only way to do this would be for it to give its non-steri to Capespan, which would be pointless, or to subsidise its steri customers. Neither alternative is viable. It wants, in effect, for us to order that the discount structure for steri and non-steri be calculated separately.

Capespan opposes this relief. In the first place, they complain that at the eleventh hour, when all the affidavits had been filed and after we had ruled that we would accept no further affidavits from any party, SAFT has come with a new case not contemplated on the papers. In the second place, a point which flows from the first, they have not been given the opportunity to meet this new case - which is now about their standard contract - when they had come to us to meet a case which was about access to their facilities. They have thus not only been put in a position where they do not know why their contract is objectionable, but they also have not been afforded the opportunity to meet such a case by justifying its terms.

[20] Recall that the steri market is much smaller than the non-steri.

We accept this argument. Whilst competition law recognises that volume discounts may be applied in a discriminatory manner to raise rivals' costs, they are equally defensible on the grounds that they either raise no competition concerns, or if they do, that they are premised on achieving efficiencies based on those volumes. In this case, the lateness of the amendment has meant that Capespan only knows of the case against it from submissions from the bar and has not been given an opportunity to state its case in its filings.

SAFT seeks to persuade us that we have a wide discretion to award alternative relief and that the order sought is contemplated in correspondence forming part of the record. If the respondent had chosen not to deal with these issues it was its own fault.

We cannot agree. The oblique mention of these issues in the welter of correspondence forming part of this record does not excuse SAFT from making its case. Whilst we do not take a formalistic approach in relation to amending one's relief, knowing what case you have to meet and being afforded the opportunity to answer it is not a mere technical matter, it is about fairness. Capespan has been afforded neither.

It is unclear whether SAFT is seeking to make out a new case for interim relief based on a new prohibited practice or whether it is seeking to allege a different form of relief for the prohibited practice made out in the papers. If it is the former, then this prohibited practice has not been made out properly in the papers so as to enable Capespan to respond. If the latter, then Capespan has still not been afforded the opportunity to respond. It does not avail SAFT to say it could respond in the form of argument from the bar when, as we have said, the facts are not properly before us. It is an express requirement of section 49 C (2)(a) that the Tribunal must give the respondent a reasonable opportunity to be heard. That right would be frustrated if we were to allow SAFT the relief it seeks on the current papers.

We have been asked to grant this relief as part of our broader discretion to award an alternative form of relief in terms of prayer 3.4. That form of relief cannot be utilised as a cure-all for a case not made out on the papers and we decline to do so.

PORTNET

The relief sought against Portnet has changed. However, to the extent that it has, it has not prejudiced them in the way that it has Capespan; it remains consistent with the original relief sought. SAFT wants to be able to conduct its own quayside services at the quay apron which it requires, as a logistic service provider, in order to fulfil it obligations to export agents. The problem with this type of relief at an interim relief stage is that it requires us to determine a price for Portnet's services on either formulation of the relief.

Both the evidence of costs that SAFT seeks to rely on for this prayer and its methodology are placed in dispute. We cannot resolve this dispute on the existing papers in SAFT's favour. Firstly, the discrepancies about the amount of costs and the methodology adopted for their calculation are of such a nature that we cannot be certain that there is discrimination. Secondly, assuming there is, its extent is uncertain and for that reason it is impossible for us to divine an appropriate royalty or rental.

The difficulty is occasioned by the fact that we are not comparing like with like. The lease agreement with Capespan means they have their own berth from which they perform their quayside activities. This arrangement forms part of their broader lease with Portnet and we are not satisfied that the applicant has made out a case for extracting the economic value of its quayside services in a lease agreement where this was not contemplated as a discrete cost.

Before analysing the glaring factual discrepancies in the evidence placed before the Tribunal, it is necessary to highlight and be mindful of the obvious peculiarities in the service relationship between Portnet and SAFT on the one hand, and Portnet and Capespan on the other.

