competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO: CR025MAY15

DEF098AUG15 / EXC099JUL15

In the strike out and exception applications between:

AGS FRASERS INTERNATIONAL (PTY) LTD **APPLICANT**

and

THE COMPETITION COMMISSION **FIRST RESPONDENT**

and

In the default judgment application between:

THE COMPETITION COMMISSION **APPLICANT**

and

AGS FRASERS INTERNATIONAL (PTY) LTD **FIRST RESPONDENT**

In re the complaint referral between:

THE COMPETITION COMMISSION **APPLICANT**

and

AGS FRASERS INTERNATIONAL (PTY) LTD **FIRST RESPONDENT**
JH RETIEF TRANSPORT CC **SECOND RESPONDENT**

Panel	:	Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	:	04 March 2016
Order issued on	:	04 March 2016
Reasons issued	:	07 April 2016

REASONS FOR DECISION

INTRODUCTION

[1] This matter concerns three interlocutory applications all related to a complaint referral ("the main matter") in which collusive tendering by the respondents - both furniture removal firms - is alleged.[1] More specifically the conduct complained of in the main matter relates to so-called 'cover pricing', a term we explain later.

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[1] Section 4(1)(b)(iii). In the main matter the respondents are cited as AGS Frasers International (Pty) Ltd, (the first respondent) and JH Retief Transport CC, (the second respondent).

[2] We gave a composite order in respect of all three interlocutory matters on 4 March 2016, the same day we heard argument, so as not to further delay pleadings in this case.

[3] We now set out our reasons for that order. For convenience the order is again attached to these reasons.

[4] The Competition Commission ("Commission") referred the main matter against the respondents on 25 May 2015. it does not seek relief against the second respondent in that case, JH Retief Transport CC ("JH Retief") [2] only the first respondent, AGS Frasers International (Pty) Ltd, ("AGS")[3].

[5] AGS has objected to the referral for several reasons. It has made its objections by way of two separate applications; one is an exception and the other an application to strike out.

[6] The third application has been brought by the Commission for a default order to be granted against AGS because it has not yet filed its answering affidavit.

[7] It is clear that although the applications have been brought separately their respective resolutions are inter-dependent if we are to escape the present procedural deadlock. AGS argues that a respondent is not required to answer to a complaint referral that is defective and it was therefore entitled to have its objection considered first. The Commission argues that while a respondent may object to a referral, it must do so as part of its answer and must otherwise plead its case on the merits, the practice known as pleading over.

[8] For this reason at a pre-hearing we directed that all three applications be decided at the same time and on 4 March 2016 we gave a composite order relating to all three. These reasons also relate to all three.

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[2] See paragraphs 23.3 and 24.3 of the Commission's complaint referral, record page 14.

[3] We have shortened the name to AGS as this is the form of the name used in the referral.

Exceptions

[9] AGS' notice of exception raised several points. However when it came to argument Ms Norton, who appeared for the firm, in our view correctly, persisted with only three of them. We confine ourselves to considering only these.

[10] The first exception relates to insufficiency of pleading. AGS argues that the Commission has not alleged what conduct by it constituted collusive tendering.

[11] In the referral the Commission relies on two separate counts of collusive tendering that it states took the form of cover pricing. Since they are set out briefly we will quote them in full.

[12] In respect of the first count the allegation contained in paragraph 20 of the referral is as follows:

> *"On or about 2007, AGS and JH Retief concluded an agreement to exchange cover prices in that one Ansie Niemand, an employee of JH Retief who wished to win a tender, requested one Lesley, an employee of AGS, to provide her with a cover price in respect of a tender issued by the South African Police Services ("SAPS"), for the transportation of furniture belonging to one Captain C. Botha, a police member of SAPS, from 77 Formosa St, Groenewide Park, George, to Wolseley. The tender was valued at R40186.00 and was rewarded to JH Retief".*

[13] In respect of the second count the allegation contained in paragraph 21 of the referral is as follows:

> *"During or about 2007, AGS and JH Retief concluded an agreement to exchange cover prices in respect of a tender issued by Grand Palm Casino and Resort for the relocation of furniture belonging to Mr. M De Klerk which JH Retief wished to win. The tender was valued at R15 241.80 and was awarded to JH Retief. JH Retief subsequently won the tender".*

[14] The Commission's case against AGS is that it engaged in collusive tendering which is a contravention of section 4(1)(b)(iii) of the Act. The Commission makes it clear that in this case the collusive tendering took the form of cover pricing. It explains what cover pricing is in paragraph 18.3 of the referral:

