COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 18/CR/Mar01

In the matter concerning the application for amendment in the complaint referral by :

The Competition Commission (Commission)

against

South African Airways (Pty) Ltd (SAA)

DECISION

This is an application by the Commission to the Tribunal in terms of Competition Rule 18. The Commission applied to amend its founding papers filed in respect of its Complaint Referral against SAA. After a hearing held on 12 November 2001 the Tribunal has decided to grant the application for the reasons set out below:

BACKGROUND

The substantive complaint referral to which this interlocutory application relates is one filed by the applicant, the Competition Commission (the "Commission"), against South African Airways ("SAA") (the "Respondent"), in terms of which the Commission alleges that SAA, a dominant firm, is offering incentive commissions to travel agents as well as incentives to travel agent consultants in the form of travel bonuses. The Commission alleges that these practices are in contravention of sections 8(d)(i) alternatively 8(c) of the Competition Act. A pre-hearing conference scheduled for 16 August 2001 was aborted when it emerged that the Commission would be filing amendments to its founding papers. The pre-hearing was accordingly postponed *sine die*. On the 17 August 2001 the Tribunal made the following order:

1. *The pre-hearing conference is postponed sine die.*

2. *The matter is adjourned to allow the Competition Commission to file, by Notice of Motion in terms of Rule 42, an application to amend and supplement their Complaint referral ("the application").*

3. *If the Respondent opposes the application it must file an answering affidavit within the time period contemplated in Rule 43 and the provisions of that sub-rule apply to any reply that the Commission may file. Thereafter the application will be set down for hearing on a date to be arranged by the Registrar.*

4. *If the Respondent does not oppose the application, it -*

    i. *Must indicate that intention by notice to the Commission and Tribunal, within 10 business days after being served with the application: and*

    ii. *will be entitled to file a supplementary answering affidavit to the Commission's amended Complaint referral within 20 business days of notifying their intention not to oppose.*

5. *Costs of the pre-hearing, if competent, have been reserved.*

On 23 August 2001, the Competition Commission filed its Notice of Motion and a Supporting Affidavit, giving notice of its intention to amend its founding affidavit in the complaint referral. This amendment was brought in terms of Competition Tribunal rule 18 read with section 50 (3) (iii) of the Act[1]. Note that the Commission's supporting affidavit simply detailed the amendments to its founding papers – it did not provide reasons for amending the papers.

On the 6 September SAA filed an objection to the Commission's application to amend its founding papers. The objection was made on the following four grounds:

1. *the amended papers show a new cause of action;*

2. *the Respondent shall suffer irremediable prejudice;*

3. *the designated application does not disclose any grounds or reasons for such amendment;*

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1 This section states that *"When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection 2(a) , it may –….*
(iii) add particulars to the complaint as submitted by the complainant…"

4. the Applicant is not bona fide in bringing such application.

Note that SAA did not provide further explanation or elaboration of its objection – it simply made the bald assertions reproduced above.

A hearing was accordingly convened to ventilate the Commission's position with regard to the amendment and SAA's objection thereto. The Commission filed heads outlining its case on 24 October 2001, in which it stated that its arguments would be more fully amplified in replying heads of argument once it had had sight of the respondent's heads, arguing that SAA's bald, unsubstantiated assertion did not provide the basis for a considered response. SAA objected to the Commission's stated intention to file heads in reply to SAA's heads, stating that the Commission, as applicant, was obliged to file substantive heads in support of its application to which the respondents would respond. They asserted that the Commission had no right of reply to their heads. The respondents were initially due to file their heads on the 7th November. In the lengthy exchange of correspondence that ensued, the respondents indicated that they would not file their heads unless and until the Commission withdrew its heads and replaced them with more substantive heads. The Commission declined to do so, stating that the respondents would be entitled to air their grievances at the hearing.

AMENDMENT

We should make clear from the outset our disquiet at the controversy – not to mention the costs – generated by the Commission's desire to make certain amendment to its founding papers. This should normally be an uncontentious issue. In the practice of the High Court an amendment takes the form of a mere notice of intention to amend – to which the opposing party is entitled to object - rather than an application to which opposition is expected. In other words, the party wishing to make the amendment would simply inform the court and the opposing party of its decision to amend its papers. This notice would usually be accompanied by a tender to cover additional costs, if any, incurred by the opposing party in responding to the amendments. Only under extreme circumstances would such an amendment be opposed, much less rejected by the adjudicator. The latter is naturally concerned to hear the best, the most complete, case that the respective parties are able to bring before it. Provided the amendment does not prejudice the opponent of the amending party the amended papers will simply be filed and the matter would, in due course, proceed to be heard on the basis of the amended papers.

