IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: CO204Oct17

CC Case No: 2012Jul0396

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
AECI LIMITED	First Respondent
FOSKOR (PTY) LIMITED	Second Respondent
OMNIA FERTILIZERS LIMITED	Third Respondent
SASOL SOUTH AFRICA (PTY) LIMITED	Fourth Respondent

Panel	: Mr Norman Manoim (Presiding Member) : Ms Mondo Mazwai (Tribunal Member) : Prof. Fiona Tregenna (Tribunal Member)
Heard on	: 25 October 2017
Last submission	: 13 December 2017
Order issued on	: 24 January 2018
Reasons issued on	: 24 January 2018

DECISION AND ORDER

Introduction

[1] This matter concerns whether the Tribunal should approve a consent agreement entered into between the Competition Commission ("Commission") and four respondent firms, in terms of section 27(1)(d) read with section 49D of the Competition Act 89 of 1998, as amended ("the Act").

[2] When a consent agreement is referred to the Tribunal, our function in terms of section 49D is to either approve, indicate changes or to refuse to make the agreement an order of the Tribunal. In most cases the Tribunal shows a high level

of deference to approving consent agreements. Nor, when they are confirmed, is the practice to give reasons, as the terms of the agreement are self-explanatory. In this case since we have refused to make the agreement a consent order, by exercising our discretion to do so in terms of section 49D(2)(c) of the Act, it is appropriate for us to give our reasons for doing so.

Proceedings

[3] In September 2017, the Commission entered into a consent agreement with AECI Limited ("AECI"), Foskor (Pty) Limited ("Foskor"), Omnia Fertilizers Limited ("Omnia") and Sasol South Africa (Pty) Limited ("Sasol"), hereinafter collectively referred to as "the respondents". This followed an investigation into a complaint that the Commission had initiated on 9 July 2012.

[4] On 25 October 2017 the parties appeared before the Tribunal to seek the confirmation of the consent agreement as an order of this Tribunal. We heard oral submissions from the Commission and the respondents, all of whom were represented at the hearing.

Background

[5] The respondents are equal partners in an ammonia terminal facility situated in Richards Bay, KwaZulu-Natal ("the RAMM facility"). The facility exists to enable the respondents to store ammonia for the purpose of importation or exportation of ammonia. They have entered into a partnership agreement to regulate their relationship in relation to the facility.

[6] The Commission has no concerns about the agreement itself but rather one of its clauses. In terms clause 12 of the agreement:

> *"12.1 Any of the Parties may approach any of the other Parties with a request to purchase ammonia from the stock of that Party held in the Ammonia Facility. The Parties will upon such a request negotiate in good faith in order to reach an agreement on the sale and purchase of such ammonia. In the event that the Parties fail to agree on the terms of such sale of ammonia in*

stock, and the effect of such failure would result in the requesting Party being prevented from importing or exporting ammonia through the Ammonia Facility, then the following would apply; The purchasing Party shall purchase such quantity from the selling Party at a price calculated according to the following formula so as to enable the purchasing Member to import or export ammonia…"

[7] The formula provided, bases the price on certain international indices for ammonia that are published from time to time and includes a specified dollar based freight rate.

[8] The rationale for this arrangement does not appear from the terms of the consent agreement but was explained to us by one of the parties during the course of our hearing. From time to time one of the parties may want to purchase ammonia from the international market and store it at the facility. If the facility is fully utilised at the time, the party may seek to purchase an amount from one of the others in order to free up space in the facility so that a ship can land the ammonia it has purchased. The arrangement and clause 12 are designed to regulate this arrangement between them.

[9] From the terms of the consent agreement it appears the Commission appreciates that the agreement had cost saving benefits for the parties involved (paragraph 2.6) and recognised that clause 12 was an incidental deadlock breaking mechanism. Nevertheless the Commission considered that clause 12 had pricing effects – although it does not explain what these are – and concluded that the object of clause 12 could be achieved by other means. In essence, and this is the nub of the agreement, the parties have agreed to replace clause 12 with an agreement that if one party wants to purchase ammonia from the RAMM facility from another, and no agreement can be reached on price, the requesting party can withdraw the stock, but must replace it within a specified period of time. In other words, the remedy is to replace a pricing formula in the event of a deadlock with a form of barter.

[10] The respondents have all agreed to amend the partnership agreement accordingly.

[11] Apart from circulating the summarised contents of the consent agreement to its affected employees, managers and directors, the respondents further undertook to refrain from reinstating or otherwise using clause 12 and refrain from agreeing on a fixed price at which the respondents will sell ammonia to each other.

[12] The Commission did not seek an administrative penalty against the respondents.

[13] It was agreed between the Commission and the respondents that the consent agreement is in full and final settlement of the complaint.

