



THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case number: CR093Jan07/SEP086Aug16

In the Application of Separation of merits and quantum between:

ALLENS MESHCO (PTY) LTD	First Applicant
HENDOK (PTY) LTD	Second Applicant
WIRE FORCE (PTY) LTD	Third Applicant
AGRI WIRE (PTY) LTD	Fourth Applicant
AGRI WIRE NORTH (PTY) LTD	Fifth Applicant
AGRI WIRE UPINGTON (PTY) LTD	Sixth Applicant
CAPE WIRE (PTY) LTD	Seventh Applicant
FOREST WIRE (PTY) LTD	Eighth Applicant
INDEPENDENT GALVANISING (PTY) LTD	Ninth Applicant
ASSOCIATED WIRE INDUSTRIES (PTY) LTD	Tenth Applicant

t/a MESHRITE

and

THE COMPETITION COMMISSION	Respondent
CAPE GATE (PTY) LTD	Second Respondent

Case number: CR093Jan07/OTH058Jul16

In the Application for Reopening of matter between:

THE COMPETITION COMMISSION

Applicant

and

ALLENS MESHCO (PTY) LTD

First Respondent

HENDOK (PTY) LTD

Second Respondent

WIRE FORCE (PTY) LTD

Third Respondent

AGRI WIRE (PTY) LTD

Fourth Respondent

AGRI WIRE NORTH (PTY) LTD

Fifth Respondent

AGRI WIRE UPINGTON (PTY) LTD

Sixth Respondent

CAPE WIRE (PTY) LTD

Seventh Respondent

FOREST WIRE (PTY) LTD

Eighth Respondent

INDEPENDENT GALVANISING (PTY) LTD

Ninth Respondent

ASSOCIATED WIRE INDUSTRIES (PTY) LTD

Tenth Respondent

t/a MESHRITE

CAPE GATE (PTY) LTD

Eleventh Respondent

and

Case numbers: CR093Jan07/STR087Aug16 & CR093Jan07/STR088Aug16

In the Applications to Strike out between:

ALLENS MESHCO (PTY) LTD

First Applicant

HENDOK (PTY) LTD

Second Applicant

WIRE FORCE (PTY) LTD

Third Applicant

AGRI WIRE (PTY) LTD

Fourth Applicant

AGRI WIRE NORTH (PTY) LTD

Fifth Applicant

AGRI WIRE UPINGTON (PTY) LTD

Sixth Applicant

CAPE WIRE (PTY) LTD

Seventh Applicant

FOREST WIRE (PTY) LTD

Eighth Applicant

INDEPENDENT GALVANISING (PTY) LTD **Ninth Applicant**

ASSOCIATED WIRE INDUSTRIES (PTY) LTD **Tenth Applicant**

t/a MESHRITE

and

THE COMPETITION COMMISSION **Respondent**

CAPE GATE (PTY) LTD **Second Respondent**

In re:

The complaint referrals between:

THE COMPETITION COMMISSION **Applicant**

and

CAPE GATE (PTY) LTD **First Respondent**

ALLENS MESHCO (PTY) LTD **Second Respondent**

HENDOK (PTY) LTD **Third Respondent**

WIRE FORCE (PTY) LTD **Fourth Respondent**

AGRI WIRE (PTY) LTD **Fifth Respondent**

AGRI WIRE NORTH (PTY) LTD **Sixth Respondent**

AGRI WIRE UPINGTON (PTY) LTD **Seventh Respondent**

CAPE WIRE (PTY) LTD **Eighth Respondent**

FOREST WIRE (PTY) LTD **Ninth Respondent**

INDEPENDENT GALVANISING (PTY) LTD **Tenth Respondent**

ASSOCIATED WIRE INDUSTRIES (PTY) LTD

t/a MESHRITE **Eleventh Respondent**

**CONSOLIDATED WIRE
INDUSTRIES (PTY) LTD** **Twelfth Respondent**

Panel: Anton Roskam (Presiding Member)
Andreas Wessels (Tribunal Member)
Fiona Tregenna (Tribunal Member)

Heard on: 12 August 2016

Orders issued on: 3 March 2017

Reasons issued on: 3 March 2017

Consolidated Decisions and Orders for Applications under case numbers:
CR093Jan07/SEP086Aug16 (**Separation of merits and quantum application**);
CR093Jan07/STR087Aug16 & CR093Jan07/STR088Aug16 (**Strike out applications**);
CR093Jan07/OTH058Jul16 (**Reopening application**)

