



THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case numbers: CRP238Mar15/PIL120Sep16 (*In Limine* Application);

CRP238Mar15/SUB017May16 (Subpoena Challenge Application);

CRP238Mar16/OTH186Dec16 (Dixon Documents Application)

In the matter between:

GLENN LLEWELLYN GELDENHUIS **First Applicant**

MARIA MANUELA GONCALVES DA FONSECA **Second Applicant**

THE SOUTH AFRICAN BATTERY MANUFACTURERS' ASSOCIATION **Third Applicant**

and

THE SOUTH AFRICAN BATTERIES IMPORTERS ASSOCIATION **First Respondent**

HUDACO TRADING PROPRIETARY LIMITED t/a DELTEC POWER DISTRIBUTORS **Second Respondent**

HUDACO TRADING PROPRIETARY LIMITED t/a SPECIALISED BATTERY SYSTEMS **Third Respondent**

ENERTEC BATTERIES PROPRIETARY LIMITED **Fourth Respondent**

PROBE CORPORATION SOUTH AFRICA PROPRIETARY LIMITED **Fifth Respondent**

TIAUTO PROPRIETARY LIMITED t/a YSA **Sixth Respondent**

In re: the complaint referral between:

THE SOUTH AFRICAN BATTERIES IMPORTERS **First Applicant**

ASSOCIATION

**HUDACO TRADING PROPRIETARY LIMITED t/a
DELTEC POWER DISTRIBUTORS** **Second Applicant**

**HUDACO TRADING PROPRIETARY LIMITED t/a
SPECIALISED BATTERY SYSTEMS** **Third Applicant**

ENERTEC BATTERIES PROPRIETARY LIMITED **Fourth Applicant**

**PROBE CORPORATION SOUTH AFRICA
PROPRIETARY LIMITED** **Fifth Applicant**

TIAUTO PROPRIETARY LIMITED t/a YSA **Sixth Applicant**

and

FIRST NATIONAL BATTERY PROPRIETARY LIMITED **First Respondent**

**POWERTECH INDUSTRIES PROPRIETARY LIMITED t/a
WILLARD BATTERIES** **Second Respondent**

**DONAVENTA HOLDINGS PROPRIETARY LIMITED t/a
DIXON BATTERIES** **Third Respondent**

**BRIDGESTONE SOUTH AFRICA RETAIL PROPRIETARY
LIMITED t/a SUPAQUICK** **Fourth Respondent**

HI-Q AUTOMOTIVE **Fifth Respondent**

BATTERY CENTRE PROPRIETARY LIMITED **Sixth Respondent**

WILLARD BATTERIES SOUTH AFRICA LIMITED **Seventh Respondent**

THE COMPETITION COMMISSION OF SOUTH AFRICA **Eighth Respondent**

Panel : Anton Roskam (Presiding Member)
Medi Mokuena (Tribunal Member)
Imraan Valodia (Tribunal Member)

Heard on : 28 September 2016, 19 April 2017

Reasons and Order issued on : 03 August 2017

DECISION AND ORDER

Introduction

- [1] The applicants¹ in this matter applied for orders that paragraphs 1 to 27 of annexure A to the subpoenas (issued 6 April 2016), addressed to the first and second applicants, be set aside and declared to be of no force and effect. In the alternative, the applicants sought that paragraphs 1 to 4 and 8 and 9, be set aside to the extent that they require the disclosure of documents that predate the commencement of the Competition Act.² The respondents³ opposed the application. This application is referred to as "*the subpoena application*".
- [2] At the commencement of the hearing on 28 September 2016, the respondents challenged the jurisdiction of the Tribunal.⁴ The Tribunal heard argument on the jurisdiction issue first. The respondents argued that the Tribunal should first determine the jurisdiction matter before hearing argument on the merits, as they might wish to appeal the Tribunal's ruling. Following lengthy argument about this, the Tribunal directed that the parties deal with the merits and that the jurisdiction ruling be determined with the merits of the application insofar as this was necessary. Argument on the merits then commenced.
- [3] During argument about the merits on 28 September 2016, a dispute arose about the admissibility of certain documents, which had been produced by Mr Russell Dixon.⁵ The Dixon documents had been furnished to the Tribunal pursuant to a Tribunal summons issued to Mr Dixon. They had, however, not been attached to the respondents' answering papers. Argument on the merits was not concluded on 28 September 2016.

