COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 91/CR/Aug07

MAPULA RESTAURANT **Applicant**

And

COCA-COLA FORTUNE (PTY) LTD **Respondent**

Panel	:	Y Carrim (Presiding Member); U Bhoola (Tribunal Member) and L Reyburn (Tribunal Member)
Heard on	:	12 February 2008
Reasons Issued	:	14 March 2008

REASONS

Introduction

[1] On 27 June 2007, Mapula Restaurant ("Mapula"), the applicant,[1] lodged a complaint with the Commission in which the following allegations against the respondent, Coca Cola Fortune (Pty) Ltd ("CCF"), were made:

1. The respondent discriminates against Mapula by refusing to supply it with Coca Cola refrigerators;
2. The respondent denied Mapula wholesale outlets rights from 1999 to date;
3. The respondent's employees stole cases of cold drinks from Mapula from 1994 to 2005; and
4. The respondent's employees trespassed on Mapula's premises by recklessly driving delivery trucks and pushing trolleys.

[2] The Commission investigated these allegations and issued a certificate of non-referral of the matter on the basis that it did not raise any competition concerns. The applicant referred the matter directly to the Tribunal in terms of section 51 (1) of the Competition Act. A telephonic pre-hearing was conducted with the parties on 13 December 2007and the matter was heard by the Tribunal on 12 February 2008. An application for condonation and an application for striking out was heard prior to the

[1] Mapula Restaurant is solely owned by Mrs Dikeledi Rampedi. We refer to the applicant either as Mapula or Mr Rampedi for ease of convenience. Mr Isaac Rampedi, the son of Mrs Dikeledi Rampedi and manager of Mapula Restaurant, represented the applicant and prosecuted the matter before the Tribunal.

hearing on the merits. The application for condonation was granted and the application to strike out was dismissed. We provide our reasons for those decisions at the end of this document.

Merits

[3] In its founding papers, the applicant alleged that the respondent's drivers had caused damage to its property by reckless driving, trespassing and theft of cold drinks. At the commencement of the hearing, the parties were told by the Tribunal that it had no jurisdiction to hear matters concerning theft or malicious damage to property and that the applicant, if it sought to pursue such claims, should do so in the ordinary civil and criminal courts. In our view the only issues that could potentially give rise to competition concerns were the allegations that the respondent had refused to supply Mapula with Coca-Cola refrigerators and the respondent's refusal to provide Mapula with wholesale outlet rights. The applicant was requested to limit its case to these two issues.

[4] Mr Isaac Rampedi, Mrs Noko Rampedi ("Mrs N Rampedi"), and Mrs Dikeledi Rampedi ("Mrs D Rampedi") testified for the applicant. Mr Paul Wessels ("Mr Wessels"), the Market Execution Manager of CCF, testified for the respondent.

Background to the complaint

[5] This matter highlights on the one hand the typical challenges faced by SMEs in conducting their businesses in rural South Africa, and on the other the complacency on the part of large firms in rendering services to such SMEs. At the same time it highlights the creativity and resilience of entrepreneurs, especially those who have conducted their trade in the context of social and economic disadvantage.

[6] Mapula is a family business owned by the 74-year-old Mrs D Rampedi. Mrs Rampedi started her business in 1954; she first established Leshabe Trading Store ("Leshabe"), and in 1978 she established Mapula in the district of Sebotse near Polokwane in Limpopo Province. She tasked Isaac Rampedi, her son, to manage Mapula while she continued her involvement in Leshabe. Mapula and Leshabe are approximately fifteen kilometers apart and both sell branded Coca-Cola beverages, also referred to as "cold drinks".

[7] CCF has the rights to bottle and distribute branded Coca-Cola products in Limpopo and Port Elizabeth. Coco-Cola South Africa ("Coke SA"), which grants these rights, is a subsidiary of Coca-Cola International, a company based in the United States of America. The practice of Coke SA is to grant rights to bottling companies in different territories of the country. Hence CCF has the rights in respect of Port Elizabeth and Limpopo Province only, Associated Bottling Industries (ABI) has similar rights in the Gauteng and Durban regions only, while another company operates under similar rights

in the Western Cape only. All these bottling and distribution companies tend to be family-owned businesses.[2]

