



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: CRH126Nov11/DSC091Jun16

In the application for further and better discovery between:

JACOBUS PETRUS HENDRIK DU PLESSIS	First Applicant
JUDEX BURNETT	Second Applicant
<i>and</i>	
LINPAC PLASTICS LIMITED (UK)	First Respondent
LINPAC PLASTICS (SOUTH AFRICA) (PTY) LTD	Second Respondent
ATLANTIC FORMING (PTY) LTD t.a LINPAC DISTRIBUTION	Third Respondent
ANKER MANUFACTURING (PTY) LTD	Fourth Respondent

In re:

The complaint referral between

JACOBUS PETRUS HENDRIK DU PLESSIS	First Applicant
JUDEX BURNETT	Second Applicant
<i>and</i>	
LINPAC PLASTICS LIMITED (UK)	First Respondent
LINPAC PLASTICS (SOUTH AFRICA) (PTY) LTD	Second Respondent
ATLANTIC FORMING (PTY) LTD t.a LINPAC DISTRIBUTION	Third Respondent
ANKER MANUFACTURING (PTY) LTD	Fourth Respondent

Panel	: Norman Manoim (Presiding Member)
	: Anton Roskam (Tribunal Member)
	: Andreas Wessels (Tribunal Member)
Heard on	: 26 August 2016
Order Issued on	: 21 October 2016
Reasons Issued on	: 21 October 2016

REASONS FOR DECISION:

APPLICATION BY THE FIRST AND SECOND RESPONDENT FOR FURTHER AND BETTER DISCOVERY

Introduction

1. This matter deals with an application for further and better discovery in a matter which has been referred to the Competition Tribunal ('Tribunal') from the Western Cape High Court at the instance of the applicants.
2. On 17 June 2016 the applicants Jacobus Petrus Hendrik du Plessis ('Du Plessis') and Judex Burnett ('Burnett') filed an application for further and better discovery. The Tribunal heard the matter on 26 August 2016 and our order and the reasons for it are set out below.