Firstly, Capespan exclusively utilises the berths which are leased to them with the cold storage facilities. They do not occupy the multipurpose terminals at all.

Secondly, SAFT provides its own infrastructure, comprising IT services and forklifts in Cape Town, but is not allowed to provide its own labour since Portnet provides its labour. It therefore depends on Portnet for forklift drivers and labourers who hook pallets onto the crane[21].

Thirdly, the underlying basis of the compensation is different. Portnet refers to minimum volume guarantees required from Capespan on the berths it utilises, which guarantees are not required on the MPT.

Capespan is permitted by Portnet to provide its own infrastructure, namely IT services and forklift operations, as well as its own labour force. In return for this privilege, Capespan pays Portnet a royalty. It is common cause that the royalty is payable for the reason that, unlike SAFT, Capespan undertakes its own quayside services at the berths it leases. The royalty is designed to compensate Portnet for the "lost opportunity" of generating a profit from rendering such services itself.[22] By contrast, the tariff that Portnet levies on SAFT is for the rendering of the aforesaid quayside services that Portnet renders on behalf of SAFT.

[21] Record page 1034
[22] Portnet Heads page 33.

There is no doubt that Capespan does enjoy a somewhat privileged position vis-à-vis SAFT in its relationship with Portnet. But whether this translates to discrimination in respect of its tariffs levied is another question. There is an entire history which could account for exactly why Capespan was able to negotiate these royalties. Some, put forward by Portnet suggest plausible explanations: the lost opportunity to Portnet arising from Capespan conducting these quayside services itself; the fact that Capespan has, over the years, effected significant improvements at these berths which have become Portnet's property without due compensation to Capespan; the decision to allow Capespan to conduct its own quayside services against payment of a royalty agreed over 20 years ago when there were no other competitors in the fruit export market; the imposition of certain minimum volume requirements on Capespan at the berths leased to it. There is simply not enough evidence to enable us to evaluate the circumstances under and basis on which the royalty was determined.

The fact remains that we are not dealing with equivalent transactions. As Portnet states:

"the act of levying a charge or tariff for the rendering of a service and the receipt of a royalty for not doing so are two very fundamentally different concepts."[23]

We shall in any event outline SAFT's analysis of the alleged price discrimination in order to illustrate the insurmountable factual disputes before us.

Analysis of Costing and alleged Price Discrimination

SAFT states there are three components which comprise the cost of exporting – royalty; rental; and labour. SAFT attempts to tease out the various three components from the charges to it by Portnet and compare those elements with similar charges to Capespan, in order to prove that price discrimination is occurring relative to what Capespan is charged by Portnet. SAFT, seeks to extrapolate rental and labour costs using various techniques and comparisons, in order to prove the extent of the price discrimination against it by Portnet. It employs this elongated method, since it is not clear ex facie the levied charges precisely what is to be attributed to each element.

Portnet charges SAFT a tariff for the rendering of the quayside services at the MPT.[24] SAFT states that it is charged an all-inclusive tariff of R50 per pallet in Cape Town and R52.50 per pallet in Durban, for the provision of labour and a rental in respect of the quayside.[25]

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[23] Portnet Heads page 33.

[24] Such services on the quay apron comprise the off-loading of fruit from the transport vehicles by way of a forklift-operated by an operator; the placing of the fruit by forklift below the ship's crane; the manual hooking of the crane onto the pallet; the execution of various IT services in conjunction with the aforesaid. (Record page 33).

[25] Note that these figures are not disputed by either Portnet or Capespan. Between 1999 and 2000 this amount was rebated from R60.19 by R10 per pallet to compensate for the provision by

(i) Royalty

SAFT maintains that there is a royalty charge to Capespan of R7.82 per pallet in Cape Town and R1.93 per pallet in Durban. This royalty is paid in exchange for the privilege of fulfilling their own labour needs in these ports, as more fully described above.

(ii) Labour

SAFT has valued the **labour component** provided by Portnet at R13.20 per pallet, based on various quotes from labour brokers to whom Portnet allegedly outsources its labour requirements[26].