[8] In Limpopo province CCF supplies Coca-Cola products to national stores as well as to wholesalers and urban stores through its regional distribution centres (RDCs). CCF also has a rural distribution strategy within this province. In order to achieve economies of scale in the distribution of its products in rural areas CCF has engaged in the practice of granting wholesale rights to a large trader located in a particular district who then becomes the distributor for smaller traders in the surrounding villages. In the past, CCF had used this strategy in the Sebotse district but the two traders that had been granted such rights had been unsuccessful in their enterprises. After this occurred, CCF resumed delivery of products directly to traders in that district.[3] Wholesale rights are granted by CCF only if the there is sufficient demand for its products in that area or district and if the trader is able to meet the financial and infrastructure criteria laid down by CCF. [4]

[9] The applicant asserts that it had requested a cooler from CCF as far back as 1978 and that CCF had refused to provide it with one, despite providing its competitors with coolers. The applicant also asserts that CCF denied Mapula wholesale outlet rights from 1999 to date. Over time, the relationship between CCF and Mapula seems to have deteriorated into an acrimonious one due to all the issues alleged in the founding papers. The Rampedi family formed the view that CCF was biased against it.

Refusal by CCF to grant wholesale rights to Mapula

[10] During the course of the proceedings Mr Rampedi conceded that Mapula in fact had not submitted an application to CCF for wholesale rights, and that even if it had done so, currently Mapula did not meet the qualifying criteria for such rights.[5] For this reason we find it unnecessary to deal with this issue any further. We now turn to the issue of the cooler.

Refusal by CCF to grant a cooler to Mapula

[2] Competitors of these companies sell other non-alcoholic beverages, for instance, SAB, Pepsi Cola, Fruit Time, etc. See Mr Wessels' evidence on pg. 106 of the transcript.
[3] Mr Wessels' evidence, pg 72 of the transcript.
[4] Traders would typically require capital between R150 000 and R200 000 to purchase large quantities of product and would need storage and transport facilities to store and deliver product to nearby villages.
[5] In his evidence, Mr Wessels testified that wholesale rights were not granted by CCF to outlets unless they complied with a variety of criteria. Firstly an outlet must make a formal application. In the assessment of this application CCF tries to establish whether the outlet meets the remaining criteria which include: whether there is sufficient need and demand for Coca Cola products in the area where the outlet is situated, whether the outlet has the capacity to house large amounts of stock and can deliver the stock, and whether the outlet has the estimated capital of between R100 000 to R250 000 to invest in stock and facilities.

[11] The essence of the complaint before us is that CCF had discriminated against Mapula by not providing it with a cooler and that such discrimination was in breach of section 9 and section 5 of the Competition Act ("the Act").[6]

[12] As part of its marketing, CCF supplies its customers with refrigerators or coolers on certain terms and conditions. Coca-Cola, like many other producers and suppliers of fast-moving consumer goods, uses coolers as a branding strategy. Coolers are given on loan to their customers on certain terms and conditions, the most common of these being that the retailer cannot stock any rival products in the cooler. Generally, such terms and conditions tend to impact on inter-brand competition in the affected markets. Suppliers usually have pre-qualifying criteria that customers are required to meet, for example achieving a certain level of sales volumes.

[13] In this case we are not dealing with inter-brand competition because the applicant does not sell any branded soft drinks other than Coca-Cola products. Moreover, the complaint is not that the CCF criteria discriminated between small and large customers who were in competition with each other, resulting in a substantial lessening of competition, but rather that CCF had refused to provide Mapula with a cooler despite the fact that Mapula had complied with CCF's criteria. Bias against Mapula is alleged.

[14] Mr Wessels testified that CCF has specific criteria which must be met by an outlet before it qualifies for a refrigerator. In terms of these criteria:-

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*"*For every 1 door cooler placed, customer must sell approximately 60 cases per month (or 20 cases per week)*

**For every 2 door cooler placed, customer must sell approximately 120 cases per month (or 40 cases per week)*

**For every 3 door cooler placed, customer must sell approximately 150 cases per month."*

[15] Mr Wessels explained that refrigerators were relatively expensive, with a two-door cooler costing approximately R5000. In addition, CCF had to carry the costs of maintenance of the coolers over their lifetime. The capital and maintenance costs were only justified if the customer sold the requisite volumes of cold drinks. He also stated that the assessment of the volumes sold was not done for a single month but over a number of months in order to establish whether the volumes were consistent over the period. Previously, CCF had refused to supply Mapula with a cooler because Mapula did not sell the required volumes in terms of CCF criteria.