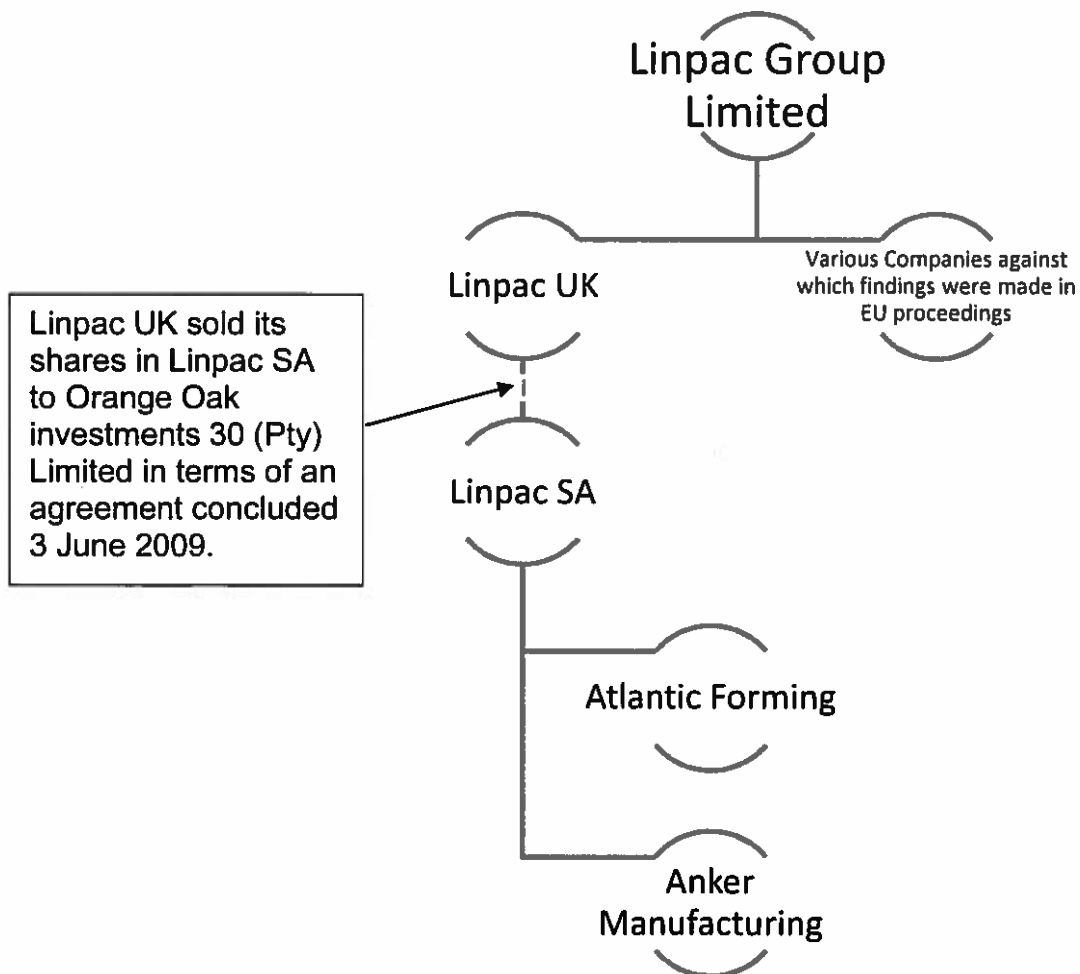
Background

3. The applicants in the matter before us face a damages suit in the Western Cape High Court arising from their alleged breach of a restraint of trade agreement. They contend that one of the issues in that matter is whether the plaintiffs claiming damages, the respondents in the matter before us, can do so in light of their involvement in conduct that is allegedly anticompetitive. Because the High Courts are precluded from determining whether particular conduct has contravened the Competition Act 89 of 1998 ('the Act'), the issue was referred to the Tribunal on 10 October 2011 to determine in terms of section 65(2)(b) of the Act.¹ It is from this referral that the application for further and better discovery before us stems.
4. The first respondent in the matter before us, and plaintiff in the High Court matter is Linpac Plastics Ltd ('Linpac UK'). Linpac UK, now trading as Linpac Packaging Ltd, is a company duly registered under the laws of England.² Linpac UK is a subsidiary of Linpac Group Ltd ('Linpac Group'), a group with a number of subsidiaries spread across the globe.

¹ We have previously had to decide a dispute between these parties relating to prescription. See our decision *Linpac Plastics and another v Jacobus Petrus Du Plessis and Another* (CT case number 019513) 06 November 2015.

² Registration number 949597. Registered office situated at 3180 Park Square, Birmingham Business Park, Birmingham B37 7yn.

5. Linpac UK was, until 3 June 2009, the holding company for Linpac Plastics (South Africa) (Pty) Ltd ('Linpac SA'), the second respondent in the matter before us and second plaintiff in the High Court matter. In 2009, Linpac UK sold its shares in Linpac SA to Orange Oak Investments 30 (Pty) Ltd ('Orange Oak'). In terms of the sales agreement, the payment of the fourth tranche of the payment price is defined as claim proceeds, which includes the amount to which Linpac SA may become entitled to as a result of the pending High Court action. Orange Oak is not a party to any of the proceedings before us.
6. Linpac SA has two wholly owned subsidiaries, Atlantic Forming (Pty) Ltd, trading as Linpac Distribution ('Linpac Distribution') and Anker Manufacturing (Pty) Ltd ('Anker'). Linpac Distribution and Anker are the third and fourth respondents before us and the third and fourth plaintiffs in the High Court matter respectively.
7. The structure of the Linpac Group is confusing. Usefully the respondents provided an organogram which makes the group structure more comprehensible. It is set out below:



Application for Further and Better Discovery

8. On 17 June 2016 the applicants applied to the Tribunal for further and better discovery.
9. The respondents opposed the application. The primary basis for their opposition was that the documents were being sought from the first respondent and that it was not properly a party to the matter before the Tribunal.
10. This basis for opposition naturally astounded the applicants who spent much of their energies in the replying affidavit and heads of argument pointing out why the first respondent was a party to these proceedings.
11. However, when it came to the hearing before us, Mr. Wilson, who appeared for the respondents, did not persist with this argument. Further Mr. Wilson made various tenders that have limited the remaining disputes. In the first place, he agreed that the first respondent must file a discovery affidavit, something it had not done to date. Second, he agreed that the first respondent would supply one of the disputed items of discovery, the Groups' antitrust policy. Third, he agreed that one of the items of documents to be discovered by the first respondent – if they existed and we did not understand him to concede that they did – were any communications that existed between the first respondent and the applicants regarding the allegations stated in paragraph 7(ii) of the Complaint referral ('the main matter'). In this paragraph the applicants make the following allegation that is material to the dispute of fact in the main matter. The applicants were alleging which parties were involved in the contraventions. They mention themselves and other names but allege, among other things, in this context that:

"These persons [i.e the applicant's and their alleged co-conspirators] acted upon the instructions and with the consent of the management of Linpac's parent company in the United Kingdom, Linpac Plastics Limited." [i.e. the first respondent].

12. Richard Paul, then of the first respondent, who deposed to the answering affidavit in the main matter put these facts in issue with a denial.³
13. Should the first respondent have in its possession any documents contemplated by the applicants in paragraph 7(ii) we understand the respondents to correctly concede that they must be discovered. We nevertheless include this obligation in our order.
14. As regards the respondents antitrust policies there was no dispute in principle to producing them and it appeared a document to this effect may already have been discovered. The applicants were concerned that those policies in operation at the relevant time of the alleged contravention may not have been discovered and to that extent we are persuaded that if there are earlier versions of this policy, it or they, should be discovered. Again we do not understand the respondents to place this in issue, but we make the order nevertheless.

Documents still in dispute

15. It is common cause that the European Union has taken enforcement action against five subsidiaries of the Linpac Group (see diagram above) for involvement in cartel activity in the European Economic Area. These cartel activities occurred during the period June 2002 and February 2008. The cartel activity in the main case relates to the period 1999 till about 2007 so there is some overlap in the time periods of the alleged collusion in this case and the collusion which is not in dispute that occurred in Europe.
16. In items 1 to 5 of their schedule the applicants seek a range of internal documents from the first respondent that relate to the European cartels. We set these out below:
 1. *"All minutes of meetings, correspondence including letters, faxes and emails notes and any other documentation exchanged between Linpac Plastic*

³ Answering affidavit in the main matter paragraphs 37.2-3.

limited and/ or Linpac group LTD and Vitembal and/ or Huhtamäki and/or sirap gema and/or Coopbox and/ or Nespak and or/ Magic Pack and/ or Silver Plastics and/or Propack between June 2002 and February 2008 in regard to Price fixing, allocation of markets and customers, bid rigging and exchange of commercially sensitive information by 5 separate cartels for retail food packaging in a large part of the European Economic Area.

2. *All minutes of meetings, correspondence including letters, faxes, and emails notes and any other documentation exchanged between Linpac plastics limited and/ or Linpac group limited and the European commission during or about the period June 2002 and June 2015 in regard to price fixing, allocation of markets and customers, bid rigging and exchange of commercially sensitive information.”*
3. *“A copy of Linpac Groups submissions to the European Commission under and in terms of which it and or its subsidiaries received full immunity from fines set by the European commission as it was the first company to reveal cartel activity to the commission, thereby avoiding a fine of £145065000.00.*
4. *All and any findings made by the European Commission against Linpac Group Ltd and/ or any of its subsidiaries in regard to anti-competitive practices undertaken by Linpac Plastics limited and/ or Linpac Group Ltd or anti-competitive practices in which Linpac Plastics Limited was directly or indirectly involved in the period June 2002 to February 2008.*
5. *All correspondence between Linpac Group Ltd and Linpac Plastics limited regarding the above.”⁴*

17. The respondents dispute the relevance of these documents. They argue that there is no nexus in fact nor in the pleadings in this matter between the activities of the five firms implicated in Europe and the activities of the respondents in South Africa.

