THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: LM179Jan14/VAR152Nov16

In the matter between:

Ferro South Africa (Pty) Ltd	First Applicant
NCS Resins (Pty) Ltd	Second Applicant
Ferro Coating Resins (Pty) Ltd	Third Applicant
and	
Atland Chemicals CC t/a Atlin Chemicals	First Respondent
Atlin Chemicals Natal (Pty) Ltd	Second Respondent
The Competition Commission of South Africa	Third Respondent

Panel	:	Andreas Wessels (Presiding Member) Mondo Mazwai (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on	:	1 February 2017
Order issued on	:	9 June 2017
Reasons issued on	:	9 June 2017

Decision and Order

Introduction

[1] This is an application brought by Ferro South Africa (Pty) Ltd ("Ferro") to vary certain merger conditions tendered by it and imposed by the Competition Tribunal ("the Tribunal") in a merger between Ferro and Arkema Resins (Pty) Ltd ("Arkema SA"). The merger was conditionally approved by the Tribunal on 4 August 2014.

[2] The merger conditions required Ferro to, *inter alia*, divest of certain intangible assets belonging to Arkema SA's business to an (at the time) unidentified third party; and to conclude a toll manufacturing agreement with the third party for a period not exceeding four years; as well as provide consulting services to the third party while the third party gained the necessary technical know-how and expertise and put in place its own manufacturing operations in order to become an effective competitor in the market affected by the merger.

[3] Ferro duly disposed of Arkema SA's relevant intangible assets and product recipes to a third party, Atland Chemicals CC, t/a Atlin Chemicals, previously known as Atlin Chemicals CC ("Atlin"), the first respondent in this matter. As part of the sale, and as required by the merger conditions, Ferro also concluded a four year toll manufacturing agreement including the provision of consulting services to Atlin.

[4] Ferro now seeks the deletion of the toll manufacturing agreement and the consulting services conditions of the Tribunal order, on grounds that a former employee of NCS Resins (Pty) Ltd ("NCS"), a wholly-owned subsidiary of Ferro, who has since joined Atlin, has allegedly misappropriated certain confidential and competitively sensitive information belonging to Ferro. Ferro alleges that Atlin is using the misappropriated information to unfairly compete with it. It therefore seeks to be released from its obligation to toll manufacture for Atlin and provide consultation services on grounds that the misappropriation of its information constitutes "exceptional circumstances" and therefore "good cause" to vary the conditions.

Background to the Merger Conditions

[5] In December 2013, Ferro and Arkema SA jointly notified the Competition Commission ("the Commission") of a proposed large merger between them. In terms of the proposed merger, Ferro would acquire the entire issued share capital of Arkema SA, including Harveys Composites (Pty) Ltd ("Harveys"), a wholly-owned subsidiary of Arkema SA. Arkema SA formed part of the French listed Arkema Group.

[6] On 8 May 2014, the Commission recommended a prohibition of the proposed merger to the Tribunal, in terms of section 14A of the Competition Act, 89 of 1998, as amended ("the Act"). The Commission had identified a horizontal overlap between the activities of Ferro and Arkema SA in the manufacture and sale of unsaturated polyester resins ("UPR") nationally. Ferro's UPR business is conducted through its wholly-owned subsidiary, NCS. In these reasons, we refer to Ferro and NCS interchangeably. Arkema SA's business was conducted through its wholly owned subsidiary, Harveys. The Commission concluded that the merger would reduce the number of participants in the relevant market from four to three, thereby substantially lessening competition in this market.

[7] Having heard the evidence before us following a two week hearing, we concluded that the proposed merger would indeed substantially prevent or lessen competition in the market for specialised or customised UPRs by removing an effective competitor from the market. This was *inter alia* because post-merger, Ferro would have accounted for approximately 60-70% of the UPR market nationally (with an accretion of approximately 10-20% market share from acquiring Arkema).

[8] As mentioned, the Commission recommended an outright prohibition of the merger. The merging parties resisted the prohibition but ultimately proposed a set of conditions to address the competition concerns.

[9] The evidence before us was that Arkema SA's UPR and coatings businesses were conducted from the same integrated plant in Isipingo, KwaZulu-Natal. According to Ferro, the rationale for acquiring Arkema SA was to enter into the manufacture and supply of coatings resins – a business in which Ferro was not involved prior to the merger (and in which there would have been no product overlap). However, it was not possible to sever and sell off the UPR business comprising both the tangible and intangible assets of the business to a third party, and only the coatings business – where Ferro's interest allegedly lay, to Ferro.

