COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 129/CR/Dec08

In the application between:

Rooibos Ltd	Applicant
and	
The South African Competition Commission	Respondent

In Re:

The Competition Commission	Applicant
and	
Rooibos Ltd	1st Respondent
National Brands Ltd	2nd Respondent
Coffee Tea and Chocolate Company (Pty) Ltd	3rd Respondent
Unilever SA Foods (Pty) Ltd	4th Respondent
Joekels Tea Packers CC	5th Respondent

Panel	:	N Manoim (Presiding Member), Y Carrim (Tribunal Member), and L Reyburn (Tribunal Member)
Heard on	:	5 August 2009
Decided on	:	29 September 2009

Reasons – Exception Application

Introduction

[1] On 12 December 2008 the Competition Commission ("the Commission") initiated complaint referral proceedings against four respondents including Rooibos Limited, the applicant and excipient in this matter. For

convenience we will refer to it as Rooibos. The Commission contended in its complaint that Rooibos, which it claimed was dominant in the market for the processing and supply of bulk rooibos tea to packers, had abused its dominance by concluding exclusive supply agreements with the main packers (the second to fourth respondents), obliging them to obtain all their supplies of bulk processed rooibos tea from Rooibos.

[2] On 27 February 2009 Rooibos delivered a notice of intention to except in which it raised seven grounds of exception. The Commission was responsive to this criticism and on 4 May 2009 the Commission filed a supplementary affidavit to supplement its founding affidavit to meet some of the criticism levelled in the exception.

[3] Subsequent to this, on 11 June 2009, Rooibos filed an exception to the complaint referral as supplemented, alleging that it still lacked the averments which are necessary to sustain the complaint, alternatively that the complaint was vague and embarrassing to the extent that Rooibos would be prejudiced in the conduct of its defence if the exception was not upheld.

[4] However Rooibos acknowledges that some of the original points of complaint have been addressed by the Commission's supplementary affidavit and it now confines its objections to five grounds. We deal with each of them separately in this decision.

Approach to exceptions

[5] This is an exception taken by a respondent at the stage when it is required to file its answering affidavit. We have previously approached the subject of exceptions at this stage by recognising that notwithstanding an absence of express provision for them in our rules, we would be willing to consider hearing an exception when appropriate. We have also indicated that the approach to exceptions in our proceedings needed to take into account the *sui generis* nature of our proceedings; we are neither a civil court

approaching pleadings in trial proceedings nor a criminal court. Our proceedings are adversarial but we also as an institution enjoy inquisitorial powers. We are guided by the need to conduct proceedings fairly and to the extent permissible, informally.[1]

[6] Rooibos devoted much of its argument to stating that our past approach to exceptions had been incorrect, was in need of reconsideration for being wrong on principle and in some instances, contradictory. Spirited and interesting as this argument proved to be, it has not persuaded us that the approach has been wrong. Case law cited to embellish the Rooibos argument was either at such high level of generality as to offer no guidance as to why our approach was wrong or perfectly consistent with it.[2] Secondly, criticisms or our existing case law neglected to observe that what appeared inconsistent was the treatment of what is fair in different contexts. Once we have accepted that fairness depends on context then analysing cases without regard to context leads to error. [3]

[7] As we shall see when we examine in more detail the specific objections, Rooibos seeks to compel the Commission to disclose more of its evidence than it is willing or able to do at this stage of the referral. Rooibos' reasoning is that as the Commission is placed in the position of being given time to investigate a complaint and enjoys concomitant powers of investigation, it ought to be in a position to disclose more material facts to respondents in pleadings. Rooibos does not argue its case for fairness, as one might have expected from the vantage point of what is fair for a

[1] See Competition Commission and Anglo American Medical Scheme et al v United South African Pharmacies et al Case No: 04//CR/Jan02 and National Association of Pharmaceutical Wholesalers et al v Glaxo Wellcome et al 45/CR/Jul01

[2] See Russel v Duke of Norfolk and others [1949] 1 All ER 109 (CA) at 118D- E cited with approval in Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646E, as was cited in excipients' Heads at par 19.2: "*There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".*

[3] See Menzi Simelane and others v Seven-Eleven Corporation and others Case No 480/2001, Competition Law Reports [2001 -2002] CPLR 13 (SCA) at par 16 where the Court quoted par 41 of the Tribunal's decision in the Novartis case saying: "*The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises."*

respondent to know in order to plead. Rather it turns this approach on its head by asserting that fairness must be judged from the opposite vantage point, namely the ability of its opponent, in this case the Commission, to provide the information it seeks.

