COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 81/IR/APR06

In the matter between:

THE BULB MAN (SA) PTY LTD	**Applicant/Complainant**
And	
HADECO (PTY) LTD	**Respondent**

Panel : DH Lewis (Presiding Member), N Manoim (Tribunal Member), and M.T. K Moerane (Tribunal Member)

Heard on : 24 October 2006
Decided on : 14 November 2006
Reasons Issued: 28 November 2006

REASONS AND ORDER [NON_CONFIDENTIAL VERSION]

INTRODUCTION

[1] The applicant has brought an application for interim relief in terms of section 49(C) of the Competition Act 89 of 1998("the Act"). This application was heard on the 24th of October 2006. The respondent opposed the application. On The 14th of November 2006, we dismissed the application. Our reasons for dismissing the application follow.

[2] The application concerns a decision by the respondent, a supplier of flower bulbs, to refuse to supply the applicant, a firm that distributes flower bulbs to schools for fund raising schemes, on terms that it had previously supplied it. The applicant contends that this refusal amounts to a contravention of sections 5(1), 8(c), 8(d)(ii) and 9 of the Competition Act 89 of 1998 ("the Act"). The respondent does not deny making such a decision, but places in issue whether it has any competitive implications. In particular, it alleges that its actions were motivated by legitimate business concerns, because it was experiencing a deteriorating business relationship with the applicant.

THE PARTIES

[3] The applicant is The Bulb Man (SA)(Pty)(Ltd) ("TBM"), a South African company with its principal place of business at Bellville in Cape Town. The respondent is Hadeco (Pty) Ltd ("Hadeco"), also a South African company, with its principal place of business at Parktown, Gauteng.

BACKGROUND

[4] The respondent is a distributor of flower bulbs that can be used in the garden or to produce cut flowers. The respondent sources its bulbs from its own production, other domestic growers and imports. The respondent has developed its eponymous brand name Hadeco, which has strong resonance with consumers of this product. The respondent distributes its product through various outlets both retail and wholesale. Recently school fund-raising schemes have become a niche outlet for the sale of bulbs to the public and this is where the applicant fits in.

[5] Len Ginsberg established the applicant's business in 1970. Some years later, his son Lee acquired an interest in the business and later, in 1984, a controlling interest.[1] (The present business of the applicant has undergone several changes of ownership form in that time but in substance, the business has remained the same and it has always been owned by members of the Ginsberg family.)[2]

[6] The business started off modestly by selling flower bulbs to scout groups as a means of fund-raising. In 1989 the business decided to expand the fund-raising concept to schools and this seems to have led to an increase in its fortunes as the applicant states that the business experienced substantial growth in the 1990"s. [3]

[7] The Bulb Man business has never produced its own bulbs and has relied on others for its source of supply. Between 1972 and 1984 it purchased on a wholesale basis from the respondent. From 1985 until 1993 it purchased its flower bulbs from a firm called Hollandia. According to the respondent, it purchased from Hollandia on a wholesale basis. [4] The applicant is less clear on this point only describing the nature of services Hollandia performed. According to the applicant, Hollandia was unable to meet its increased needs, because Hollandia was in turn being supplied by the respondent, which was unwilling to extend Hollandia credit.[5] The respondent's version of the supply switch is that the applicant did not want to continue an arrangement with Hollandia where it, the applicant, had to carry the risk of non-sale stock. In 1993 it had purchased two million bulbs too many from Hollandia and

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[1] See page 402 of the record

[2] The Bulb Man (Pty) Ltd was formed in 1978 and the Bulb Man Scheme became the business of that company The company was converted into a Close Corporation in 1984 Len Ginsberg and his son Lee Ginsberg held the members interest in the close corporation. A further close corporation was formed in Cape Town, with the members' interest held in the same proportions between Len Ginsberg and Lee Ginsberg In 1996 Bulbman Limited, a company registered in the Hague and a branch thereof registered as an external company in the Republic of South African, acquired the business of the two close corporations In 2004, the complainant was formed and the business of the Bulbman Limited with all its assets, liabilities, rights and obligations were transferred to it in that year

[3] See page 403 of the record

[4] See page 116 of the record at paragraph 11

[5] See page 403 of the record paragraph 43

because it no longer wanted to carry this risk itself it switched suppliers so that it could enjoy an agency relationship with the respondent.[6]

[8] Whichever version for the change in supplier is correct, it is at least common cause that in 1993 the applicant resumed its direct relationship with the respondent. It is also common cause that there was an agreement regulating this relationship. The legal nature of the relationship is not common cause and has been the subject matter of dispute for years. The respondent states that the applicant became its agent.[7] The applicant denies this and alleges that it has been the principal throughout. For our purposes not much turns on how the relationship would be classified by the common law. Although in this decision we will from now on refer to this as an 'agency' relationship this is out of convenience, to distinguish this from the wholesale relationship – it is not indicative of any legal conclusion we have reached about the nature of the relationship.