[10] Ferro and Arkema SA tendered several proposed remedies during the Commission's investigation of the merger and continued to tender remedies in the course of the hearing before us, which the Commission rejected. Ferro however eventually proposed an enhanced set of conditions which the Commission considered preferable to prior remedies proposed.

[11] The final set of conditions required the divestiture of Arkema SA's intangible assets, comprising product formulations and recipes and related data; customer lists; raw material supplier lists; and the right to market the products using the Arkema brand. It is important to note that the divestiture excluded all tangible assets, such as industrial equipment, warehouses, land, buildings and other fixed assets, and trademarks. It also did not include the employees of Arkema SA as they would be transferred to Ferro as part of the sale of the coatings business.

[12] We were satisfied on the evidence before us that the intangible assets presented the potential buyer with valuable product information. However, the evidence also showed that the manufacture of specialised or customised resin was a highly technical process requiring special expertise. We concluded that a divestiture of the product formulations and recipes on their own would not be sufficient for effective entry or expansion by any prospective third party without the technical know-how to manufacture specialised or customised resins which are not homogenous, and as the evidence showed, hard to replicate.

[13] Moreover, since no physical industrial and other fixed assets formed part of the divestiture for the reasons mentioned above, there was a concern that, without manufacturing facilities, the third party whether a new entrant or one seeking to expand its existing production, would not be able to manufacture UPR even if it had the necessary formulations and recipes.

[14] To address both these concerns (the lack of technical expertise and manufacturing facilities by the prospective third party), the merging parties ultimately tendered a four year toll manufacturing agreement and a skills transfer condition for the duration of the toll manufacturing agreement. As mentioned in our reasons, the rationale for the toll manufacturing agreement and consulting services was "*to allow the relevant acquirer time to invest in its own UPR production and/or blending capacity.*[1]" It bears mention that Ferro initially proposed a one year toll manufacturing agreement but this was rejected by the Commission and several witnesses, who considered a three to five year period as reasonable.

[15] Although the Commission found the tendered condition including the toll manufacturing and consulting services arrangement preferable, it expressed reservation regarding potential post-merger information exchange between the

[1] See Merger Reasons dated 25 September 2014, page 689 of the record at paragraph 106.

merged entity and the third party purchaser as a result of the toll manufacturing agreement – the concern was that it could be a platform for collusion as Ferro would be manufacturing for a competitor and would, through the tolling agreement, gain access to a competitor's competitively sensitive information. The Commission acknowledged however that there was no other remedy that could achieve a better outcome than the remedy as proposed.

[16] Its concern was addressed through confidentiality undertakings to prevent the exchange of competitively sensitive information firstly between Ferro and the relevant former employees of Arkema SA who would be transferred to Ferro; and secondly between the relevant employees of Ferro and those of the third party purchaser who would be involved in the toll manufacturing agreement.

[17] As stated above, we approved the merger on 4 August 2014 subject to the set of conditions proposed by the merging parties, with certain enhancements.

[18] Following a tender process, Ferro identified Atlin as the purchaser of the business to be divested. The Commission was notified of the divestiture as an intermediate merger and it unconditionally approved the merger on 20 February 2015.

[19] Prior to its acquisition of the divested business, Atlin was not involved in the manufacture of UPR. It operated as an importer and blender of UPR, and still does. In 2015, Atlin Natal was incorporated. Atlin Natal is also an importer and blender of UPR. Atlin explains its relationship with Atlin Natal in its answering affidavit as that of an association. Atlin's Johannesburg based office purchases UPR from Ferro and invoices Atlin Natal at cost.

[20] Atlin Natal operates in KwaZulu-Natal and until recently, in Port Elizabeth. It competes with Ferro in these areas in the sale of UPR, which is manufactured on its behalf by Ferro in terms of the toll agreement. This has been the case since March 2015 and in

terms of the imposed conditions the toll manufacturing agreement will subsist until 28 February 2019.

The Relevant Clauses of the Merger Conditions

[21] Clause 2.8 and 2.9 of the merger conditions respectively provide that:

> *"2.8 In addition to the divesture of the Divestment Business, Ferro will simultaneously enter into a toll manufacturing or similar agreement (on ordinary and reasonable commercial terms to be mutually agreed) of no longer than 4 (four) years with the Purchaser, in order to assist the Purchaser, if required by the Purchaser, in continuing to supply Arkema's current base until such time as its own manufacturing operations are operational. The toll manufacturing agreement will be concluded on a "cost-plus" basis. Once the terms of the toll manufacturing agreement have been agreed with the Purchaser, a copy of the toll manufacturing agreement will be provided to the Commission for its consideration and approval to ensure that the agreement complies with the terms and spirit of the Merger Conditions imposed by the Tribunal.*
>
> *2.9 During the Course of the toll manufacturing agreement, Ferro confirms that the Purchaser shall be entitled to consult with any Arkema employee(s) by prior arrangement with the Managing Director of Arkema (or his/her successor-in-tile after the Approval Date) and for a reasonable period of time (subject to appropriate compensation as agreed or determined on a reasonable basis) in order to gain the necessary knowledge required to produce the UPRs which form the subject of the toll manufacturing agreement."*

