COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 18/CR/Mar01

In the matter concerning the
Complaint referral by :

The Competition Commission

and

South African Airways (Pty) Ltd

REASONS FOR DECISION

1. In this application the respondent (South African Airways (Pty) (Ltd)) has applied in terms of Rule 22 (1)(c)(iii) of the Tribunal Rules for clarification of the issues contained in the applicant's ('the Commission') founding affidavit as amended. [1]

2. At a pre-hearing conference held on 12 August 2003, the respondent had indicated that it wished to request certain particulars from the Commission in order to clarify the case against it.

3. Pursuant to this request the presiding member issued the following directive –

    1. *Parties wishing to request further particulars with respect to clarifying issues in this matter for the purpose of preparing for the hearing must file this request by **29 August 2003.***

    2. *Parties replying to this request must file their answer by **26 September 2003.***

    3. *Any party not satisfied with an answer, and which wishes to file an application to compel further particulars for hearing, must file the application within 10 business days of receipt of the answer*.

1 Rule 22 (1)(c)(iii) states " At a pre-hearing conference, the assigned member of the Tribunal may - …give directions in respect of …. clarifying and simplifying the issues."

4. Thereafter the respondent filed its request, which emerged as a 31 page long list of interrogatories. The Commission responded by answering only a handful of the questions, the balance were met with the stock answer that the Rule relied on did not require it to provide any further information.

5. The respondent, not satisfied with the answers it received, then brought this application to compel further and better responses to the questions. Whilst the respondent argued that it had pared down its original list for the purpose of this application, the number of questions it requires to be answered is still formidable.

6. As the application was served late the Commission did not have an opportunity to file answering papers. Nevertheless it indicated it was not prejudiced by the late filing and was willing to argue on the respondent's papers. We condoned the non-compliance with the time periods set out in our directive and heard argument from both parties.

7. The Commission argued that the respondent had abused Rule 22 (1) (c)(iii) as the rule, properly interpreted, provides that clarification of issues is the prerogative of the Tribunal and is not intended to mandate a process where requests for further particulars are conducted between the parties. It argues that if questions of 'clarification' are left to the parties to determine, this would inevitably lead to an abuse of process, and that, says the Commission, is what has occurred in this matter.

8. The Commission appears to want the Tribunal to introduce certainty regarding the application of the rule in future cases. There was much debate between the parties as to whether the rule meant the same thing as a request for particulars for trial in the High Court or whether, since the language is different, it meant something more or less extensive. [2]

9. The Tribunal's rules must be interpreted in the context of its own procedures. In implementing its procedures, the Tribunal is subject to the requirement of fairness imposed on all administrative bodies by the Constitution and those values set out in section 55(1)- (2) of the Competition Act

10. One of those values is that proceedings be conducted informally. The pre-hearing powers found in rules 22- 23 invest the presiding member with a large measure of discretion to determine procedures precisely to

2 The High Court rule reads as follows " Rule 21(2) – After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within 10 days of receipt thereof."

retain the element of informality that the Act mandates.

11. We decline the Commission's invitation to give the rule a rigid interpretation or to find that it cannot be applied to requests for clarification made by the parties inter se. We can however contextualise the rule. It will typically be invoked at some time after the close of pleadings. Tribunal pleadings as we have noted before are more extensive than pleadings in High Court trial actions as they comprise affidavits. Thus a complaint referral is not as succinct as its counterpart - the summons - but it is also not necessary to be exhaustive of all the factual averments in the case as a hearing involving further testimony will follow. In our proceedings we can compel the production of witness statements prior to the hearing. How rule 22 is optimally utilised depends very much on the state of detail disclosed in the pleadings and whether there will be reliance on witness statements in advance. The more detail disclosed in the affidavits and in witness statements, the less likely rule 22(1)(c)(iii) needs to be invoked or if invoked, to be over ambitious. Beyond this observation we are reluctant to be prescriptive about how the rule should be applied in future.

12. That being said, where a procedure embarked upon is used in a manner that inhibits expedition, (another value enshrined in section 52) the Tribunal should not permit it.

13. In this case the procedure utilised by the respondent was embarked upon with the consent of the Commission at the last pre-hearing. There is nothing in the rule that suggests that it precludes the Tribunal from permitting one party to ask questions of another with that objective in mind. Indeed the Tribunal at the pre-hearing stage knows less about a matter than do the litigants before it and hence this approach to the rule accords with common sense. Nevertheless it does not preclude the Tribunal from doing what the Commission suggests it does, and that is asking questions itself, but it is not restricted to this use of rule 22 (1)(c)(iii).

14. In the context of our proceedings where we can direct the parties to produce witness statements in advance, requests for clarification do not have to be used as particulars for trial. If parties want to prepare, and receive a witness statement in advance, that should suffice to prevent them being ambushed.

15. In this case, as we indicated during the argument, we will direct the parties to provide witness statements prior to the hearing. Hopefully much of the outstanding answers that the respondent seeks will be contained in these.

16. Although we believe that the submission of witness statements ought to provide the respondent with the necessary clarity it is entitled to in terms of our rules, we do not want to pre-judge the issue and we will accordingly stay this application pending the furnishing of those witness statements by the Commission to the respondent.

17. We are however persuaded that two issues remain that do require clarification and may not be cured by the furnishing of witness statements:

18. The first issue relates to the allegation that the respondent is a dominant firm. The Commission does no more than repeat a legal conclusion from the Act, that the respondent has more than 45 % of the relevant market. Whether this figure is based on sales value or the volume of tickets sold is not clear, although in a related application for discovery the Commission seeks both from the respondent. [3]

19. Nor does the respondent have a more precise view of whether its alleged market share is 46% or 100%. The Commission is required to give greater precision in this regard although it of course is not obliged to commit itself to an exact figure. The respondent is at least entitled to know where it is in the ballpark.

20. Nor does the respondent know how this percentage has been arrived at. It is entitled, at the very least, to know whether this figure is based on the total sales of all travel agents in South Africa or just a representative sample.

21. In relation to the second issue, the allegation that the respondent is liable to an administrative fine in terms of section 59 (1)(b) of the Act, the Commission apart from indicating that it will rely on this section makes no allegation as to why it may be applicable.

22. The section provides that:

"The Competition Tribunal may impose an administrative penalty only -.

….

b) for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same firm of

3 See the Commission's Discovery Application, dated 22 October 2003, in paragraph 4 of the accompanying Notice which is Annexure X to the founding affidavit.

conduct previously found by the Competition Tribunal to be a prohibited practice:"

23. The Commission fails to make out any allegation as to why the respondent is a firm contemplated in this section. The respondent is entitled to know this in order to prepare its defence.

24. We have for this reason, formulated questions that will provide the respondent with clarity on these two points. They are annexed to our order as .

In our view, the respondent is not entitled to answers to the remaining questions at this stage, given that they might well be provided in advance with the Commission's witness statements.

The costs of this application are reserved. [4]

_____ **31 October 2003**

N. Manoim Date

Concurring: U. Bhoola, M.Madlanga

4 Note that in an earlier decision in this matter we left open for later argument the question of whether in complaint referrals initiated by the Commission we can give costs for or against the Commission. Our reservation of costs should not be construed as presupposing that we can. See Competition Commission and SAA 18/CR/Mar01, where the Commission applied for an amendment of its complaint referral.