competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR228Dec18/DSM258Feb19

In the dismissal and exception application between:

SHOPRITE CHECKERS (PTY) LTD Applicant

and

COMPETITION COMMISSION Respondent

Case No: CR228Dec18/OTH256Feb19

In the exception application between:

COMPUTICKET (PTY) LTD Applicant

and

COMPETITION COMMISSION Respondent

Case No: CR228Dec18

In *re* the complaint referral between:

COMPETITION COMMISSION Applicant

and

COMPUTICKET (PTY) LTD First Respondent

And

SHOPRITE CHECKERS (PTY) LTD Second Respondent

Panel	: Anton Roskam (Presiding Member) : Enver Daniels (Tribunal Member) : Thando Vilakazi (Tribunal Member)
Heard on	: 22 November 2019
Order issued on	: 2 April 2020
Reasons issued on	: 2 April 2020

REASONS FOR DECISION

INTRODUCTION

[1] On 22 November 2019, the Competition Tribunal ("Tribunal") heard three interlocutory applications filed in response to the Competition Commission's ("Commission") complaint referral of 18 December 2018 against Computicket (Pty) Ltd ("Computicket") and Shoprite Checkers (Pty) Ltd ("Shoprite Checkers").

[2] We collectively refer to Computicket and Shoprite Checkers as 'the respondents'.

[3] Computicket originally filed a stay application and an exception application. Shoprite Checkers filed a dismissal application and an exception application. Computicket's stay application was later abandoned after the Competition Appeal Court ("CAC") issued its judgment in the first Computicket matter[1] ("the 2010 referral").

BACKGROUND

The 2010 referral

[4] In 2010, the Commission referred a complaint against Computicket for the contravention of section 8(d)(i) alternatively section 8(c) of the Act for entering into exclusive agreements with inventory providers for outsourced ticketing services during the period 2005 to 2010 ("the 2010 referral"). Inventory providers refers to theatre owners, theatre producers, promoters, music/film production companies and festival event organisers who provide content or seats for shows or events and who require the selling of tickets in order for end-consumers to view the particular event or show.

[5] In January 2019, the Competition Tribunal decided in favour of the Commission's finding that Computicket contravened section 8(d)(i) of the Act and accordingly imposed an administrative penalty of R20 million.[2]

[6] Dissatisfied with this adverse finding against it, Computicket appealed the Tribunal's decision to the CAC.

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[1] *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19).
[2] *Competition Commission v Computicket (Pty) Ltd* (CR008Apr10).

[7] On 23 October 2019, the CAC dismissed the appeal with costs. The Tribunal's decision against Computicket, therefore, stands.

The 2018 referral

[8] On 18 December 2018, the Commission referred a complaint against Computicket and its controlling entity, Shoprite Checkers. The Commission alleges that during the period 2013 to June 2018, Computicket abused its dominant position by requiring or inducing customers of Computicket to not deal with its actual competitors in contravention of section 8(d)(i), alternatively section 8(c) of the Act ("the 2018 referral").

[9] The Commission seeks from the Tribunal: (i) a declaratory order that the exclusivity provisions in these agreements contravene section 8(d)(i), alternatively 8(c) and are thus void; (ii) an order interdicting Shoprite Checkers and Computicket from concluding any further exclusive agreements; and (iii) that both Shoprite Checkers and Computicket pay an administrative penalty of 10% of each of their respective annual turnovers in the Republic during the preceding financial year, jointly and severally the one paying the other to be absolved.

[10] The third relief sought is different to that which was sought in the 2010 referral and forms one of the bases for Shoprite Checkers' dismissal application.

[11] Similar to the 2010 referral, the 2018 referral concerns Computicket's exclusive agreements whereby Computicket as an outsourced ticketing service ("OTS") agent on behalf of the inventory providers is responsible for selling tickets to customers in exchange for a fee payable to Computicket. The Commission contends that these exclusive agreements contain certain anti-competitive features culminating in the Commission's complaint that Shoprite Checkers and Computicket have abused Computicket's dominance by requiring or inducing customers not to deal with competitors or alternatively by engaging in an exclusionary act to the detriment of competition.