Regrettably, however, the Commission's attempt to amend its paper in this matter has not proceeded in the routine manner outlined above. On the contrary its attempt to amend its founding papers has spilled over into a heated pre-hearing conference and an irascible exchange of correspondence between the parties, and, now, is the subject of an opposed proceeding that has itself generated significantly more heat than light, and more cost than both.

We are in little doubt that in this particular matter original sin resides with the Commission:

- The first intimation that either the respondent or the Tribunal had of the Commission's intention to amend its papers came as the parties and their legal counsel and members of the Tribunal gathered at a pre-hearing conference convened by the Tribunal to resolve certain matters pre-trial. The papers filed by the parties constituted the basic ingredient for a meaningful pre-hearing conference that was then aborted in consequence of the Commission's sudden notice of its intention to amend its papers.
- On belatedly revealing its intention to amend its papers the Commission did not see fit to tender an apology much less the costs incurred by the respondent in attending the aborted pre-hearing conference and in responding to the amended papers.
- Having been specifically ordered by the Tribunal to make application for an amendment to its founding papers in terms of the provision of Rule 42, the Commission inexplicably submitted its application in terms of Rule 18 read with Section 50(3)(iii).
- Despite having informally revealed to the pre-hearing conference the rationale underlying its desire to amend its papers, the Commission then obdurately refused to motivate its formal notice to amend its proposal.

Neither has the respondent covered itself in glory:

- In response to the Commission's filing of its amended pleadings the respondent contented itself with a terse, peremptory listing of the broad basis of its objections to the amendment and constantly resisted pleas by the Commission to elaborate its bald assertions so as to enable the Commission to respond meaningfully.
- And then, at the commencement of the present hearings, the respondent suddenly submitted lengthy heads of argument elaborating the legal and factual basis of its objection.

The Tribunal was then obliged to preside over lengthy legal argument in a matter that, in the ordinary course of events, should not have detained the members of the Tribunal, nor the opposing legal counsel, nor, of course, their long suffering clients. In summary:

Mr. Pretorius for the Commission argues that the Tribunal should, in this matter, follow High Court convention and view amendments to pleadings as a matter of course, akin to a right enjoyed by any party appearing before it and which only require to be motivated in argument in the event that the other party to the proceedings challenges the amendment and provides reason for this challenge. Given that, in this matter, the respondent has contented itself with a number of broad assertions rather than an elaborated statement of the reasons underlying its objection, Mr. Pretorius thus contends that there is not a proper objection before us. In particular, insists Mr. Pretorius, the respondent has not been able to show that it has suffered prejudice in consequence of the Commission's desire to amend its papers.

Mr. Bhana for the respondent contends that a proper application to amend has not been placed before us. He takes a different view of High Court convention and, in any event, points out that the rule in terms of which the Tribunal ordered the Commission to submit its amendment specifically contemplates an *application* rather than a mere *notice* and that *application* presupposes that the grounds on which the application be made are elaborated and that the respondent be afforded an opportunity to *respond* to that fully elaborated application. Moreover he insists that the respondent has suffered prejudice, to wit the additional cost incurred in consequence of the amendment, including the cost of the pre-hearing conference that was aborted by the amendment.[2] However, he argues that the Tribunal is not even required to consider the question of prejudice, because the Commission, by filing a defective application to amend, has not even reached the hurdle beyond which the question of prejudice is appropriately considered.

We are not going to provide a lengthy, elaborately reasoned response to a matter which has already occasioned considerably more agitation and cogitation than is warranted. Suffice to point out that the approach taken by the respondent to the status of pleadings before the Tribunal – and therefore to the amendment of these pleadings – ignores the fact that proceedings before this Tribunal are never simply civil disputes between two warring private parties. The Tribunal is a creature of a particular statute that has as its principal objective the protection of the public from anti-competitive conduct. This reality accounts for certain of the powers given us by the

2 Note that in the elaborate heads of argument submitted at the hearing the respondent argued that additional prejudice arose insofar as the Commission has sought to amend its papers after sight of and in response to its opponent's counter argument outlined in its answer to the founding papers. Our reading of the record is that this claim was later abandoned – it is, in any event, without merit in this case - leaving cost as the only instance of prejudice.

legislature including our inquisitorial power and it animates our approach to a range of simple and complex matters including the status of pleadings before us. In short it ensures that we adopt, if anything, a more flexible approach to the pleadings before us than would the High Court in a civil matter. We are not refereeing a conflict between two private rivals; we are securing the objectives of the Competition Act.[3]