Since the Commission is possessed with these statutory powers, *a fortiori* fairness, Rooibos argues, requires it to make greater disclosure in pleadings. But this line of reasoning is a non sequitur. It does not follow that because the Commission can ascertain certain facts prior to referral that it must disclose them all in its referral in order to make proceedings fair. What is fair for a respondent to be told in order for it to plead is notionally independent of the powers of the party required to make the referral. What is required to constitute an adequate referral is perfectly clear from Rule 15 of the Tribunal Rules – it requires the concise statement of the grounds of complaint and the material facts or points of law relied on. This rule does not oblige the Commission to do anymore. [4]

[8] Fairness is not a one way street tested only by the impact of an approach on respondents. The Commission and private complainants have a right to fairness in conducting their case as well and that right does not oblige them to make more known of their case at pleadings stage than the rules presently require. What fairness dictates at another point in time in proceedings in the matter is again a question of context. Thus, as a matter of practice, respondents in our trial proceedings have received witness statements of the Commission and discovery of documents in its possession relevant to the proceeding prior to the commencement of the proceedings.

[9] The Commission in our view correctly argued that the Tribunal has applied the correct test in the past because it balances the amount of detail that has to be pleaded against the criterion of fairness to a respondent as to

[4] The fallacy of Rooibos logic in assessing a pleading obligation from the vantage point of the powers of the complaining party is exposed when one considers that complaint referrals can also be brought at the behest of private complainants who do not enjoy the Commission's statutory powers. Should one then assess the adequacy of referrals by demanding a higher standard of information disclosure from the Commission than the private complainant?

how it should plead. The Commission is not obliged to present the minute details of the case but only the material facts and points of law as set out in Rule 15.

First exception: self-standing or cumulative effects of agreements

[10]According to Rooibos the Commission has not set out in its referral whether it relies on each of the agreements as a self-standing cause for complaint or whether it relies on the cumulative effect of the alleged series of agreements for its contention that Rooibos behaved anti-competitively and in contravention of the Act. It argued that a proper consideration of the effects of each of the agreements relied upon, requires the Commission to explain either the anti-competitive effect of each of the agreements relied upon with reference to the material facts that inform the allegations on effect, or, if the anti-competitive effect of the agreements individually is not relied upon, but rather the cumulative effect, then the material facts relating to the cumulative effects need to be pleaded. Since the Commission has failed to do this and did no more than to indicate in its supplementary affidavit that both the individual and cumulative effects were being relied on, the referral is vague and embarrassing.

[11]This exception is without merit. The Commission's response is clear. The Commission in its supplementary affidavit specifically points out, in answer to the exception raised, that it relies on the individual and cumulative effect of the agreements.[5] Whether the facts ultimately put up by the Commission support such a claim, is for the Tribunal to decide after hearing the evidence. Rooibos knows that it must formulate a response to counter complaints based on the individual as well and the cumulative effects of the agreements.

[12]The exception is dismissed.

[5] See supplementary affidavit paragraph 24.

Second exception: Reliance on the 2006 agreement with fourth respondent

[13]The Commission, in its founding affidavit, relied on supply agreements entered into between Rooibos Ltd and Unilever in 2001 and 2006 for its contention that Rooibos has abused its dominant position. Rooibos claims that the Commission failed to identify the clauses in the 2006 agreement on which it relies. The Commission also did not attach the agreements to the founding affidavit.

[14]To cure this, the Commission indicated in its supplementary affidavit that the relevant clause in the 2006 agreement is clause 4.2 which it said should be read with annexure "B" to the agreement. When one considers this in its entirety, argues the Commission, it is clear that Rooibos intended to impose similar supply obligations on Unilever to those that existed in the 2001 agreement.

[15]However, Rooibos argues that the Commission did not explain on which facts and points of law it relied upon in claiming that an ordinary non-exclusive commercial agreement stipulating volumes of supply amounted to an abuse of Rooibos' dominant position. Neither did the cross-reference to what had been pleaded in respect of the 2001 agreement nor the general allegation that the combination of the two agreements foreclosed the market cure the defect in the Commission's pleading. Rooibos argues that intent is irrelevant if no effect is felt. The Commission should have explained that the foreclosure in respect of the 2006 agreement was causally linked to the conduct of Rooibos even when other commercially rational reasons for the foreclosure existed. Since it is unable to plead to the allegations in respect of the 2006 agreement the pleadings remain defective, it submits.