Initially, Portnet maintained that its labour costs were R54.32, but SAFT alleges that they failed to recognise that there are 4 hatchets in a ship served by 4 gangs. Therefore, the actual per pallet labour cost of Portnet is in fact much lower than they submit.[27] SAFT therefore constructs its own figure of what Portnet's labour costs would be, by taking Portnet's avowed labour cost of R54.32 per pallet,[28] and dividing it by 4, representing the number of hatches on a ship which are loaded, to arrive at a figure of approximately R13.58 per pallet.[29]

(iii) Rental

SAFT arrives at the **rental cost** by taking the total annual market rentals that Capespan pays in terms of the lease agreement, for unimproved land for B, C and D Berths, namely R6 016 182. Capespan utilises a total square metreage of 76 862 square metres, or R78.27 per metre.[30] SAFT divides the total rental by the number of pallets put through per annum (450 000) to arrive at a figure of R13.37 per pallet.

SAFT of its own IT tracking system and forklift equipment. Portnet maintains they were incorporated in a tariff agreement with SAFT, concluded in May 2001, subject to a reduction on a sliding scale for volumes exceeding 130,000 pallets. They therefore contend that SAFT has waived its right to asserting price discrimination. (Portnet Heads at 17,41). SAFT however maintains, as stated in correspondence by their attorneys to this effect, that in order to use their harbour facilities, they were left with no choice but to pay the prescribed tariff. (Page 155 of record).

[26] Signal Hill quotes a rate of R13.20 per pallet (page 975 record).

[27] SAFT Heads page 51.

[28] See Trevor Kotze's affidavit (page 879 record). Computation at page 885(b).

[29] On page 100 Portnet confirms that it does 28 pallet moves per hour per hook. Further, on page 903, it states "in determining a reasonable rental as aforesaid the Tribunal is advised that the loading activities of the claimant as currently performed and as envisaged in the future, in respect of each ship worked, it is accepted to constitute the loading through each of the loading vessels, four hatches, at the rate of 28 pallets per hour".

[30] Record page 951.

SAFT then multiplies the per metre charge by the 17 200 square metres it would require in E-berth, therefore arriving at its total rental, approximately R13,359 ,000. By dividing this figure by 100,000, which is the estimated pallets SAFT exports per annum, SAFT arrives at its own per pallet rental figure of R13.59 per pallet. SAFT therefore concludes that the appropriate rental should be somewhere between R13.37 and a maximum of R13.59 per pallet. [31]

Portnet gives no separate rental figure per se, but initially includes the quayside rental in its labour calculation of R54.32 per pallet.

On this basis, SAFT sketches various scenarios based on each party's evidence of their costs, as described above, in order to attempt to determine the extent of the alleged discrimination levied on it by Portnet, (amount overpaid) and to arrive at a figure representing what a fair tariff would be.

SAFT's initial estimates based on market related costs

CAPE TOWN:	**Rand Cost/pallet**	**Current Portnet Charge/Tariff**	**Current Portnet Charge/Tariff-DBN**
Labour	R11.04[32]		
Rental	R 6.88[33]		
Subtotal	R17.92		**52.50[34]**
Profit Margin (15%)	R 2.69		
Total	**R20.61**	**50.00**	
Amount overpaid - CT	R29.39		
- DBN	R31.89		

SAFT estimate using Portnet Figures

CAPE TOWN:	**Rand Cost/pallet**	**Current Portnet Charge/Tariff-CT**	**Current Portnet Charge/Tariff-DBN**
Labour & Rental	R13.58[35]		
Royalty[36] - CT	R 7.82		
- DBN	R 1.93		
Total - CT	**R21.40**	**50.00**	**52.50**
- DBN	**R15.51**		

