



**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)**

CT CASE NO: CR 086 Jun 17

CC CASE NO: 2015Aug0453/
2016Feb0029

In the matter between:

THE COMPETITION COMMISSION

Applicant

And

CATHA SILKSCREEN PRINTERS CC

First Respondent

MELEMO TRADING CC

Second Respondent

LOUNGE 848 CC

Third Respondent

NAKANYANE BUSINESS SOLUTIONS CC

Fourth Respondent

LITABE AND SEEMA TRADING CC

Fifth Respondent

Panel : Enver Daniels (Presiding Member)

Heard on : 6 September 2018

Decision and Reasons issued on: 7 September 2018

**DECISION AND REASONS FOR THE DECISION IN THE APPLICATION TO
COMPEL MADE BY THE THIRD RESPONDENT.**

By arrangement between the parties, the Application to Compel instituted by the Third Respondent against the Applicant was heard by way of a telephone conference, in accordance with section 52(2A) (b) of the Competition Act, 1998 (Act No. 89 of 1998), on 6 September 2018.

This arrangement was made, in the interests of justice and for expediency, to save the parties, which are small businesses, the expenses involved in travelling to Pretoria for the purposes of hearing the application and for the convenience of the parties.

It is recorded that by agreement between the parties, the hearing of the Application to Compel was presided over by only one Competition Tribunal member.

The Competition Tribunal is an organ of state which must be easily accessible to the public and the hearing of this application by way of a telephone conference accords with that.

In its application, the Third Respondent seeks an order in the following terms:

Compelling the Applicant to discover:

1.1 The Tender documents submitted to the Free State Treasury by Mo-Mollo records (Pty) Ltd t/a Mo-Faya Inc and Kgomo Ya Maphuru General Trading CC under Tender Number FST 005/14/15;

1.2 All the communications between the Applicant and Mo-Mollo records (Pty) Ltd t/a Mo-Faya Inc and Kgomo Ya Maphuru General Trading CC in respect of the commission's investigation against the parties regarding Tender Number FST 005/14/15.

After hearing the Parties, the Application was dismissed.

These are the reasons.

[1] For the sake of convenience, the Applicant, a close corporation, will be referred to as the Third Respondent and the Respondent in this application as the Commission. Mo-Mollo records (Pty) Ltd and Kgomo Ya Maphuru General Trading CC will be referred as "Mo-Faya" and "Kgomo" respectively.

[2] In support of its application, the Third Respondent filed an affidavit deposed to by Mr Tsepo Praiseworthy Nyedimane ("Nyedimane"), its sole member.

[3] In this affidavit, Nyedimane alleges that the Commission has documents, pertinent to the matter, in its possession, which it has failed to disclose.

[4] According to Nyedimane, the Commission had issued a media statement in which it mentioned that it had referred all the respondents in this matter and also Mo-Faya and Kgomo to the Competition Tribunal and that they were competitors and had entered into an agreement and/or engaged in a concerted practice and collusive

tendering in relation to a tender.¹ Nyedimane also mentions that Mo-Faya and Kgomo are known to him as suppliers of stationery in the Bloemfontein area.

[5] It is unnecessary for the purposes of the reasons to deal more fully with the averments made about Mo-Faya and Kgomo. What is significant is that Nyedimane alleges that the Commission acted arbitrarily in pursuing its case against the respondents in these proceedings and not against Mo-Faya and Kgomo.² According to Nyedimane, compelling the Commission to produce the documents sought will disprove the Commission's case against the respondents, because Mo-Faya and Kgomo use the same suppliers and have the same prices for certain stationery lines.

[6] Ms Watson, for the Third Respondent argued that the documents were relevant and that the Third Respondent was prejudiced by not having sight of those documents. I do not agree. This argument misses the point that the respondents in this matter will be leading evidence at the hearing relating to the arrangements which they made with suppliers, the discussions which they had with the provincial treasury and the bases on which they tendered. The Third Respondent does not require the documents relating to any investigation initiated against Mo-Faya and Kgomo for the purposes of conducting its defence. This matter will be dealt with again later herein.