[16] At the hearing, it emerged that during November 2007 CCF had provided Mapula with a one-door cooler. In our view the matter ought to have rested there. However Mr Rampedi, who despite lacking legal qualifications displayed a remarkable ability to conduct a cogent case, was of the view that CCF's belated actions had been motivated by the fact of these proceedings before this Tribunal rather than compliance with the

[6] We do not consider section 5 as relevant, and for that reason, will deal only with sections 8 and 9 of the Act.

Act. He also argued that CCF had been in breach of the Act prior to November 2007 and that Mapula had suffered damages of R500 000 as a result of such breach of the Act. Accordingly he sought an appropriate declaration from the Tribunal and insisted that the matter proceed.[7]

Legal Framework - section 9 of the Act[8]

[17] Section 9 is located in Part B of the Act which deals with abuse of a dominant position. In *Sasol v Nationwide Poles*,[9] this Tribunal recognized that section 9 of the Act was uniquely concerned with the structural impact of abuse of dominance on small customers. It also noted that section 9 did not constitute a blanket prohibition on price differentiation and that its application was limited to the circumstances contemplated in its sub-sections. [10]

[18] Section 9(1) in the first instance prohibits only dominant firms from engaging in price discrimination. Sub-sections 9(1)(a) – (c) then set out the circumstances in which price differentiation becomes prohibited price discrimination, as opposed to mere differentiation. The section prohibits not only price discrimination but also discrimination in terms of discounts and the provision of services in respect of the goods and services sold.[11] Notably the differentiation must be such that it is likely to have the effect of substantially preventing or lessening competition[12]*and* it relates to the sale, in equivalent transactions, of goods and services of like grade and quality to different purchasers *and* it involves discriminating between those purchasers in terms of the matters set out in sub-sections (i) - (iv). Once an applicant has discharged that burden a range of defences are available to the respondent. In order to determine whether CCF's conduct was in breach of the Act we need to consider such conduct in one or more defined relevant markets and assess whether the applicant discharged the burden of proof required of it in section 9.

Dominance and relevant markets

[19] The first requirement of section 9(1) is that the firm complained of must be dominant in the relevant market. Very little economic or documentary evidence of market definition was led by the parties. It was clear from the evidence of Mr Wessels that CCF is the sole distributor of Coca-Cola products in the Limpopo province, which includes Polokwane and Makopane[13], and that Mapula and Leshabe are customers of CCF. Furthermore, CCF and Mapula are not competitors in the retail market.

[20] Mr Wessels attempted to argue that the relevant market for purposes of establishing dominance was the broad market for non-alcoholic beverages, which

[7] Mr Rampedi also stated that the one-door cooler did not satisfy Mapula's needs: it needed a two-door cooler.
[8] These reasons deal mainly with section 9 of the Act. Section 8 is not dealt with in detail.
[9] Case No. 72/CR/Dec03.
[10] Case No. 72/CR/Dec03 at para 89 – 90.
[11] See s9(1)(c)(i)-(iv).
[12] Section 9 (1)(a).
[13] Previously Pietersburg and Potgietersrus respectively.

includes water, juices and a variety of other soft drinks. However no evidence, such as strategic internal documents or econometric evidence was led to support this argument. While it may be that Coca-Cola products face some measure of competition from other beverages in urban centres, competition in the rural sector from other soft drinks seems very limited if not absent altogether.

[21] According to Mrs D Rampedi, no cold drinks other than Coca-Cola products are sold by Mapula and Leshabe. Nor did the applicant regard Pepsi or any other soft drink as an alternative to Coca-Cola products in its businesses. Once again, very little evidence, even if anecdotal, was led by the applicant that Coca-Cola products compete with other beverages including milk, juices, tea, coffee and water in the rural areas.

[22] Mapula is in the retail market for Coca-Cola products, as is Leshabe. The evidence in relation to the geographic proximity of Mapula and Leshabe was somewhat unclear.

[23] According to Mr Wessels, only two companies run a delivery service to the rural areas in CCF's allocated territory; namely CCF and Sasko. Hence rural traders would have to obtain other goods from urban centres such as Polokwane and Mokopane by incurring additional transport costs. While Pepsi-Cola had recently established a depot in Seshego, a township in Polokwane, it had as yet not implemented a rural distribution service. However, both Leshabe and Mapula could obtain Coca-Cola products from wholesalers in Polokwane or Mokopane, some 80-90 km away, as alternative suppliers to CCF, albeit at additional transport costs.