[31] Record, page 951. (Transcript 2 February page 63).
[32] Assuming 12 500 pallets are shipped per month, using 16 forklift drivers, 12 unskilled labourers, 2 supervisors permanently employed on two shifts per day. (Record p 35, 148). The lower labour figure SAFT arrives at is R9.44 per pallet. It later builds in an amount for management and overheads. It uses the higher figure of R11.04 as an indication of its willingness to accept any order the Tribunal will make.
[33] Monthly rental cost for land adjacent to quayside is R86,000 divided by 12,500, again on the assumption that this number of pallets is shipped per month. This per pallet cost comprises equipment, overhead, rental costs and a profit margin of 15%. (Page 789 of record).
[34] Initially a gross amount of R62.50, but then subject to a R10 rebate in respect of machinery and equipment costs.
[35] R54.32 divided by 4 gangs for 4 hatches.
[36] Offered to Capespan in respect of its doing its own services.

Amount overpaid - CT	R28.60		
- DBN	R36.99		

SAFT estimate using Capespan Figures:

CAPE TOWN:	**Rand Cost/pallet**	**Current Portnet Charge/Tariff-CT**	**Current Portnet Charge/Tariff-DBN**
Labour	R13.20		
Rental	R13.59		
Royalty[37] - CT	R 7.82		
- DBN	R 1.93		
Total - CT	**R34.61**	**50.00**	**52.50**
- DBN	**R28.72**		
Amount overpaid - CT	R15.39		
- DBN	R23.78		

By taking the figures which show the least price discrimination, SAFT concludes that Portnet is charging, at the very least, an excess of approximately **R15.00** per pallet in Cape Town and approximately **R23.00** per pallet in Durban.

SAFT therefore asks us to fashion an appropriate and fair remedy in accordance with these costings which it alleges are the true costs faced by Portnet and Capespan. They point out that, in the case of rental and labour, these figures represent the "high water mark" per pallet and the cost may in reality well be significantly lower.[38] Notwithstanding these possibilities, they are prepared to accept a remedy based on the above conservative calculations.

> *"So at the end of the day on the labour, if the Tribunal can make one of two decisions as we see it. Either let us do our labour and then pay the same royalty as they do, and do our own labour, alternatively the Tribunal must look at this and at the very worst, at the very worst, it must give us a seventeen Rand (R17,00) discount on Cape Town and a twenty-three Rand (R23,00) discount in Durban on the charges currently levelled, because that's the extent of the discrimination, as I've just explained… I'm saying at the very worst, I'm taking the figures that's the worst for us"* [39]

[37] Offered to Capespan in respect of its doing its own services.
[38] In the case of labour, Portnet's initial costing of R54.32 represented both labour and rental. In the case of rental, SAFT envisages that Capespan's actual rental component may even be lower to account for the benefits it receives such as building its own infrastructure. (Transcript 4 March page 112).
[39] Transcript 1 Feb page 73.

However, the obvious disputes of fact prevent us from accepting these figures with any certainty. Both Portnet and SAFT attack the bases of the various cost comparisons. [40]

Labour

- While Portnet accepts that the actual labour component of costs proposed by SAFT are relatively comparable, it maintains that there must be an additional apportionment for equipment, management and land rental costs, which would increase Portnet's costs.[41] It is significant that, on its own version of Portnet's costs, SAFT makes allowance for all these elements.[42]

- Similarly, the labour comparisons ignore both associated labour and other overhead costs, such as office accommodation, pension contributions, annual and holiday bonuses [43].

- Capespan steadfastly maintains that FPT pays a flat rate in respect of labour of R29.11 in Cape Town and R25.84 in Durban to a labour trust which provides for all its labour requirements in the harbour. Accordingly, this is a flat rate per pallet. They contend that they cannot break down the labour cost any further since this flat rate is negotiated regardless of the type of market they serve. They allege that this excludes stevedoring and maintain that their total cost is not confined to just the royalty and labour, but also includes management, equipment and office costs. Their average cost figure is R133.55 in Capetown and R104.56 in Durban.[44]

- SAFT adduces evidence to show that outsourced labour is brought in by Portnet, which works under the supervision of SAFT.[45] It accordingly premises its labour cost calculations on a temporary labour force provided by labour brokers as and when required.[46] However, Portnet vehemently maintains it utilises a permanent labour force at the MPT, which costs cannot be appropriately compared to those of temporary outsourced labour.