> *"Cover price is a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so. The cover price is given to enable the firm that does not wish to win the tender, to submit a higher price. A cover price may also be provided by a firm that does not wish to win a tender to a firm that does wish to win the tender, to enable the firm that wishes to win the tender to submit a lower price".*

[15] It follows from this explanation that cover pricing requires some form of conduct on behalf of the recipient of the request – in this case AGS – in response. Yet the complaint referral contains no allegations of any response by AGS. In respect of the first count, apart from someone called Lesley receiving the request from JH Retief, no other conduct pursuant to that request by AGS is alleged. The same holds for the second count. Here the pleading is even sparser, as not even the name of the recipient of the request is alleged.

[16] In argument Mr Trengove for the Commission submitted that it did not need to plead these facts, as it had alleged that the conduct in respect of both counts constituted an 'agreement'. In this regard he relied on paragraph 19 of the referral which states as follows:

> *"This complaint referral is based on the Commission's findings and conclusions that AGS entered into a collusive agreement with JH Retief in respect of a relocation tender issued by the South African Police Services ("SAPS") and a relocation tender issued by Grand Palm Casino and Resort".*(Our emphasis)

[17] He also argued that the allegation that an agreement had been concluded is repeated when the specifics of both counts are set in paragraphs 20 and 21, respectively, which we cited above. This observation is correct.

[18] However the question to be decided is whether alleging the fact of an agreement without pleading any further conduct suffices at referral stage?

[19] In terms of Rule 15(2)(b) of the Tribunal Rules, a valid referral requires, inter alia, *"...a statement of the material facts or the points of law relevant to the complaint and relied on by the Commission."*

[20] A complaint under section 4(1)(b)(iii) of the Act is not one of unilateral but co-ordinated conduct. The conduct to be impugned requires, "*...an agreement between ...firms... in a horizontal relationship.*"

[21] In this case the agreement involves the practice of collusive tendering and, more specifically, cover pricing. It does not suffice for the Commission to allege only what one of the parties, in this case JH Retief, the requesting party did. The Commission also needs to allege what AGS, the party which according to it was the recipient of the request did. This conduct is a material fact of the impugned conduct which Rule 15(2) requires to be pleaded.

[22] It does not suffice when the referral is silent on this point to simply rely on the allegation that there has been an agreement to 'glue' the actions of the two respondents together.

[23] Alleging the existence of an agreement amounts to no more than a statement of a legal conclusion. The Commission does not explain what AGS did to arrive at this conclusion. AGS is entitled to know this in order to decide how to answer the referral.

[24] It is thus correct, as AGS alleges, that the pleading fails to meet the standard laid down by Rule 15(2) for pleading the material facts.

[25] For this reason the exception is upheld. However the deficiency can easily be remedied by the supply of further particulars and hence clause 2 of our order provides for this.

[26] The second exception was that the Commission had failed to allege in respect of either count that the employee in question had authority. This exception is without foundation. The Commission alleges the nexus to AGS by alleging that

the person concerned was an employee. This suffices as a material fact in a section 4(1)(b) case for the purpose of pleading. If AGS wishes to allege lack of authority as a defence it can do so in its answer. AGS has not advanced any case authority in competition law as to why such an allegation needs to be made out by the pleader in the referral.

[27] The one Tribunal decision relied upon, the *Gralio* case is not authority for this proposition.[4] While it is correct that in that decision the Tribunal found on the facts that the person involved in an alleged contravention was not authorised by the respondent firm, the conclusion was arrived at after a full hearing of the evidence about the individual's lack of authority. It was not decided at the pleadings stage.

[28] This exception is dismissed.

[29] The third exception was that the Commission has no jurisdiction to bring the complaint as the action has prescribed because of the limitation on bringing an action provision contained in section 67(1) of the Act.

[30] That section states:

> *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*

[31] We refer to this provision by the more familiar and convenient term, prescription. Ordinarily a plea of prescription in a civil case is described as a special plea and would not be decided by way of exception as there would need to be evidence.

[32] This case is unusual however and as we go on to explain can be determined by way of exception. Before we consider the factual issues raised by this case let us consider the Commission's argument.

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[4] See *Competition Commission v Gralio Pre Cast (Pty) Ltd.* Case number 23/CR/Feb09 where the question was whether a person who at one time had been an agent of the firm had authority to bind it to a pricing decision at a time when the firm had acquired new owners.

