COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR166Dec14/AME318Mar18

In the application for amendment between:

The Competition Commission of South Africa	**Applicant**
and	
Power Construction (West Cape) (Pty) Ltd	**First Respondent**
Power Construction (Pty) Ltd	**Second Respondent**
Haw and Inglis (Pty) Ltd	**Third Respondent**

In re the complaint between

The Competition Commission of South Africa	**Applicant**
and	
Power Construction (West Cape) (Pty) Ltd	**First Respondent**
Power Construction (Pty) Ltd	**Second Respondent**
Haw and Inglis (Pty) Ltd	**Third Respondent**

Panel	: Mr Enver Daniels (Presiding Member)
	: Mr Anton Roskam (Tribunal Member)
	: Prof Fiona Tregenna (Tribunal Member)
Heard on	: 22 August 2018
Order Issued on	: 09 April 2019
Reasons Issued on	: 09 April 2019

REASONS FOR DECISION

Introduction

[1] On 22 August 2018, the Competition Tribunal ("Tribunal") heard the Competition Commission's ('Commission') application seeking leave to amend and supplement a complaint referral filed under case number CR166Dec14 ('the referral'). The purpose of this amendment was to extend the scope of the referral such that the Second Respondent is cited as having contravened the Competition Act 89 of 1998 ('the Act') by engaging in collusive conduct.

[2] We have decided to dismiss the Commission's application to amend.

[3] The reasons for the dismissal follow.

Background

[4] On 17 December 2014, the Competition Commission filed a referral against the respondents. The referral alleged that the first respondent, Power Construction (West Cape) (Pty) Ltd ("West Cape") and the third respondent Haw and Inglis (Pty) Ltd ('H&I') colluded in respect of a tender submitted to SANRAL for the provision of maintenance services in respect of a section of the National Route N1 ("the N1 project"), in contravention of section 4(1)(b)(ii) and (iii) of the Act.

[5] The Commission alleged that West Cape had submitted a bid for the project with no intention of rendering the services. This was done on the instruction of H&I to ensure that sufficient bids were received for SANRAL to award the contract in terms of its tender processes. The N1 project was ultimately awarded to H&I.

[6] In its referral, the Commission sought an order that West Cape had contravened the Act but that the Second Respondent, Power Construction (Pty) Ltd ("Power Construction"), was liable for the administrative penalty.[1] The

[1] The Commission did not seek a penalty against H&I in this referral as it had successfully applied for Corporate Leniency.

business of West Cape had been transferred to Power as a going concern in July 2007.

[7] Importantly to the matter at hand, in the original referral, there was no allegation that Power Construction itself had contravened the Act, only that it would be liable for the administrative penalty for West Cape's contravention.

[8] After a number of *points in limine* were raised and argued before this Tribunal and the Competition Appeal Court, Power Construction made a *with-prejudice* settlement offer ('the settlement offer') to the Commission. At a pre-hearing held on 18 July 2017, the Tribunal was made aware of this settlement offer and a timetable was established to facilitate the settlement process.

[9] On 3 November 2017 the Commission informed the respondents that it refused the offer. The Commission stated that upon reviewing the settlement offer and accompanying financial statements of the respondents, it had noticed that the West Cape and Power Construction shared a majority of their directors.

[10] According to the Commission, the existence of these common directors would be sufficient to **implicate** Power Construction in the alleged collusive conduct. As such, the Commission believed that any penalty amount needed to be calculated using the (higher) turnover figures of Power Construction and not those of West Cape.

[11] Another pre-hearing was convened on 8 February 2018 where the Commission explained its position, stating that the new information provided in the settlement offer implicated Power Construction in the anti-competitive behaviour and thus justified the use of Power Construction's turnover figures in the calculation of the fine. The respondents denied this and argued, *inter alia*, that the Commission could not use Power Construction's turnover because the Commission had never alleged that Power Construction itself had contravened the Act.

[12] It was ultimately decided at the pre-hearing that the Commission would bring an application to amend the initial referral to reflect that Power should similarly be implicated in the conduct along with West Cape.