¹ The first applicant, Mr G L Geldenhuis, is the chairperson of SABMA, the second applicant, Ms MMG Da Fonseca, is the personal assistant to Mr Geldenhuis, and the third applicant is the South African Battery Manufacturers' Association (SABMA). They are not respondents in the main complaint referral.

² Act 89 of 1998 as amended.

³ The first respondent is the South African Batteries Importers Association (SABIA). The second to further respondents are five of SABIA's members: Hudaco Trading (Pty) Ltd t/a Deltec Power Distributors, Hudaco Trading (Pty) Ltd t/a Specialised Battery Systems, Enertec Batteries (Pty) Ltd, Probe Corporation South Africa (Pty) Ltd and Tiauto (Pty) Ltd t/a YSA.

⁴ The Competition Tribunal.

⁵ For convenience, these documents are referred to as "the Dixon documents".

- [4] During the adjournment, the dispute about the admissibility of the "Dixon documents" escalated. On 2 November 2016, and pursuant to correspondence between the parties themselves and the Tribunal, the Tribunal directed that if the respondents wished to introduce the Dixon documents at that stage of the proceedings, they had to do so by way of a written application, which the applicants could oppose. The respondents duly brought this application, which was opposed. This application is referred to as "*the Dixon application*". For convenience, we refer to the parties as they are cited in the subpoena application.
- [5] Following further correspondence between the parties, and between the parties and the Tribunal, it was evident that the parties could not agree upon a date for the hearing to resume. The Tribunal then set the matter down unilaterally.
- [6] At the resumption of the hearing on 19 April 2017, the parties indicated as follows: The respondents had made a proposal to limit the scope of the subpoenas. The applicants responded to the effect that certain of these documents did not exist or were not in their possession, and that others were not relevant. The applicants' attorneys undertook to provide affidavits from the first and second applicants regarding the documents that did not exist or were not in their possession. This meant that only three of the 27 items listed in annexure A to the subpoenas remained in issue. These were the documents referred to in paragraphs 18, 19 and 21.
- [7] In addition, the respondents also indicated that in the light of these developments, it was not necessary to pursue the Dixon application.
- [8] Therefore, the issues in dispute were now narrowed down to: (a) the Tribunal's jurisdiction in the subpoena application, which the respondents persisted with; (b) whether paragraphs 18, 19 and 21 of the annexure A to the subpoenas should be set aside and declared to be of no force and effect; (c) the costs of the subpoena application; and (d) the costs of the Dixon application.
- [9] Before dealing with the jurisdictional issues, it is necessary to contextualise the issues in dispute by providing a brief background to the complaint referral and the subpoena.

The Complaint Referral and the Summons

- [10] In 2014, SABIA lodged a complaint against various manufacturers and retailers of automotive batteries. After investigating the complaint, the Commission⁶ declined to refer it to the Tribunal. In 2015, SABIA self-referred the complaint to the Tribunal.
- [11] The complaint referral affidavit alleges breaches of: (a) section 4(1)(b)(i) of the Competition Act as between the first to third respondents in the complaint referral, First National Battery⁷, Willard⁸ and Dixon⁹; and (b) section 5(1) and section 8(c) by two of the automotive battery producers, FNB and Willard.
- [12] The section 4(1)(b)(i) complaint concerns the allegation that the three battery producers fixed the battery prices into the “aftermarket”, including the so-called battery scrap surcharge. The allegation relating to the scrap surcharge is that First National Battery, Willard and Dixon agreed to fix the surcharge under the auspices of SABMA. SABMA is not cited as a respondent in the complaint referral.
- [13] The sections 5(1) and 8(c) complaint related to allegations concerning the vertical relationships between First National Battery and Willard with battery distributors, retailers or franchisees, which constitute the remainder of the respondents to the complaint referral.
- [14] The applicants in the complaint referral have settled the matter with all the respondents except Dixon. In other words, Dixon is the only party against which the complaint referral is proceeding. Therefore, the complaints relating to breaches of sections 5(1) and 8(c) of the Competition Act are no longer relevant.
- [15] The two summonses, which are identically-worded and which the Tribunal issued pursuant to SABIA’s request, were initially issued on 6 January 2016. They were re-issued on 5 April 2016 after a return of non-service from the sheriff. Each