[12] In addition, the exclusive agreements have the effect of preventing or impeding other outsourced ticketing services from entering or expanding into the relevant

market and or obtaining a sufficient customer base to achieve economies of scale in the relevant market.

[13] In terms of the allegations against Shoprite Checkers, the Commission neither considers Shoprite Checkers as an active participant in the market for the provision of OTS in South Africa nor as a dominant firm in such a market. Nonetheless, the Commission has included Shoprite Checkers in the complaint.

[14] The Commission is of the view that, after Shoprite Checkers acquired Computicket in 2005, Computicket was fully integrated into Shoprite Checkers' value chain and was, therefore, able to exert "*decisive influence*" over Computicket, which included the enforcement of exclusive contracts with inventory providers. Shoprite Checkers was party to the negotiations of the impugned exclusive contracts, according to the Commission.

[15] In response to the 2018 referral, as previously mentioned, Shoprite Checkers and Computicket filed their respective interlocutory objections which we have to determine.

THE INTERLOCUTORY APPLICATIONS

[16] We deal first with Shoprite Checkers' dismissal application followed by Shoprite Checkers and Computicket's exception applications as they both traverse the same issues.

The dismissal application

[17] In its referral, the Commission states that the impugned conduct applies to both respondents because either Computicket and Shoprite Checkers were involved in the impugned conduct or Shoprite Checkers exercised decisive influence over the decisions of Computicket so that Computicket did not decide its own market conduct independently but rather in accordance with the will of Shoprite Checkers, its parent company.

[18] In this regard, the Commission relies on a number of factors to support its contention that Shoprite Checkers exercised decisive influence over Computicket. Some of the factors include:

[18.1] Shoprite Checkers' 2005 acquisition of Computicket in terms of which Computicket would be fully integrated into the value chain of Shoprite Checkers;

[18.2] The General Manager of Shoprite Checkers' Value-Added Division, [redacted], implemented Shoprite Checkers' strategy in relation to Computicket. The Commission's view in regard to the former's influence over the latter is bolstered by the fact that he was subsequently appointed as Chief Executive Officer ("CEO") of Computicket in 2007. He was also appointed to the Shoprite Checkers Board of Directors in 2009.

[18.3] Shoprite Checkers required Computicket to include three-year exclusivity clauses with inventory providers.

[18.4] The negotiation of the agreements with inventory providers was shared between the respondents and Shoprite Checkers was aware of and endorsed the conduct of Computicket which gave rise to the (alleged) contraventions of the Act.

[19] A further basis for Shoprite Checkers' inclusion in the referral is that the respondents constitute a single economic entity and, therefore, a *"firm"* as defined in section 1 of the Act for the purpose of section 8. According to the Commission, once one accepts that the separate legal personalities that are Shoprite Checkers and Computicket constitute a single economic entity (and a "*firm*" as defined in section 1 of the Act) then it follows that they collectively pursued the impugned conduct and are both liable. In support of this contention, the Commission relied on this Tribunal's leading decision in *Competition Commission v Delatoy Investments (Pty) Ltd and others* (*Delatoy*)[3] and the authority of the European Commission in *Akzo Nobel and others v Commission* (*Akzo*).[4] Even though the Commission conceded that Shoprite Checkers was not active in the market for outsourced ticketing services, it submitted that this would not affect its case since the respondents are a single economic entity, and a contravention of the Act through the conduct of Computicket had been established.

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[3] (Case No: CR212Feb15
[4] (Case C-97/08P).

[20] Shoprite Checkers objected to the Commission's case in a number of respects.

[21] Firstly, the Commission's complaint referral makes no reference to the doctrine of a single economic entity which suggests that that was not the case that the Commission contemplated at the time of referral.