[33] The Commission argued that it does not need to allege facts to show that the conduct in question has not ceased. As a general proposition the Commission is certainly correct. Indeed in past cases we have found that this is a fact on which the onus is on the respondent which means that it is not necessary therefore for the Commission to specifically plead this.[5] This case does not change that approach as a matter of law.

[34] However on the facts, this case raises the unique scenario, that prima facie, on the Commission's own version, as set out in the referral, it would appear that the claim has prescribed.

[35] We consider the referral to see why that is the case.

[36] The Commission appears to allege that the complaint was initiated by it in 2011. We say 'appears' because in paragraph 10 of the referral, the Commission alleges that an initiation was made against firms in the furniture removal industry on 3 November 2010, but this seems to be alleged only by way background, because it goes on to allege that the 2010 complaint was amended on 1 June 2011, to include AGS. This would, prima facie, suggest that the 2011, rather than the 2010 date, is the one relied on as the date of initiation. However in respect of both counts the conduct is alleged to have taken place sometime in 2007. Cover pricing, as described by the Commission, is not apparently on these facts, ongoing conduct.[6] Rather, it is episodic in nature. It is therefore reasonable to infer that if AGS had provided a cover price to JH Retief, it was given in 2007, the year the Commission alleges the "agreement" occurred in respect of both counts, and that hence at least four years would have elapsed between the date of the practice having ceased and the date of initiation.

[37] Thus the Commission's pleading on the face of it – if we take the time periods it alleges coupled with the specific nature of the conduct it relies upon – all suggest that the conduct complained of in respect of both counts has prescribed. The Commission in oral argument stated it has an answer to this. It

[5] *Paramount Mills v Competition Commission [2012] ZACAC 4 (27 July 2012).*

[6] See paragraph 18.3 of the referral.

may; for this reason we have given the Commission the opportunity to do so by giving particularity on this point as set out in clauses 2.1.1 and 2.1.3 of our order.

Striking out

[38] The final objection relates to the striking out application. Although AGS had applied for several parts of the referral to be struck out, Ms Norton contended for only one of them, again correctly in our view.

[39] The paragraph objected to is paragraph 17 of the referral. This paragraph must be read with the preceding paragraph 16 both of which we quote below:

> *16. "From 24 October 2014, the Commission issued invitations to furniture removal companies to settle the instances of collusive conduct which they were involved in. On 24 October 2014, the Commission issued invitations to AGS to settle two instances of collusive tendering that it was involved in. AGS invitation to settle in attached hereto marked KM2".*
>
> *17. "In response to the invitation AGS admitted having engaged in collusive tendering in respect of two relocation tenders but refused to pay an administrative penalty in line with the invitation".*

[40] AGS contends that paragraph 17 relates to the content of a letter from it, which was a without prejudice communication when there was an attempt by AGS to settle the matter. Ms Norton argued that to allow the Commission to make such allegations relying on admissions that were the subject matter of settlement negotiations, would chill the negotiation process as respondent firms would not be comfortable to negotiate with the Commission if they feared such communication might, if negotiations were unsuccessful get used as admissions against it. Since public policy should encourage the settlement process such an approach by the Commission should be impermissible. Mr Trengove argued that it would be premature for us to decide the point now. AGS should plead this point in its answering affidavit and we should await the Commission's reply as it may have an answer to this.

[41] As we understood him he was not defending the Commission's position but urging us to decide this point only later once AGS had filed its answer. Thus the argument was not that the AGS point was a bad one but rather it should not be determined now. AGS must plead over.

[42] We are not persuaded by this. On the Commission's own facts the so called admission came in response to an invitation to settle.[7] Settlement discussions are by their nature without prejudice to enable their success and to avoid lengthy and expensive litigation for all parties. Further, the reliability of an admission made for the purposes of settlement may take the case into fruitless ancillary disputes. It may well be that a firm explores making an admission purely for the purpose of deciding whether settlement is a cheaper option than litigation. This type of admission does not amount to a confession and if such evidence was permitted, lengthy disputes about the context of the admission would ensue.

[43] The argument raised here that disclosing such admissions in the course of negotiations is inadmissible as being against public policy to encourage settlement is compelling. There is little point in deciding this issue later after pleadings close. The Commission advances no other facts as to why AGS construction of the communication as without prejudice is wrong. Further, this construction is a reasonable reading of the Commission's own allegations in paragraphs 16 and 17of the referral. AGS' striking out application in this respect is upheld and hence clause 1 of our order.