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[40] SAFT accuses the respondents of obfuscating the true state of things, a claim which is not necessarily without merit, however, this does not assist us in arriving at an unequivocal conclusion of the existence of price discrimination, which is necessary to grant interim relief.
[41] Portnet Heads page 40 (Record page 885b).
[42] See footnote 31 above (page 789 of record).
[43] Kotze affidavit, paragraph 13 (a) to (l) page 885 (b).
[44] Record page 481
[45] Record page 1030.
[46] Which Portnet maintains is new matter, not raised before in SAFT's founding affidavit but appearing for the first time in its last supplementary affidavit filed in reply to Kotze's affidavit. Portnet applied to strike out this affidavit claiming that it was prejudiced by this affidavit in that it had not had a proper opportunity to reply thereto. (Record page 1066).

- Portnet alleges that SAFT's labour cost comparisons ignore seasonal fluctuations - a greater workforce may be required during the high fruit season than at other times.

- Furthermore, the number of pallets handled per hour ("handling norm") will fluctuate and determine whether gains or losses are made.

The respondents also attack SAFT's rental assumptions creating other nagging factual disputes preventing us from forming any coherent view of the status quo, namely –

Rental

- Portnet maintains that there is no factual or legal basis for comparing the rentals paid by Capespan and those paid by SAFT.[47] The leased berths are dedicated exclusively to the export of fruit, while those at the MPT through which SAFT exports its produce handle, as the name suggests, a wide range of commodities. SAFT however maintains that both E and L Berths in Cape Town and Durban respectively, have been established as dedicated berths for direct fruit shipments in terms of a common understanding with the MPT arm of Portnet for more than two years, while F Berth in Cape Town and M Berth in Durban are used as overflow Berths for direct fruit shipments where more than one vessel is docked at the same time. SAFT states that these Berths' occupancy levels are very low in respect to other commodities.[48] Nevertheless, even on SAFT's own submission, Capespan has <u>exclusive use</u> over its berths throughout the year, while SAFT itself shares its facilities with other users for a portion of the year.[49]

- Portnet attacks SAFT's rental comparisons as being contrived and artificial insofar as it seeks to extrapolate rental figures based on what Capespan pays for the entire area it leases, and translate it into a rental figure per pallet in respect of an area in the multipurpose terminals. Notwithstanding SAFT's protestations that its rental calculations were based on unimproved land only, without financial or actuarial evidence as to how these rentals were calculated, Portnet's submissions in this regard, are tenable:

  "There can be no question about the fact that the leases foreshadow that Capespan would enjoy the benefit of the improvements undertaken by it for the duration of the lease agreements. A value is accordingly ascribable, for the purposes of the SAFT comparison, to the improvements undertaken by Capespan. No evidence was placed before

[47] Portnet Heads page 34, 54.
[48] Record pages 99, 1034.
[49] SAFT Heads page 55.

you as to how the value should be established or determined for the purposes of the comparison. Any argument to the effect that improvements effected by Capespan should be ignored would, in our submission, be nonsensical…. The improvements effected by Capespan constitute the very basis whereupon it was afforded the benefit of the lease agreements and the right to undertake its own quayside services. Regard must be had thereto in determining the duration of the relevant lease agreements and the consideration levied by Portnet for the benefits afforded to Capespan.."