[9] The dispute over whether the applicant was the respondent's agent was not a mere conceptual debate, but related to who bore the commercial risk of the scheme, and who could hold out to schools as being the principal. The respondent, both agreed, was responsible for dispatching invoices to the schools - but it was on whose behalf that there was disagreement.[8] Correspondence forming part of the record shows that this dispute dates back as far as 1996, at least.[9] From what we have on record, this dispute is never resolved, although the business relationship seems to persist despite the apparent fault-line looming beneath it.

[10] Eventually the inevitable rupture occurred in 2005. It was precipitated by the departure of Len Ginsberg, the founder of the applicant's business and at the time its chief executive officer. We are not given any explanation in the interim relief papers why this happened, but we do know that Len Ginsberg re-entered the bulb market through another entity, known as Len's Flower Bulbs CC ("LFB'). LFB entered the market as a direct competitor of the applicant. Whether LFB already existed prior to his departure or not is in dispute. On the respondent's version, the wife of Len Ginsberg had founded LFB and he had joined on his departure from the applicant. On the applicant's version this business, although established in April 2005, could not have started without the full involvement of Len Ginsberg whose employment with the applicant had terminated in July 2005.[10]

[11] Hostilities between LFB and the applicant commenced swiftly. The applicant accused LFB of passing off and brought an interdict against it in the Cape High Court in August 2005. That dispute has taken its own trajectory, but it is how the respondent has become embroiled in the dispute that is relevant for the present matter.

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[6] See record pages 117- 117 A paragraph 15
[7] See page 116 of the record at paragraph 12
[8] See record page 453-4.
[9] See record pages 469- 472
[10] See page 403 of the record

[12] In 2005, the respondent was the supplier of both the applicant and LFB, both it appears being supplied on the "agency" basis. Initially, it seems that the respondent adopted a neutral stance in the war, supplying both sides on equal terms.[11] Eventually the respondent ended its neutrality and appears to have favoured LFB over the applicant. Why this has come about is not clear, nor important for the purpose of this application. What is important is the fact of the breach, as this has become the rationale for the respondent's refusal to supply the applicant on the "agency" terms

[13] The respondent then attempted to terminate its contract with the applicant. The applicant contested its right to do so and the matter too went to court in the Transvaal Provincial Division of the High Court (TPD) and culminated in a consent order in November 2005. The terms of the consent order appear to be a preservation of the status quo in terms of the existing contract as well as an attempt to plug some gaps in it – its terms are lengthy and need not be repeated here. The consent order also contained a series of interdicts against interference in the applicant's business, inter alia, by either the respondent or LFB.

[14] The terms of the consent order only obliged the applicant to supply the respondent on that basis until June 2006. In November 2005, the respondent's attorneys indicated that it would no longer supply to the applicant on the terms contained in the order beyond that period.

[15] In December 2005 the applicant then lodged a complaint with the Competition Commission, alleging that the respondent was contravening sections 8 and 9 of the Competition Act by refusing to supply it on the terms contained in the original supply arrangement - what we have termed the "*agency*" arrangement In March 2006, the Commission indicated that it would not refer the complaint and issued the applicant with a certificate of non-referral. Thereafter, the applicant referred the dispute directly to the Tribunal. In the complaint referral the applicant seeks an order that it be supplied on the same terms as set out in the TPD order. At a pre-hearing of the complaint matter, held in July 2006, we set the matter down for hearing from 22 January 2007.

[16] Concerned that even if it succeeds in the main complaint, this may come to late to save its business, the applicant decided to launch interim relief proceedings in addition. It is unusual for a party that has filed a complaint referral and obtained hearing dates, to at the same, time seek interim relief. The applicant has its reasons for doing so, which we explain later, when we look at the mechanics of the scheme and its time sensitivity.

[17] The respondent has opposed both the main complaint proceeding and the interim relief proceeding It has however indicated that it is prepared to continue supplying the applicant on the terms it supplies its bulk wholesale

[11] See paragraph 17 on page 9 of the record

customers, pending determination of the main complaint proceedings [12] This offer of wholesale terms is not acceptable to the applicant, hence this application.

THE NATURE OF THE SCHEME

[18] The bulb-selling scheme, as implemented by the applicant, and presumably by LFB as well, is organised over a long time line. It begins in June of the previous year when the applicant designs the scheme This involves determining how it will market the scheme to schools. Schools are offered various incentives to participate, including prizes and free bulbs. Since free bulbs are part of the incentives, this involves consultation with the respondent.[13] From July until November, the applicant markets the scheme to schools and signs up participants. (This explains why the applicant applied for interim relief now. If it has to wait until next year to ascertain if it has an agency contract it fears it will not be able to recruit schools in time If it recruits schools without certainty about its conditions of supply, it might assume an unacceptable risk.)