Default judgment

[44] It remains for us to consider the third application, i.e. the Commission's application for default judgment. Recall the Commission's argument is that AGS should have filed an answer in which it raised its objections and it then should have pleaded over. Since it did not file an answer in the period prescribed by

[7] As stated in paragraph 16 of the referral quoted earlier.

rule 16 of the Tribunal rules, the Commission on expiry of this period was entitled to apply in terms of rule 53 of the Tribunal rules for a default order.[8]

[45] Rule 53 is triggered when a person served with an initiating document in this case the complaint referral) has not filed a "response". The term response is not defined but note the rule does not use the term answer (the term used in complaint proceedings as well as in the rule that deals with other applications (rule 43)) which suggests that a response is something more widely defined than the filing of an answer.

[46] If this interpretation is correct then filing an objection within the time period otherwise required for filing an answer might constitute a '*response*'. The question then is whether any objection brought within the time period for filing an answer and without pleading over should be regarded as a response.

[47] AGS argues that bringing these applications was reasonable as without their resolution it was prejudicial to it to have to file an answer. It also argued that based on past practice in the Tribunal there was a reasonable expectation that an objection could be brought first without pleading over.

[48] Mr Trengove in reply fairly conceded that the Commission did not expect to obtain a default order at this time but wanted clarity from the Tribunal that respondents who wish to take exceptions should plead over to avoid delay in finalising litigation.

[49] In our view granting a default order in the present circumstances would not have been appropriate. AGS has not been a delinquent litigant in this matter and has adequately engaged the Commission with its concerns first in correspondence and then by way of exception. There has thus been a response from it. There has been no clear practice to date that this was not permissible. The Commission argued that AGS should have brought an application for directions

[8] Rule 53 of the Tribunal's Rules provides for default orders where a person who has been served with an initiating document has not filed a response within the prescribed period. The prescribed period is to be found in Rule 20 which provides that an answer must be filed within 20 days of the respondent having been served with the complaint referral.

first. But this approach would be self-defeating for the expedition the Commission seeks; increasing rather than decreasing the burden of litigation.

[50] However we are mindful of the Commission's concerns about the problem of opportunistic objections delaying the closing of pleadings. Although we have found that three of the objections made in this case were sound and justified being raised without pleading over, the remainder would not fall into this category and were of the sort that either were not good at all or could be raised at the same time as pleading over. Put differently they may not have been sufficient to constitute a response without pleading over.

[51] In general where a respondent wishes to raise an objection it should plead over unless the nature of the objection goes to the root of the referral and the respondent is unable to plead over. We decline in this case to set out a list of which objections fall into this category and which do not, as this would be too categorical an approach. Case law over time may develop this. This case illustrates three points of exception and one point of striking out where an objection taken prior to pleading was justified. The remaining exceptions are good examples of ones that do not.[9]

[52] We reaffirm our approach to the taking of objections as set out in *National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome and Others.*[10] Here we held that an objection taken at what was described as the 'first stage' (i.e. before a respondent has pleaded) would be considered premature, unless it could be shown that it would substantially curtail further pleadings. In this case the points upheld fall into this category.

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[9] Some of these exceptions were: (i) the allegation in form CT 1 (1) (specifying an agreement, alternatively...prohibited practice) is similarly inconsistent with the plurality of "agreement") in paragraph 22 (read also with paragraphs 20 and 21), themselves contradicted by the singularity of "agreement" in paragraph 19 and (ii) whether the alleged agreement was oral, tacit (and if so, pursuant to what conduct by *both* alleged parties to the agreement) or in writing.

[10] Case number 45/CR/Jul01 in particular as set out in paragraphs 56-65.

Conclusion

[53] AGS also raised several other objections in its papers which were not pursued in oral argument. Ms Norton, who had come into the case only after heads of argument had been filed, confirmed that we did not need to consider them. We have however dismissed the remainder formally for the sake of clarity although as there was no dispute about them any longer, we haven't needed to give reasons.

[54] We have also required AGS to plead over, provided the Commission has complied with our order, as given the length of time in this matter, there are unlikely to be any objections of a nature that would still warrant deferring pleading over.

Norman Manoim

07 April 2016
Date

Yasmin Carrim and Mondo Mazwai concurring

Tribunal Researcher	: Ipeleng Selaledi
For AGS Frasers	: Adv. Michelle Norton SC with Adv. F.B. Pelser instructed by Edward Nathan Sonnenbergs Attorneys
For the Commission	: Adv. Wim Trengove SC with Adv. Tembeka Ngcukaitobi instructed by Ndzabandzaba Attorneys