[7] Mr Moropene who argued the matter on behalf of the Commission, mentioned that all documents material to the instant matter had been fully discovered. In addition, the Third Respondent laboured under the mistaken belief that the charges against Mo-Faya and Kgomo were not being pursued. He explained that the cases against these latter two entities were filed with the Competition Tribunal on 27 June 2017 already under *CT Case NO: CR087Jun17*, *CC Case No:2016Feb0028*, and that that cases were ripe for hearing.

[8] Mr Moropene also explained that the Commission had during the course of the initial investigation against the respondents in the instant matter ascertained that there were a large number of other entities, about 360 in total, who appeared to have been engaged in activities in contravention of the Act and that all of those entities were being investigated and, where appropriate, would be referred to the Competition Tribunal. It was during the course of one of the ancillary investigations that the facts against Mo-Faya and Kgomo came to light. That explains, according to Mr Moropene, why Mo-Faya and Kgomo were referred separately to the Competition Tribunal.

[9] The Commission, therefore, asserts that it has preferred charges against Mo-Faya and Kgomo and has referred those separately to the Competition Tribunal and not as part of the charges against the respondents in the instant case, as they are separate cases which have nothing to do with the case against the Third Respondent and the other respondents in this matter.

[10] For that reason as well, Mr Moropene asserts that the Third Respondent is not entitled to the documents requested.

¹ See para 4 of the affidavit.

² See para 10 of the affidavit.

[11] We pause to point out that Rule 13 of the Competition Tribunal Rules, provides for any person, upon payment of the prescribed fee to inspect or copy any record of the Tribunal's proceedings, subject to the confidentiality provisions in that rule.

[12] The correct approach should have been for the Third Respondent to have ascertained from the Commission, either by way of an enquiry or through a request for further particulars in the instant matter what the status was of the investigation against Mo-Faya and Kgomo referred to in the media statement mentioned by Nyedimane.

[13] The Third Respondent has based its application on the entirely incorrect assumption that the Commission has acted arbitrarily in referring only the respondents in this matter to the Competition Tribunal and not Mo-Faya and Kgomo. The arbitrary allegation levelled against the Commission suggests that the Third Respondent should seek a review of the Commission's decision not to charge Mo-Faya and Kgomo, if it has grounds for that belief. The Third Respondent, upon being informed of the separate referral did not challenge the information and did not suggest that the separate referral was arbitrary. The basis for the application as stated by Mr Nyedimane is to "show that the Commission acted arbitrarily in pursuing its case against the respondents in these proceedings and not against Mo-Faya and Kgomo." An application to compel further discovery cannot be made for the purposes of proving arbitrariness on the part of the Commission in these proceedings.

[14] The Third Respondent has not explained why it did not take steps to verify its allegation of arbitrariness on the part of the Commission. The application by the Third Respondent must fail as it has not provided sufficient facts to show that it has been prejudiced by the conduct of the Commission in filing the cases against it and against Mo-Faya and Kgomo separately.

[15] The Third Respondent is not remedy-less, though. Acting in terms of Rule 13, the Third Respondent may, should it deem it necessary to do so, either inspect or copy the documents filed of record in respect of the referral to the Tribunal of the cases involving Mo-Faya and Kgomo.

[16] In passing, we note that, possibly, the referrals of the two matters, i.e., the instant matter and the Mo-Faya and Kgomo matters may be premised on the same facts. If that is so, it would probably be in the interests of the justice for the two matters to be consolidated. That is a determination which this Tribunal cannot make without an application to that effect by the parties.

Accordingly, the application by the Third Respondent is dismissed.

DATED AT PRETORIA THIS 7 DAY OF SEPTEMBER 2018.

A handwritten signature in black ink, appearing to read 'Enver Daniels', written in a cursive style.

ENVER DANIELS – DEPUTY CHAIRPERSON AND PRESIDING MEMBER.

Tribunal case manager: Ms Busisiwe Masina

For the Applicant / Third Respondent: Ms Watson instructed by Britz and Mathee Inc

For the Commission / Respondent. Mr M Moropene