The trigger for this application

[22] On 27 May 2016, an employee of NCS, a certain Mrs Elmarie Allan ("Mrs Allan") who was employed as a Sales Administration Assistant in NCS' Port Elizabeth office, resigned from NCS. She allegedly did not disclose that she was going to be joining Atlin in its Port Elizabeth office.

[23] When Ferro became aware that Mrs Allan had taken up employment with Atlin in early June 2016, it engaged the services of a forensic investigator to carry out a forensic analysis of the computer previously used by Mrs Allan while employed by NCS. The forensic investigation allegedly revealed that prior to her departure, Mrs Allan had copied certain confidential and competitively sensitive documents belonging to NCS onto a memory stick.

[24] Ferro approached the Eastern Cape Division of the High Court to obtain an Anton Piller order *inter alia* for the return of the misappropriated information and for damages. Pursuant to the Anton Piller order proceedings, the Sheriff executed the order at the premises of Atlin and certain devises were seized from Mrs Allan and a certain Mr Glen Blom ("Mr Blom"), the Branch Manager of Atlin's Port Elizabeth office. According to Ferro, the forensic investigation revealed that the same memory stick that had been used to access NCS's confidential information had been plugged into the computers of Mrs Allan and Mr Blom. It is alleged that this information is being used by Atlin to unfairly compete with Ferro.

[25] The memory stick used by Mrs Allan to copy NCS's documents has not been recovered as it had allegedly since been thrown away. Nevertheless, according to Ferro, the forensic investigation confirms that some of the documents which were found on Mrs Allan's computer were also found on Mr Blom's computer.

[26] On 16 August 2016, Ferro addressed a letter to the Commission requesting it to waive or suspend the operation of the toll manufacturing agreement and the consulting services from the conditions in terms of clause 11.1 of the merger conditions. Clause 11.1 provides for a waiver of any of the conditions on "exceptional" grounds.

[27] The Commission addressed a letter (which included Ferro's letter dated 16 August 2016) to Atlin inviting Atlin to respond to Ferro's allegations. Atlin denied that Mrs Allan had stolen the alleged information. It claimed that the allegations were yet another attempt by Ferro to sabotage its business as Ferro had allegedly done since the hand-over of the divested business. In this regard, there is a pending investigation before the Commission.

[28] Following Atlin's response, the Commission addressed a letter to Ferro declining to intervene. It advised Ferro that since there was a dispute of fact regarding whether the information was stolen, which was pending in the High Court, it would be premature for the Commission to suspend the conditions. The Commission suggested that Ferro should approach the Tribunal for appropriate relief if it still had concerns. Ferro has now brought this application.

Jurisdiction and Nature of these Proceedings

[29] Clause 11.1.2 of the merger conditions provides that: *"The Commission shall, where appropriate in response to a request from Ferro showing good cause: waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in the Conditions."*

[30] Since the Commission had declined to waive the clauses as requested, Ferro brought this application in terms of Rule 42 of the Tribunal Rules which provides that *"Any proceedings not otherwise provided for in these Rules may be initiated only by filing a*

Notice of Motion in Form CT6 and supporting affidavit setting out the facts on which the application is based".

[31] Atlin submitted in its heads of argument, that the Tribunal did not have inherent powers under Rule 42 to amend the merger conditions since the conditions specifically make provision for the Commission, not the Tribunal, to waive or modify the conditions, despite the conditions having been imposed by the Tribunal itself. Atlin argued that Rule 42 is merely procedural in nature and does not confer on the Tribunal substantive powers it does not enjoy[2]. The Tribunal is therefore *functus officio*, with its powers in this case limited to review powers, according to Ferro[3].

[32] In oral argument however, Mr Wesley who appeared for Atlin did not persist with this argument. He submitted that the Tribunal could assume jurisdiction for purposes of this decision.[4]

[33] We have decided to assume jurisdiction for purposes of this decision.

