competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR223Mar17/EXC064May17

In the Exception application between:

UNILEVER SOUTH AFRICA (PTY) LTD **Excipient (First Respondent)**

and

THE COMPETITION COMMISSION

In re:

The Complaint referral between:

THE COMPETITION COMMISSION **Applicant**

and

UNILEVER SOUTH AFRICA (PTY) LTD **First Respondent**

SIME DARBY HUDSON & KNIGHT (PTY) LTD **Second Respondent**

Panel	:	Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Fiona Tregenna (Tribunal Member)
Heard on	:	27 September 2017
Order issued on	:	7 November 2017
Reasons issued on	:	7 November 2017

REASONS AND ORDER

Introduction

[1] On 27 September 2017, the Competition Tribunal ("the Tribunal") heard an exception application brought by Unilever South Africa (Pty) Ltd ("Unilever") against the Competition Commission's ("the Commission") complaint referral. Unilever sought an order from the Tribunal to direct the Commission to amend its referral, so as to enable Unilever to properly answer the case brought against it. The Tribunal has ordered the Commission to file a supplementary affidavit. The reasons for our decision follow.

Background

[2] On 1 March 2017, the Commission referred a complaint to the Tribunal alleging that between 2004-2013, Unilever and Sime Darby Hudson & Knight (Pty) Ltd[1] ("Sime Darby") (herein also referred to as the "respondents") who competed with one another in the market for the supply of bakery and cooking products, divided the market by allocating the market for various products between them. This market division was effected through a series of agreements.

[3] In its referral the Commission alleges that there was a general agreement to divide the market in respect of certain products. It alleges that this agreement had its *"origin"* from the Sale of Refinery Business and Bakery agreement ("Sale of Business agreement"), which was concluded by Unilever and Sime Darby in 2004, when Unilever sold its refinery business to Sime Darby. The relevant clause in the Sale of Business agreement stipulates that the respondents will not compete with each other in relation to certain product types, sizes and distribution channels where the products were sold. It is alleged that there is a non-compete table which listed the products, and was annexed to the agreement.

[4] It appears that the clause was later amended in 2005, when Unilever sold its Crispa and Holsum business to Sime Darby, with the aim of removing white fats and adjusting pack sizes on the list of products that fell under the clause. The amendment precluded Sime Darby from manufacturing and supplying frying oil/fat

[1] Sime Darby entered into a settlement agreement with the Commission which was made an order of this Tribunal in July 2016.

in pack sizes equal to or less than 5 kilograms ("kg") and 5 litres ("l"), 15 kg and 15l and 25 kg and 25l. All the precluded products were reserved for Unilever.

[5] The Commission further alleges that additional agreements were entered into namely the Raw Materials and Processed Oil agreement ("Raw Materials agreement") and the Co-packaging agreement, which made it possible for the respondents to monitor compliance of the non-compete clause. The Commission concludes that the collusive agreements are a serious contravention of section 4(1)(b)(ii) of the Competition Act ("the Act").[2] The Raw Materials agreement the Commission alleges, also provided for something described as a 'Smart Partnership' between the two firms which was an arrangement which would survive beyond the existence of the Raw Materials agreement.

The Exception application

[6] Unilever submitted that the Commission's referral is vague and embarrassing. Unilever's application was premised on two grounds; that the Commission's case is confusing and second that it lacks specificity. We agree with this criticism despite the Commission's contention that this was mere carping. [3]

[7] The confusion results from the fact that the Commission purports to rely on the formal agreements described in the referral i.e. the Sales of Businesses agreements, the Raw Materials agreement and the Co-packaging agreement as the source of the collusion, but at the same time appears to rely on the existence of a more general agreement not to compete. Thus in paragraph 14 of the referral the Commission refers to the fact that the respondents had "*a general agreement not to compete with each other…*" which is described as having its "*…origin from*

[2] Act 89 of 1998, as amended.

[3] The Commission did not file an answer to the application, but made oral submissions contained in its written heads of argument. At the hearing the Commission argued that it is clear from its referral what case Unilever has to meet. The Commission argued that the nature of its complaint is that the respondents had a general agreement which emanated from the Sale of Business agreement read together with the Raw Materials agreement to divide markets, territories, customers and specific types of goods for bakery and cooking products. The Commission further argues that these are sufficient material facts for Unilever to answer to, and if Unilever is unclear as to what case it has to answer to, it can either admit, or deny or plead ignorance of these facts. The Commission further argued that the Commission's referral sets out in clear and unambiguous terms its case which is, whether or not Unilever was involved in anti-competitive conduct from 2004-2013.

the [Sale of Business agreement of 2004]". This manner of pleading is confusing, because it is not clear if the reference to the 'general agreement' is something separate to the specific named contracts set out in paragraph 14 and then later in the referral. Put differently, do the contracts constitute the universe of the market division, or do the contracts simply manifest an underlying agreement in more general terms to affect a market division that exists independently of, and apart from, the agreement?

[8] Later on in paragraph 19 of the referral the Commission, whilst specifying a particular agreement, (this time the Raw Material agreement) alleges that this complemented and reinforced the agreement not to compete. The same problem of ambiguity arises here again. It is not clear which agreement this is said to reinforce; an independent general agreement that exists outside of the contracts or if this reference is confined to the 2004 Sale of Business agreement.[4]

[9] Put at its most simple, when relying on a series of agreements over a period of time to allege a market division and where these agreements manifest themselves in the guise of conventional commercial contracts – sales of businesses and supply agreements - context matters to explain why they may be wolves in the guise of sheep's clothing.

[10] But even the references to the contracts specifically alleged have created confusion as it emerged in the course of argument. To give two examples.

[11] In paragraph 20 of the referral the Commission alleges that the Raw Materials agreement extended the duration of the non-compete agreement. It's not clear why and how it does this.