INTRODUCTION

- [1] In the above matter the Competition Tribunal (**“the Tribunal”**) heard five applications. The first was brought by the Competition Commission (**“the Commission”**). The remaining four were filed by the second to eleventh respondents in the main matter, referred to as the **“Allens Meshco Group”** or **“AMG”**.
- [2] In the first application – **“the reopening application”** – the Commission sought to reopen its case in relation to the remedies aspect of its case against AMG.
- [3] The second application, which is dated 8 July 2016, sought to strike out an affidavit dated 6 July 2016 of Mr Legh, the attorney for Cape Gate (Pty) Limited (**“Cape Gate”**), the first respondent in the main matter. This affidavit was filed in the Commission’s amendment application, in which the Commission sought to amend its application in the main matter to include declaratory relief against the twelfth respondent, Consolidated Wire Industries (Pty) Ltd (**“CWI”**).¹The

¹ CWI is the leniency applicant in the main matter.

Commission later withdrew the amendment application before it was heard by the Tribunal.

- [4] The third application, which is dated 10 August 2016, sought to strike out Mr Legh's affidavit dated 25 July 2016, which had been filed by Mr Legh in relation to the Commission's reopening application. Mr Legh also filed a supplementary affidavit in the Commission's reopening application, which the Tribunal admitted.
- [5] The fourth was an application dated 10 August 2016 to have the merits and remedies of the complaint relating to AMG separated ("**the separation application**").
- [6] The fifth was an application dated 10 August 2016 to have AMG's strike out application dated 8 July 2016 separated from the other issues and adjudicated before the other applications.
- [7] The Tribunal held that it was not necessary to hear the second application (i.e. the strike out application relating to Cape Gate's answering affidavit of 6 July 2016) because this strike out application had been filed in the Commission's amendment application and the amendment application had been withdrawn. There was, therefore, nothing to strike out once the amendment application was not before us. Consequently, it was also not necessary to hear or determine the fifth application.
- [8] AMG requested that its separation application be dealt with first, as it submitted that if the separation application was granted, then it would no longer be necessary for the Tribunal to consider the other applications. This request was agreed to.

SEPARATION OF MERITS AND REMEDIES

- [9] AMG sought the separation of the merits from the remedies in respect of its case. AMG argued that no inconvenience would be suffered by any of the parties, as there is no overlap in the issues relating to the merits and remedies aspects of the complaint relating to AMG. AMG also submitted that the separation would result in a speedier resolution of the matter.

- [10] Cape Gate opposed AMG's application. The Commission did not oppose the application, but Mr Maenetje, who appeared for the Commission, made several submissions that he thought the Tribunal should consider.
- [11] In terms of Rule 55(1)(b) of the Tribunal's Rules, the Tribunal may have regard to the High Court Rules. Rule 33(4) of the High Court Rules² provides that in any pending action, a court may make an order to separately hear any question of law or fact unless it appears that the questions cannot conveniently be decided separately. Convenience does not refer to the parties' convenience only, but also to the convenience of the court granting the separation application³.
- [12] While the speedy resolution of litigation is an important factor to consider, there are others: for example, whether the issues that are to be heard separately are extricably linked⁴ and whether evidence will overlap⁵.
- [13] The issue of separation is nothing new to the current proceedings. Before the commencement of the hearing on the merits and at a pre-hearing convened by the Tribunal on 15 April 2015, the Tribunal directed that the merits and remedies not be separated.
- [14] The nature of this matter suggests that to grant a separation of the merits from the remedies would neither be to the advantage of the parties nor the Tribunal. The factual issues relating to the merits and the remedies are intertwined. This includes the duration of the contravention – whether the so-called price war period signified a break-up of the alleged cartel and the formation of an alleged new cartel when the price war ended. Cape Gate has conceded that it was part of a cartel, but alleges that its duration was shorter than that contended for by the Commission. AMG disputes that it was part of a cartel. These issues are intertwined and not easily pigeonholed into merits or remedies.

² Rule 33(4) states the following: "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

³ See Harms, "Civil Procedure in the High Court", paragraph B33.11.

⁴ See *Denel (Pty) Ltd v Vorster* 2004 4 SA 481 (SCA).