⁴ Schedule of discovery documents in issue between the parties, submitted by the applicants 23 August 2016 ('discovery schedule').

In the first place the first respondent was not implicated in Europe nor was its parent, Linpac Group. There is thus no link between any of the respondents in this matter and the siblings implicated in Europe.

18. The applicants argued that there might be something in this documentation which would provide some clues as to how the alleged cartel operations in South Africa ran. This is speculative. We do not even know if these documents are in the first respondents' possession since, as noted earlier, it was not implicated in cartel activities in Europe nor was its parent, Linpac Group.
19. The applicants have annexed to their papers a copy of an opinion by an Advisory Committee on restrictive agreements which advised the European Commission on its proposed enforcement actions.⁵ In this opinion, which is published in the Official Journal of the European Union, the Committee makes the following comment; it says it agrees with the Commission that: *"the undertakings concerned by the draft decision have participated in separate single and continuous infringements."*
20. This extract not only does not support the applicants' case for discovery but directly contradicts it. According to this opinion not only were the five cartels not part of a worldwide cartel but there was no evidence to suggest they even formed part of a European wide conspiracy. Each was "separate" thus undermining any argument for their possible relevance to an alleged South African conspiracy. It is also not clear that any of these documents would be in the possession of the first respondent which, as we stated earlier, was not found to have been a party to any of the five cartels uncovered in Europe.
21. We find that the applicants have not made out a case for why these documents may be in the possession of the first respondent nor, if they are, why they are relevant to the current dispute.
22. Finally we must deal with a new argument raised in the hearing by Mr. Van Riet who appeared for the applicants. He argued that since the first respondent was

⁵ Annexure F, Hearing Record page 67, paragraph 3.

now agreeing to provide a discovery affidavit, we should not make any order yet until the applicants had sight of this affidavit. Whilst he is correct that a discovery affidavit would normally be provided before an application to compel, we have sufficient information before us to make the orders that we do and this at least reduces the issues presently in dispute between the parties.

23. As far as costs are concerned each side has only been partially successful. The respondents should not have adopted the attitude that the first respondent was not a party to this litigation, a stance sensibly dropped at the hearing, but which put the applicants to much trouble to dispute. The applicants, however, have not been successful in seeking items 1- 5 of their amended schedule. We consider for this reason that each side should pay its own costs.

24. We have provided shorter time periods than we would normally do for the first respondent to comply with our order. This is because given the proximity of the hearing dates, granting a longer period would have put those dates in jeopardy. We do not think this expedited period will be unfair to the first respondent. This is because the order largely corresponds with the tender made at the hearing. The only items in dispute were those we declined to order discovery of.

Order

25. After having heard the parties in this application the Competition Tribunal ('Tribunal') orders as follows:

- 25.1. The first respondent is ordered to make general discovery within 5 (five) business days of this order.

- 25.2. Notwithstanding the order in point 1 (one) above, the first respondent is ordered to discover the following documents or data within 5 (five) business days of the date of this order:

25.2.1. Copies of Linpac Group (Pty) Ltd's policies including divisional standing orders and anti-trust policies in relation to the period 2002-2008 referred to by Richard Paul at paragraph 28.7 of his affidavit of 15 December 2011.

25.2.2. Any documents addressing the allegation that Kobus Du Plessis, Carl Du Plessis and/ or JD Burnett acted upon the instruction, consent and/or knowledge of the first respondent during the commission of the alleged contraventions set out in the complaint referral of 18 November 2011.

25.3. The application for discovery of items 1-5 in the schedule dated 23 August 2016 is dismissed

25.4. No order is made regarding costs.



Norman Manoim

21 October 2016
Date

Anton Roskam and Andreas Wessels concurring

Tribunal Researcher: Alistair Dey-van Heerden

For the applicants: Mr R S Van Riet SC
Instructed by: Minde, Shapiro and Smith Attorneys

For the respondents: Mr J Wilson SC
Instructed by: Webber Wentzel Attorneys