[19] In November, the respondent informs the applicant at what prices it will supply it. This becomes the basis on which the applicant sets its selling price to the schools, and importantly, the price at which the school sells to members of the public. Under the bulb- selling scheme, it is the intermediary, that is, the applicant or LFB, that sets the price that the school sells to the public.

[20] In January the following year, the applicant distributes promotional material to the schools that have signed up. Included in this material are colour brochures of the flower bulbs, which pupils use to solicit orders from the public. They are given a window period to do this, usually it is from February to March. At the same time as taking the order the pupil is supposed to get payment, which is then remitted to the school.[14] The applicant then collates the orders and forwards them to the respondent. The respondent packs the bulbs in pack sizes suitable for the schools.

[21] The respondent then delivers the bulbs to the schools, invoices them and collects payment. Once the respondent has collected payment from the schools, it deducts the amounts owing to it for the cost of the bulbs and pays the balance to the applicant.

[22] We have attempted to describe the scheme, as best as we can, on a common cause set of facts. It has not been easy for us to do so as the parties

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[12] See paragraph 28 on page 121 of the Record
[13] See paragraph 11 1 on page 5 of the Record
[14] According to the applicant's forms, " all orders must be cash on order not cash on delivery."

have differed in the papers over detail, no doubt because the agreement between them has always been the subject of dispute, as we stated earlier.[15]

[23] What is relevant to us from the scheme are the following features. The school adopts a relatively passive role It takes its purchase price and selling price from the applicant. The school relies entirely on the applicant to run the scheme. It appears to write draft letters from the school to parents on how the scheme works, advises on whom to sell to etc.[16]

[24] Secondly, the scheme whether considered in law an agency contract or not, involves several interactions between the applicant and the respondent over the life of the scheme and no doubt a high degree of co-operation between respective staff to co-ordinate deliveries, collection of monies and dividing up the spoils. Add to this the appearance of joint marketing by way of carrier bags and branding, and one appreciates that if the relationship between the two firms breaks down it may create havoc for both businesses and bemusement for the third party, the school.

[25] By contrast the wholesale arrangement, which the respondent offers the applicant, at least until the complaint proceeding has run its course, involves far less contact and interaction.[17] As we understand it the applicant would then be treated on the same terms as the standard bulk wholesale client, that is, a nursery, for instance, and there is no special regard for the special requirements of the fund raising scheme. This means the applicant would have to take the risk that the schools would procure what it has ordered, pack the bulbs and deliver them. The applicant also claims that the respondent will not guarantee that it will supply it with sufficient bulbs to serve its needs. Thus as we understand the applicant, the wholesale model may serve the general retailer well, but not a firm like it which has a niche market depending on timing and a precise match between orders and supply. In the agency model the risk of matching orders and supply rests with the respondent. In the wholesale model, the risk is with the applicant; it has to order before it knows its demand from the schools and so it faces the risk that it will have too much or too little. Recall that on the respondent's version the applicant was left with two million unsold bulbs when it had a wholesaler relationship with Hollandia.

[26] Rather surprisingly having made this fact known in its papers the respondent's economist has still attempted to suggest that the applicant is commercially better off as a wholesale customer than it is as a customer with an "agency" relationship.[18] This is not a factual dispute that we need to resolve now – the fact is that the applicant does not share this sanguine view of the wholesaling relationship, hence the present application. Of course, one

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[15] See pages 288-293 of the Respondent's answering affidavit and pages 415-421 of the Applicant's replying affidavit

[16] See record page 476 – document from applicant entitled "suggested letter to parents" which suggest inter alia selling to Dad's golf and Mom's tennis friends)

[17] Under the wholesale arrangement it appears the Bulb Man would be supplied "unbranded" bulbs Under the agency arrangement the bulb packages contain the Hadeco logo.

[18] See report by Price Metrics, the respondent's economist, page 207

could argue that the applicant is only at risk for one season, until the main complaint has been heard. The applicant states, however, that the wholesale model is so unattractive that it may force it out of the market for this season and that if this happens it will be hard to return as an effective competitor. In the meantime, it contends, its competitor LFB continues to be supplied on the agency terms and hence will be able to take its customers from it.

RELEVANT MARKETS

[27] Much of the dispute in the papers concerns definition of the relevant markets, as the competition problem manifests itself in an upstream market, where the respondent supplies product to intermediaries, and a downstream one, where the applicant sells product to schools. The applicant and the respondent do not agree on the definition of either upstream or downstream market. As a matter of practice, since this is an interim relief case, we would want to avoid making a decision on market definition, which might at the main hearing prove premature, unless it is necessary for us to do so to determine this application. We find it is not necessary for us to do so, because even if we adopt those market definitions most favourable to the applicant's case, it still fails to establish the existence of a prohibited practice.

