



**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)**

CT CASENO: CR1910ct17/EXC248Jan19

In the exception application:

INTERACTION MARKET SERVICES HOLDING (PTY) LTD **Applicant**

and

THE COMPETITION COMMISSION **Respondent**

In *re* the matter between:

THE COMPETITION COMMISSION **Applicant**

and

BOTHA ROODT (JOHANNESBURG) **1st Respondent**

BOTHA ROODT (PRETORIA) **2nd Respondent**

SUBTROPICO (PTY) LTD **3rd Respondent**

INTERACTION MARKET SERVICES HOLDING (PTY)LTD **4th Respondent**

DAPPER MARKET AGENTS (PTY) LTD **5th Respondent**

DW FRESH PRODUCE CC **6th Respondent**

FARMERS TRUST CC **7th Respondent**

NOORDVAAL MARKET AGENTS (PTY) LTD **8th Respondent**

MARCO FRESH PRODUCE AGENCY **9th Respondent**

WENPRO MARKET AGENTS CC	10th Respondent
WENPRO MARKET AGENTS (KZN)	11th Respondent
PRINSLOO & VENTER MARKET AGENTS	12th Respondent
FINE FOODS (PTY) LTD	13th Respondent
DELTA MARKET AGENTS (PTY) LTD	14th Respondent
INSTITUTE FOR MARKET AGENTS	15th Respondent

Panel : E. Daniels (Presiding Member)
AW Wessels (Tribunal Member)
F Tregenna (Tribunal Member)

Heard on : 31 October 2019

Decided on : 27 November 2019

Exception Application: Reasons for Decision

Having heard the parties in the above matter, on 31 October 2019, the Competition Tribunal made the following order:

1. The Commission must amend its complaint referral under case number CR191Oct17 by filing a (an amended) Supplementary Founding Affidavit within 10 business days of the date of this order;
2. The Supplementary Founding Affidavit must set out clear and concise statements of the material facts upon which the Commission relies for its claims with sufficient particularity to enable the other parties to reply thereto;
3. For the avoidance of doubt, the new amended Supplementary Founding Affidavit must set out the following:
 - 3.1. the manner in which section 4(1)(b)(i) of the Competition Act 89 of 1998 has been contravened;
 - 3.2. the relevant product market(s);
 - 3.3. the geographical market(s) in which this contravention took place;
 - 3.4. full details of the agreement and how it was enforced;

- 3.5. the manner and extent that this alleged contravention has on competition in any relevant market;
4. Interaction Market Services Holding (Pty) Ltd and any other respondent must file its Supplementary Answering Affidavit, if any, within 10 business days of the Commission having filed its Supplementary Founding Affidavit.
5. The Commission must file its Supplementary Replying Affidavit, if any, within five business days of receiving any Supplementary Answering Affidavit.

Our reasons follow.

Introduction

- [1] This is an exception application by Interaction Market Services Holding (Pty) Ltd (the applicant which is the fourth respondent in the main matter).
- [2] We shall, for the sake of convenience refer to the applicant as IMS and to the Competition Commission as the Commission.
- [3] This is the second exception application brought in these proceedings.

Background

- [4] On 07 July 2017, the Commission initiated a complaint in terms of section 49B (1) of the Competition Act, 1998 (Act No.89 of 1998) as amended (“the Act”) against the respondents.
- [5] The respondents, who are Fresh Produce Market Agents and act as intermediaries between farmers and buyers of freshly produced fruit and vegetables, are all members of the Institute of Market Agents South Africa (“IMASA”), the 15th respondent.
- [6] The Commission’s complaint referral is based on its findings that the respondents entered into an agreement and/or engaged in a concerted practice to fix the commission they charge farmers for selling fresh produce on behalf of the farmers at the fresh produce markets in the country in contravention of section 4(1)(b)(i) of the Act.¹

¹ This section reads as follows: “An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) ...