⁶ The Competition Commission.

⁷ First National Battery (Pty) Ltd.

⁸ Powertech Industries (Pty) Ltd t/a Willard Batteries.

⁹ Donaventa Holdings (Pty) Ltd t/a Dixon Batteries.

summons is, in effect, a subpoena *duces tecum*¹⁰. It requires SABMA to deliver a long list of documents contained in annexure A to the summons. When the summonses were initially issued the settlement agreements with the respondents in the complaint referral had not been concluded, but when they were re-issued in April 2016 they had been concluded; and therefore, the only issue before the Tribunal was the alleged breach by Dixon of section 4(1)(b)(i) of the Competition Act.

The Tribunal's Jurisdiction

[16] As noted earlier, the respondents contended that the Tribunal does not have the requisite jurisdiction to set aside the subpoenas. Before considering the respondents' contentions, the relevant sections of the Competition Act are reviewed.

[17] The Tribunal is a creature of statute. It is not a court of law. It must, as is stipulated in section 26(1)(d) of the Competition Act, exercise its functions in accordance with the Act.

[18] In terms of section 52(2)(d), Tribunal hearings must be conducted in public, as expeditiously as possible and in accordance with the principles of natural justice. In addition, these hearings may be conducted informally and in an inquisitorial manner.

[19] In this context section 27(1)(d) provides the Tribunal with the power to "*make any ruling or order necessary or incidental to the performance of its functions in terms of [the Competition Act].*" Related to this are the provisions of sections 55(1) and (2) which state:

"55. Rules of procedure.

(1) *Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter*

¹⁰ A subpoena *duces tecum* is a summons ordering the recipient to appear before a court or tribunal and produce documents or other tangible evidence for use at a hearing or trial.

of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52 (2).

(2) *The Tribunal may condone any technical irregularities arising in any of its proceedings."*

[20] The power to issue a summons is provided for in section 54. cThat section is entitled "Powers of member presiding at hearing". Subsection (c) stipulates as follows:

"The member of the Competition Tribunal presiding at a hearing may–

(c) *summon or order any person–*

(i) *to produce any book, document or item necessary for the purposes of the hearing; or*

(ii) *to perform any other act in relation to this Act."*

[21] The respondents' contention was that while the Competition Act provides the Tribunal with a power to issue a summons or subpoena, it does not provide it with the power to set aside a summons or subpoena.

[22] In support of this, Mr Bhana, who appeared for the respondents on 28 September 2016, submitted that: (a) unlike the High Court, the Tribunal as a creature of statute does not have inherent powers to set aside a subpoena; (b) unlike in the High Court where the Registrar must issue a subpoena and has no discretion whether or not to issue it, the presiding Tribunal member has a discretion; (c) the subpoena application before us was a review application that required the Tribunal to review itself, which it cannot do; (d) the Tribunal has no powers to review itself and once it has exercised its power to issue a subpoena, it has no further authority (i.e. it is *functus*); (e) section 27(1)(d) is not applicable because there is another remedy; namely, to review the issuing of the summons in the CAC¹¹, whose function it is in terms of section 37(1)(a), read with section 61(1),

¹¹ Competition Appeal Court.

to review any decision of the Tribunal;¹² and, (f) section 52(1) is not applicable because the setting aside of a summons or subpoena is not a matter of procedure.