[28] The applicant defines the upstream market as one for the production and supply of dry flower bulbs and that this would make the respondent the only major supplier in the market. The applicant is not able to provide market share figures for its version of the market so we understand its case to be that the respondent is the only viable supplier for its business model. The respondent, whilst conceding the market share figures are hard to ascertain, contends that the market is one for all bulbs and includes imports among its competitors. The scope of this debate involves more botany than economics and we can spare the reader the full details now.[19] Briefly, however, dry bulbs are bulbs produced for growing in a garden The other type of bulb is a bulb used for growing what will become cut flowers. Lest the horticulturally challenged assume that a bulb is still a bulb by any other name and hence interchangeable, the applicant's expert Keith Kirsten contends that they are not. Bulbs to be used for cut flowers are "programmed" and "forced" during their growth period to force or delay flowering and are not suitable for garden use. The respondent has both a horticultural, and hence it follows, an economic disagreement on this point It contends that cut flower bulbs can be sold to the domestic consumer and hence should be included in the relevant market. Once that exercise is done, its economist concludes that it would have no more than **[20-25 %CONFIDENTIAL]** of the relevant market.[20] Note that this is a derived figure and involves making certain assumptions about land under cultivation and the respondent's share of exports and imports.

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[19] In its replying affidavit the applicant has included an affidavit by a horticulturist Keith Kirsten, This was not left unanswered by the respondent which filed a supplementary affidavit inter alia engaging with Kirsten on these matters

[20] See record of main complaint application Price Metrics report May 2006, paragraph 64.

[29] It will be seen from this very brief summary of the differences that a definitive answer to the market definition is not a task for a panel considering interim relief. For the benefit of the applicant, we will assume that this is an upstream market in which the respondent is a dominant firm - expressed differently, that it has some market power in relation to the applicant. We will assume as well that, given the niche nature of the bulb fund-raising scheme, the respondent is the only viable supplier that can supply the amounts needed on a national basis to retain the applicant at its present level of supply to schools.

[30] The applicant defines the downstream market as the market for the sale of dry bulbs to school fund-raising schemes. The respondent denies that this is a market at all and suggests that if schools are in some fund-raising market, then all forms of fund-raising schemes must be considered as viable substitutes, not just those that involve the sale of bulbs. Again, we take no view on this debate at this stage. As the downstream market is the one where the anti-competitive effect is alleged to manifest itself, we will examine that contention from the perspective of both contending downstream market definitions. Prior to doing so, we consider the relief sought and the legal standard to be applied

RELIEF SOUGHT

[31] The applicant seeks the following relief

- (i) Ordering the respondent to supply the applicant with bulbs on the same terms set out in the order of the Transvaal Provincial Division of the High Court of South Africa dated 10 November 2005
- (ii) Directing that the order set out in paragraph (i) above shall remain in force for six months after the date of its issue or until the matter before the Tribunal has been finally determined, whichever is earlier
- (iii) Ordering the respondent to pay costs of the application in so far as it opposes it

REQUIREMENTS FOR INTERIM RELIEF

[32] The requirements for the interim relief are set out in section 49C (2)(b) of the Act, which states that, 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*

[33] As the applicant correctly argues, in our case law, following the practice of our civil courts in interdicts, these factors are considered as interrelated and not individually decisive. In *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals Distributors (Pty)Ltd*[21], we approved the following dictum from *Eriksen Motors (Welkom)Ltd v Protea Motors Warrenton*[22] a decision of the Appellate Division that the factors in the section:

> "... *are not individually decisive, but are interrelated, for example, the stronger the applicant's prospect for success the less the need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him.*" [23]

[34] That notwithstanding, the applicant must at least make some showing that there is a prohibited practice. As we put it in *Nuco Chrome (Pty) Ltd and Xstrata South Africa (Pty) Ltd, Rand York Minerals*[24]:

> " *While the requirement of section 49(2)(b) that we have regard to the three factors listed above suggests that a strong positive finding on two factors might outweigh a lesser or possibly negative finding on the third, we would, as we have observed elsewhere, be extremely reluctant to uphold an application for interim relief in the absence of evidence confirming the restrictive practice alleged.*[25]

[35] In this case, for reasons that follow, we have found that the applicant has failed to make out a case that a prohibited practice has occurred. For this reason we do not need to consider the remaining factors set out in section 49C(2)(b)(ii) and (iii).

THE CONTRAVENTIONS

[36] The applicant initially alleged that the applicant had, inter alia, contravened section 5(1) of the Act in that the respondent had an exclusive supply arrangement with its competitor LFB. The respondent has denied that this is an exclusive arrangement and this claim has not been persisted with. [26]

[37] The applicant thus relies on three provisions of the Act. The first is the complaint under section 8(c) of the Act, the second is under section 8(d)(ii) and the third is under section 9 of the Act.

