



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR164Nov16/SUP063Jun19

In the application to supplement the trial bundle

Competition Commission of South Africa	Applicant
And	
Roadmac Surfacing (Pty) Ltd	First Respondent
Much Asphalt (Pty) Ltd	Second Respondent

Case No: CR164Nov16

In re the complaint referral between:

Competition Commission of South Africa	Applicant
And	
Much Asphalt (Pty) Ltd	First Respondent
Roadmac Surfacing (Pty) Ltd	Second Respondent

Panel	: Mondo Mazwai
Heard on	: 3 September 2019
Order Issued on	: 20 December 2019
Reasons Issued on	: 20 December 2019

Reasons for Decision - Application to Supplement the Trial Bundle

Introduction

- [1] This matter concerns an application by the Competition Commission (“Commission”) to supplement the trial bundle in a complaint referral against Much Asphalt (Pty) Ltd (“Much Asphalt”) and Roadmac Surfacing (Pty) Ltd (“Roadmac”), hereinafter collectively referred to as the “Respondents”. The documents sought to be introduced were discovered but not included in the trial bundle.

- [2] The Commission seeks an order to introduce the documents in oral evidence during the hearing. The Respondents have opposed the application.
- [3] The Competition Tribunal (“Tribunal”), in terms of the order below, grants leave to the Commission to introduce the documents in oral evidence. Our reasons for such order follow.

Background

- [4] On 16 November 2016, the Commission filed a complaint referral with the Tribunal against the Respondents.
- [5] The Commission alleged that from 2005 to 2007, Much Asphalt and Roadmac, being firms in a horizontal relationship, bilaterally agreed, alternatively engaged in a concerted practice to divide markets by allocating territories in the provision of asphalt products, in contravention of section 4(1)(b)(iii) of the Competition Act no 89 of 1998, as amended (“the Act”).
- [6] According to the Commission, the Respondents agreed that Roadmac would not enter into the commercial asphalt market and compete with Much Asphalt. Roadmac would also continue to source asphalt from Much Asphalt in provinces where Roadmac had no presence. The Respondents deny the allegations levelled against them.
- [7] Pursuant to the complaint referral, the Tribunal has heard two applications: a condonation application; and a related costs application. The condonation application was triggered by the Commission’s actions a few days prior to the hearing of the complaint referral.
- [8] The main matter was set down to be heard on 6 August 2018. Two days before the hearing of the complaint referral, the Commission sought to supplement the trial bundle with an additional 1221 pages. According to the Respondents, they only received the additional documents a day before the hearing.

- [9] On the first day of the hearing, at the request of the Respondents the matter was postponed *sine die* and the Commission was directed to file an application for condonation for the late introduction of the documents in the trial bundle.¹ The pre-hearing directive issued the next day (“the first pre-hearing directive dated 7 August 2018”) required the Commission to address the reasons for the late inclusion of the documents as well as the relevance of the additional documents. As noted, the documents had already been discovered, but were not included in the trial bundle.
- [10] The Commission filed the condonation application on 10 August 2018. The Respondents opposed the application and in addition, Much Asphalt filed an application for wasted costs against the Commission as a consequence of the postponement. On 17 October 2018, both applications were heard by the Tribunal and on 4 April 2019 both were dismissed.²
- [11] On 14 May 2019, a pre-hearing was held to determine the further conduct of proceedings in the main matter. The Commission sought clarity on whether it was able to supplement the trial bundle or introduce the additional documents in oral evidence at the hearing since they were already in the record. The Presiding Member issued a directive on the same day (“the second pre-hearing directive dated 14 May 2019”), directing the Commission to submit an application setting out the *relevance* of the documents and what they are.³ By agreement between the parties, the pre-hearing directive also made provision for this application to be heard by a single Member.
- [12] It appears from the Tribunal decision that although the Commission had been directed to explain the relevance of the documents in the first pre-hearing directive issued by the Presiding Member, the Commission did not address this fully. Consequently, when the condonation application was heard, no finding on relevance was made.⁴

¹ Tribunal Directive dated 7 August 2018.

² *Competition Commission v Much Asphalt (Pty) Ltd and Roadmac Surfacing (Pty) Ltd* Case No. CR164Nov16/CON153Aug18 para 4.

³ Tribunal Directive dated 14 May 2019.

⁴ See paragraph 34 of *Competition Commission v Much Asphalt (Pty) Ltd and Roadmac Surfacing (Pty) Ltd* Case No. CR164Nov16/CON153Aug18.

[13] On 7 June 2019, the Commission accordingly submitted an application for an order to supplement the trial bundle with a reduced set of documents from the documents initially forming the subject matter of the condonation application. In its application, the Commission explained the relevance of the documents. The number of documents had been reduced to 27 pages from the 1221 pages in the condonation application.

[14] On 21 June 2019, Roadmac and Much Asphalt each filed its Answering Affidavit. They submitted that the Commission's application was a further attempt to introduce documents it had been denied in the condonation application. They disputed the relevance of the documents.