[13] The Commission brought its application on 20 March 2018, Power Construction and West Cape filed their answer on 12 April 2018. It is this application with which these reasons deal.

Deficiency in the Amendment Application

[14] Tribunal Rule 18 provides that any person who has filed a referral may, at any time prior to the end of the hearing, apply for leave to amend its referral. Should a referral be granted, any affected parties are given an opportunity to amend its papers.[2]

[15] Whilst the Tribunal's rules make express provision for amendments, the Tribunal has, in the past, looked to the jurisprudence of the High Court in the process of determining amendments.

[16] The Competition Appeal Court (CAC) and Tribunal have followed a generally permissive approach to amendments.[3] As put forward by the Commission and the Respondents in their heads of arguments, the approach with regard to the granting of an amendment application should be a generally permissive one to allow the full ventilation of the issues at hand.[4]

[17] High Court jurisprudence tempers this approach with the considerations of prejudice or injustice to the opponent in cases in which an application to amend is made. The Courts have sought to refuse amendments in instances where the parties affected by the amendment cannot be put back, for the purposes of justice, in the same position as they were when the pleading which is sought to be amended was filed. [5]

[18] The Courts have also drawn a distinction between an amendment introducing a new cause of action and one which merely introduces fresh and alternative

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[2] Rules for Conduct of Proceedings in the Competition Tribunal, Rule 18.
[3] *See* Competition Commission v Yara South Africa (Pty) Ltd and another (31/CR/May05) para 47 and 48; Yara South Africa (Pty) Ltd v Competition Commission (93/CAC/ Mar10)
[4] Tribunal judgement *Ibid* para 48.
[5] Moolman v Estate Moolman 1927 CPD 27 at 29.

facts supporting the original right of action as set out in the cause of action, showing a refusal to grant amendments which would resuscitate a prescribed claim or defeat a statutory limitation as to time.[6]

[19] The core of our decision lies in the fact that, despite a generally permissive approach to amendment applications, the Commission has failed to provide any material evidence to establish a *prima facie* case in favour of amendment. This deficiency in the substance of the Commission's case is decidedly more fatal considering the potential prejudice to be suffered by the Respondents if the amendment were to be granted at this late stage of the matter.

Undue delay

[20] The Commission has relied on what it alleges to be new information in bringing this application before us. This new information is the Commission's discovery of a significant number of common directors between the first and second respondents. The Commission states that it had no knowledge of these common directors prior to the receipt of the financial statements for the respondents that were contained in the with-prejudice settlement offer. According to the Commission, only upon review of the settlement offer documents in July 2017 did it discover these common directors and begin to further investigate the possible complicity of Power Construction.

[21] The Respondents argue that if the Commission did not have actual knowledge then it at least *should have known* about the common directors years prior to July 2017. This is because the Commission had at their disposal a number of submissions from a Mr A du Preez (who was an executive of both respondents) from April 2011, as well as the financial statements of Power Construction by January 2012 which detail Mr du Preez's involvement.

[22] The Respondents argue that upon reasonable investigation the Commission could have concluded that there were common directorships. The Respondents argue that it is clear the Commission did not conduct this investigation into

[6] Competition Commission v Yara (note 3 above) Appeal Court Judgement para 20.

Power Construction in the years preceding 2017 as it had no reason to believe that Power Construction should be complicit in the alleged contravention.[7] It was only after the Commission was made aware of the maximum penalty amounts that it would be capable of implementing against West Cape that it decided to pursue Power Construction, with its significantly higher turnover, in order to implement a higher fine.[8]

[23] At the hearing, the Commission could not put up any reasonable explanation for the failure to take reasonable investigatory steps.[9] Instead, it chose to focus on the fact that delays should not, by themselves, be fatal to an amendment application. This may be true in principle, but this does not mean that a delay can never contribute to the dismissal of such an application. Here the focus should be on whether the delay (including the cause and duration of such) has created or significantly contributed to 'a situation of unfair prejudice towards the opponent of the application that cannot be remedied by costs or a postponement order'.