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[21] [2001-2002]CPLR 363 CT

[22] 1973 3 SA 685 A

[23] Tribunal Case Number: 98/IR/Dec00

[24] Tribunal Case Number: 31/IR/Apr04 page 6

[25] Tribunal Case Number: 31/IR/APR04

[26] See applicants heads of argument paragraph 103 and counsel's opening address record page 7

[38] Section 8(c), provides that it is a prohibited practice for a dominant firm to-

> *" 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; or "*

[39] Section 8(d)(ii) states that it is a prohibited practice for a dominant firm to –

> *" engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-*
> *(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;"*

[40] Section 9(1) states that:

> *" An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if-*
> *(a) it is likely to have the effect of substantially preventing or lessening competition;*
> *(b) it relates to the sale, in equivalent transactions, of goods or services of the like grade and quality to different purchasers; and*
> *(c) it involves discriminating between those purchasers in terms of-*
> *(i) the price charged for the goods or services;*
> *(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services*
> *(iii) the provision of services in respect of the goods or services; or*
> *(iv) payment for services provided in respect of the goods or services.*

(Our emphasis. We explain the reasons for this later when we analyse the anti-competitive effect)

EVIDENCE OF A PROHIBITED PRACTICE

[41] Proof of an anti-competitive effect is a necessary element of all the sections that the applicant alleges that the respondent has contravened as can be seen from the underlined phrases in the Act we have cited.[27]

[27] We use "anti-competitive effect" as shorthand to include the phrase in section 9(1)(a) *"substantially preventing or lessening competition in the market"*

[42] Accordingly, we have first approached the contraventions alleged holistically, that is, we considered as a point of departure, whether an anti-competitive effect is established. Without some evidence, even if weak, of this effect, the application must necessarily fail. Our conclusion is that the applicant has failed to establish any evidence of an anti-competitive effect, hence its case in respect of both the alleged section 8 contraventions fails.

[43] Because price discrimination may require a lower threshold for anti-competitive effect, we have considered whether the applicant would nevertheless succeed if it could cross this hurdle. We find nevertheless that it fails to make out a case for a further necessary element of that contravention. We discuss this more fully below.

ANTI-COMPETITIVE EFFECT

[44] The applicant contends that the relevant market in which the anti-competitive effect is experienced is what it terms the market for the sale of dry bulbs for fund-raising. This market is downstream to the one for the supply of bulbs – the market in which the respondent is alleged to be dominant. As we understand the applicant's case, the respondent leverages its dominance in the upstream market to exclude the applicant from the downstream market by engaging in conduct 'tantamount' to a refusal to supply it. We use the word 'tantamount' advisedly because it is common cause that the respondent's refusal to supply is not absolute. It is willing to supply the applicant on the same terms as its wholesale customers, at least until the complaint referral has been determined. It is not willing to supply it in terms of a previous arrangement between the applicant and the respondent. The applicant alleges that the terms of the wholesale arrangement are so unattractive for it that it would be forced to exit the downstream market, and so the respondent's conduct amounts to a refusal to deal by a dominant firm. If the applicant is excluded from the downstream market, this would have an adverse effect on school fund-raising, as, faced with less competition, those left in the market would reduce the margin enjoyed by the school. Recall that in terms of both the applicant and LFB's business models it is the intermediary, not the school, which sets the price at which learners sell to the public.

[45] The respondent says the downstream market is for school fund-raising schemes. If bulb schemes do not offer a school an attractive return it will choose another form of fund-raising, since the school's object is to raise funds not to engage in the business of bulb selling.

[46] The applicant seeks to counter this argument by contending that its own experience, which it says is confirmed by its economists who have interviewed school staff, is that schools do not make their choice of fund-raising scheme by reference to the returns that they could enjoy in respect of different types of fund-raising scheme, but rather see bulb selling as a market on its own. Expressed differently, schools will compare the virtues of various bulb-selling schemes, but they would not compare bulb-selling, to say cake

sales or a fete, in their choice of scheme. This, argues the applicant, is proof that the market must be the one for which it contends.

[47] The applicant relies crucially for this on the fact that when LFB entered the market, it offered schools a margin of 40% instead of the 33% traditionally offered by the applicant. When it became clear that the applicant might be excluded from the market, LFB dropped the schools margin back to 33%. This, says the applicant, is clear evidence that other school fund-raising schemes do not constrain the bulb schemes and that such schemes are not in the same market.

[48] It is not necessary for us to decide which of these two downstream market definitions is the correct one. Instead of making this determination we will analyse whether an anti-competitive effect is established on either version of the downstream market.