You're dealing with the rental of a large area, you're dealing with rentals in respect of a place where the fundamental infrastructure has been constructed by Capespan. On the other hand, in the multipurpose terminals, you're dealing with structures, which are constructed by us entirely. You're dealing with services, which are provided by us entirely and you're dealing, generally, with an entire facility, which is provided by us to SAFT."[50]

- In any event, as Capespan points out, there is no evidence that Capespan pays a per pallet rental.[51] Capespan alleges it pays a fixed rental in terms of its lease agreement with Portnet. It refers to volume requirements and time considerations. There are minimum volumes that Capespan must guarantee to Portnet, which means that if Capespan exports more pallets in any given year than the number on which SAFT bases its calculations, then, on SAFT's methodology, the per pallet rental will be lower. This serves to confirm the unreliability of SAFT's figures.

- As for Portnet's figures, according to Portnet's Business Development Manager of its Port Operations Division, Trevor Kotze, quayside rental is a component of its per pallet labour cost of R13.58, together with other labour overheads.[52] However, he attributes no values to quayside rental or any of the other management costs. SAFT therefore attempts to quantify the labour and rental components of Portnet's per pallet cost. The manner in which they do this is based on assumptions that, in the absence of hard evidence are, at best, tenuous.[53]

[50] Transcript 4 March 2002 page 4 and 53.
[51] Transcript 5 March 2002 page 3.
[52] As per his initial affidavit dated 12 December 2001 (record page 879). On page 881 of the record, Kotze builds quayside management and labour overhead costs into his computation, which, when divided by 4 hatches, approximates SAFT's figure. (at page 885(b) of record).
[53] Based on Kotze's statement that management and labour overhead costs comprise 69.7% of its total cost structure, SAFT determines that quayside rental must be 8.5% of the mark-up of 69.7% (one twelfth of 100%), namely R5.50 and the labour component, R8.00.

> *"If we look at Portnet's figures…..the labour and rental is R13.58 all in. And we say that of that the labour is probably R8.00 and the rental is anything between 46.5c and R5,55."*[54]

Portnet contends that this method is flawed.

Later, Kotze contends[55] that notwithstanding his averments in his first affidavit, he did not intend to allow for office accommodation, quayside rental, equipment costs or profit margins in his initial labour cost calculation. Despite being a glaring contradiction of his previous evidence, we have no hard and fast evidence to gainsay this assertion. While it is doubtful that Kotze did not include quayside rental in his initial computation, especially after having specifically referred to it, there remains the possibility that Portnet's costs could well be higher were one to take account of these costs, on top of the labour costs. Ultimately SAFT abandons this exercise:

> *"The difficulty is that we don't … the only thing that is not definite here, that is not certain and based on the papers of Portnet, is their last affidavit by saying that the 13.58 did not include rental…If you believe him now to say he made a mistake, then we must assume that that thirteen fifty-two (R13,52) is now only his labour cost, which seems … you see, when we get to the rental calculation we don't know, because the labour cost can vary from nine (9) to thirteen (13). So it may be that there was quayside rental included in here. He says not, but I think at the end of the day I will argue it doesn't matter which way you decide, because I am prepared, the claimant is prepared to accept everything of these figures to the benefit of what could possibly be the best deal for Capespan … for Portnet."* [56]

Portnet maintains throughout its argument that the rates of R50 and R52.50 are based on the published tariff rates, relative to which SAFT enjoys a discount of 40% on the normal user charge.[57] SAFT contends that these published rates have no relevance to the services currently provided by Portnet to SAFT. They aver that there is no appropriate tariff which would correspond to this adapted service.[58] The fact that this is an adapted service for which there is no applicable formal tariff serves to confirm the complexity of constructing an appropriate costs

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[54] Transcript 1 February 2002 pages 66, 70.

[55] Second Affidavit at page 1004 of Record. Portnet cites the reason for excluding these additional costs as being that these were not applicable when the tariffs in Cape Town and Durban were agreed to. However, these have now become applicable since the divisionalisation of Portnet into the National Port Authority and Port Operations Division since the POD is liable to the NPA for rental in respect of office accommodation and quayside space. (Record page 1005).

[56] Transcript 1 Feb 2002, pages 59, 71.

[57] Transcript 4 March 2002, page 29.