Basis for Relevance

[15] The documents sought to be introduced were Much Asphalt's trading results from 2005-2009, as well as its three-year business plans dating back from 2004-2010.

[16] The Commission stated that the additional documents were relevant for the following reasons:

- "(i) Firstly, part of the Commission's case relates to Much Asphalt's modus operandi, this includes strategic documents which indicates the threats identified by Much Asphalt through the SWOT analysis in relation to vertically integrated companies and new entrants into the asphalt market.*
- (ii) Secondly, Much Asphalt formulated strategies on how to deal with the identified threats in order to maintain market stability. These included arranging to meet and actually meeting actual and potential competitors, acquisitions, use of environmental protection objection to delay or block regional entry and other factors that increases barriers to entry into the market asphalt.*
- (iii) These documents pertain to these issues and as such shed some light on the foundation and the basis of Much Asphalt's behaviour in the market, in particular, the means that were employed by Much Asphalt in addressing threats that were identified in its strategic documents."⁵*

[17] According to the Commission, the additional documents demonstrated the type of conduct Much Asphalt considered threatening to its market position and the

⁵ Commission's founding affidavit, pg 4.

approach it adopted to addressing these threats. As such, it wanted to put into context Much Asphalt's behaviour in the market in which the alleged cartel conduct took place.

[18] Ms Le Roux appearing for Roadmac contended that the Commission failed to establish that Much Asphalt's strategic documents were relevant to the pleaded case.

[19] She submitted, firstly that the nature of the case pleaded by the Commission was narrow. Since the Commission's case is that in 2005, Roadmac and Much Asphalt had a meeting where they reached a collusive agreement, Roadmac fails to understand how Much Asphalt's strategic documents relate to the aforementioned facts, since the strategy documents do not show communication between, Mr Rudolph Fourie and Mr Phillip Hechter being the representatives of Roadmac and Much Asphalt respectively who allegedly met to reach the collusive agreement.⁶

[20] Secondly, Roadmac submitted that the additional documents were "*Much Asphalt's internal documents that monitor the competitive landscape.*"⁷ The documents do not mention Roadmac and therefore, Roadmac was unable to interpret those documents.

[21] Thirdly, Roadmac objected to the inclusion of documents that fell outside the alleged period of contravention. Since the alleged contravention took place between the period of 2005 and 2007, documents outside this period it was argued, were irrelevant.

[22] Mr Wilson appearing for Much Asphalt disputed the relevance of the documents on similar grounds to Roadmac.

[23] He added that the Tribunal had already determined in *Competition Commission v Roadspan Surfaces (Pty) Ltd and Much Asphalt (Pty) Ltd*⁸ (*Roadspan*), that these documents were not relevant.⁹ In that case, Much Asphalt was alleged to have

⁶ See Transcript, pg 15.

⁷ Ibid.

⁸ CR163Nov16.

⁹ See Transcript, pages 34 – 36.

entered into a market division agreement with Roadspan; and the Commission requested that the same documents that form the subject matter of this application be admitted into the trial bundle. The Tribunal granted the Commission's request and after hearing the oral evidence relating to the documents, concluded that the documents did not advance the Commission's case.¹⁰

[24] Much Asphalt's primary objection was, since the Commission was relying on similar-fact evidence, the probative value of the documents must be high. This is because according to the law of evidence, the standard for the admission of similar-fact evidence was its strong probative value.¹¹ Since the documents sought to be introduced by the Commission were found by the Tribunal not to advance the Commission's case, their probative value was low.

[25] The Commission disputed Much Asphalt's argument that it was relying on similar fact evidence. It submitted rather that it sought to show, through the documents, "*Much Asphalt's strategy in dealing with threats to its market, which involved meeting with potential competitors, with a view to obtaining concessions that indeed those entities will not enter the market. This is set out in various parts of the documents...*"¹²

Our Assessment

[26] We do not understand the Commission to be saying that the Respondents were found to have engaged in market division in *Roadspan* or in other instances and therefore their conduct amounts to similar fact evidence. According to the Commission, it seeks to show strategies employed by Much Asphalt in the market, *inter alia*, to monitor the conduct of competitors, including new entrants and vertically integrated firms. The documents may be relevant for instance in showing how the alleged agreement was implemented or how it was monitored, or they may be shown to be unilateral conduct by Much Asphalt.¹³ Therefore at this stage of the proceedings, we do not have to decide the probative value of the documents.

¹⁰ *Competition Commission v Roadspan Surfaces (Pty) Ltd and Much Asphalt (Pty) Ltd* CR163Nov16, para 47.

¹¹ Much Asphalt relied on DP van der Merwe 'Evidence' in WA Joubert (eds) *The Law of South Africa* 3 ed (2015) paras 126 and 130.

¹² See Transcript, pg 67.

¹³ See Transcript, pages 47 and 48.

[27] What we have to decide is whether (i) the documents are relevant; and (ii) whether there would be prejudice to the Respondents were the documents to be allowed in oral evidence.