⁵ *Hotel, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C).

[15] Related to this are the issues about the present existence of the firms that make up the Allens Mescho Group and which of these firms should be the subject of any penalties, if AMG is found to have breached the Competition Act 89 of 1998 (“the Competition Act”).

[16] In addition, a separation might lead to piecemeal litigation because once the merits are determined there may be appeals, which would simply delay the final determination of the matter. Given the history of the litigation in this matter, this concern is real.

[17] For these reasons, we ruled that a separation of issues was not advantageous and convenient for the Tribunal and the parties.

REOPENING AND STRIKE OUT APPLICATIONS

[18] The reopening and the remaining strike out application were heard at the same time. We deal with the strike out application first.

Strike Out Application

[19] AMG’s reasons for applying for Mr Legh’s affidavit of 25 July 2016 to be struck out were: (i) the affidavit published confidential information; (ii) Mr Legh inspected the documents at the Commission’s office without representatives of AMG or its lawyers being present; (iii) it is not evident that Mr Legh signed the confidentiality undertaking; and, (iv) it is unclear whether he took copies of the documents.

[20] From the evidence in the affidavits the following appears to be the facts: The contents of Mr Legh’s affidavit of 25 July 2016, except for the information obtained from a credit bureau, Experian (Pty) Ltd (“**Experian**”), appears in the Commission’s affidavit as well. The information obtained from Experian is not confidential. Mr Legh deposed to a confidential and non-confidential version of his affidavit. There was no publication of the confidential version to anyone other than the Commission, AMG and the Tribunal’s panel members. When Mr Legh inspected AMG’s documents for the first time, AMG knew about this and did not send anyone to be present at this inspection. AMG’s attorneys knew that arrangements were being made for the second inspection, but failed to raise any

desire to attend or any concern about not being present at the inspection.⁶ Mr Legh signed the necessary confidentiality undertakings and took no copies of the documents.

[21] There is therefore no basis to strike out the affidavit.

Reopening Application

[22] On 26 May 2016, the Tribunal issued directives relating to the firms that form part of the Allens Meschco Group to discover their audited financial statements for 2009 to 2015. In respect of Independent Galvanising (Pty) Ltd, the tenth respondent, the Tribunal order it to discover its audited financial statements for the last two financial years in which it operated. The Tribunal published its reasons for its directive on 17 June 2016.

[23] After this directive and its reasons were made known, AMG made the documents available for inspection. Cape Gate and the Commission inspected the documents.

[24] In our directive of 26 May 2016, we stated that if any party wanted to re-open its case, it must deliver an application to this effect. We also stated that the application would have to fully motivate the reasons for this and why the evidence sought to be led was not led before the applicant closed its case.

[25] The Commission delivered an application in which it sought to reopen its case in respect of:

- “(i) “The determination of the statutory cap in accordance with section 59(2) of the Competition Act, 1998 (Act 89 of 1998) (“the Competition Act”) – and only in respect of determining the precise last completed financial year of normal economic activity where the financials provided on 22 June 2016 reflect zero turnover or a significantly reduced turnover, sometimes accompanied by a reduction in assets”; and

⁶ It is also doubtful whether Mr Legh’s inspection of these documents in the absence of an AMG representative could be a legitimate ground for striking out his affidavit.

- (ii) "The determination of the firm/s that will be held liable for the payment of any fines levied against any of the Second to Eleventh Respondents where the possibility exists that a business or portions of businesses may have been transferred to related firms or to firms contended by the Second to Eleventh Respondents to be part of a single economic entity."

[26] Mr Legh's affidavit of 25 July 2016 "painted a picture" of the facts that emerge from these documents as well as the documents from Experian. Mr Legh alleged that the picture that emerges from the audited financial statements is also found in the Commission's affidavits. According to them, the financial statements show, amongst other things, that the turnover and asset levels of the various entities within AMG have significantly diminished since 2007 and that some companies within the group paid huge dividends and disposed of large assets.

[27] Mr Legh also stated that the picture that emerges from the Experian documents, it appears that firms in the Allens Mescho Group have merged with other companies and deregistered, or are in the process of deregistering. It also appears that there have been resignations of directors and new companies formed that perform some of the businesses of firms in the Allens Mescho Group.

[28] AMG opposed the application and brought its application to strike out Mr Legh's affidavit.

