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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 11/CR/Feb04

In the matter between:

The Competition Commission	**Applicant**
And	
Telkom SA Limited	**Respondent**

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (TribunalMember) Takalani Madima (Tribunal Member)
Heard on	:	19 August 2011
Order issued on	:	24 August 2011
Reasons issued on	:	30 August 2011

Reasons for Decision and Order

Introduction

[1] On 10 August 2011 the Commission filed an application to compel further and better discovery. We heard the matter on 19 August 2011 and issued an order directing Telkom to remove all redactions on the documents listed in the Commission's Annexure A of its Affidavit dated 10 August 2011.

[2] We did not give reasons at the time we made the order. We do so now.

Background

[3] The complaint was referred to the Tribunal on 24 February 2004. Telkom challenged the jurisdiction of the Tribunal to hear the matter and it was only 5 years later, after the Supreme Court of Appeal had rejected Telkom's challenge on 27 November 2009 that the matter then proceeded in our forum.

[4] Telkom' filed its answering affidavit on 12 April 2010 and the Commission replied on 22 June 2010. In the course of discovery Telkom objected to producing documents pertaining to its costs on the basis that the Commission's pleadings did not warrant these and that the Commission was seeking to introduce a margin squeeze case through the discovery process. The Commission denied this saying that it was entitled to seek underlying costs data because Telkom was relying on a costs defence. Telkom eventually decided not to pursue with this defence.

[5] In its answer to the complaint referral Telkom had also observed that the Commission's excessive price case did not comply with the approach set out in the CAC's *Mittal* judgement.[1]

[6] The Commission eventually filed an application to amend its answering affidavit, on 27 September 2010, in order to introduce a margin squeeze case. The Tribunal dismissed this application directing the Commission on how to rectify the objections to its application. The Commission never revived the amendment to include the margin squeeze claim. Despite being put on notice, the Commission had not sought to amend its excessive pricing case during this period.

[7] The Commission then brought a second amendment application which was heard on 21 April 2011. In this application it sought to amend the description of the range and services which are the subject of the Commission's complaint as well as to effect certain changes to its section 8(c) claim and its excessive pricing claim in terms of section 8(a). The amendment to the product definitions were granted but the Tribunal dismissed the application in respect of 8(c) and 8(a).

[8] This uncertainty regarding the ambit of the Commission's case had an unsettling effect on the Commission's applications for discovery which have paralleled the various amendment processes. So much so that this is the third version of its discovery application that we are being asked to consider. The previous two applications were heard on 27 January 2011 and the second on 15 July 2011.

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[1] Mittal Steel South Africa Ltd and others v Harmony Gold Mining Company Ltd and others, Case No: 70/CAC/Apr07, released on 29 May 2009.

The third discovery application

[9] In its application the Commission raised two categories of discovery, the one being documents that are yet to be discovered and the second that Telkom has redacted certain documents that it discovered on the basis that the redacted paragraphs were irrelevant. Certain documents were also illegible and Telkom was asked to provide better quality documents. These are: Items 61, 100, 103, 114, 115, 117, 121, 123, 127, 134 and 141.Telkom has agreed to do so, to the extent it has the documents in question in a form that is more legible. For this reason we make no order in respect of this claim.

[10] Telkom indicated that the documents not discovered did not exist and the issue can therefore not be taken further. The Commission accepts this and did not at the hearing further press for discovery of these items. Accordingly, we again make no order in respect of these claims.

[11] The only issue that remains in dispute are the redactions of the documents listed in Annexure A of the Commission's Affidavit. We consider this issue more fully below.

[12] The Commission argued that it is not competent and permissible for Telkom to redact documents on the basis of relevance, unless it is manifestly clear when reading the document that the matters being redacted are separate from the issues being traversed in that document. More so when the document deals with a single composite issue because then one needs the full context of the document to appreciate the effect of the material that Telkom has seen fit to produce. It is also not for Telkom to decide, at the level of content, what is relevant and what not. That is for the Tribunal to decide.