[24] It is worth noting that the Tribunal does not enjoy the jurisdiction to make an order of costs against the Commission. The Commission submits that this is no bar to allowing an amendment and that the High Court jurisprudence should be interpreted to allow amendments when asked by the Commission when, even though there is prejudice, it is the *type of prejudice* that would be reparable by costs if the option were available to the Tribunal.[10] We are not fully convinced by this argument. Nor are we convinced by the Respondent's argument that we should strictly interpret the fact that the Tribunal cannot award costs as an indication that the Commission's ability to seek an amendment should be curtailed.

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[7] Respondent Heads of Argument (Respondent HOA) p16 para 32.3 "*It* [the Commission] *could, of course, also invoked its investigative powers to ask Power West Cape and Power Construction to provide the Commission with a list of their respective directors. It did not do so, because it had no reason to believe that Power Construction was somehow complicit in the actions of Power West Cape*".
[8] Respondent HOA p21 para 46.2.
[9] Transcript of Proceedings CR166Dec14/AME318Mar18 22 Aug (Transcript) p65.
[10] Transcript p64.

[25] We find that the enquiry should ultimately balance the prejudice suffered against the value of the proposed amendment in the pursuit of justice.

[26] As a starting point, the Commission has a duty to thoroughly investigate the matter regardless of the fact that a complaint was part of the fast-track settlement process. The Commission had, in 2011, all the knowledge it purported to only obtain in 2017 and it failed to provide any reasonable justification for its conduct in the investigation process.[11] The failure to act in accordance with its duty is evidenced by bringing a claim of contravention at the eleventh hour of this matter against a respondent who has already made with-prejudice settlement offers.

[27] In this context, the Commission should make a case as to why the amendments they wish to make are so relevant for the full ventilation of issues in this matter that it outweighs any prejudice occasioned by the delays discussed above.

Limited evidence put forward

[28] We note that in an application for amendment, care must be taken to prevent the proceedings from descending into mini-trials.[12] It is well established that these matters should steer clear of factual disputes or findings on the strength or weakness of a case.[13]

[29] However, the burden still lies on the applicant to prove that they are deserving of the indulgence of an amendment by putting sufficient factual allegations before the court and offering a satisfactory account for any unreasonable delay in bringing such an application.[14] There is no amendment by right.[15]

[30] It is also evident that the Tribunal must consider whether the amendment, as granted, would render the Commission's referral excipiable. This analysis is implicit in assessing the value of the proposed amendment to the full ventilation

[11] Respondent HOA p17-20, Competition Commission Heads of Argument (CC HOA) p11-15.
[12] Competition Commission v Loungefoam (Pty) Ltd and Others, In re: Competition Commission v Loungefoam (Pty) Ltd and Others (103/CR/Sep08) [2010] ZACT 39 (8 June 2010) para 19.
[13] *Ibid.*
[14] Zarug v Parthie NO 1962 (3) SA 872 (D) at 876 C-D.
[15] See Discussion in Herbenstien and Van Winsen "The Civil Practice of the High Courts of South Africa" 5th ED Juta 2012 p680.

of the matters. If the amendment sought by the Commission renders the pleadings excipiable, it can hardly be said that the interests of justice are best served by granting the amendment. There is thus an implicit requirement for the assessment as to whether, if the amendment sought raises a case against a new party, as it does in this matter, there is sufficient granularity within that amendment, that would enable the respondent to understand and answer the fresh case against them.

[31] In this regard, the Commission has not placed the full dimensions of its amendment before us. We heard in oral argument that the Commission seeks to construct a case against Power Construction that it was complicit in the actions of West Cape because the directors of Power Construction had knowledge of the actions of West Cape and failed to report such to the authorities.[16] In support of this argument, the Commission relies on the European *Alborg* case and the importation of its principles therein.[17]

[32] On a cursory reading, none of the cases provided by the Commission in an attempt to prove this matter are on point. That is, none of the cases deal with the same factual circumstances of the case the Commission seeks to launch against Power Construction, namely, that the presence of a common director between West Cape and Power Construction who had knowledge of the illegal actions in West Cape but failed to report such to the authorities, renders Power Construction, which was formed six months after the anti-competitive conduct took place, complicit in the conduct of West Cape.