[58] Record page 1044.

order where the factual evidence is equivocal, were we to find evidence of discrimination.

If we cannot calculate what the quayside service is costing Capespan we cannot be certain of discrimination by Portnet.

For this reason we cannot find that Portnet is discriminating against SAFT and without such a finding the relief on which it is premised must fail.

In its first prayer, SAFT requests that Portnet allow SAFT to conduct its own quayside services. Portnet objects to allowing SAFT to conduct its own quayside services since insofar as it would entail, it alleges, severe delays and disruption of the port operation at the MPT, it would neither be feasible nor viable.[59] Again, this is subject to significant disputes of fact, but since we cannot find evidence of discrimination against SAFT, there is, in any event, no basis for us to allow SAFT to conduct its own services at the quayside.

Accordingly we find that the applicant has not made out a case, even on the interim relief standard, that Portnet is involved in any form of unfair discrimination against it. Without proof of unfair discrimination the applicant cannot establish the existence of a prohibited practice.

APPLICATION TO STRIKE OUT SAFT LAST AFFIDAVIT BY PORTNET

Portnet requests that SAFT's latest affidavit and supporting affidavits responding to Trevor Kotze's affidavit be struck out on the basis that they introduce new matter for the first time and try to make out a new case. In fact, as SAFT point out, it is merely responding to specific facts raised in Kotze's affidavit, facts which were not raised with any particularity in any of Portnet's papers until then. Portnet alleged *inter alia,* organisational hazards would arise if SAFT were allowed onto the quayside, which SAFT was obliged to respond to in order to contradict the assertions.

We have therefore decided to admit this affidavit as well as its supporting affidavits.

COSTS

[59] Transcript 4 March 2002 page 43. Portnet alleges that the effect of an order against Portnet requiring it to reduce its tariff and/or allow SAFT to undertake its own quayside services would, in all probability, open the floodgates to complaints and probably litigation from other users of the port for similar benefits. The efficiency with which Portnet undertakes its services would be significantly interfered with and affected.

Insofar as Portnet is concerned, subject to our previous costs order of 2 February 2002, SAFT is liable for Portnet's costs. SAFT is however entitled to costs in respect of the unsuccessful striking out application.

As far as Capespan is concerned, the situation is more complicated. Although Capespan has been successful we have decided to reduce its costs.

When it filed its answering papers, Capespan took the point that there had not been proper joinder of the lessees of the facilities at Durban and Capetown from whom it was alleged that Capespan sublet . It subsequently emerged that the premises at Cape Town had been ceded to Capespan contrary to what it had alleged. This information was uncovered by SAFT, much to the embarrassment of Capespan., At the hearing on 13 December 2001 Capespan conceded that they had taken cession of the Cape Town premises but alleged that due to an administrative error, they were unaware that the lease had been ceded. Apparently the cession had for some time awaited Portnet's consent and signature and when that eventually took place, unbeknown to the senior executives of Capespan, the cession had been returned to them and filed away without their having sight of it.

Even if we accept the factual allegations of this explanation, it does not excuse Capespan's conduct which put the applicant to considerable expense and inconvenience. Once they had taken the point, Capespan had to make sure they had done their homework and on their own version, they had not. The situation is aggravated by the fact that they knew of the pending cession and yet insisted on taking the point without taking the most elementary steps to verify them. To show our disapproval of this, we have decided to reduce Capespan's costs by an amount of **15%** of the amount finally awarded to them on taxation.

Accordingly we make the following **order:**

The application is dismissed against all the respondents.

1. Subject to our order on 2 February 2002, the first respondent is awarded costs on a party and party basis including the costs of three legal representatives.

2. The second to fourth respondents are awarded costs on a party and party basis including the costs of three legal representatives. Such costs to be reduced by an amount of 15%.

3. SAFT is awarded the costs of the application to strike out on a party and party basis including the costs of three legal representatives.

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N. Manoim

29 April 2002
Date

Concurring: D. Lewis and M. Moerane