ANTI-COMPETITIVE EFFECTS- RESPONDENT'S MARKET DEFINITION

[49] Recall that the respondent argues that the downstream market is the market for school fund-raising schemes. On this version, if the flower bulb scheme is unattractive for schools they can substitute it with an infinite variety of other schemes whose object it is to raise funds for schools. The respondent does not attempt to describe the extent of this market. Presumably, this is because there is an infinite variety of schemes in which schools can engage. The important point here is that if this is the correct downstream market, then the exit of the applicant would have no anti-competitive effect, as schools can substitute with other schemes, whether they involve the selling of flower bulbs or some other goods, be it cakes or hamsters. The respondent notes that schools do not consistently engage in the flower selling scheme and that annual repeats by the same schools of the bulb scheme are less frequent than schools who take a break from the scheme for a year or so. We do not need to decide what the other schemes are; it would seem clear that schools that use the bulb scheme substitute with other schemes on a frequent basis. If the market is therefore one for fund-raising, the flower bulb segment is not sufficiently ubiquitous that the exit of even a major player such as the Bulb Man would have an anti-competitive effect. The applicant does not appear to contest the notion that there would be no anti-competitive effect if the market is for fund-raising. Rather, it focussed its efforts on contending for a narrower market. Therefore, if the respondent has defined the market correctly then the exit of the applicant would have no significant anti-competitive effects as schools, as buyers of fund-raising services, would have other choices.

ANTI-COMPETITIVE EFFECTS - APPLICANT'S MARKET DEFINITION

[50] It is not the applicant's case that the ordinary consumer of bulbs experiences the anti-competitive effect – it concedes that consumers can purchase bulbs from nurseries and other retailers.[28] Indeed, on the respondent's version, these sell to consumers at lower prices than they could

[28] See page 8 of the transcript of the hearing.

purchase through any school-based scheme. The reason school schemes survive at all according to the respondent is because consumers purchasing choices are sentimental not rational.[29]

[51] The applicant's case is that the anti-competitive effect is felt in the downstream market for fund-raising for schools through the sale of bulbs. The major players at present in this market are the applicant and LFB. There is some disagreement as to who else may be in this market. The respondent appears to supply some schools directly, who it would appear, purchase from it in the same way as other wholesale customers would. There is also reference to the presence of other intermediaries – but their significance as players is disputed.[30] The applicant suggests that the others are bit part players, whilst the respondent, not surprisingly, sings their praises. This is not something we can resolve on these papers. We will assume in the applicant's favour that if it were to exit, then the market would comprise LFB and those schools that can order directly from the respondent.

[52] The question then is whether it is clear that this will have an anti-competitive effect on the schools. In respect of those provisions for which dominance is a prerequisite, it would not seem that the exit of the applicant, enhances or establishes the market power of the respondent. What is lacking in the applicant's case is a credible theory of competition harm. If the respondent is intent on excluding the applicant from the downstream market what anti-competitive object does it have for doing so? The respondent is not its competitor in these markets – it is thus not apparently motivated, as many dominant firms who compete with their customers are, to exclude them, take their customers or squeeze their margins. On the present papers, the respondent's margins to intermediaries, and its pricing power to consumers, remain the same whether the applicant is in this market or not. Indeed, if anything the respondent is worse off without the applicant, if it is as effective an intermediary it contends it is.

[53] The only evidence of competition harm the applicant advances is to drawn an inference from a change in margins offered by LFB. In 2005 when it entered the market, LFB circulated a pamphlet advising schools that if they signed up with it they would get a 40% margin. Up until then, the applicant had only offered schools a 33.3% margin. In 2006, however, LFB has reverted to the 33,3% margin offered to schools, at least so it appears from a pamphlet circulated to schools this year.[31] The applicant draws from this the conclusion that when there was competition in the market for schools in 2005, they benefited by getting higher margins. At this stage LFB knew the applicant was its competitor and needed to win market share from it. In 2006, presumably because it knew that the applicant's supply arrangement with the respondent

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[29] See page 123 paragraph 35 2 " *This reflects the fact that the former purchases* [school fund-raising sales] *are driven by school fund-raising considerations rather than by rational market driven considerations* "

[30] Names of the firms are confidential

[31] See record page 25 and exhibits JAG 5 and JAG 12 to the founding affidavit of Jackie Ginsberg

was to end in June, LFB could confidently withdraw the additional margin offered to the schools in 2005, without fear of an adverse competitive response from the applicant.

[54] This does not help the applicant in its case against the respondent. At best it suggests that LFB, not the respondent, is the beneficiary of the applicant's exclusion, as there is no evidence on the papers that the margin foregone and then retained by LFB, was passed on to the respondent. Nor is the LFB margin move on its own significant. This may have been no more than an extravagant marketing promotion from a new entrant, since, on the applicant's papers, LFB only entered the market in mid -2005. An aggressive publicity promotion, in the absence of evidence of actual harm, is not sufficient to found a case for an anti-competitive effect. If it was, every sale offer once granted and subsequently withdrawn, might lead to inferences of the insidious presence of monopoly. In the face of this margin switch by LFB, the respondent's market position remains constant. If it has market power, the absence or presence of the applicant in the downstream market makes no difference to it.