[33] The Commission appears, therefore, to be embarking on a complex and uncharted legal course with the case it seeks to bring against Power Construction. Whilst it is improper to, at this stage, comment on the potential success or failure of such a path, we can take into account its complexity and novelty within the complex of weighing up the interests as to whether to grant the amendment.

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[16] Transcript p5 lines 21- p6 lines 10.

[17] Aalborg Portland A/S v Commission of the European Communities (Joined Cases C204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P).

[34] The Appellate Division, as it was then, has held, albeit it in context of an exception applications, that the complexity of a case may necessitate a higher standard of pleading, or pleading to a greater degree of precision in order to be considered fair.[18] If we import this principle into the present application we find that considerations of fairness may require that an amendment seeking to launch a more complex legal argument may require a stronger factual basis. This importation is not entirely misplaced given the fact that, as described above, the Tribunal should be mindful to avoid allowing any amendment which would render pleadings excipiable by the affected parties.

[35] What then is the factual basis of the Commission's case? It has put up one fact and promised another. The fact put up is that that there were common directors as between Power Construction and West Cape.[19] Mr Quilliam acknowledges, rightly so, that it will be incumbent upon the Commission at the trial to prove that the common directors had knowledge of the infringement[20]—the fact promised.

[36] Addressing the fact promised, Mr Graham Power on behalf of the respondents, submitted in his answering affidavit to the amendment application that the common directors between Power Construction and West Cape had no knowledge of the collusive conduct in question undertaken by Mr Beddingham at West Cape.[21]

[37] In support of this averment, if one examines the letter sent from Power Construction to the Commission on 15 April 2011, the letter in which the Commission first came to know of the N1 Tender, it seems plausible to us that the directors of Power West Cape would only have established any knowledge of the N1 tender through a thorough search of their tenders. The letter thus, absent any evidence to the contrary put up by the Commission, seems to

[18] Imprefed (Pty) Ltd v National Transport Commission 1993(3) SA 94 (A) at 107; *see also* Swissborough Diamond mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA279 9T) at 342 (C).
[19] That this fact was available to the commission since the submission of its letter has an impact on our consideration of the delay in bringing this application, which we consider more broadly below.
[20] Transcript p15 lines 7-14.
[21] Answering affidavit p210 para 74.1.

indicate that Power Construction had no knowledge of the conduct of West Cape's actions.

[38] The *Plascon-Evans rule* is of guidance when evaluating factual disputes that arise out of the Commission's intended amendments. The *Plascon-Evans rule*, simply stated, is that an application is determined upon the facts alleged by the respondent, together with the applicant's facts which the respondent has admitted or not denied, unless the respondent' s version is absurd, improbable or defective for some other reason.

[39] The Commission argued that strict adherence to the *Plascon-Evans* rule was inappropriate because the nature of our proceedings are distinguishable from formal applications proceedings which are run entirely on the papers and are rather more akin to a "hybrid procedure", where we can hear any evidence that was available.[22]

[40] Assuming the validity of this argument, the Commission, in any case, failed to utilise the "hybrid nature of our proceedings" by not leading any material facts outside of the papers to dispute the respondent's version. In the absence of a party's request to refer a factual dispute to oral evidence, courts do not usually refer disputes of fact in application proceedings to oral evidence and are entitled to deal with the application on the undisputed facts. We can see no reason why we should not follow the same approach.

[41] Although we are mindful to not entirely prejudge the strength of the Commission's proposed argument in this matter, the lack of substance to the proposed amendment and the lack of a thorough legal basis for pursuing Power Construction weighs heavily against granting the amendment.

Prescription

[22] Transcript p39.

[42] If leave is granted to amend its papers, in addition to the scant factual and legal case presented, the Commission faces the further challenge, that of prescription.

[43] The issue of prescription has been raised by the Respondents. They argue that the Commission should not be allowed to amend its original referral to include the allegation that Power Construction was complicit in the anti-competitive conduct because the initiation, as against Power Construction for this conduct, occurred more than three years after the conduct in question had ceased.[23]

[44] This argument relied on the assertion that the original initiation against the respondents which occurred, according to the CAC, at some point between May and November 2011 ('2011 initiation') did not include the allegation that Power Construction was a complicit party in the cover pricing.