[24] The evidence of witnesses regarding the proximity of Leshabe and Mapula was confusing, with figures ranging from 5km to 30km. Mr Isaac Rampedi stated that the two stores were at least fifteen kilometres apart and that this was a "walking distance" in the rural areas. He argued that that Leshabe and Mapula were competitors in the same geographic market.

[25] Given our finding below we are of the view that there is no need to conclusively define the relevant product and geographic markets in this matter.

Different treatment and equivalent transactions

[26] A second and critical requirement of section 9 of the Act is that an applicant must show that a dominant firm engages in some kind of differential treatment of its customers in relation to equivalent transactions of goods and services. The treatment does not have to constitute actual differences in prices or discounts but could involve services related to the sale of goods. Without making any finding whether the provision of a cooler (which is a mechanism customarily utilized by suppliers to encourage customers to market their products to the exclusion of rival products) is an allowance or a service as contemplated in any of the sub-sections in 9(1) (c)(i)-(iv), the Tribunal must be satisfied that the respondent had actually engaged in some differential treatment of customers in relation to equivalent transactions.

[27] We emphasize that the complaint is not directed at CCF's criteria for providing coolers but rather at the fact that Mapula was not being given a cooler despite achieving the required volumes of sales. The case made out by Mr Rampedi was that CCF was not applying its criteria consistently because Leshabe, a competitor, had been given a cooler even though its volumes of Coca-Cola sales were lower than those of Mapula.[14]

[28] In support of this contention, we were referred to invoices filed by the applicant, which reflected its purchases from CCF over a period of approximately twelve months. A spreadsheet prepared by CCF also reflecting the purchases by Mapula between July 2006 to June 2007, showed that while in a particular month Mapula may have sold something in the region of 19 cases per week it did not consistently sell 20 cases per week or 60 cases per month over that period. Except for the months of December 2006 and March 2007, Mapula's sales were below 20 cases per week.

[29] The applicant argued that CCF had somehow manipulated the figures on the spreadsheet so as to reflect lower volumes than were actually purchased by Mapula. A cursory glance at the numbers reflected on the spreadsheet revealed that they were in fact consistent with the figures on the invoices that Mapula had filed in support of its complaint and that CCF had not provided the Tribunal with inaccurate figures.[15] A further argument put up in support of the alleged lower sales of Leshabe and the higher sales of Mapula was that occasionally Mapula would supply Leshabe with cold drinks.

[30] Leshabe's turnover figures were not placed before this Tribunal to enable us to assess whether there had been any inconsistent application of CCF's criteria. This was rather surprising given that this was a family-run business. Both Mapula and Leshabe are owned by Mr Rampedi's mother; which would make it easy for him to obtain such evidence. Nor could Mrs D Rampedi or Mr Rampedi, with any degree of certainty, provide us with estimates of the volumes sold by Leshabe. Of course this failure to put Leshabe's figures before us could have been due to the difficulties faced by an unrepresented applicant who is unfamiliar with legal proceedings, let alone the complexities of the proceedings in this forum. However, both Mr Rampedi's arguments and Mrs D Rampedi's evidence suggested that they had at least appreciated that there was a need to demonstrate some differential treatment to this Tribunal.

[31] Mrs Rampedi's evidence seemed to suggest that Leshabe's coolers were a historical fact which neither she nor the CCF witnesses could explain.[16] Mr Wessels was not employed at CCF at the time it was supplied. Moreover, the fact that Mapula was supplying volumes to Leshabe suggested that it was Leshabe, rather than Mapula that was doing the larger volumes.

[14] Based on the evidence given by Mrs D Rampedi, Leshabe had been given two coolders in 2003 but one was taken back in 2006 because it could only run on electricity rather than gas or paraffin.
[15] See annexure C of the complaint record.
[16] Mrs Rampedi's evidence was mainly that Leshabe was doing lower volumes than Mapula.

[32] On the basis of the evidence put before us we are unable to determine that Leshabe and Mapula were being treated differently and that such differentiation related to the sale in equivalent transactions of goods from CCF. The applicant, who had been involved in the business for a long time and who had demonstrated that the affairs of the business had been reasonably conducted, was best placed to put such evidence before the Tribunal but failed to do so.

[33] Accordingly we find the applicant has failed to show any differential treatment between it and another customer of CCF to support a charge of discrimination as contemplated in section 9 of the Act.

[34] In our view, the applicant, while displaying creativity and determination in bringing this application, and possibly due to no fault on its part, failed to properly appreciate the difference between the requirements of section 9 of the Competition Act and section 9 of the Constitution which seeks to promote social equality by prohibiting discrimination on specified and analogous grounds. Both section 9 of the Constitution and section 9 of the Competition Act use the language of discrimination.