[55] The crucial question here is : does the respondent's refusal to deal advantage its alleged market power? In *York Timbers Ltd v SA Forestry Company Ltd*, we cited the following page from Areeda and Hovenkamp's treatise, which we suggest is apposite:

> *"An arbitrary refusal to deal by a monopolist cannot be unlawful unless it extends, preserves or creates, or threatens to create significant market power in some market, which could be either the primary market in which the monopoly firms sells or a vertically related or even collateral market. Refusals that do not accomplish at least one of these results do not violate section 2 (of the Sherman Act), no matter how much they might harm the person or class of persons declined service. Nor are such refusals an 'abuse' of monopoly power in the sense of using power in one market as 'leverage' to increase one's advantage in another market."*[32]

[56] We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? [33] As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the probabilities in favour of the applicant.

Faul and Nickpay observe in relation to European jurisprudence that:

> *"A refusal to deal by a dominant undertaking will not be considered an abuse under Article 82 of the EC Treaty if it is objectively justified. This*

[32] See [2001-2002] CPLR 408 (CT)

[33] Note that we have not found the respondent dominant we simply make this favourable assumption to the applicant, to test the other aspects of its case

will be the case if the refusal can be justified on business grounds other than the intention to eliminate a competitor from the market."[34]

[57] In this case, the respondent advances what on the papers appears to be a legitimate business justification for its conduct.

[58] When the respondent gave notice of its intention to terminate its agency agreement with the applicant it justified doing so on the basis that their relationship had become strained as a result of the dispute between the applicant and LFB which had culminated in High Court litigation in which the respondent had become embroiled.[35]

[59] It is common cause that the Ginsberg family have been in the business of selling flower bulbs for fund-raising schemes for some years and that various members of the family have been involved in some capacity over time. Historically, they were all involved, trading as the Bulb Man until 2005, when, for reasons not clear to us, the joint family enterprise fractured into two rival businesses, with the erstwhile founder of the applicant establishing LFB, in competition with his son and daughter-in-law who remained with the applicant. The respondent too appears to be a business where family relationships figure large. The chairman and chief executive; Floris and Stuart Barnhoorn are father and son. In the letters exchanged around the agency debate in 1996, which we referred to earlier, both offspring Ginsberg and Barnhoorn are the protagonists and refer to understandings they had with the respective fathers.[36] Unsurprisingly, in business relationships where personal contact seems of great importance, the Ginsberg fallout was to have consequences for the respondent, which appears to be considered not merely the preferred, but only possible supplier, by each of these warring firms. That the respondent appears to have chosen sides in this dispute seems probable from the papers, as is the observation that once it had chosen sides, the loser would inevitably have to pay the commercial price in a business environment where a supplier relationship is a prerequisite to success. It is not for us to presume on the rights and wrongs of this dispute or whether the respondent could have avoided becoming embroiled. The fact is that it did, and having done so, relationships, as the correspondence and the history suggest, reached a most unhappy state.

[60] In the context of this dispute the respondent's conduct in refusing to supply the applicant in terms of an agency arrangement amount not to the actions of a dominant firm flexing its anti-competitive muscle, but a supplier divorcing its customer based on irretrievable breakdown.[37] It must be borne in

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[34] See Faull and Nickpay *The EC Law of Competition* 3.156

[35] See the letter from the respondent's attorneys on page 53 of the record.

[36] See letter from Stuart Barnhoon to Jackie Ginsberg page 470, *"This entire arrangement was agreed to three years ago with Len"* and letter from Lee Ginsberg to Stuart Barnhoorn page 471, *" The following issues were discussed and agreed at this meeting between Floris, Len and myself "*

[37] See letters emanating from the respondent's attorney, record page 56 and 90 and 104.

mind that the agency relationship, unlike the wholesale one, calls for repeated contacts between the supplier and the agent – a breakdown in trust between the two is far more problematic to manage in this arrangement than in wholesale relationship characterised as it is by its impersonal nature and minimal contact.

[61] On the present papers, the more probable version for the respondent's conduct in refusing to supply the applicant on an agency basis is the breakdown in the business relationship, as opposed to an attempt to wield market power or to exclude the applicant for an anti-competitive end.

[62] Without any evidence that this conduct leads to an enhancement of the respondent's market power on the present papers, we cannot see the likelihood of an anti-competitive effect, even making the most favourable assumptions for the applicant, on all the other facts. The applicant has disputed the rights and wrongs of many of the incidents giving rise to the present parlous state of the business relationship but it does not dispute the fact of its decline. Nor does the applicant place before us an anti-competitive motive for the conduct. At best, it suggests the dispute will lead to its exit and hence an anti-competitive outcome, but it does not explain why the refusal itself furthers some anti-competitive design. There is no reason then for us not to accept the respondent's justification.