(b) It involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;”

- [7] The Commission alleges that the practice by the respondents of charging fixed commissions dates to 1970 when it was authorised under the Commission for Fresh Produce Markets Act, 1970 (Act No 82 of 1970) (“the Commissions Act”).
- [8] IMS and the second respondent, Botha Roodt (Pretoria), filed interlocutory applications as they are of the view that they are unable to plead and are prejudiced by the Commission’s failure to clearly and with particularity plead the material facts or points of law relevant to the complaint referral.
- [9] The interlocutory applications were heard together on 14 August 2018. These two applications comprise the first interlocutory application.
- [10] The applicants submit that the cause of action has not been adequately pleaded. According to them, to establish a contravention of section 4(1)(b)(i) of the Act, the Commission must show that there was an agreement between the respondents and that the Commission must plead that there was either a meeting of minds or consensus between them.
- [11] In addition, the applicants argue that the Commission must provide at least the dates on which the agreement was concluded, the place where it was concluded and the identities of the representatives of the respondents who were involved in concluding the agreement.
- [12] The Commission, according to the two applicants, had referred broadly to the charging of fixed commissions which were initially authorised under the Competition Act and which continued to be charged after that Act was repealed and had alleged that that constituted an agreement and / or a concerted practice without providing any other details.
- [13] Essentially the applicants argue that the Commission’s Founding Affidavit is impermissibly vague and embarrassing in certain important respects relating to the agreement and concerted practice, the fixed commission fee charged and the time span of the alleged price fixing conduct.
- [14] On 07 November 2018, the Tribunal upheld the exceptions and issued its reasons and the following order:

[1] The Applicants’ exception is upheld in the following respects:

[1.1] Within fifteen business days of this order, the Commission must file a supplementary founding affidavit to the complaint referral to cure the defects in the Complaint Referral

by complying with the provisions of Tribunal Rule 15(2), failing which the applicants in this matter are given leave to approach the Tribunal for an order that the Complaint Referral in so far as it relates to the applicants in this matter be dismissed.

- [15] In the reasons for the order, the Tribunal noted that a similar objection, to that raised by the two applicants, was raised in *Omnico*² and said, amongst other things, that the Commission should indicate whether it relies on the same facts to allege the concerted practice as it does for the agreement or if it relies on different facts, it must allege those facts.³
- [16] The Tribunal also noted that it would “be very difficult for the applicants to plead because of the paucity of information on a critical element of the contravention.”⁴
- [17] The Tribunal specifically noted that “the Commission’s allegations on the market which it alleges is national are very vague. However, Mr Ngobese (who represented the Commission) did indicate, in response to a question from the Chair of the panel which heard the first exception application, that he did not see a problem with amending the pleadings in respect of the markets.”⁵ In other words, the Commission itself stated that it would not have a problem in amending the pleadings in respect of the markets.
- [18] The respondents are entitled to details about the type of conduct described in the definition of *concerted practice* to respond to those allegations.⁶
- [19] Pursuant to the order, the Commission filed a supplementary affidavit.
- [20] In the present exception application (the second exception application), IMS now contends that the supplementary affidavit still does not comply with the provisions of Tribunal Rule 15(2) and seeks to have the complaint against it dismissed.
- [21] Botha Roodt (Pretoria), the second respondent has not filed another exception application.
- [22] In *Premier of the Eastern Cape and Another v Dlava and others*, Griffith J said that the power to stay proceedings in certain circumstances should be exercised with circumspection and only in exceptional cases.⁷

² *Omnico (Pty) Ltd and Others v Competition Commission, In re: Competition Commission v Pienaar and Others* (73/CR/Jul12).

³ Para [19] of the reasons dated 7 November 2018.

⁴ Para [29] of the reasons.

⁵ Para [34] of the reasons.

⁶ Para [32] of the reasons.

⁷ *Premier of the Eastern Cape and Another v Dlava and others* [2013] 4 ALL SA 182 [ECM]. Page 206. Para [98].

- [23] The circumstances of each case must be considered to determine whether a stay of an action is warranted.
- [24] Griffiths J noted that a case will be regarded as vexatious when the action is hopeless, or success becomes impossible.⁸
- [25] However, a finding that the relevant proceedings are vexatious is not a pre-requisite to grant a stay of proceedings. The demands of equity and whether it is in the interests of justice to do so are the decisive factors.⁹
- [26] In *Invensys*¹⁰, the Tribunal outlined its approach to exception applications as follows:

“[13] Exceptions to pleadings can contribute to the expedition of a trial through a clarification of the issues between the parties. However, unlike the approach in the High Court, the Tribunal’s general approach to such applications has been to decide each case on its own merits and circumstances and not adopt an overly technical approach (our emphasis).

[14] Our approach has been informed by three central considerations. First, complaint proceedings in the Tribunal are sui generis and consists of elements of both motion and trial proceedings in the High Court. Complaint referrals are brought on Notice of Motion, together with a supporting affidavit. At this stage all that a complainant is required to do is to provide “a concise statement of the grounds of the complaint and the material facts or the points of law relevant to the complaint and the material facts or the points of law relevant to the complaint and relied upon by the complainant.” A respondent is permitted to file an answer to this and the complainant a reply. Thereafter parties are entitled to exchange documents through a process of discovery and to file expert and factual witness statements.