Our Analysis

[14] It is trite that powers exercised by the Tribunal must be consistent with the provisions of the Act. When exercising the power in deciding whether or not to confirm a consent agreement as an order, the nature of the discretion exercised by the Tribunal is no different. The Competition Appeal Court in *Netcare*[1] stated the following:

> *"In exercising its discretion whether to approve a consent order it [the Tribunal] must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement... It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute."*

[15] Following the approach laid down in *Netcare,* we must ascertain whether the agreement before us is a rational one. The consent agreement contains a number of unusual features. The Commission does not allege which section of the Act has been contravened. The furthest the Commission goes in this regard is in paragraph 2.4 of the consent agreement where it states: " *... clause 12 of the partnership agreement has the potential effect of substantially preventing or lessening competition in the ammonia market."*[2] Since a consent agreement settles a

[1] *Netcare Hospital Group (Pty) Ltd and Another v Norman Manoim NO and Others* (75/CAC/Apr08) para 29.
[2] The language of paragraph 2.1 of the agreement suggests that the Commission initiated the complaint over price fixing which would suggest section 4(1)(a) or 4(1)(b) of the Act but nowhere is this specifically alleged.

complaint and a complaint has, at its essence, an alleged prohibited practice perpetrated by the respondent, failure by the Commission to allege what this is in a consent agreement is as a factor, taken on its own, enough to condemn the agreement as one lacking an essential jurisdictional fact. How would any party later be able to rely on such a settlement to claim civil damages where alleging which section of the Act had been contravened, is an essential averment.[3] Nor would it be clear in the event of any subsequent enforcement action against that respondent what prohibited practice had been settled – a relevant jurisdictional fact for the purposes of section 67(2) and sections 59(1)(b) and 59(3)(g) of the Act.

[16] Note that we distinguish here between those cases where respondents do not make an admission of a contravention and those such as in the present agreement where there is no allegation by the Commission of what section of the Act has been contravened. It is true that in the former we have approved such agreements as consent orders in the past, in the latter we have no decided case that such a lacuna still renders an agreement susceptible to approval as an order of the Tribunal. [4]

[17] Of course such a deficiency could be rectified if we asked the parties to include this averment in the order, by exercising our discretion to do so in terms of section 49D(2)(b).[5] However that possibility has now become academic. As we discuss later, the Commission has not only not pursued such a suggestion with the respondents, it has instead decided to seek withdrawal of the consent agreement.

[18] But even if this order was amended by the inclusion of the section the respondents have allegedly contravened, this would still not make the agreement appropriate to be approved as a consent order. What makes an agreement rational is the logic of the link between the harm occasioned and the remedy offered.

This lacuna matters as the one section contains a *per se* prohibition and the other does not. The one admits of a penalty remedy for a first time contravention whilst the other does not.

[3] See section 65(6) which gives the right to claim civil damages to a party that has suffered loss as a result of a *prohibited practice*. The section goes on to require the party to get a certificate from the Tribunal or Competition Appeal Court, as the case may be, which *inter alia* must set out " *... the section of this Act in terms of which the Tribunal or Competition Appeal Court made its finding.*". Note while section 49(D) (4) could be read to give a complainant an additional remedy; this is limited to complainants as defined in the Act. Section 65 gives the right to claim damages to wider class of persons other than the complainant as it applies to any person who has suffered loss as a result of the prohibited practice.

[4] See *The Competition Commission v South African Airways (Pty) Ltd and Others* (83/CR/Oct04).

[5] This subsection states that after hearing a motion for a consent order the Tribunal may "*...indicate any changes that must be made in the draft order;*"

[19] In the present agreement no coherent theory of harm is alleged. Nor in response to questions from the panel during the hearing was anything further offered.

[20] The Commission's representative in answer to the question of its theory of harm stated the following:

> *"Ja, the issue of the theory of harm it's not something we have delved much into but- ...."*

He goes on to say:

> *"Ja, I wanted to maybe just finish the point of if in future we do in fact discover that this formula is being used in other products which ammonia is an input, we'll be forced to look into detail and maybe develop a proper theory of harm."*[6]

[21] When asked pertinently what section of the Act had been contravened he stated the following:

> *"... So I mean as I've said initially to say although we do accept that there is no clear contraventions but out of the consent [concern] that we had we were basically then of the view that whether you look at it, you know from the pro or the anti, it still gives us the sense that there will be those situations where the parties, particularly because if you look at it, this agreement, it has all the relationships. There was the horizontal and also the vertical aspect. So from the vertical aspects we are saying it is not something that we can pursue and/or we really have so much concern about it, but from the horizontal we think that going forward or in future it can in fact enable the parties to use this formula, or because of the interaction, the information that they get from their own interaction, to use whatever information, to extend this commercial sensitive information to other products which they are manufacturing across or which are similar, you see."*[7]

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[6] Transcript, page 32, line 2-6.
[7] Transcript, page 19, line 22-25; page 20, line 1-14.