[29] The parties submitted detailed heads of argument in which they summarised the law relating to this issue. One of the issues that a party applying to reopen its case must do is explain why it did not present the evidence before it closed its case. We also made this directive in our order of 26 May 2016. This was also emphasised by the Tribunal in the *National Association of Pharmaceutical Wholesalers*⁷ case, which referred to the case of *Mkhwanazi v van der Merwe*⁸. In that case, the court listed several factors to be considered when determining an application to re-open a case.⁹

⁷ See *National Association of Pharmaceutical Wholesalers and others vs Glaxo Welcome (Pty) Ltd and others* (Case No:68/IR/JUN 00).

⁸ 1970 (1) SA 609 (A) at 616-7.

⁹ At 6-6-7 it stated the following:

"The discretion under Rule 28(11) must be exercised judicially, upon a consideration of all relevant

[30] Notwithstanding a notably weak explanation from the Commission regarding the reasons why the evidence was not led timeously, it is evident that the evidence is material and necessary for us to make an informed determination.

[31] The documents referred to in the reopening application are important for at least two reasons.

[32] The first is to establish the relevant year for determining the cap on the administrative penalty. In this regard, it is worth noting that when Mr Geach, who appeared for AMG, was asked which is the relevant year for determining the statutory cap, he replied that 2012 was the relevant year because some AMG companies had a zero turnover in 2015. He claimed that in 2012 all the companies in the AMG group had what appears to be a normal turnover. This is precisely what must be determined. The newly discovered documents and

factors, and in essence it is a matter of fairness to both sides. It is inappropriate for judicial decisions to lay down immutable conditions which have to be satisfied before the relief sought can be granted. Over the years the Courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales, the pros against the cons.

The considerations which usually fall to be weighed, in an application by a plaintiff under Rule 28(11), include the following:

- i. The reason why the evidence was not led timeously.
- ii. The degree of materiality of the evidence.
- iii. The possibility that it may have been shaped to relieve the pinch of the shoe.
- iv. The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings de novo.
- v. The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.
- vi. The healing balm of an appropriate order as to costs.
- vii. The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the indeterminate way to litigation de novo in all its tedious amplitude.

The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client."

further evidence regarding them will be necessary to establish the last year of normal activity of the AMG firms in question.

[33] The second reason is determining which firm or firms the penalties should be directed to, if we find that the AMG companies breached the Competition Act. We cannot have a situation where penalties imposed on AMG and its companies cannot be recovered because of corporate changes that render one or more of the companies that form part of AMG mere shells.

[34] The Tribunal is not a civil court of law. It has statutory functions, which must be fulfilled, regardless of whether the Commission should have presented evidence before it closed its case. Therefore, if the Commission does not investigate these documents and present the evidence, the Tribunal would be required to obtain this evidence and conduct the hearing in an inquisitorial manner. If we did not, we would not be able to properly determine the issues referred to above and we would be failing in our duties. Thus, whatever the process, the evidence must be presented so that we can determine the matter properly. It makes far greater sense for the Commission to present this evidence and for AMG to counteract it than for us to conduct a purely inquisitorial process.

[35] The reopening is necessary because of the high degree of materiality of the documents and evidence sought to be introduced and led. Accordingly, we grant the Commission's application to reopen its case against AMG in respect of the determination of remedies.

[36] We therefore make the following order.

ORDER

1. AMG's application to separate merits from remedies under case number CR093Jan07/SEP086Aug16 is dismissed.
2. The Commission's application to reopen its case under case number CR093Jan07/OTH058Jul16 is granted. The case may be reopened to the extent that it deals with the issues set out in paragraph [25] above.

3. AMG's strike out application in relation to Mr Legh's affidavit of 25 July 2016 under case number CR093Jan07/STR088Aug16 is dismissed.
4. There is no order as to costs.



3 March 2017

Mr Anton Roskam

Date

Prof. Fiona Tregenna and Mr Andreas Wessels concurring.

Tribunal Researcher:	Caroline Sserufusa
For the Allens Meshco Group:	Adv. BP Geach SC instructed by Roestoff and Kruse Attorneys
For Cape Gate:	Adv. J Campbell SC instructed by Bowman Gilfillan Attorneys
For the Commission:	Adv. NH Maenetje SC and BD Lekokotla instructed by the State Attorney