[15] Second, the subject matter of our proceedings involves the intersection of law and economics, often requiring complex economic analyses of the facts to advance a theory of harm. It is often the case that a particular set of facts could be seen through the lens of more than one section of the Act. For example, a difference in price might be assessed by a complainant as a contravention of section 9(1) but might in reality be ultimately assessed by the Tribunal as a refusal to deal or contravention of section 8. Likewise what may at times appear as a vertical agreement, could in fact be a horizontal one effected through hub and spoke arrangements. And what may appear to be a pure point of law may, in fact, require

⁸ *Ibid*, para [100].

⁹ *Ibid*, para [106].

¹⁰ *Invensys PLC and two others and Protea Automation Solutions (Pty) Ltd In re The Complaint referral between Protea Automation Solutions (Pty) Ltd and Invensys PLC and four others*. Case No: 019315.

an entire factual matrix for it to be decided. Sometimes as happened in Senwes an expert witness might, relying on the same conduct, articulate a theory of harm differently to what was initially alleged by a party.

[16] Third, the Tribunal enjoys inquisitorial powers and is required to exercise these in its truth-seeking functions. In this it also enjoys a wide discretion to conduct its proceedings. Hence, the approach taken by the Tribunal is not an overly technical one and each case is determined on its own merits and circumstances. The guiding principle is that of fairness.

[17] The usual remedy for exception applications brought on the basis of vague and embarrassing or a failure to disclose a cause of action (lacking sufficient material allegations to show a cause of action) is to grant the offending party an opportunity to amend its pleadings. In certain circumstances, such as when the exception concerns a pure point of law which might be determinative of the matter, dismissal of the case might be an appropriate remedy. Invensys' application, however, was not brought on the basis of a pure point of law, but consisted of a mix of law and facts."

- [27] In paragraph 20 the Tribunal stated, "The Tribunal would not readily reach for a dismissal of a matter on the merits of a case without first satisfying itself that the prospects of success for a complainant are low and without first providing a party with an opportunity to clarify its case."¹¹
- [28] The Tribunal clarified its stance on dismissals by saying "[21] This does not mean that the Tribunal would never, depending on the facts of the case, reach for a dismissal prior to granting a party an opportunity to amend. Each case must be decided on its own facts. Having said that, we find that in this case, dismissal is not an appropriate remedy."¹²
- [29] As a rule, the Tribunal will not simply dismiss an action without satisfying itself about a complainant's prospects of success.
- [30] The Commission filed a supplementary affidavit but stated that it stands by its referral affidavit and that the supplementary affidavit must be read with the Commission's referral affidavit.¹³
- [31] Rule 15(2) (a) and (b) of the Tribunal Rules stipulate that a Complaint Referral must be supported by an affidavit setting out a concise statement of the grounds of the complaint

¹¹ *Invensys PLC and two others and Protea Automation Solutions (Pty) Ltd In re The Complaint referral between Protea Automation Solutions (Pty) Ltd and Invensys PLC and four others. Case No: 019315.*

¹² *Invensys PLC and two others and Protea Automation Solutions (Pty) Ltd In re The Complaint referral between Protea Automation Solutions (Pty) Ltd and Invensys PLC and four others. Case No: 019315.*

¹³ Supplementary affidavit. para 5.

and the material facts or points of law relevant to the complaint and relied on by the Commission.

- [32] According to IMS, it is still unable to plead to the allegations made by the Commission in its founding and supplementary founding affidavits because they are vague, broad and bereft of any statement of material facts.
- [33] IMS contends that the product and geographic markets have not been defined and that uncertainty regarding the commissions charged and the time period relating to the commissions have still not been resolved in the supplementary founding affidavit.
- [34] IMS specifically takes issue with the accusation made by the Commission that the respondents have entered into an agreement and/or engaged in a concerted practice to fix the commission which farmers had to pay.
- [35] IMS's complaint is that the Commission has not provided any facts to indicate the kind of agreement reached if an agreement is in fact being alleged. Similarly, if a concerted action is being alleged, no facts to substantiate that has been provided.
- [36] In *Netstar*, the Competition Appeal Court stated that:

*“An **agreement** arises from actions of and discussions among parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. The parties have reached consensus.*