[63] It follows, that if on either version of the market there is no anti-competitive effect, assuming that the applicant is excluded from the market, the application must fail. We examine briefly if this conclusion holds for the applicant's case in respect of the remaining contravention, namely section 9(1).

SECTION 9(1)

[64] The applicant's case under section 9(1) is that the respondent is a dominant firm and is supplying the applicant's competitor on one set of terms which it refuses to provide to the applicant. The terms offered to the applicant, it alleges, are discriminatory as to both service and credit.

[65] As we indicated earlier, to found a section 9(1) claim, the applicant must still establish that the price discrimination has an anti-competitive effect.[38]

[66] In *Sasol Oil (Pty) Ltd and Nationwide Poles CC* the Competition Appeal Court held that the test for competitive harm in terms of section 9(1)(a) is to ask is there a reasonable possibility that competition may be adversely affected by a practice.[39]

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[38] This is because of section 9(1)(a) which states an action by a dominant firm is prohibited price discrimination if " it is likely to have the effect of substantially lessening or preventing competition

[39] See page 28 of this Competition Appeal Court decision: Case Number 49/CC/Apr05

[67] The CAC test is a more stringent test than the one adopted by this tribunal.[40] However, it is not clear, as the CAC did not need to pronounce upon this point, whether, because of a slight difference in the language of the sections, that test is less demanding than the test for section 8.

[68] It would not be appropriate in an interim relief case to explore that issue further and for that reason we will, out of caution, assume that it is a lesser test, and that the applicant might have met that threshold under section 9(1) although, not under section 8.

[69] This means we must consider the respondent's other defence to the section 9 (1) claim, and, that is, that the applicant fails to make out the next element of the section 9 claim, which requires that transactions are *equivalent*.

[70] The so-called agency agreement is one that involves several different elements that distinguish it from a wholesale agreement. Thus even if we accept that the latter is less favourable than the agency agreement they involve sufficiently different commercial terms, logistics and interaction between supplier, customer and third parties that justifies them not being considered equivalent. Most significantly, the commercial risk of a scheme, which requires someone to bet on whether the number of orders will correspond to the available supply of product, shifts depending on the choice of scheme – this factor alone negates their equivalence. The problem for the applicant is that it has sought to distinguish the commercial imperative of the two arrangements to justify why it cannot survive under a wholesale arrangement, but in so doing, it has succeeded in emphasising not only their difference but also their non-equivalence.

[71] As we stated in *Nationwide Poles*[41] on the interpretation of this subsection of section 9:

> *"Thus transactions may be functionally equal - one business class seat or one telephone call between Cape Town and Johannesburg may be functionally equal to another business class seat or telephone call, but they may not be equivalent (a call or a flight made in peak time as opposed to one made during a non peak period) in the sense that their economic effect is different and hence the legislature, recognising this, chose to bring 'non-equivalent' transactions under the rubric of prohibited price discrimination despite the fact that the in other respects they may be regarded as equal"*

[72] The applicant fails in its claim in terms of this section as well

[40] The tribunal's test is that the complainant must situate the complaint as being one relevant to competition but does not require proof of some standard of harm

[41] See Tribunal case number: 72/CR/Dec03 on page 34 paragraph 132

CONCLUSION

[73] Since the applicant has failed to establish that the conduct of the respondent has an anti-competitive effect, it fails to make out a case that there is evidence of an alleged prohibited practice. Whilst we have observed in the past that the factors we take into account for a section 49C claim are interrelated and that a weakness in one respect may be compensated for by strength in others, this case fails on its most important constituent element, namely, the competitive effect of the conduct of the respondent. It is not a case of there being some evidence albeit weak – it is a case of there being no evidence at all. Even granting the applicant the benefit of many assumptions on the facts, it fails to rise to a case about competition harm, albeit it may be about commercial harm.

COSTS

[74] As with our normal practice costs follow cause and there is no reason on the facts of this case to depart from that practice. The respondent is entitled to its costs.

ORDER

[75] We make the following order:

1. That the application be dismissed; and

2. That the applicant pays the respondent's costs in the application on a party and party scale, and such costs are to include costs of one counsel.[42]

N Manoim
Tribunal Member

28 November 2006
Date

Concurring: D Lewis and M. T.K. Moerane

Tribunal Researcher : J Ngobeni

[42] Note that the order was made earlier on 14 November 2006.

For the Applicants : Mark Wesley
Instructed by Jowell Glyn & Marais

For the Respondents : Jerome Wilson
Instructed by Edward Nathan Sonnenberg