Our concern is then simply that the substantive complaint be fully ventilated. We cannot allow our disquiet at the cavalier approach adopted by the parties to these proceedings to undermine our duty to the public, including its right to have complaints that are referred to us fully ventilated. This consideration, more than any of the technical arguments made by the Commission or the respondent, dictates that the Commission be allowed to file its amendments and that the respondent be accorded the opportunity to respond to these amendments. This is, in our view, what a proper application of the Act requires. In *Whittaker v Roos & Another; Morant v Roos & Another* Wessels J laid out the position of the court, in the process expressing concerns not evidenced by the posture of either of the parties in the matter before us:

> *'This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon*

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3 Had either party seen fit to consult earlier decisions of the Tribunal they would have recognized that this issue has been previously decided. Cf the Tribunal's decision in Case Number: 49/CR/Apr00 *American Natural Soda Ash Corp/CHC Global (Pty) Ltd and and The Competition Commission/Botswana Ash (Pty) Ltd/Chemserve Technical Products (Pty) Ltd*: 'This leads us on immediately to the second consideration, for if the Tribunal is entitled to enter the fray in this way, unlike its civil court counterpart, it suggests that the function of pleadings to determine the parameters of a dispute, as we understand them in civil actions is diminished. The policy rationale behind this is that prohibited practices do not just have private effects but also affect the broader public. The Tribunal as the guardian of the purposes of the Act cannot be constrained by the ambit of pleadings to the extent would a civil court in adversarial proceedings. The legislature did not intend to make the Tribunal a prisoner confined by the walls of opposing lawyers' pleadings. We must bear in mind that the primary purpose of pleadings is to define the issues between the parties so that each knows what case it must be prepared to meet and secondly so that the court is in a position to identify the issues on which it must make its decision. In the Tribunal's proceedings pleadings serve this function as well, but their status is less elevated given the inquisitorial nature of the Tribunal and the public character of complaint procedures we alluded to above. Consequently our approach to pleadings will be more flexible than a civil court's. Furthermore in our proceedings the defining of issues is not the sole preserve of the pleadings and this function can be supplemented by a pre-hearing conference.'

> *what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'*

We accordingly authorise the amendment but will allow the respondent to file a supplementary answering affidavit and for the Commission to reply thereto.

COSTS

While we must ensure that our decision as to the substantive admissibility of the Commission's amended papers is neither influenced by the Commission's role in causing this wasteful litigation in the first place, nor by the respondents role in extending it, these considerations would normally play a central role in the determination of a costs award.

In our previous order we reserved the determination of the costs of participating in the aborted pre-hearing conference. We confirm that here and, in addition, reserve the determination of costs occasioned by the amendment and the costs associated with the opposed proceeding in this matter.

Our previous order reserved costs 'if competent'. That rider was inserted specifically in deference to the possibility that the Tribunal may not be able to award costs for or against the Commission. That matter remains to be resolved. However, while the legal questions are unanswered, from a public policy standpoint it is clear that the prevalent notion that we are barred from awarding costs in a matter involving the Commission is responsible for a perverse set of incentives – in short it enables the Commission to adopt what Mr. Bhana in this matter aptly characterized as a 'slapdash' approach to its role in litigation. On the other hand it enables defendants to oppose matters, even matters already decided in the Tribunal and the High Court, for no apparent reason other than pique and the desire to prevent opponents from having their day in court. This matter is ripe for determination and after the final resolution of the substantive issues in this matter it will be decided. Since the award of costs for or against the Commission has serious implications for it, we did not want to decide our competence to do so without giving both parties the opportunity to fully argue the matter and hence our decision to reserve.

ORDER

The Tribunal accordingly makes the following order:

1. We authorize the Commission's amendment and supplementation of the Founding Affidavit of Izak Wouter De Villiers Meyer, attached to its Compaint Referral, in the manner contained in the affidavit accompanying its Notice of Motion filed by the Commission on 23 August 2001;

2. The respondent must file its supplementary answering affidavit, if any, to the amended complaint referral **within 20 business days** of the date of this order;

3. The Commission must thereafter file its reply, if any, to the respondent's supplementary answering affidavit, **within 10 business days** of being served therewith;

4. The following issues of costs are reserved to be resolved at the hearing-

   i. participation in the pre-hearing conference on 16 August 2001;
   ii. the wasted costs occasioned by the amendments; and
   iii. the costs occasioned by the opposition to the amendments.

_____ 16 November 2001

D.H. Lewis