[16]What the Commission contends for is clearly set out in its supplementary affidavit in paragraphs 16 and 17, read with par 66.7 in its founding affidavit. Both agreements relied on by the Commission are alleged to

have the same effect, the one having an exclusivity clause as its basis while the other establishes the quantity that Unilever is expected to buy. The allegation is that the quantity stipulated makes for a de facto exclusive agreement irrespective of the fact that it may not be de jure exclusivity as was the case with the 2001 agreement.

[17]If Rooibos does not agree with this allegation it can deny it and argue that the Commission has misconstrued the intention of the 2006 agreement but it cannot claim to not understand what the Commission is conveying. In fact Unilever, a party to these agreements and the fourth respondent in this matter, responded to this allegation in its answering affidavit. It clearly understood what the Commission was saying.

[18]The second exception is therefore dismissed.

The third and fourth exceptions: Existence of agreements not per se and abuse and the consequences of the volume rebates

[19]We discuss these exceptions together as both relate to the evidence that the Commission must lead on the pleadings to establish its complaint.

[20]Rooibos, firstly, contends that the existence of the agreements in question is not a per se abuse. According to Rooibos, the Commission must allege in its founding papers both the grounds of the complaint and all of the material facts or the points of law relevant to the complaint relied upon in order to comply with Tribunal Rule 15(2). The referral must contain allegations such as:

1) the first respondent (i.e. Rooibos) had insisted that the exclusive supply arrangements be included in the agreements,

2) the first respondent had enforced or sought to enforce the exclusivity provision,

3) but for the exclusive supply arrangements contained in the agreements, competitors of the first respondent would have attracted the custom of the second to fifth respondents

4) any action by the first respondent in consequence of the agreement had resulted in anti-competitive effects.

[21]Rooibos argues that since the Commission's referral does not contain these necessary factual allegations, it therefore does not sustain a cause of action under either sec 8(c) or 8(d) (i).

[22]Secondly, Rooibos alleges that the Commission failed to describe with any particularity the manner in which the discount system operated and/or the manner in which these discounts resulted in an anti-competitive effect. It failed to explain with precision the rules governing the discount scheme, whether it might be pro-competitive, and how it impacted on the choices of the second to the fifth respondents.

[23]We consider that the Commission sufficiently sets out the facts on which it relies in its founding affidavit at pars 48 and 68-86 in order for the excipient to understand the case it has to meet. That part of the founding affidavit states at length that Rooibos is a dominant firm that abused its dominance by tying up customers through exclusive supply agreements, by requiring the packers to purchase all or most of their supplies from Rooibos, and by undertaking to give them volume rebates or discounts of specified types. The Commission alleges that its investigation further revealed that these agreements and the utilisation of the volume discounts foreclose about 85% of the local rooibos bulk processing and supply market from the first respondent's competitors and therefore restricts packers from exercising their possible choices, and impedes the entry of new competitors. The Commission also indicated in its supplementary affidavit that its witnesses will explain in their witness statements the manner in which the discounts work to have an anticompetitive effect. However the Commission sets out in par 67 of its founding affidavit how it understands the mechanism of the

discount and it is also fully disclosed in the Annexures that form part of the supply agreements.

[24]We again reiterate what we have said earlier, that the Tribunal, in the hearing the evidence, will decide whether the Commission's allegations as set out can be sustained or not. We find at this stage, however, that the Commission has sufficiently set out the material facts necessary for Rooibos to answer to the allegations.

[25]The exception is dismissed.

The fifth exception: Identification of parties affected

[26]Rooibos alleges that the referral is vague and embarrassing in that it fails to identify which packers were affected by its alleged conduct. In particular the Commission has not indicated whether it contends that the alleged effect of the exclusive supply agreements extends to packers other than the the second to the fourth respondents.

[27]The exception is without foundation. The Commission clearly indicated in its referral which agreements are the subject of the complaint and who the parties are to those agreements. This exception too is dismissed.

Conclusion

[28]In the result, Rooibos' application is dismissed.

Costs

[29]No order is made regarding costs.

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N Manoim
Presiding Member

Concurring: Y Carrim and L Reyburn

Tribunal Researcher: Rietsie Badenhorst

For the Applicant: Adv MJ Engelbrecht instructed by Cliffe Dekker Hofmeyr

For the Respondent: Adv NH Maenetje instructed by Tando Ngeno