[45] At best for the Commission, so the respondents argue, the initiation of 2011 was amended in 2017 to include that Power Construction was a complicit party to the prohibited conduct. This amendment would have fallen outside the relevant time periods established in section 67(1).

[46] This raises the novel question as to whether the Commission's initiation as defined by the CAC as occurring at some point in 2011 would be valid as an initiation against Power Construction for the charge of being complicit in anti-competitive practices.[24] Answering this question would require an assessment of both the party against whom initiation was conducted and the conduct which was initiated against.

[47] The Commission provides no context to either of the components of this question in its papers. In reply, it avers that:

> "*the commission submits it initiated it complaint against Power on 1 September 2009, well within the period set out in section 67(1). Even if it should be found*

[23] The statutorily imposed limitation on the Commission's ability to initiate a complaint into conduct (often referred for ease to the 'prescription period' contained in s67(2) of the Act.)

[24] Power Construction (Pty) Ltd vs The Competition Commission of South Africa 145/CAC/Sep16.

that initiation of the complaint took place on or about 15 April 2011, the Commission did so within the time period stipulated in section 67(1)."

[48] The CAC, in its reasons refers the initiation in 2011 being as against "the appellants" which entails both Power Construction and West Cape.[25] If, however, it was the case, then the Commission appreciated that it was initiating a complaint against Power Construction for being complicit in the conduct of West Cape at that time, then it only makes the fact that it waited for seven years to bring an amendment application all the more fatal to the ability of the Tribunal to grant the application now.

[49] Mr Quilliam, rightly in our view, concedes that this is a matter on which further facts would need to be averred.[26] The Commission thus again seeks to bring a case against the respondents without the requisite supporting facts and legal argument, failing to adequately establish a case as to why its amendment should be granted.

The prejudice caused to the Respondents

[50] The Respondents, on the case presented to it, made a with-prejudice settlement offer to the Commission. This settlement included several concessions, which the respondents aver would prejudice them should the Commission's case be amended and were made in the context of the case presented to them. This is a prejudice to the respondents which is incapable of being remedied by a cost order or the ability to submit further papers on the issue.

[51] In addition, allowing the amendment at the late stage of this case, may well lead to a lengthy trial on the merits against Power Construction after several concessions were made by the Respondents.[27]

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[25] *Ibid* paras 38 and 40.
[26] Transcript p23.
[27] Respondents HOA p20 para 46.

[52] The resources of running a trial and defending allegations cannot be considered prejudice enough to refuse an amendment, but they cannot be entirely disregarded.

[53] In the context of the limited evidence put forward by the Commission in support of this application it would be unjust to force the Respondents back into complex proceedings on the merits. Especially so, when it is clear they have made reasonable attempts to reach settlement with the Commission.

Conclusion

[54] The Commission brought the amendment application prejudicially late in proceedings with little explanation for its failure to bring its case earlier. This created a burden for it to prove that the interest of justice would be best served by allowing the amendment. It failed to do so. It seeks to bring a complex legal argument on facts which are, *prima facie*, not in its favour.

[55] Further the amendment either renders the referral as against Power Construction excipiable on the basis of prescription or it renders the lethargy of the Commission in bringing the application so unpalatable that we must conclude that, in the interests of justice, the amendment should fail.

[56] The amendment would be prejudicial to Power Construction, which has made several concessions and sought to settle its conduct with the Commission.

[57] Taking into account the potential prejudice to the Respondents and the deficiency in the Commission's case, we are hard pressed to believe it to be in the interests of justice not to allow the complaint against Power Construction.

Order

1. The Application for leave to amend is dismissed.

Mr Enver Daniels

9 April 2019
Date

Mr Anton Roskam and Prof Fiona Tregenna concurring.

Tribunal Researcher:	Alistair Dey-Van Heerden; Jonathan Thomson
For the merging parties	Adv. Greta Engelbrecht instructed by Marlene van der Merwe of Van Huysteens Commercial Attorneys.
For the Commission:	Layne Quilliam