What Ferro seeks

[34] Ferro seeks: (i) the deletion of clauses 2.8 and 2.9 of the merger conditions alternatively; (ii) the setting aside of the Commission's decision not to modify or waive clauses 2.8 and 2.9 and substituting it with deleting these clauses, i.e. a form of a review of the Commission's decision, and as a further alternative; (iii) the interim suspension of clauses 2.8 and 2.9 pending the final determination by the Tribunal of the amendment application, or of the review of the Commission's decision. The further alternative prayer (i.e. (iii)) is sought in case the Tribunal finds that there are disputes

[2] See Atlin's heads of argument, page 14 paragraph 25.
[3] Ibid, pages 14-15, paragraphs 26 and 27.
[4] See transcript, page 133, lines 10-21. See also Atlin's heads of argument at paragraph 55 and transcript, page 112, lines 9-24.

of fact which cannot be resolved on the papers before it, and therefore has to refer the matter to oral evidence.

[35] Ferro and Atlin both agreed that there were no material factual disputes between them to warrant a referral to oral evidence, but left it open to the Tribunal to do so if it wished.[5] We have decided not to refer the matter to oral evidence for reasons we explain later. It is therefore not necessary for us to deal with the prayer for the interim suspension of the conditions.

[36] We now turn to consider whether "exceptional circumstances" have been established that warrant the deletion of the relevant merger conditions.

Have exceptional circumstances been established?

[37] It is common cause between Ferro and Atlin that "exceptional circumstances" means unusual and unexpected circumstances as held by the courts.[6] There is also no dispute that the existence of "exceptional circumstances" must be determined on the facts of each case, and must be incidental to, or arise out of a particular case.

[38] Both Atlin and the Commission submitted that the alleged theft of Ferro's confidential information did not qualify as "exceptional circumstances" as contemplated in the merger conditions. This is because at the time that Ferro proposed the divestiture conditions which included the toll manufacturing agreement, the Commission warned of the inherent risk of confidential information being exchanged between competitors – inevitably Ferro would gain competitively sensitive information about Atlin's business which was necessary to enable continued supply by Atlin to former Arkema SA customers. This risk was however lessened in the conditions through confidentiality undertakings.

[5] See Transcript, pages 3 lines 14-25 and page 1-184. See also lines 14-25.
[6] See Ferro's heads of argument, pages 11 – 13 paragraphs 23.1 – 24.3 and Atlin's heads of argument.

[39] The Commission further pointed out that the poaching of staff between Ferro and the third party purchaser was a possibility foreseen by Ferro. This is because in addition to the confidentiality undertakings proposed by the Commission, Ferro also wanted a restraint of trade to be imposed on any of its employees who would be dealing with the third party purchaser under the toll arrangement, but accepted that the risk of its employees being poached in the normal course of business would remain whether they were restrained or not.[7] In point of fact, Mrs Allan although not involved in the toll agreement had a restraint of trade but was nevertheless poached.

Our Assessment

[40] Our overall assessment does not distinguish between "exceptional circumstances" and "good cause" since there is an overlap in the evidence relied on for both. Indeed both Ferro and Atlin submitted that it was not necessary to determine the precise boundaries of each[8].

[41] First and foremost, it must be said that theft is unlawful. The theft of confidential and proprietary information by a competitor is deplorable and cannot be countenanced. It is for that reason that our civil courts provide redress for injured parties against it. However, the significant competition concerns that gave rise to the conditional approval of the merger should not be lost sight of, as we explain below. Without the remedy, i.e. the imposed conditions including the toll manufacturing arrangement and the consultancy services, the proposed merger would have been prohibited.

[42] Mr Wilson acknowledged the existence of the common law remedies available to Ferro but tried to mount a competition issue on the basis that the misappropriation of Ferro's information was tantamount to the exchange of competitively sensitive

[7] See transcript dated 1 February 2017, page 143, lines 10-23.
[8] See Ferro's heads of argument, pages 11-13 paragraphs 23.1-24.3, and Atlin's heads of argument, page 17, paragraph 36.

information which is prohibited under section 4 of the Act. He accepted that the kind of information exchange that is prohibited in section 4 is usually a voluntary exchange between competitors collaborating to avoid competition between them. It necessarily involves at least two or more competitors.

[43] This is not such a case. Ferro is not suggesting that it is a party to the information exchange. To the contrary, it is aggrieved by the misappropriation of its information. The Commission is empowered under the Act to investigate complaints of anti-competitive behaviour in terms of the Act, not unlawful competition arising from the theft of information by a competitor. There is therefore no alleged contravention of the Act to have triggered an investigation by the Commission.

[44] The critical issue is whether the alleged misappropriation of Ferro's information qualifies as "exceptional circumstances" as contemplated in the merger conditions. Mr Wilson submitted that although concerns of collusion were raised regarding the toll agreement during the hearing, the misappropriation of information as happened in this case was not contemplated and must therefore qualify as exceptional circumstances, firstly because the theft of Ferro's information has caused an irretrievable breakdown in the trust relationship between it and Atlin. By keeping the conditions in force, Ferro is in effect, being compelled to assist Atlin in furthering its unlawful conduct. He argued that this situation is clearly an unusual circumstance which was not foreseen at the time that the merger conditions were imposed.