[13] The Commission specifically referred to Telkom's management accounts and said that the Commission requires the summarized cost data that are contained in the accounts in order to assess the extent of Telkom's profitability and its source within the framework of Telkom's business. The Commission wants to compare Telkom's pricing to its own internal divisions with that charged to third parties. It would not, for the purpose of excessive pricing, look at what went into the cost structure of Telkom. However, said the Commission, Telkom cannot conclude from this that cost is irrelevant

because it is relevant in terms of sections 8(a), 8(c) and 9, where one has to consider the effect that Telkom's conduct had on the market. One of the ways that one can measure the effect is to look at the profit that Telkom gained from its conduct compared to others who hadn't. Therefore Telkom's revenue and specifically its general cost are relevant.

[14] The fact that Telkom is not relying on costs as a defence cannot render irrelevant documents or portions of documents relevant to the Commission's case.[2]

[15] Telkom argued that one has to take, as conclusive, the statement on oath by the party making discovery that documents or portions of them are irrelevant unless the other party can demonstrate that despite that statement those portions or documents are in fact relevant.

[16] Secondly, Telkom argued that that there is a rule in our law against making use of documents obtained by the compulsory process of discovery for any other purpose than in the proceedings for which discovery was made. Since the Commission, in this case, has, so Telkom alleges, made use of documents obtained in other proceedings, Telkom is concerned that the Commission will repeat its previous attempts to broaden its complaint to include margin squeeze and it fears that the Commission as prosecutor will use the documents for purposes other than the purposes that it should. Therefore, it claims, Telkom is entitled to redact out of its documents that which is not relevant to the proceedings because the Commission is not entitled to any cost documents since Telkom is no longer relying on a cost defence and the Commission has now declined to plead a margin squeeze case. Telkom also relies on the Commission's statements earlier in these proceedings in which it claims the Commission conceded that it did not require access to discovery over cost once Telkom had abandoned this defence.

[17] There are two issues we have to address in our decision. The first relates to whether cost evidence of the type the Commission seeks is relevant to the case as presently pleaded. The second is that even if it is, whether Telkom's

[2] See Harms "Civil Procedure in the Supreme Court" at par B35.5 and Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 2 SA 279 (T) 310-311

assertion that the redacted portions contain no relevant material should be determinative of the matter.

Is the cost data the Commission seeks relevant?

[18] The Commission, in its complaint referral, alleges that Telkom engages in price discrimination and/or excessive pricing in contravention of sections 9 and 8(a) and/or 8(c) of the Act. Firstly Telkom provides Diginet and Diginet-Plus line rental services to customers of Telvans in respect of VANS and/or competing services/products at prices which are cheaper than those charged to private VANS providers and their customers. Secondly, it alleges, Telkom charges its own customers of VANS and/or their customers about half what it charges private VANS providers and/or their customers for the rental of the end connections – network terminating units, local leads and Diginet Ports for Diginet circuit – that must be acquired in order to obtain access to VANS and/or competing services/products. This conduct the Commission alleges has an anti-competitive effect because it forecloses VAN providers from the downstream market.

[19] Telkom has attempted to argue that the case can be decided without reference to cost data, because of the way the Commission has pleaded this case does not require this information to be considered and hence it is irrelevant to the case. But this contention is without foundation. The costs of the respondent are at the heart of price discrimination and excessive pricing cases. As the European Court of Justice stated in United Brands Company and United Brands Continentaal BV v Commission, 27/76 [1978] ECR-207 stated at par 252:

> *"The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."*

[20] Furthermore in assessing whether a dominant firm would likely foreclose the market one has to assess its ability to conduct such a strategy and that in turn depends on its profitability and hence its costs. A firm with a deep pocket is more likely to be able to execute such a strategy than one without. In order

to determine if Telkom's competitors are being foreclosed due to price discrimination or excessive prices the Tribunal has to engage with Telkom's price levels and the circumstances peculiar to it. The Tribunal will, have to examine economic data relating to cost and sale prices, particularly whether Telkom's prices bear a reasonable relation to the economic value of its goods and services or whether it is higher. To ascertain the economic value of a product/service, the Tribunal needs to consider, for instance, Telkom's costs in order to compare it with competitors who broadly have the same cost structures.[3]

[21] Finally, Telkom in its answering affidavit argues that the Commission is not comparing prices of similar services of "like grade and quality". By implication different grades and different quality suggests different components. Either the services contain different numbers of technical components (e.g. more connections or more parts) or different quality components. Such differences necessarily would have cost implications. In order for the Tribunal to determine this difference in "grade and quality", the Tribunal would need to have all relevant information including the cost pertaining to the services.