[12] Paragraph 21 of the Commission's referral refers to the 'Smart Partnership. But beyond alleging how this partnership is described, its relevance if any, to the

[4] As we understand the chronology, the Raw material agreement was concluded in 2004 and was subsequent to the first Sale agreement (the refinery and Bakery one also in 2004) but prior to the second one involving Crispa and Holsum alleged to have been in 2005.

alleged contravention is not apparent. If it is, the Commission needs to allege this and explain why.

[13] Finally paragraph 16 of the referral is drafted in the most opaque language. It states as follows:

> 13.1 *"In or about 2005, when Unilever sold its Crispa and Holsum business to Sime Darby, the respondents amended the non-compete table to remove white fats and adjust pack sizes on the list of products in respect of which they agreed not to compete. The amended Non-compete table is attached hereto as annexure "TM9"."*

[14] It is unclear whether this expands, modifies or reduces the then extant market division. A better explanation of what was occurring is required.

[15] Tribunal rule 15(2) stipulates as follows;

> 15.1 *"Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –*
>
> *(a) a concise statement of the grounds of the complaint; and*
>
> *(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be."*

[16] The requirements of rule 15 are very clear, namely that any complainant that files a referral to the Tribunal must set out a precise statement of grounds and material facts or points of law.

[17] As explained above the Commission has not met this standard with the current referral, a respondent is not required to have to join the dots.

[18] Unilever also complains that the Commission relies in the alternative on the conduct at issue, constituting a concerted practice. Case law suggests that when reliance is placed on a concerted practice in addition to an agreement this requires

more specific pleading.[5] We have held that the same facts may give rise to an inference of either and if this is clearly alleged, this would suffice.[6]

[19] However this does not necessarily arise in every situation. In this particular case if the Commission is restricting its case to just the written contracts alleged in the referral then it would be difficult to appreciate how they would also constitute a concerted practice, as they would appear to be unambiguously in the form of agreements as the Act defines them. However, if the Commission is relying on more than the mere agreements – and this point as noted earlier is not clear from the pleadings – then the case may go further than mere contracts and rely on conduct that constitutes concerted practices as well. If this is the case then the Commission needs to state this clearly.

Conclusion

[20] In light of the above, we conclude that the Commission's referral is vague and embarrassing as it is not clear which agreements the Commission relies on or how many agreements form part of the subject matter. Further clarity is thus required from the Commission in order for Unilever to answer to the case brought against it. Unilever did not seek dismissal of the referral if the exception was upheld and usefully provided suggestions for further particularity most of which we have adopted in the order we have given below.

[5] *Netstar (Pty) Ltd v Competition Commission 2011 (3) SA 171 (CAC).*
[6] *Omnico (Pty) Ltd & Others v The Competition Commission; case number; 73/CR/Jul12.*

ORDER

1. Unilever's exception to the Commission's complaint referral dated 1 March 2017 is upheld.

2. The Commission is directed to file a supplementary affidavit within fifteen (15) business days of the date of this order, addressing the following;

   2.1 Whether the Commission will rely on any facts preceding the Sale of Business agreement referred to in paragraph 14 of the referral to establish the conclusion of market division that it alleges in paragraph 13 of the referral.

   2.2 Whether the Commission relies solely upon the Sales of Business agreements or some other agreement extraneous to those agreements (in addition or in substitution of them). If the latter, when and by whom those agreement/s were concluded or reached and what their terms were (if the agreements were in writing, copies should be provided);

   2.3 Whether the Sale of Business agreement alleged in paragraph 16 of the referral, constituted an addition to, modification of or reduction of the alleged non-compete agreement referred to in paragraph 14 of the referral. What was the context in which this agreement was alleged to have arisen? If preceded by some other agreement when and by whom that agreement was concluded or reached, and what its terms were (if the agreement is in writing, a copy should be provided);

   2.4 Whether the Commission relies on the provisions of the Raw Materials agreement and the Co-packaging agreement in and of themselves to allege a contravention of section 4(1)(b) of the Act, and if so, how. In other words, does the Commission rely on these agreements (the Raw Materials agreement and the Co-packaging agreement) only to suggest that they were used to extend and monitor the restraint in the Sale of Business agreement, or whether by themselves the provisions of these agreements contravene the Act (and if so, specifically which provisions)? How is it

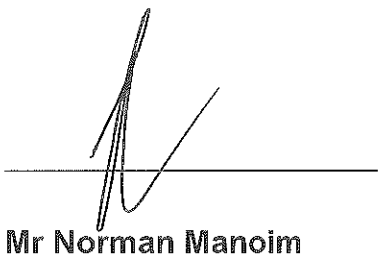
alleged that the Raw Materials agreement extended the duration of the non-compete agreement in particular what was its duration prior to this and how long did it extend thereafter, subsequently and by virtue of what provision?

2.5 The particulars set out in paragraph 2.4 above are repeated in respect of the Smart Partnership insofar as this is not dealt with already in providing particulars in respect of 2.4.

2.6 Whether the Commission relies upon a concerted practice, and if so, whether the conduct relied upon for the concerted practice is the same as that relied upon for the impugned agreement/s or something different or additional thereto and if it is something different or additional, what precisely that conduct is.

3. Upon receipt of the Commission's supplementary affidavit, Unilever must file its answering affidavit within twenty (20) business days.

4. There is no order as to costs.



Mr Norman Manoim

7 November 2017

Date

Prof. Fiona Tregenna and Ms Yasmin Carrim concurring

Tribunal Researcher: Caroline Sserufusa

For the 1st Respondent: AR Bhana SC and AG Gotz instructed by Baker McKenzie

For the Commission: V Ngalwana SC and Z Ngwenya instructed by Mogaswa Inc Attorneys