[45] We are sympathetic to Ferro's position. However, the significant competition concerns that gave rise to a detailed set of divestiture conditions should not be lost sight of. A break in the trust relationship is in and of itself not an unusual or exceptional circumstance. Of course in ordinary commercial relationships, as contended for by Ferro, if the trust is broken, a party would be entitled to cancel the commercial relationship.

[46] However, the conditions were imposed not for the benefit of Ferro but in the public interest to address the significant competition concerns associated with the merger in the national UPR market. This rationale for requiring the detailed set of conditions has not changed. Prior to the merger, Arkema SA competed nationally with Ferro whereas Atlin operated in KwaZulu-Natal. By Ferro's own admission, the conditions have enabled Atlin to expand its operations from one office in KwaZulu-Natal and one in Johannesburg, to opening an office in Port Elizabeth recently.

[47] It is well recognised that, as a public body, the Tribunal (and Commission) is concerned with the enforcement of the Act in the interests of the public, not private parties. It is correct that the conditions stem out of a Tribunal order. However, it does not follow that the misappropriation of Ferro's information makes it a competition issue and that the imposed conditions and their rationale can now be discounted.

[48] We know from the papers that the information alleged to have been stolen is Ferro's information in the Port Elizabeth area, not nationally. Mr Wilson clarified that the Port Elizabeth area extends to the broader Eastern Cape[9]. Either way, cancelling the entire toll agreement which enables Atlin to compete nationally, as the imposed conditions intended, would be a disproportionate remedy, as it would cut off supply to Atlin for resin nationally (to the detriment of the public interest) when the information allegedly stolen concerned only the Port Elizabeth area, or at most the Eastern Cape region (and would be limited to serving only Ferro's private interests).

[49] When asked what purpose cancelling the toll agreement would serve, given that the information is already in Atlin's hands, Mr Wilson said at the very least delinking the

[9] See annexure "C" to the replying affidavit, page 710 of the record.

contact between Ferro and Atlin (given the broken trust relationship) would remove the apprehension of the same conduct happening in the future[10].

[50] However, it is common cause that the theft of Ferro's information did not arise from the toll manufacturing agreement. The evidence before us is that Atlin is a customer of Ferro for certain non-Arkema SA resins. In this context, there was regular contact between Mr Blom and Mrs Allan as customer-supplier respectively.

[51] Any injury to Ferro did not occur as a result of the toll agreement but in the normal course of an employee taking up employment with a competitor. Cancelling the toll agreement would be tantamount to retributive justice which does not form part of our law. In the normal course of employment (where the leak occurred), Mrs Allan had a restraint of trade and was bound to confidentiality[11], which Ferro is entitled to enforce in the civil courts, and indeed is doing. The misappropriation of Ferro's information does not raise any facts that change the purpose of the conditions.

[52] Conceding that there was no case of collusion to investigate, Ferro argued secondly, that the misappropriation of its information undermines the very purpose of the merger conditions since Atlin is now in possession of its confidential information which places Ferro at a competitive disadvantage as Atlin can now simply target Ferro's customers to win them away on the basis of the stolen information, instead of competing on merit.

[53] However, there is no evidence to support these allegations. Even assuming that the allegations could be supported, as mentioned, the objective under our Act is the enforcement of competition in the public, not private interests. In our view, maintaining the status quo appears in the long term, to better serve the public interest than cancelling the toll agreement.

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[10] See transcript, pages 66- 69.
[11] See record, pages 361-363.

[54] As we found in the merger hearing, the nature of the divestiture proposed by the merging parties was "not ideal" because it would place the unknown third party purchaser at a competitive disadvantage as it would inevitably have to divulge its competitive information to Ferro for purposes of the toll manufacture, since the physical assets to manufacture were not available for sale to the third party. That Ferro's information has been stolen does not make the already sub-optimal competitive situation materially worse, particularly given the nature of the information stolen as we discuss below.

[55] While not condoning any unlawful conduct on the part of Atlin, it paradoxically indicates that there is actual competition between these two rivals as intended by the imposed remedy. It is not *fait accompli* as alleged, that Atlin will price just below Ferro's pricing to win customers away from Ferro. There is also nothing stopping Ferro from lowering its prices further or engaging in other competitive strategies to retain the customers. Even if the parties chose not to battle it out, any loss of competition is likely to be temporary since the value of the misappropriated information in Atlin's possession is of limited scope and duration. Any temporary loss to Ferro is far outweighed by the likely permanent loss of competition in the relevant market on a national scale if the toll agreement is cancelled.