Should Telkom be entitled to determine relevance?

[22] The Tribunal, in this application, did not have access to the documents listed in Annexure A of the Commission's application. We can therefore not form an opinion on the level of redactions and whether those portions of the documents are relevant for purposes of this case.

[23] The manner in which many of the redactions have been effected makes it impossible to determine whether only irrelevant material has been redacted. We know, as this is common cause, that at least some redactions were done incorrectly, and material of relevance was excised. Telkom concedes this and explains this was due to discovery being performed under pressure which led to error. It claims that documents have been reconsidered and certain other redactions have been removed and only that which is irrelevant has remained redacted. It argues that its contention that the documents no longer contain excisions that are relevant has to be accepted in the same way that a party's contention that it has discovered all the relevant documents in a case has to

[3] Mittal case par 48 - 53

be accepted unless the claimant has established good reason for not accepting this assertion.

[24] There are several reasons why we should not accept this argument. In the first place the redactions have been made in strategic documents containing matter that is otherwise, it is common cause, relevant. Thus the context of the documents suggests prima facie that relevant material would be contained in them. Recall that the Commission does not seek cost data at the level of detail, but high level aggregated costs data of the sort likely to be contained in this genre of document.

[25] Secondly, we know that the efforts at redaction have led to error. Although Telkom claim to have redressed all the errors there is a reasonable apprehension that this may not be so. This is not to suggest the redactions have been made in bad faith, but given that Telkom has more narrowly construed relevance than it should, that it has made it impossible to determine ex facie the document that some material is irrelevant (for instance if a document contained headings that suggested their lack of relevance by way of context), that this discovery process has been more prolonged than it should, we consider that the interests of justice favour an order requiring the redactions to be rescinded. For this reason we have not followed the language in the Commission's proposed order as it fails to address the problems that have already arisen in this litigation leaving Telkom with an unclear guideline as to what material to redact which will inevitably lead to further dispute and delay in this matter which is set down to be heard in October this year. Recall that this hearing has already been postponed from July this year, due to pre-trial disputes over pleadings and discovery.

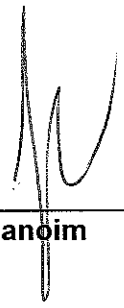
[26] Thirdly, Telkom's concern that the discovered material may be used by the Commission for complaint creep or in other matters is not a relevant consideration for determining discovery issues in this case. If the information redacted is relevant it must be revealed. How it is later used, can be addressed at the appropriate time. Finally we must deal with the point that the Commission has waived its rights to discovery of the cost data as it had on previous occasions during the discovery process conceded that it did not need this data since Telkom was not relying on a cost defence. The Commission denies it made a concession in this manner. Rather it asserts

the concession related to the breakdown of costs not the aggregated information that would appear in the redacted documents.

[27] We don't need to decide this dispute. As an inquisitorial body we are not limited by the Commission's consideration of what is relevant from the pleadings, assuming that it has made such a concession. We are entitled to take our own view of the issues as the Competition Appeal Court has recently reminded us in the *SPC* case.[4] The material is relevant for us to properly discharge our adjudicative function. These are not private party disputes where the case law on discovery, which Telkom seeks to rely on, emerge. A tribunal hearing into an alleged prohibited practice is conducted in the public interest and hence narrower conceptions of discovery that emerge from private adversarial disputes are not always appropriate.

Conclusion

[28] We have for these reasons ordered that Telkom must provide the Commission with copies of the documents listed in confidential Annexure A to our order without any redactions by no later than 29 August 2011.



N Manoim **30 August 2011**
DATE

Y Carrim and T Madima concurring.

Tribunal Researcher: Rietsie Badenhorst

For the Complainant/Applicant: Adv M Brassey SC assisted by H Maenetje instructed by Gildenhuys Lessing Malatji Attorneys

For the 1st Respondent: Adv F Snyckers instructed by Motle Jooma Sabdia and Werksmans Attorneys

[4] Southern Pipeline Contractors et al v The Competition Commission, CAC Case No: 105/CAC/Dec10 and 105/CAC/Dec10