[22] From these two answers it would appear that the Commission's concerns relate less to the RAMM facility arrangement itself, but rather the pricing effects in the ammonia market caused by this arrangement. Nevertheless it has put up no facts to make this link. Moreover, if the Commission's suspicions about the nature of harm is correct, this agreement is remarkably under deterrent. Apart from the deletion of clause 12, and an undertaking not to reinstate it, no other remedy is imposed; in particular, no penalty is provided for. Why settle a case of collusion in the ammonia market – a very serious and far reaching allegation – with a remedy whose design is of such limited application?

[23] If the pricing formula was being used to communicate a price agreement to be used more widely, how does the deletion of clause 12 remedy this? Since the mechanism's alleged wider purpose is not explained, but only hinted at, it follows that it is impossible to assess the utility of the remedy. Expressed differently, without a coherent theory of harm it is not possible to assess whether a chosen remedy is an appropriate one. Sometimes of course the harm is obvious as is typically the case with section 4(1)(b) contraventions. But where the order is silent as to what the prohibited practice is, and the theory of harm apparently more complex, its absence is more problematic. The Tribunal cannot be expected to divine the harm and in so doing, divine the adequacy of the proposed remedy.

[24] But at the same time as settling the complaint on these terms, the Commission may also close the door on further enforcement. It has in paragraph 3.1.4 of the agreement, recorded that the agreement is in full and final settlement of the complaint. We do not have the full terms of the complaint before us, but this clause may well preclude the Commission from referring the wider industry complaint in the future, as the respondents could raise the double jeopardy provision in section 67(2) of the Act. (That section states that the Commission may not refer a complaint against a respondent if that conduct is substantially the same conduct alleged in completed proceedings. A consent agreement once approved as an order would constitute completed proceedings.)

[25] On the other hand if the theory of harm is entirely speculative, and the respondents have agreed to amend their agreement in any event, then a consent order is

unnecessary and indeed over deterrent. On either scenario, the agreement is not a rational one.

[26] The respondents for their part maintained the view that they had not contravened the Act and it appeared had entered into the consent agreement to avoid a protracted hearing.[8] Since, as observed, the agreement provides for a final settlement of the complaint, it is not surprising that the respondents would be eager to consent to a remedy, which has no serious impact on their business and does not result in a penalty or the possibility of civil damages. One can perceive a rationale for the respondents' attitude, for their own benefit, but that does not make the agreement a rational one for the purpose of determining enforcement of the Act. It is the latter, not the private advantage gained by a respondent, which is the yardstick for us to determine an agreement's rationality.

Further procedures post the hearing

[27] As is evident from the discussion above, at the conclusion of the hearing the panel had serious reservations about confirming the agreement. Nevertheless we decided to give the Commission an opportunity to make further written submissions to us. These submissions were never forthcoming; with the Commission first asking for extensions of time to make them, and then, eventually, seeking to withdraw the consent agreement.

[28] This provoked an angry reaction from one of the respondents, Omnia, in correspondence. Omnia contended that the Commission was not entitled to unilaterally withdraw a consent agreement and urged us to grant the consent order.

Conclusion

[29] We do not need to decide the correctness of this latter point of Omnia's. We will assume that the order is still before us to decide whether it should be approved.

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[8] Omnia consented to the agreement as it did not wish to face the cost and reputational damage that comes with a protracted complaint referral. In addition, Omnia was only aware of one occasion where the clause was invoked. AECI's representative submitted that he had hoped that the Commission would have used its advocacy functions and prevail upon the respondents to remove the clause and avoid a consent hearing altogether. See Transcript page 12, line 5-7; page 13, line 24-25; and page14, line 1-6.

[30] Since the Commission did not make any further submissions and ultimately sought to withdraw the agreement, no further facts or argument have been put before us to justify the approval of the agreement as a consent order. We are thus confined to considering the terms of the agreement and the submissions made by all the parties during the hearing.

[31] We have decided not to approve the consent agreement as a consent order for the following reasons. In the first place the agreement contains no averment as to which section of the Act the respondents have allegedly contravened. Separately to that point, and as a self-standing ground, we find that the agreement, applying the *Netcare* test, is not a rational one, for the reasons advanced earlier in the analysis section.

ORDER

[1] The confirmation of the consent agreement as an order of this Tribunal in terms of section 27(1)(d) read with section 49D(2)(c) of the Act is refused.

[2] There is no order as to costs.

Mr Norman Manoim

24 January 2018

Date

Ms Mondo Mazwai and Prof. Fiona Tregenna concurring

Tribunal Case Managers	: N Ndlovu.
For the Competition Commission	: F Mudimeli.
For the First Respondent	: R Wilson of Webber Wentzel.
For the Second Respondent	: S Freese instructed by Shaheem Samsodien Attorneys.
For the Third Respondent	: H Irvine of Falcon & Hume Attorneys Inc.
For the Fourth Respondent	: W Radford of Nortons Inc.