[22] Secondly, if one were to accept that the respondents constitute a single economic entity for the purposes of a section 8 contravention, the Commission's case is confusing because, under the relief sought, it seeks penalties from each respondent respectively for the same conduct as opposed to seeking one penalty from the so-called single firm.

[23] Thirdly, even if the Commission had, in fact, pleaded its single economic entity case on the papers, the invocation of the single economic entity doctrine would itself be excipiable since the doctrine has only ever been invoked in cases pertaining to horizontal restrictive practices proscribed under section 4 of the Act.

[24] Fourthly, the Commission failed to establish dominance in terms of section 7 of the Act on the part of Shoprite Checkers in the market for the provision of OTS. There is no allegation, or any facts pleaded illustrating that Shoprite Checkers abused its dominance or acted in a manner contrary to section 8(d)(i) and/or section 8(c).

[25] Lastly, Section 59(3A) of the Act, which permits an administrative penalty to include the turnover of any firms that control the respondent, where the controlling firms knew or should reasonably have known that the respondent was engaged in the prohibited conduct, is one of the many amendments to the Act which were only promulgated in July 2019 and do not apply retrospectively. In other words, the 2018 referral was referred to the Tribunal prior to section 59(3A) being promulgated into law. Prior to the inclusion of Section 59(3A), the Act did not permit the imposition of a penalty on a parent company for the prohibited conduct of a subsidiary. According to Shoprite Checkers, the Commission is merely attempting to prematurely invoke a new power which does not apply to the relevant conduct which took place between 2013 and June 2018.

Our analysis

[26] The single economic entity principle is enshrined in section 4(5) of the Act which states that the provisions of section 4(1) do not apply to an agreement or concerted practice engaged in by a company, its wholly owned subsidiary, a wholly owned subsidiary of that subsidiary or any combination of them; or by firms that constitute a single economic entity. This principle was considered by the Competition Appeal Court in *A'Africa Pest Prevention CC and another v Competition Commission of South Africa*[5] (*A'Africa*) and *Loungefoam (Pty) Ltd v Competition Commission and others*[6] (*Loungefoam*). The Tribunal case of *Competition Commission v Delatoy Investments (Pty) Ltd and others*[7] (*Delatoy*) is also relevant.

[27] In *A'Africa*, the CAC had to determine whether firms accused of collusive tendering constituted a single economic entity and are, therefore, exempt from the application of section 4(1)(b)(i) and (iii) of the Act. Here, the Tribunal found against the appellants (i.e. A'Africa and Mosebetsi) in that they had contravened section 4(1)(b)(i) and (iii). The appellants had submitted identical quotations for fumigation services at the Magistrates Office to the Department of Public works. They had both quoted an amount of R2 640.00 (excl. VAT) to render the requested services. The CAC traversed the origins of the single economic entity doctrine, highlighting its prominence in the United States and Europe.[8] It is unnecessary for us to repeat all of its observations herein. Having considered the facts and circumstances of this case, the court doubted, however, whether the appellants were in a single economic entity within the interpretation of section 4(5) and, therefore, assumed on behalf of the Commission that section 4(5) did not apply.

[28] In *Loungefoam*, the application of section 4(5) was decided in the context of section 4(1)(b)(i) and (ii). There the appellants, Loungefoam and Vitafoam, alleged that they could not have been parties to horizontal restrictive practices with one another as they were at all relevant times part of a single economic entity.[9] The Commission argued that even in the event that Loungefoam and Vitafoam were at all material

[5] (168/CAC/Oct18).
[6] (102/CAC/June10).
[7] (Case No: CR212Feb15).
[8] *A'Africa* para 27.
[9] *Loungefoam* para 4.

times a single economic entity, Steinhoff International and Steinhoff Africa (the holding companies of the firms) should be liable for any administrative penalty imposed by the Tribunal.[10]