[23] When a subpoena is issued, it is usually done without hearing the representations of the recipient of the subpoena. To say that the Tribunal cannot correct its decision to issue the subpoena in this context, flies in the face of the requirement that the Tribunal must act in accordance with the rules of natural justice.

[24] The respondents' contentions would lead to absurd results. For example, the Tribunal would not be able to correct, vary, set aside or release the recipient from a subpoena when the recipient appeared before the Tribunal at a hearing and made convincing representations that the documents sought were irrelevant, that there was an ulterior motive, or that the subpoena was a fishing expedition and an abuse of process. Instead the recipient would have to be advised to review, the Tribunal's decision to issue the subpoena. This is at variance with the requirement that the Tribunal conduct its hearings "as expeditiously as possible".

[25] The issuing of a summons or subpoena is a function of the presiding member at a Tribunal. Therefore, the variation, setting aside or the release of a person from a subpoena are matters that are incidental to the performance of the Tribunal's function. In short, the Tribunal has jurisdiction to vary or set aside a subpoena in terms of section 27(1)(d) of the Competition Act.

The Documents in Paragraphs 18, 19 And 21

[26] The documents sought in paragraphs 18, 19 and 21 of the annexures to the subpoena are:

¹² Section 37(1) states: "37. **Functions of Competition Appeal Court.**—(1) The Competition Appeal Court may— (a) review any decision of the Competition Tribunal;" Section 61 provides: "61. Appeals. – (1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter."

“18. All documents and communications relating to SABMA engagements with the Department of Trade and Industry in respect of scrap batteries being exported from South Africa.

19. All documents and communications relating to SABMA engagements with ITAC in respect of scrap batteries being exported from South Africa.

21. All documents and communications relating to engagements between SABMA and/or any of its members with ITAC relating to the imposition of increased tariffs in respect of imported batteries.”

[27] The applicants contended that: (a) these documents were irrelevant, as they concern the export of scrap batteries and not the scrap surcharge on locally produced batteries; and (b) the Tribunal has no power or jurisdiction to order the disclosure of these documents, as they had been claimed as confidential documents in terms of the International Trade and Administration Act, 2002¹³ and, in terms of that Act, only ITAC and the High Court could order their disclosure.

Relevance

[28] Mr Kelly, who appeared on behalf of the respondents at the hearing on 19 April 2017, submitted that the documents were relevant. Referring to SABMA's attorney's correspondence with the Commission dated 1 October 2014, he pointed out the following: SABMA had applied to ITAC¹⁴ for tariff protection for its members. SABMA argued that importers were pricing at low prices in the South African market such that local SABMA members could not compete. One of the ways which allowed them to charge lower prices was that importers were not charging a scrap deposit. It was most likely that SABMA's submissions to ITAC and the DTI¹⁵ would have raised the issue of scrap surcharges.

¹³ Act 71 of 2002.

¹⁴ International Trade Administration Commission of South Africa.

¹⁵ Department of Trade and Industry.

[29] Mr Cockrell, who appeared on behalf of the applicants argued that the competition complaint was limited to collusion about the fixing of prices relating to the surcharge and did not concern itself with predatory pricing or the trade dispute.

[30] Mr Cockrell's contention requires us to approach relevance too narrowly. In *Rellams*¹⁶, the full bench of the Supreme Court, as it was then known, held as follows:

"The question remains whether the documents called to be produced are relevant to any matter in the action. The test for determining this as laid down in Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co. 11 Q.B.D. 55, has often been accepted and applied in our courts. After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett L.J. stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

[31] Based on this dictum, and a broad approach to the determination of relevance, we are of the view that the documents may, directly or indirectly, be relevant and are therefore discoverable.

¹⁶ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564.