Relevance

[28] In our view the documents appear to be sufficiently relevant. They address the relevant markets in which the alleged cartel conduct took place; who the participants are in those markets; and the commercial strategies of Much Asphalt in the market at the time.

[29] In *Roadspan* the conclusion on the relevance of the documents was correctly made following the hearing of evidence. The Tribunal determined that the documents were not *directly* relevant¹⁴ and concluded that they did not advance the Commission's case;¹⁵ and that the Commission needed to do more than present the documents through its investigator as it did. It needed to make out a case regarding the documents.

[30] This being a different matter it must be decided on its own merits which are yet to be heard.

[31] We cannot therefore conclusively decide on the face of the documents what their probative value is since this has not been tested with any witness. This determination can only be made when all the evidence is considered together, and the documents are tested with witnesses. The documents may well exonerate the Respondents but without hearing evidence regarding the documents, it would be premature to make this determination. The Tribunal will ultimately give the appropriate weight as to the value of the documents after hearing oral evidence on these documents.

[32] The Commission may lead its evidence differently to Roadmac and it must be given the opportunity to do so.

¹⁴ See Transcript, pg 74 and 75.

¹⁵ *Ibid.*

[33] Turning then to prejudice.

Prejudice

[34] The Commission submitted that the probability that the Respondents could potentially suffer prejudice was long gone¹⁶ since the matter has been postponed *sine die* and the size of the additional documents has been substantially reduced.¹⁷ Therefore, the hearing of the main matter would not be encumbered by the introduction of the significantly reduced documents.

[35] The Commission added that principles of natural justice dictate that the documents be included in the hearing of the main matter. Since the Commission is litigating in the public's interest and as such, it must be permitted to produce all evidence it believes to be useful in the Tribunal reaching a decision.¹⁸

[36] Roadmac differed with the Commission. It argued that the principles of natural justice dictate that the Respondents must know the case that they have to meet. After reading the Commission's application, Roadmac still did not understand how the documents related to the pleaded case. It was of the view that the inclusion of the documents was going to hinder its ability to adequately prepare a defence. It was also of the view that *"it would be unfair to require Roadmac to await the hearing and be surprised or ambushed with a new case theory by the Commission distilled somehow from Much Asphalt's documents."*¹⁹

[37] Much Asphalt had a similar argument to Roadmac. It was of the view that if the Tribunal permitted the inclusion of the additional documents, it would give rise to an expanded case against the Respondents by the back door.²⁰

[38] Much Asphalt also asserted that it would be prejudicial to introduce similar fact evidence in the quest to prosecute the respondent for other unlawful conduct; and

¹⁶ See Transcript, pg 75.

¹⁷ Ibid.

¹⁸ See Transcript, pg 11.

¹⁹ Roadmac's answering affidavit, pg 5.

²⁰ Much Asphalt's answering affidavit, pg 12.

may raise numerous collateral issues that are not probative of the specific complaint in question.²¹

[39] In line with our truth-seeking function as an administrative Tribunal, our practice is generally to allow documents to be introduced during proceedings provided there is no prejudice to the other party/parties. We again note that the documents were discovered but were not put in the trial bundle.

[40] In our view, there would be no prejudice to the Respondents in allowing the documents since the matter was postponed. The Respondents concede this much.²² Moreover, the documents in the discovery sought to be used by the Commission are Much Asphalt's own documents. Roadmac is mentioned in some of the documents. The Commission must be permitted to test the documents with the Respondents.

[41] The Respondents' argument that they are unable to prepare their defence since they do not know what the Commission's case is, or that they may be ambushed can be cured.

[42] As the Respondents state, the Commission has categorically stated that it has not moved from its pleaded case. The Commission can therefore not introduce a new case. Its case will stand or fall on the merits of the pleaded case as supported by evidence. Prejudice, if any, arising from the respondents' inability to prepare a defence can also be cured if necessary, by allowing the respondents time to prepare a defence.

[43] Furthermore, the Tribunal will give due regard and weight to documents that pertain to periods beyond the complaint period, based on the evidence that will be led.

Conclusion

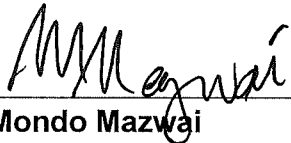
²¹ Ibid.

²² See Transcript, pg 7.

[44] For the above reasons, we find that the Commission has made out a prima facie case for relevance. The Respondents are unlikely to be prejudiced by the inclusion of the additional 27 already discovered documents in oral evidence. Furthermore, any prejudice from the inclusion of the documents can be cured as discussed above.

ORDER

1. The application to supplement the trial bundle with the additional 27 documents identified in the Commission's founding affidavit is granted;
2. There is no order as to the costs.



Ms Mondo Mazwai

20 December 2019
Date

Case Managers: H Vazi
For the Applicant: M Ngobese and M Fhatuwani
For the Respondents: Jerome Wilson
Instructed by: Bowman Gilfillan
Michelle Le Roux
Instructed by: Webber Wentzel