[56] Thirdly, Ferro claims that Atlin has both the technical and financial wherewithal to manufacture its own resins, alternatively to import it. It is allegedly not doing so because it is enjoying the cost-plus pricing in terms of the toll manufacturing agreement which serves as a disincentive to Atlin to invest in its own manufacturing capabilities. Furthermore, Atlin allegedly also has alternative resin toll manufacturers in the form of Scott Bader and KZN Resins.

[57] Atlin's response is that it cannot self-supply yet since it is in the process of amplifying its manufacturing facilities which will be ready when the four year toll period comes to an end in February 2019. In reply, Ferro queried this allegation but understandably could not take it any further since this information is peculiarly within Atlin's knowledge.

[58] Mr Wilson suggested that although the issue of the readiness of Atlin's manufacturing facilities was not a material dispute, it could be referred to oral evidence before us or to the Commission for investigation. However, we are not persuaded that this is warranted. This is because Atlin's version is not implausible given the evidence in the merger hearing (discussed below) that a tolling period of between three and five years was considered by witnesses who testified before us, as necessary and reasonable. Furthermore, Ferro has not put up any evidence to show that market conditions in the relevant market have changed since our decision.

[59] A further difficulty with Ferro's argument regarding Atlin's alleged technical and financial capabilities is that it has known of these capabilities since Atlin's bid in 2015, as Ferro itself acknowledges. Ferro correctly submitted that when the conditions were imposed, the identity of the purchaser was unknown, hence the requirement for the toll manufacturing agreement was not made compulsory but dependent on the purchaser's needs as encapsulated in the words "*...Ferro will simultaneously enter into a toll manufacturing or similar agreement...of no longer that 4 (four) years with the Purchaser, in order to assist the Purchaser, if required by the Purchaser...*"

[60] However, Ferro did not raise any of the abovementioned facts with the Commission at the time that the identity of the purchaser, whom it selected, became known. It was open to Ferro if it believed the capabilities it claims Atlin has, to request that the toll

manufacture and consulting services conditions be dispensed with at that time. It did not. Ferro's belated contention regarding Atlin's capabilities at this stage seems expedient to bolster its request for variation.

[61] Mr Wilson further argued that the four year period was the maximum not minimum period, depending on the capabilities of the prospective purchaser. That is correct, but we have already said that the belated claim regarding Atlin's alleged capabilities should have been raised when the purchaser (Atlin) was identified.

[62] It was also argued that the four year period envisaged a greenfield entrant, not a firm like Atlin with the alleged existing capabilities. However, there is nothing in the reasons that suggests that the four year period was limited to greenfield entry. Recall that among the reasons for the four year period, was the complexity of duplicating specific types of resin which were described as an art and required time. Ferro itself testified during the hearing that it had had repeated attempts to replicate certain of Arkema SA's resin but was unsuccessful[12].

[63] The evidence of several witnesses who were already involved in the UPR business was that a toll manufacturing agreement for a period of between three and five years was required for effective entry into this market[13]. There is thus nothing to suggest that the four year period envisaged a greenfield entrant.

[64] As to alternative suppliers, Atlin disputes the allegation that it can source DCPD resin from Scott Bader. According to Atlin, Ferro is the only local producer of DCPD resin and the only one with the right equipment to make this kind of resin which constitutes the bulk of Atlin's orders with Ferro. Atlin states that even utilising the same formula,

[12] See transcript 21 July 2014, page 867.
[13] See transcript 28 July 2013, pages 1717, 1719, 1731.

resins manufactured in different plants are not the same.[14] Atlin stated further that sourcing alternative supply of DCPD resin of the same character to Ferro's would require time and a structured approach to enable it to continue competing on the same terms as those to which Arkema SA's customers are accustomed. An abrupt termination of the toll agreement would result in its customers terminating their contracts, effectively giving Ferro Arkema SA's market share which the merger conditions sought to prevent.

[65] Regarding supply by Scott Bader (of DCPD resin specifically), Ferro relies on the allegation made by Mr Perrow, the Sales Director of NCS and Mr Souchon, the Managing Director of Arkema SA in the merger hearing who both said Scott Bader supplied DCPD resin.

[66] We note that the evidence relied on shows that at the time of the hearing, Scott Bader was in the process of trialing imported DCPD as a potential supplier for that specific resin. There is however no evidence before us that it succeeded in its trials and that it indeed entered the market.