The International Trade Administration Act

- [32] Mr Cockrell's submission that we are precluded from ordering the disclosure of these documents because they have been claimed as confidential in terms of International Trade and Administration Act raises some difficulties. However, a pragmatic approach can resolve them.
- [33] Mr Cockrell's contention means that once the documents are claimed to be confidential in terms of the International Trade and Administration Act, the Tribunal cannot order their disclosure in terms of the Competition Act and they cannot be used in the determination of the referral before their disclosure is permitted by ITAC or the High Court in terms of the International Trade and Administration Act.
- [34] Presumably, if this were true, the same would apply regarding documents that are claimed confidential in terms of the Competition Act, and which a party wishes to use in ITAC proceedings.
- [35] The effect is that processes in either forum are hamstrung by confidentiality claims in the other forum. This impedes the expeditious resolution of disputes.
- [36] At the same time, the Tribunal cannot act in a manner that undermines the processes and rules contemplated in the International Trade and Administration Act.
- [37] Bearing in mind our powers in terms of the Competition Act, we are of the view that the documents should be disclosed under an appropriate confidentiality regime and subject to a proviso that they may only be used for the purposes of the determination of the referral in the Tribunal. This, we believe, is in the interests of fairness, the resolution of disputes and the parties' legitimate interests and it protects the integrity of ITAC's functions and processes. The usual confidentiality regime of allowing disclosure to the respondents' legal representatives and expert witnesses, if any, upon the provision of suitable confidentiality undertakings by the respondents' attorneys and expert witnesses, is sufficient and appropriate.

Costs

[38] A costs award in this matter is appropriate.

The Dixon Application

[39] In our view, the respondents should pay the costs of the application. The respondents argued that these documents, which were received pursuant to another subpoena, served before the Tribunal and were therefore part of the referral. The applicants are not parties to the referral and cannot be expected to inspect the Tribunal's file for documents that may be relevant to the subpoenas served on them. This is an inadequate explanation for why the Dixon application was delivered so late.

[40] One would have expected the respondents to include in their answering affidavit the Dixon documents that were relevant to their contentions in the subpoena application, instead of simply referring to them. In addition, the explanation for the relevance of the Dixon documents – they are self-evidently relevant – is inadequate. Therefore, the respondents should bear the costs of this application.

The Subpoena Application

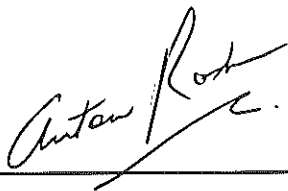
[41] The second issue is the subpoena application. In our view, the respondents should be liable for the costs of this application, despite being partially successful. The reasons for this relate to: (a) the over-breadth of the documents sought, and the fact that many of the documents for which they required disclosure were abandoned; (b) the result vis-à-vis the jurisdiction point; and, (c) the way in which the jurisdiction point was raised – it was not raised in the papers, which would have allowed the parties and the Tribunal to prepare properly on the issue.

[42] The costs orders in relation to the Dixon and subpoena applications should include the costs of two counsel. The costs of two counsel is justified in the light of the nature of the application. It is also evident from the fact that both parties had both senior and junior counsel on brief.

ORDER

[43] In the circumstances, we make the following order:

1. Subject to (2), the first and second applicants are ordered to disclose the documents sought in paragraphs 18, 19 and 21 of annexure A of the subpoenas issued on 6 April 2016.
2. The documents referred to in (1) may only:
 - 2.1. be disclosed to the respondents' legal representatives and expert witnesses, if any, after the respondents' attorneys and expert witnesses provide a suitable written confidentiality undertaking;
 - 2.2. be used for the purposes of the determination of the referral in this matter and may not be used in any proceedings under the International Trade and Administration Act unless permission for the disclosure of the documents is granted in terms of that Act.
3. The first to sixth respondents are to pay the costs, of both the subpoena application dated 5 May 2016 and the Dixon application dated 29 November 2016, including the costs of two counsel on the party-and-party scale, on a joint and several basis, the one paying the others to be absolved.



Mr Anton Roskam

03 August 2017

Date

Prof. Imraan Valodia and Ms Medi Mokuena concurring.

Tribunal Researcher: Caroline Sserufusa

For the Applicant: Adv. A. Cockrell SC and Adv. N. Luthuli instructed by Webber
Wentzel Attorneys

For Respondents: Adv. AR. Bhana SC and Adv. LC Kelly instructed by Nortons
Inc.