[29] In all the cases cited above, the firms were accused of horizontal restrictive practices in terms of section 4. In the matter before us, the 2018 referral concerns a section 8 contravention. We must ask the question whether it would be appropriate to apply a doctrine, normally relied on and applied in horizontal restrictive practice cases, to an abuse of dominance case? In our view, no. The reading of section 4(5) clearly applies to agreements or concerted practices in the context and framework of section 4(1), as subsection (5) reads "*the provisions of subsection (1) do not apply to an agreement between, or concerted practice...*". If its application were intended for section 8, the legislature would have indicated such an intention clearly, by inserting a similar provision to section 4(5) under section 8.

[30] We have not yet dealt with any cases in which section 4(5) was used in a section 8 context. The Commission's case in this regard is, therefore, rather novel. No case authority was provided to illustrate such an application.

[31] In addition, some scholars are rather sceptical of the doctrine's application in abuse of dominance cases. They observe the difficulty of a situation where a dominant company would marginalise its subsidiary or sister company in the market in order to increase prices to the detriment of consumers. If such misalignment in strategy would occur, it can be said that such firms do not have sufficient unity of interest to be considered an economic entity.[11]

[32] Lastly, the Commission's attempt to bolster its case by illustrating the manner in which Shoprite Checkers had decisive influence over Computicket is not entirely persuasive. These allegations lack clarity and do not take the matter further.

[33] From the Commission's case, it is clear that it wishes to rely on this doctrine purely to hold Shoprite Checkers liable for an administrative penalty. This too is misguided. The CAC in *Loungefoam*[12] rejected the Commission's reliance on the

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[10] *Loungefoam* para 5.
[11] See Fasken Martineau, Mackenzie et al, *The Single Economic Entity Doctrine in South Africa and its implications for Competition Policy* pg. 6.
[12] (102/CAC/June10).

doctrine to hold a parent company liable for administrative penalties of its subsidiary. It held that:

> *"the purpose of this section is to prevent companies operating within a group of companies, or firms operating within a single economic entity similar to a group of companies, from being accused of perpetrating restrictive horizontal practices in consequence of their interactions with one another as part of the group. The purpose of the section is exclusionary. It is not creative of obligations going beyond that exclusionary purpose. Its operation is restricted to [section] 4 of the Act and to relationships between members of the group, whether a group of companies or a group of firms."*[13] (our emphasis)

[34] The jurisprudence concerning section 4(5) is instructive. We, therefore, need not deal with the *Akzo* case, as any progressive interpretation of the Act or reliance on any foreign case law will not be of any assistance.

[35] The Commission cannot rely on any of the provisions contained under section 59 of the Act. Shoprite Checkers was of the view that the Commission sought to hold it liable for a penalty in terms of section 59(3A) of the Act – a recent amendment to the Act. Section 59(3A) was promulgated in July 2019 and the Commission's complaint was referred before then. The amendments do not have retrospective effect and, therefore, reliance on section 59(3A) must fail.

[36] It is our view, in light of the law outlined above, that Computicket and Shoprite Checkers are separate economic entities and should therefore be treated as such in respect of the allegations contained in the Commission's complaint referral.

[37] With regards to the issue of dominance, the Commission conceded that Shoprite Checkers is not active in the market for outsourced ticketing services to inventory providers in which Computicket is active. Unsurprisingly, no market shares attributable to Shoprite Checkers are reflected anywhere in the Commission's referral. It simply is unclear what we are to make of the allegations against Shoprite Checkers. Given that the Commission's reliance on the single economic entity

[13] *Loungefoam* para 66.

doctrine fails and the question of dominance is abundantly opaque, the Commission must rectify its referral to properly reflect and clarify the case against Shoprite Checkers in order for it to meet the case put against it.

The exception applications

[38] In their respective exception applications, the respondents averred that the Commission's complaint referral failed to disclose a cause of action as it lacked the necessary factual averments to sustain a complaint under sections 8(d)(i) and/or 8(c) of the Act and was vague and embarrassing.

