IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO.:84/CR/AUG07

In the matter between:

RAYMOND LEONARD	First Applicant
GLOBAL TECHNOLOGY INVESTMENTS (PTY) LTD	Second Applicant
ACCURATE TRADING 34 (PTY) LIMITED	Third Applicant
ACCURATE TRADING 44 (PTY) LIMITED	Fourth Applicant

and

NEDBANK LIMITED	First Respondent
STANDARD BANK OF SOUTH AFRICA	Second Respondent
GENSEC NSA EQUITY FUND TRUST	Third Respondent

Panel : N Manoim (Presiding Member), D Lewis (Tribunal Member) and T Orleyn (Tribunal Member)

Heard on : 20 March 2008

Order Issued : 26 March 2008

Reasons Issued: 21 May 2008

REASONS

INTRODUCTION

These are reasons for an order issued by this Tribunal on 26 March 2008, following a stay application made by the applicants, and the points in limine which were raised by the respondents.

THE PARTIES

There are four applicants in this matter. The first applicant is Raymond Leonard, the second applicant is Global Technology Investments (Pty) Ltd ("Glotec"), the third applicant is Accurate Trading 34 (Pty) Ltd ("Accurate 34"), and the fourth applicant is Accurate Trading 44 (Pty) Ltd ("Accurate 44").[1] For the sake of convenience, the applicants are referred to as such throughout this decision even when we refer to related proceedings in which they are not applicants. Where certain facts relate to only some of the applicants we refer to them by name.

The first respondent is Nedbank Limited ("Nedbank"), the second respondent is Standard Bank of South Africa (Standard Bank"), and the third respondent is Gensec NSA Equity Fund Trust ("Gensec"). Similarly for consistency we refer to them throughout as the respondents even with reference to proceedings where they are not the respondents.

BACKGROUND

These applications arise out of three consolidated actions instituted in the High Court by Nedbank against the Accurate Companies; the principal debtors of amounts loaned to them, and secured by mortgage bonds, which amounts they allegedly failed to pay. Glotec and Leonard were concurrently sued on the basis of suretyship undertakings provided by them with respect to the Accurate Companies' indebtedness to Nedbank. Competition issues were raised in the High Court by way of an amendment of a special plea by the applicants who were the defendants in those proceedings, and by agreement, these issues were referred to the Tribunal in terms of section 65 (2) of the Act, and the High Court proceedings were stayed, pending the outcome of the referral to the Tribunal.[2]

The High Court referral was made on 16 April 2007. In terms of the Tribunal's rules once a matter has been referred in terms of section 65(2), the applicant must initiate proceedings in the Tribunal by filing what is referred to as a complaint referral. Although the High Court did not set a date for when the referral had to be made nor do our rules provide for this either, as a rule of thumb a reasonable period for filing a complaint referral would be 20 business days.[3] This

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1 The third and fourth applicants are collectively referred to as the "Accurate companies".
2 The High Court Referral Order is In Annexure "RL5".
3 We say this because this is the period the rules provide in terms of Rule 14 (1) (b) of the Competition Tribunal Rules, for a complainant which brings its own referral after the Commission has advised it that it will not be referring the complaint. The complainant in that situation is in an analogous position to a complainant whose matter is referred to us in terms of section 65(2).

would have meant a referral would have been filed, at latest, by the 16th May 2007. However by mid-June, the applicants had yet to file their complaint referral and so Nedbank, whose case was now marooned between the High Court where it could not proceed because of this referral, and the Tribunal where the case could not proceed until the applicants filed their referral, decided in desperation to file the referral themselves. This referral was filed on 14 June 2007. This rather unorthodox step stirred the applicants into action, and on 14 August 2007, they filed their own referral. Nedbank has not persisted with its own referral and has withdrawn it, so we need only consider the referral brought by the applicants.

In their complaint referral the applicants alleged that the prohibited practice relied on was that Nedbank required the Accurate companies to purchase insurance from them as a condition for the granting of the loans which they allege constitutes a practice commonly referred to as tying which may constitute a prohibited practice under the Act.[4] They also alleged that the respondents had implemented and failed to notify a merger in contravention of section 13A of the Act; what the parties refer to as the 'merger complaint'. In their replying affidavits for the first time, the applicants alleged that the respondents had also contravened section 4 of the Act, which inter alia prohibits collusion. The parties refer to this as the collusion complaint.