*A **concerted practice** examines the conduct of the parties to determine whether it is coordinated conduct or if they are acting in concert. The absence of an arrangement between them or any belief that they are obliged to act in that fashion does not have an effect. A concerted practice is based on evidence that assesses the nature of the conduct of the firms said to be a party to the conduct.”¹⁴*

- [37] Evidence relied upon may point to an agreement or a concerted practice, but they are different.
- [38] There must either have been an agreement between the parties and / or concerted action and the applicants are entitled to details of the agreement and concerted action to enable them to meet the case against them. If the Commission has no specific facts to plead regarding the respondents reaching an agreement (for example when, where, by whom)

¹⁴ *Netstar v Competition Commission* 2011 (3) SA 171 (CAC) [para 25].

it should state that. If the Commission relies on inferal reasoning from other facts to establish an agreement or concerted practice, that must be stated.

- [39] In this case, therefore, the Commission should either indicate whether it relies on the same facts to allege the concerted practice as it does for the agreement or if it relies on different facts, it must allege them.
- [40] We had identified the areas of concern in our earlier reasons to eliminate any doubts about what information needed to be supplemented by the Commission.
- [41] The Commission appears to rely on the respondent's membership of IMASA to support its contention that "the practice of charging a fixed base commission is not a unilateral decision of each agent," because IMASA "encourages the charging of commission not below a certain base for particular types of fresh produce."¹⁵
- [42] However, such bald statements are not sufficient to enable the respondents to plead.
- [43] In fairness to the Commission, it does deal in its supplementary affidavit with the commission question and the role of IMASA. In this regard, the Commission states:

"13. The IMASA constitutions regulates manner in which its member agents should charge the commission including that members should not 'present any commission as a cost expense which is not normally considered a cost or an expense.' The IMASA constitution will be provided on request. The Respondents as members of IMASA subscribe to the prescripts of this constitution.

14. IMASA in its various structures communicates to members, including the Respondents, what the base commission should be and / or increase thereof.

15. The Respondents continued membership of IMASA despite knowledge that IMASA encourages the charge of certain base commissions and the fact that the Respondents do not deviate from the base commission set by IMASA indicates that the Respondents have in fact agreed or associated themselves with the practice of charging a fixed base commission.

20. Further IMASA in which all the Respondents are members encourages uniform base commissions across all fresh produce markets as set out in paragraph 16 above."¹⁶

- [44] Mr Nzabandzaba who appeared on behalf of the Commission stated that the Commission's "view is that the Commission's referral papers is supplemented, do disclose

¹⁵ Supplementary affidavit, para 12.

¹⁶ Supplementary Affidavit, para 13 - 15.

the cause of action at the bare minimum, at least to enable the applicant, or rather the excipient to the case of the Commission.”¹⁷

[45] By this, we understand him to be saying that the supplementary affidavit discloses the bare minimum of the Commission’s cause of action and that should enable the excipient to respond to the Commission’s case.

[46] We indicated during the hearing that we were of the view that the Commission had complied in various respects with our earlier order. However, although the Commission may well be correct that it need only furnish the “bare minimum”, that (bare minimum) must still contain sufficient information to enable a respondent to plead to the Commission’s case. In other words, a concise statement of the grounds of the complaint and the material facts or the points of law relevant to the complaint and relied upon by the Commission or complainant must be provided in accordance with Rule 15(2).

[47] Mr Ndzabandzaba also stated that the facts set out in the papers point to an agreement or alternatively a concerted practice and that the same facts that support an agreement can also support a concerted practice. In support of his argument, he quoted the Competition Appeal Court which had this to say:

“No doubt, in many cases, the same evidence may be relied upon, as pointing towards, either an agreement, or a concerted practice. However, sight should not be lost of the fact that they are different, the two are different. The finishing of an agreement extends the concept beyond contractual arrangement, however, what it requires is still a form of arrangement that the practice regards as binding upon both themselves and the other parties to the agreement. Absent such an arrangement, there is no agreement, even the more extended sense embodied in the definition. By contrast the considered practice examines the conduct of the parties to determine whether it is so coordinated conduct, or they are acting in concert. The absence of any arrangement between them or any belief that they are obliged to act in that fashion is immaterial.”¹⁸

[48] Mr Ndzabandzaba is, of course, correct, but as indicated above the Commission should provide further particulars regarding the agreement and the concerted practice in the pleadings, particularly in the light of the comments made, in *Netstar*, by Wallis, AJA (as he then was) who specifically stated that:

¹⁷ Transcript, page 47, lines 7 -10.