[67] Ferro also relied on the evidence of Dr Hahn, the Managing Director of Rocbolt, a mining customer of Arkema SA.[15]

[68] However, the claim by Rocbolt that it used to import DCPD competitively from the US seems to have been historical at the time since Dr Hahn also said that when Arkema SA learned of the DCPD imports Rocbolt was making, it improved its formulations to a point where it could make it locally. Rocbolt then switched back to Arkema SA[16]. There is no evidence that this has changed.

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[14] See answering affidavit, page 644 paragraph 164.7.
[15] See replying affidavit pages 922-925, paragraphs13-17.
[16] Ibid

[69] As to the claim that KZN Resins could also toll manufacture for the third party purchaser, Ferro provided no evidence that KZN Resins can toll manufacture DCPD resin.

[70] Insofar as other resins are concerned (which according to Atlin, constitute a relatively minor proportion of Atlin's orders since the bulk is DCPD resin), there is no evidence of the terms on which the alleged suppliers would be able to supply Atlin. Recall that in order to avoid a prohibition of its merger, Ferro tendered, *inter alia*, to toll manufacture for Atlin at cost-plus. Even assuming Scott Bader or KZN Resins were alternative toll suppliers, there appears to be no basis or incentive for them to toll manufacture on the same terms since they were not part of the merger.

[71] The point of supplying at cost was to enable the third party purchaser to continue to supply Arkema SA's customers UPRs of the same standard and quality as the erstwhile Arkema SA, at competitive prices while the manufacturing facility was being put in place. While the alleged theft of Ferro's information is deplorable, it is no basis to escape the cost-plus pricing of the toll agreement whose rationale Ferro understood when it tendered the conditions to secure the merger.

[72] As to imports, we have already found in our merger decision that imports were not substitutable with locally produced UPR for reasons more fully explained in our merger decision. There is no evidence that this has changed.

[73] As to the argument that Atlin has the financial capability to undertake the investments required - and whether this is the case or not, the enquiry before us is whether the theft of Ferro's information constitutes exceptional circumstances and therefore warrants the cancellation of the toll agreement, not whether Atlin can afford manufacturing facilities of its own. Furthermore, as stated above, the relevant products are complex and the manufacturing thereof requires technical know-how and expertise that can only be acquired over time.

[74] In our view, Ferro has not shown exceptional circumstances as contemplated in clause 11.1 of the conditions.

[75] We have also found no basis to refer the matter to the Commission for investigation, or to refer the matter to oral evidence before us. This is firstly because, as we have already mentioned, the Commission is empowered to investigate anti-competitive behaviour in terms of the Act. There is no allegation that the Act has been contravened. Only that Ferro's information has been stolen by Atlin, an allegation that falls outside the mandate of the Commission.

[76] Secondly, there is no evidence of changes in market conditions that would justify lifting the relevant conditions.

[77] Thirdly, Atlin's alleged technical and financial capabilities have been known to Ferro since it selected Atlin as the successful bidder in 2015. Ferro did not ask for the conditions to be revisited at the time. By its own admission, its request has only come as a result of the theft of its information. It would be unjustifiable in the circumstances of this case, to expend public resources to protect private interests when Ferro has appropriate recourse in the High Court.

[78] For the sake of completeness we consider below the nature of the stolen information since it was fully ventilated by the parties.

The nature of the allegedly stolen information

[79] The PFS report prepared by the forensic experts lists a range of information found to have been transferred onto Mrs Allan's USB flash drive, which Ferro alleged in its founding affidavit, was competitively sensitive. It is common cause that ten documents were transferred, some of which were also found on Mr Blom's computer. For ease of reference, we present the documents in the table below. It is clear from the

description of each document, save for items 11 and 12, that they disclose no or limited competitively sensitive information.

NUMBER	DOCUMENTS
1	CUSTOMER INFO PE.xls (Found on both Mrs Allan's and Mr Blom's computer) Document discloses the name of the company, the contact person, the contact number, an e-mail address, a physical and postal address. It contains no product, volume or pricing information.
2	CUSTOMER INFO.xls (Found on Mrs Allan's computer) Document discloses the name of the company, the contact person, the contact number, an e-mail address, a physical and postal address. It contains no product, volume or pricing information.
3	POOL QUOTE xls New.xls (Found on Mrs Allan's computer) Document contains a template, a formula indicating how much resin is required for a particular size swimming pool. It contains no product, volume or pricing information.
4	POOL QUOTE xls 2015.xls (Found on both Mrs Allan's computer) Document contains a template, a formula indicating how much resin is required for a particular size swimming pool. It contains no product, volume or pricing information.
5	VAT NO'S.xlsx (Found on Mrs Allan's computer) Document contains the VAT registration numbers of various customers. It contains no product, volume or pricing information.
6	PETTY CASH 2016.xls (Found on Mrs Allan's computer) NCS Resins Petty Cash Record dating back to October 2013. It contains no product, volume or pricing information.
7	CASH SALES 2014.xls