In brief both the collusion and merger complaints relate to the same conduct by the respondents, in which it is alleged that they constituted a joint venture which took control of one of the Accurate companies and caused them to cancel the lease agreement they had with certain tenants thus depriving them of the net receipts by way of rentals in respect of these leases for the balance of their terms. The act of cancellation, it is suggested is unlawful either because it was acted upon pursuant to an act of collusion in contravention of section 4 of the Act or was the fruit of an unlawfully implemented merger, or both.[5] These amounts are now claimed from Nedbank in a counter claim to the main claim. The counter claim appears to have been filed in the High Court in March 2008.[6]

The late appearance of the collusion complaint led to a flurry of responses from the respondents in which the thrust of the objection was the late arrival in a reply of a substantive cause of action. The applicants then brought an amendment application in February 2008, ostensibly to remedy this criticism by including allegations in their papers in respect of the collusion and amending their relief. The respondents oppose this application as well.

Amid this morass of pleadings that filled our files as well as those of the High Court, some procedural sanity prevailed. The parties agreed to attend a pre-hearing conference at the

4 We say *may* because the practice is not per se unlawful and a number of conditions need to exist before the conduct constitutes unlawful tying. They rely for this on the provisions of sections 8 (d) (iii) and 5 (1) of the Act.
5 See counterclaim record page 168.
6 See *ibid* page 170.

Tribunal at which they proposed that the matter would not proceed to trial until we resolved the issues which relate to the applicants amendment application and various points in limine raised by the respondents which are:

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1. whether the applicants' "tying complaint" is precluded by prescription in terms of section 67 of the Competition Act ("the Act");
2. whether the "merger complaint" was referred to the Tribunal by the High Court; and
3. whether the "collusion complaint" was referred to the Tribunal by the High Court.

Having reached agreement that this was the way to proceed, the matter was set down for hearing on 20 March 2008. But matters did not follow the pre-hearing script. On 7th March 2008, the applicants instituted an application in the High Court seeking to amend the existing High Court section 65(2) referral so as to include the collusion and merger complaints.

On 14 March 2008, thus six days before the hearing, the applicants advised the respondents that they had decided not to proceed with the amendment application, as their decision to return to the High Court to obtain a new referral in terms of section 65(2), would properly capture these latter two issues, namely the collusion and merger complaints, and would thus obviate the need for the amendment application. We use the odd phrase "properly capture" to reflect the fact that the applicants persist in the contradictory posture that their original referral did contemplate the referral of these two issues, but yet still consider that they need to return to the High Court to obtain an amendment.

The relevance of this to the present applications is that whilst the respondents want us to declare that the latter two issues have not been included in the High Court referral, the applicants want us to simply stay the proceedings. The stay application, also not part of the pre-hearing script, was brought belatedly by the applicants and constitutes the only relief that they seek from us at present.

We have before us therefore the stay application, and if we decide to dismiss that then the three points in limine raised by the respondents must be considered.

The stay application

The essence of the stay application is that we should remain supine until the High Court sorts out the referral by cleaning it up and sending it back to us on unambiguous terms. On the face of that seems a reasonable suggestion. But once one has regard to the history of the litigation it is not. All the fault lines that exist in the referral are solely the result of the manner in which the applicants have conducted this litigation. It is a history in which the ambit of the competition complaints are never properly formulated and they emerge in haphazard and incremental fashion to the detriment of the respondents who in seeking to recover their debt in one forum have now been drawn into another at great expense and inconvenience. Whilst the applicants are within their rights to rely on section 65(2), if they can make out a case for doing so, they must do so in a manner that properly sets out the issues. In failing to do so, and we consider this more fully below when we discuss some of the objections, they must face the consequences of the manner in which they have conducted this litigation. There is no reason to stay these proceedings and inconvenience the respondents further.

It follows that having dismissed the stay we must now go on to consider the objections. We deal first with the objection to the merger complaint and the collusion complaint. These can be considered together as both relate to an interpretation of the High Court's referral order in terms of section 65.

There is no dispute that the third complaint, relating to unlawful tying, has been properly referred, but what is at issue is whether the matter has prescribed.