[35] However, while considerations of fairness or equity may underpin the provisions of section 9 of the Competition Act, it does not seek to promote social equality as contemplated in section 9 of the Constitution. Section 9 of the Competition Act has very limited application, its purpose being to prevent an abuse by a dominant firm in a particular market when discrimination is likely to adversely affect competition. This Tribunal is required to consider the differentiation complained of in this matter through the lens of competition law, rather than human rights law. This does not of course mean that the Tribunal is not cognisant of the constitutional framework in which the Act is to be applied. However, the Tribunal's jurisdiction is limited to matters affecting competition.

[36] Accordingly, the application is dismissed. This does not mean that the applicant's perception that CCF was biased against it and had provided it with poor levels of service was unfounded. Indeed the conduct of CCF in the face of various complaints made by Mapula over the years to its salespersons reflects complacency and indifference, suggesting that this was a relatively large firm which had become accustomed to view its smaller customers as inconveniences rather than successful enterprises operating in difficult circumstances. One of the constant complaints articulated by the applicant in these proceedings was that CCF had poor communication with its customers. Mr Rampedi averred that had he known about the eligibility criteria for obtaining wholesale rights he would not have persisted with this complaint. Whether or not this has any merit, it is instructive to note that CCF has testified that it has now distributed some 390 coolers in the region to customers who sell between 15 and 20 cases per week and do not meet the existing criteria. While Mr Rampedi is of the view that CCF's actions were galvanized by this application, it is more likely that its action in this regard was spurred by the threat of competition from an international brand in the form of Pepsi-Cola in a region where it has faced little inter- brand competition until now. Mr Wessels conceded that CCF's customer relations had in the past not been ideal, but

claimed that they were now enjoying proper attention and priority. It is to be hoped that this also applies to competition issues.

Condonation Application

[37] Prior to the commencement of the hearing the respondent had lodged an application with the Tribunal to condone the lateness of its answer, which was filed some 70 business days after it was due ("the condonation application"). The applicant opposed the condonation application and asked the Tribunal to strike out the respondent's answer. At the same time the applicant had also filed a reply, after having previously indicated that it did not intend to do so.[17] Argument in relation to these applications was heard prior to the commencement of the hearings on the merits. The Tribunal dismissed the applicant's application to strike out and granted the application for condonation. The Tribunal also condoned the applicant's non-compliance with the rules in the filing of its reply.

[38] In exercising its discretion whether or not to condone non-compliance with its rules, the Tribunal can have regard to a number of factors, including whether good cause was shown for the non-compliance, fairness to both sides, the degree of non-compliance and the explanation thereof, the prospects of success, prejudice suffered, the convenience of the Tribunal and the avoidance of delay in the administration of justice. These factors are not an exhaustive list.[18]

[39] CCF, despite being a substantial company with approximately under 1000 employees, had been extremely tardy in filing its answer. The respondent claimed that the lateness arose because the complaint had been served by the applicant on CCF's sales department and not on the human resources department, which also acts as the legal department. The sales department neglected to transfer the application to the legal department because it was under the misimpression that the matter had been resolved after the Commission had issued its certificate of non-referral. However, once CCF had been appraised of the situation by the registrar, it had taken immediate steps to rectify its non-compliance with the rules. Mapula had also not complied with the rules of the Tribunal when it filed a reply to the answer despite having initially filed a notice of non-reply.

[40] The Tribunal noted that both parties were unrepresented by lawyers and were unfamiliar with the Tribunal's proceedings. In addition, the applicant was unable to show any significant prejudice to it as a result of the late filing of the answer or as a result of the Tribunal granting the application for condonation. Accordingly, the respondent's application for condonation was granted and the applicant's application to strike out the respondent's answer was dismissed. The Tribunal also condoned the applicant's late filing of its reply.

Order

[17] See the applicant's notice of non-reply dated 7 November 2007.
[18] Competition Commission and SAA/Comair 83/CR/OCT04 at para 40.

[41] The Tribunal makes the following order:

1. The condonation application is granted.
2. The applicant's case is dismissed.
3. No order as to costs is made.

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Y. Carrim
Presiding member

Concurring: U Bhoola and L Reyburn

Tribunal Researcher : L. Xaba
For Mapula Restaurant : Isaac Rampedi
For Coca-Cola Fortune : Prince Verveen