[39] Shoprite Checkers averred that the Commission must advance material factual allegations to sustain a contravention under section 8(c). It must, according to them, address: (i) dominance on the part of Shoprite Checkers in the market; (ii) the manner in which Shoprite's conduct impedes entry and expansion into a market and; (iii) its allegedly anti-competitive conduct and how that is not outweighed by any pro-competitive effects.

[40] With regards to the allegation made in terms of section 8(d)(i), the Commission must show: (i) dominance on the part of Shoprite Checkers in the market; (ii) the existence of an agreement between Shoprite Checkers and inventory providers to the exclusion of other third parties; and, (iii) the manner in which Shoprite Checkers competes with third party outsourced ticketing service providers. According to Shoprite Checkers, the Commission must do so in respect of section 8(c) as well.

[41] Shoprite Checkers also contended that the Commission's complaint referral is unclear and inconsistent. On the one hand, the Commission seeks a declaratory order that the exclusive agreements to which Computicket, not Shoprite Checkers, is a party, contravene either section 8(d)(i) or 8(c) of the Act. One the other hand, the Commission then seeks a second declarator against both entities separately but not as a joint firm. This, as Shoprite Checkers argued, creates an anomaly whereby only Computicket can be found to have contravened the Act. However, in such event, two fines will be imposed, one on Computicket and the other on Shoprite Checkers, for the same conduct. This is further exacerbated by the fact that the Commission's founding affidavit concedes that Shoprite Checkers is not dominant in the market for outsourced ticket services and does not, itself, conclude

any exclusive agreements with inventory providers. This can only mean that none of the section 8 requirements necessary to sustain the finding of a contravention are present in the case of Shoprite Checkers.

[42] As for the relief sought, Shoprite Checkers submitted that in the event that the Tribunal does not dismiss the 2018 referral against Shoprite Checkers on the grounds pleaded, the Commission must be ordered to plead the relevant facts and to indicate with clarity which allegations are made in respect of Shoprite Checkers.

[43] In its defence, the Commission contended that it had sufficiently set out the material factual allegations and the law on which it relies in its cause of action. It argued that it pleaded its case with sufficient particularity in its referral to allow Shoprite Checkers to plead specifically to the allegations contained therein.

[44] Similarly, Computicket's exception application contends that the Commission's complaint referral is vague and embarrassing in a number of respects. Firstly, the Commission has not pleaded with either any degree of clarity or certainty which allegations are made against it alone and which of the allegations include alleged conduct on the part of Shoprite Checkers. For example, it does not detail the existence or nature of the alleged influence or participation of Shoprite Checkers in respect of the allegations levelled against Computicket.

[45] Computicket also argued that it is in no position to respond to the Commission's allegation that it is dominant in the relevant market and holds a 69% market share, because it is not clear what methodology was used in determining dominance and reaching that figure.[14]

[46] Furthermore, Computicket argued that the assertion by the Commission that it adopted and enforced the "*all or nothing*" policy in negotiations with inventory providers is pleaded without any material facts to support it. The Commission does not provide dates of the alleged period during which Computicket adopted or enforced such policy.

[47] In response to Computicket, the Commission maintained its position regarding the application of a single economic entity doctrine. Even though Computicket and

[14] See Computicket's Exception Application Founding Affidavit para 18.3.

Shoprite Checkers are two separate, legal entities they operated as a single economic entity and therefore should be taken together as a "firm" for purposes of section 8. The founding affidavit explains that allegations regarding abuse of dominance apply to Shoprite Checkers and explains why.