Collusion and merger complaint

Section 65(2) in terms of which a court is empowered to refer a matter to the Tribunal states:

> *"65 (2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that*

issue on its merits, and –

a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

b) Otherwise, the court must refer that issue to the Tribunal to be considered on its merits…"

For their contention that the Court has in terms of section 65(2) referred the merger and collusion complaints, the applicants rely on sub-paragraph 2.2 of an annexure to that Court referral which states:

> " In giving effect to and implementing the loan agreement, the plaintiff, together with Standard Bank of South Africa Limited, Gensec and Global Technology Investments (Pty) Ltd exercised control over the lessee of the first defendant Global Technology Limited, ("GTL") and the first defendant, as a result of which they were able, to the prejudice of the first defendant, to terminate the lease in terms of which GTL was required to pay to the first defendant rental which would enable it to discharge its obligations under the loan agreement to the plaintiff."[7]

It is difficult to discern from the sub-paragraph 2.2 what part of it contains any reference to an issue raised concerning conduct that is prohibited in terms of the Act. That some time after the fact the applicants suggest that this refers to their collusion and merger complaint is in no way clear from the language of that sub-paragraph, albeit that an ambitious reading might extract this possibility. But the reader of the referral is not required to make such an ambitious reading. The referral should expressly set out what the prohibited conduct is, so that the opposing party and the court can appreciate if a referral is justified. No such reading can be made of sub-paragraph 2.2. That its use of the word 'control' is supposed to signify a merger, let alone an unlawful one, and its reference to firms, who it is said to do something 'together' is suggestive of unlawful collusion, begs the question as to why, if the applicants were so conscious at the time of these unlawful forms of conducts, they did not spell them out in clear language and not leave the reader to engage upon forensic feats to determine what contraventions of the Act lurk

7 See Annexure RL4.

beneath the language of the paragraph.

By failing to make this kind of specification it was unclear to the respondents what prohibited conduct was being identified, and, once it was identified, why; which is the second part of the 65(2) enquiry, the issue was required to be referred to the Tribunal for resolution in order to determine the outcome of the action.

This second leg of the enquiry is no less important than the first, otherwise opportunistic litigants may seek to stay civil proceedings by finding some inkling of competition harm lurking in the civil dispute to which they are a party. Given that referring an issue to another adjudicator and postponing ones own proceedings is a drastic step, the Court would need to be satisfied that the resolution of the merger and collusion complaints would determine the final outcome of the issues before it. Nothing in the language of 2.2 suggests this. In contrast, 2.1 at least attempts to link the issue of the enforceability of the lease to the question of its legality in terms of the Act.[8]

Thus while under 2.1 the applicants refer to three reasons why the conduct in respect of the loan is allegedly unlawful, no such attempt is made in 2.2. The words 'merger' and 'collusion' used later in their pleadings to explain the basis of the counterclaim, when it is filed in 2008, are noticeably missing.

The respondents were entitled to know at the time of the referral, as was the Court, what was unlawful, why it was unlawful and why its remedy before the Competition Tribunal required a stay of the Courts' proceedings. The language of paragraph 2.2 is at best for the applicants, capable of a reading in which all this might be contemplated by the determined forensically minded reader steeped in the possibilities afforded by the Competition Act who could both detect what the competition harms were and what remedies competition law might offer, but it is done so cryptically that no reasonable Court or respondent could be expected to detect it. It begs the question if these issues are so clear to the applicants now, why did they not frame the issues clearly then. They did not do so and cannot avoid the inescapable conclusion that these issues have not been properly referred to in the present referral – at the very least by some standard of legality which ensures that the parties to the litigation, the referring Court and the Tribunal to whom the matter has been referred, have sufficient clarity about the subject matter of the referral.

8 See *ibid* para 2.1.

We find that there is no proper description of the collusion complaint or the merger complaint contained in the Court's referral. We therefore make this declaration as sought by the respondents.

It follows from this conclusion that the applicants are not entitled to refer the merger and collusion complaints to the Tribunal, and that if they wish to do so, they must re-approach the High Court as they state they intend doing. Having not done what they should have, and having put the respondents to the considerable trouble of dealing with these issues in our proceedings to date, they are not entitled to stay this issue until the issue is addressed by the High Court. Indeed the High Court might well decide not to refer these two complaints. For this reason the stay application should be dismissed and the respondents are entitled to their costs.

Prescription

Nedbank contends that the tying complaint has prescribed by virtue of the provisions of section 67 (1) of the Act, which provides as follows:

> *"67 (1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased".*

There is no dispute that the tying complaint was contemplated in the High Court's referral.[9] It is also common cause that if Nedbank required the relevant parties amongst the applicants, to obtain insurance from them as a condition of the granting of the loan, then this practice, referred to in the literature as bundling, may constitute a prohibited practice if the requirements of section 8(d)(iii) of the Act are met.

In terms of that section it is prohibited for a dominant firm to engage in any exclusionary Act, inter alia:

> "selling goods and services on condition that the buyer purchases separate goods and services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract."