¹⁸ *Netstar (Pty) Ltd v Competition Commission 2011 (3) SA 171 (CAC)*. Quoted from pages 51 -52, paras 10 -20 of the transcript. The actual quote is to be found in *Netstar* at para [25].

“Observing the distinction between an agreement and a concerted practice is essential to a proper analysis of allegedly anti-competitive conduct. If the argument or analysis runs the two together that leads to confusion and error. In particular, and that is evident in this case, it leads to an incorrect approach to and evaluation of the evidence. The case for a concerted practice is based on evidence that assesses the nature of the conduct of the firms said to be party to the practice. By contrast the case for an agreement examines whether an agreement as defined was concluded and that focuses on the existence of consensus between the parties. Even where reliance is placed on the same evidence in support of these distinct cases it requires separate evaluation. There are also jurisdictional and procedural reasons for a careful observance of the distinction. The jurisdictional reason lies in the path by which a complaint reaches the Competition Tribunal. The process starts with the Commissioner initiating a complaint in terms of s 49B(1) of the Act or some other person submitting a complaint to the Commission under s 49B(2)(b) of the Act. In either case the complaint must be investigated and, if the Commission concludes that a prohibited practice has been established, must be referred to the Tribunal under s 50 of the Act. The Tribunal’s jurisdiction is confined to a consideration of the complaint so referred and the terms of that complaint are likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person. Accordingly, if the original ground for the complaint is that there was a prohibited agreement the Tribunal cannot determine it on the basis that there was a concerted practice or vice versa.”¹⁹

[49] The Commission has attempted to comply with our earlier order, even though it has not done so with precision.

[50] The interests of justice, therefore, require us to afford the Commission a further opportunity to supplement its papers in relation to the following aspects:

[50.1] The Commission should provide specific facts regarding an alleged agreement between the respondents to fix prices (i.e., commissions), including when, where, how and by whom agreement was reached. If the Commission has no such specific facts regarding the alleged agreement and it wants an agreement to be inferred from the other facts, that should be indicated.

[50.2] The Commission should clarify if it relies on the same set of facts to allege the agreement as it does for the concerted practice. If it relies on different

¹⁹ *Netstar*. para [26].

facts for each of these elements, it must indicate which facts relate to an alleged agreement and which facts relate to an alleged concerted practice.

[50.3] In relation to the product market concerned, the Commission has already indicated that the respondents are all Fresh Produce Market Agents that sell fresh produce on behalf of farmers in South Africa. It goes on to describe the respondents as intermediaries between farmers and buyers of freshly produced fruits and vegetables. To assist the respondents in understanding where the alleged horizontal relationship is in the value chain, the Commission should describe the relevant value chain more fully and indicate where in the value chain the alleged horizontal relationship between the respondents is and what service(s) are at issue. It should also provide further details regarding the geographic market(s) relating to the respondents' alleged price fixing conduct.

[50.4] In relation to the part of our order concerning the manner and extent that the alleged contravention has on competition in any relevant market, this relates only to paragraph 27.3 of the Commission's Founding Affidavit which deals with an alleged fixed commission fee charged by the respondents to farmers of "*up to 9.5% for all fruits and vegetables delivered to them [the respondents] by farmers without pallets*" (emphasis added).²⁰ In its Supplementary Affidavit the Commission states "*... it is correct that the 9.5% commission is the maximum commission set for fresh produce delivered without pellets, ...*" (emphasis added).²¹ Since the above quoted paragraph of the Commission's referral relates to a 'maximum' commission (a so-called price cap), it should state the following: (i) clarify if it is the Commission's case that the maximum commission was indeed charged by the respondents to farmers during the complaint period, i.e. 9.5% for fruit and vegetables delivered without pellets; and (ii) explain how an agreed maximum commission / price when charged by competitors, could have negative consequences for competition.

[51] We make no order as to costs.

²⁰ Commission's Founding Affidavit page 8.

²¹ Commission's Supplementary Affidavit para 16.

26 May 2021

Presiding Member

Date

Mr Enver Daniels

Concurring: Mr Andreas Wessels and Prof Fiona Tregenna

Case Manager:

Busisiwe Masina

For the Applicants:

Mr Gavin Marriott instructed by Webber Wentzel.

Mr Frank Snyckers instructed by Edward Nathan

Sonnenbergs Inc.

For the Commission:

Mr Anthony Ndzabandzaba of Ndzabandzaba Attorneys Inc
instructed by the Competition Commission.