[48] Furthermore, the Commission is not obliged to plead the facts that underpin the allegations of dominance, or the level of the market share allegedly held over a period of time. The Commission argued that it pleaded with sufficient particularity to enable the respondent to file an answer to the referral as required by the test set out in *Paramount Mills.*[15]

Our analysis

[49] The Tribunal's approach when considering exception applications takes into consideration the *sui generis* nature of its proceedings as it does not approach pleadings in the same way as civil or criminal courts.[16] Its approach to pleadings is less strict than that of the high courts.[17]

[50] In these applications, the Tribunal must determine whether the Commission's referral against the respondents contains concise statements of the grounds of the complaint and contains material facts or points of law relevant to the complaint, which disclose a cause of action that allows the respondents to meet the complaint against them.

[51] In so far as Shoprite Checkers is concerned, we need not deal again with the issue of dominance. The Commission ought to clarify and sufficiently plead its case, if at all, against Shoprite Checkers as a separate legal entity from Computicket in relation to section 8 of the Act.

[52] In relation to Computicket, it is not clear which allegations are made against Computicket alone or against Computicket and Shoprite Checkers. The Commission ought to fully clarify the context in which allegations are made against the respondents.

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[15] *Paramount Mills (Pty) Ltd v the Competition Commission* Case No: 112/CAC/Sep11 paras 60-62.
[16] *Rooibos Ltd v Competition Commission* (129/CR/Dec08) para 5.
[17] *Competition Commission, Anglo American Medical Scheme and Engen Medical Fund v United South African Pharmacies and Members of United South African Pharmacies* (04/CR/Jan02) para 2.

[53] On the issue of Computicket's alleged dominance, we agree that the Commission is not obliged to plead the facts that underpin the allegation of dominance, or the level of the market share allegedly held over time. If Computicket disputes this, it will have an opportunity to dispel the Commission's allegations in its answering affidavit.

[54] In its referral, the Commission alleged the adoption and implementation of an "*all or nothing*" policy by Computicket with regards to its exclusive agreements with inventory providers. The referral only explains that Computicket strictly enforces its exclusivity agreements to prevent inventory sharing with other OTS providers and in the event of an OTS provider not doing so, Computicket either terminates or threatens to terminate the agreement with that OTS provider. The Commission ought to clarify in sufficient detail what the "*all or nothing*" policy entails and any material contractual clauses or elements that point directly to this policy.

CONCLUSION

[55] In the result the Commission's complaint referral against the respondents is excipiable in some respects, though, not to the degree where it is incapable of rectification and warrants a dismissal.

ORDER

After hearing the parties in the matter above, the Competition Tribunal orders as follows:

[1] The Shoprite Checkers (Pty) Ltd dismissal application and exception application are upheld in the following respects:

[1.1] Within thirty (30)[18] business days of this order, the Commission must file a supplementary founding affidavit to the Complaint Referral to cure the defects in the Complaint Referral in respect of the allegations against Shoprite Checkers (Pty) Ltd by complying with the provisions of Tribunal Rule 15(2), failing which the applicants in this matter are given leave to approach the

[18] The 30 day period mentioned here and in para [2.1] takes into account the lockdown period contained in the National Disaster Management Act regulations.

Tribunal for an order that the Complaint Referral in so far as it relates to Shoprite Checkers (Pty) Ltd be dismissed.

[2] The Computicket (Pty) Ltd exception application is upheld in the following respects:

[2.1] Within thirty (30) business days of this order, the Commission must file a supplementary founding affidavit to the Complaint Referral to cure the defects in the Complaint Referral in respect of the allegations against Computicket (Pty) Ltd by complying with the provisions of Tribunal Rule 15(2), failing which the applicants in this matter are given leave to approach the Tribunal for an order that the Complaint Referral in so far as it relates to Computicket (Pty) Ltd be dismissed.

[3] No order is made as to costs.

Mr Enver Daniels

3 April 2020
Date

Concurring: Mr Anton Roskam and Dr Thando Vilakazi

Tribunal Case Manager	: Ndumiso Ndlovu
For Shoprite Checkers (Pty) Ltd and Computicket (Pty) Ltd	: MJ Engelbrecht instructed by Werksmans Attorneys
For the Commission	: M Van Wyk and M Swart