	(Found on Mrs Allan's computer) Excel spreadsheet of NCS's sales, contains customer cash sales information dating back to November 2013. It contains no product, volume or pricing information.
8	CASH SALE UPDATE 2015.xls (Found on both Mrs Allan's and Mr Blom's computer) Excel spreadsheet containing two worksheets of cash sales information and customer names dating back to March 2012. Document discloses the purchaser, the purchase order number and the amount paid. It contains no product, volume or pricing information.
9	CASH SALES 2016 Excel spreadsheet of NCS sales, contains customer cash sale information dating back to November 2013. It contains no product, volume or pricing information.
10	CASH SALES UPDATE 2016.xlsx Excel spreadsheet containing two worksheets of cash sales information and customer names dating back to March 2012. It contains no product, volume or pricing information.
	The following files were also found on Mrs Allan's computer in an e-mail
11	PE AVERAGE SALES.xlsx Contains NCS's customer information and their average monthly spend with NCS over a 12 month period.
12	PE AVERAGE SALES xlsx.msg E-mail sent to Dean, Atlin Durban, on 21 June 2016. Attached to this e-mail were the documents referred to in 11 above.

[80] The "PE Average Sales.xlsx" and "PE Average Sales xlsx.msg" – items 11 and 12 in the table above list NCS's top 40 customers, product codes and the customers' average monthly spend in 2016 in the Port Elizabeth and broader Eastern Cape areas.

[81] These documents, unlike the others listed above, were not listed in the PFS report as having been found on Mrs Allan's USB. Atlin disputes that Mrs Allan was the source

of this information. According to Atlin, the document was compiled by a certain Mr Hayden, the Regional Manager of Atlin using the customer list acquired by Atlin from Arkema as part of the divestiture. Mrs Allan gave input into the document, using information in her head which she acquired in her ten years of employment with NCS, and which Mr Wesley submitted, was not unlawful. In any event, the average monthly spend figures were estimates based on the collective industry knowledge of Mr Hayden and Mrs Allan.

[82] Ferro argued that, irrespective of whether the document was transferred onto the USB device or not, what was relevant was that Mrs Allan gave input into the document.

[83] Of importance for purposes of our decision is the competitive significance of the information in Atlin's hands irrespective of where it came from, weighed against the adverse effect on competition in the relevant market at a national scale should the toll agreement be cancelled. Although customer names and monthly spend, averaged or not, are competitively sensitive and valuable in a competitor's hands, the public nature of the Act enjoins us to protect the public interest and not private interests. We have already mentioned the limited value of the PE Average Sales documents in the long term compared to the likely substantial lessening of competition in the national market for UPR as a result of the merger which necessitated the conditions. On the facts of this case, cancelling the toll agreement and consultancy services would serve Ferro's private interests to the detriment of the public interests. We have therefore decided to not vary the conditions.

Costs

[84] Both parties have sought costs against each other.

[85] Atlin submitted that the Tribunal has the power under section 27 of the Act, to make whatever order is necessary for the proper conduct of its proceedings particularly

where its proceedings have been abused, as in this case. Mr Wesley submitted that Atlin has been put to unnecessary trouble and expense to defend the unsubstantiated claims made by Ferro. He submitted that we should order costs on an attorney-client scale.

[86] Ferro submitted that the Tribunal's powers to award costs are set out in section 57 of the Act and in terms of that section, are limited to complaint proceedings, which these proceedings are not. Ferro submitted further that, even if the Tribunal had a discretion to award costs under section 27, Atlin has not made out a case for punitive costs on an attorney-client scale.

[87] However, even assuming we have a discretion under section 27, we have decided not to award costs in favour of either party. This is because, although Ferro has been unsuccessful in its application, Atlin through the conduct of Mrs Allan who is now an employee of Atlin is tainted with the (alleged) misappropriation of information, some of which has been found in its possession. This cannot be condoned.

ORDER

[1] The application is dismissed.

[2] There is no order as to costs.

Ms MONDO MAZWAI 9 June 2017
DATE

Mr Andreas Wessels and Ms Medi Mokuena concurring

Tribunal Researcher:	Ms Busisiwe Masina and Mr Ndumiso Ndlovu
For the Applicants:	Adv. J. Wilson S.C. and Adv. GD Marriott, instructed by Nortons Inc
For the First and Second Respondent:	Adv. MA Wesley, instructed by Friedman Scheckter Attorneys
For the Third Respondent:	Ms Anisa Kessery representing the Competition Commission