The applicants also assert that the same conduct also constitutes a contravention of section 5(1) of the Act. Whether it does is a moot point because if the prescription objection is good it excludes both the section 8 and section 5 claims.

9 This is explicitly referred to in para 2.1 of annexure RL4.

The respondents allege that on the applicants own facts the claims have prescribed. In Leonard's replying affidavit, he asserts that "…*Nedbank insurance was cancelled by Accurate Trading 34 and 44 on 22 May 2001…and moved to a far less expensive option*"[10]. If the tying complaint was to be initiated it needed to be so before the 22 May 2004. This then raises the issue as to what act by a complainant initiates a complaint? Is it a complaint made to the Commission, the referral by the High Court or the filing of a complaint referral with the Tribunal?

As the respondents point out, we need not determine that issue. The earliest date on which the complaint might have been considered as having been initiated, is the date on which their complaint was made to the Commission. This is the version most favourable to the applicants. It is common cause that this was on the 1 October 2004, and thus more than three years after the alleged prohibited practice had ceased.

The applicants do not deny these contentions but seek to avoid the logical consequences of the respondents' arguments by raising two issues one legal and one factual.

The first is that we have no jurisdiction to consider the prescription issue because once the matter has been referred to us by the High Court we are precluded from considering this issue. This argument ignores the reason why a matter is referred by the High Court. It is because substantive competition issues are subject to the exclusive jurisdiction of the competition authorities in terms of section 62(1) of the Act which states:

a) *"62 (1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction of the following matters: interpretation and application of Chapter 2,3 and 5, other than –*

   i) *A question or matter referred to in subsection 2; or*

   ii) *A review of a certificate issued by the Minister of Finance in terms of section 18 (2); and*

b) *The functions referred to in sections 21 (1), 27 (1) and 37, other than a question or matter referred to in subsection (2)…"*

It follows that it is our task to determine whether the conduct complained of constitutes conduct

10 Replying affidavit paragraph 12.4 ENS bundle pg. 1201.

that is unlawful under Chapter 2 of the Act. Only once you have determined what the unlawful conduct is, are you in a position to ascertain when it started and when it ended. It is not helpful to suggest that the Court should have been deemed to have made this decision. If it was precluded from defining what was unlawful, it could hardly be expected to apply itself to the issue of when the conduct began or when it ended. We are not suggesting that in referring a case the court could not have regard to the possibility of prescription –clearly if it felt it could do so, it is competent to do so. The mere act of referral does not preclude us from considering the issue of prescription.

The applicants' second defence to the prescription objection is on the interpretation of the common cause facts. In his replying affidavit, Leonard alleged that despite the fact that the insurance was cancelled on the dates alleged, Nedbank thereafter continued to debit the costs of insurance, with interest, from the relevant applicants' accounts up to the present date.[11] Thus the applicants seek to argue that even if the insurance was cancelled at a time when the period of prescription would have run its full course, deductions for it continued after that date and up until the present date which means that on their interpretation the prohibited practice has not ceased.

This argument confuses a consequence of the alleged prohibited practice with the practice itself. Section 67(1) is explicit in referring to the cessation of the practice. When the Act uses the term practice it refers to the conduct that gives rise to that practice. Despite the alleged continuing deductions, there is no dispute in the papers that the conduct that founds the tying complaint, ceased after the date on which the insurance was cancelled. Further, if indeed the deductions continued to be made when the insurance had been cancelled, that is a commercial issue of undue payment; unrelated to the tying complaint, over which the Tribunal has no jurisdiction.

On the facts as alleged by the respondents, and not disputed by the applicants, the tying ceased after 22 May 2001, but at earliest the complaint in respect of that conducted was only initiated in October 2004. This means that the applicants are precluded from bringing this complaint by virtue of section 67(1).

Costs

11 Replying affidavit para 12.5 ENS bundle, pg. 1202.

We have explained why we have awarded costs in relation to the stay application. Given our findings in respect of the balance of the issues the respondents are entitled to the costs that follow these reasons.

Order

We gave our order on the 26 March 2008, a copy of which we attach to our reasons as annexure A.

_____ Date_____

Norman Manoim 21 May 2008

D Lewis and T Orleyn concurring

Tribunal Researcher: Londiwe Xaba

For the applicants – Advocate Brassey instructed by Brian Kahn

For the first respondent – Advocate Symon instructed by Edward Nathan Sonnenberg

For the second respondent – Advocate McNally instructed by Bowman Gilfillan

For the third respondent – Advocate Wesley instructed by Denys Reitz