



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR163Nov16

In the complaint referral between:

Competition Commission

Applicant

And

Roadspan Surfaces (Pty) Ltd

First Respondent

Much Asphalt (Pty) Ltd

Second Respondent

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Andreas Wessels (Tribunal Member)
Heard on	: 19 and 20 November 2018
Last submission received on	: 26 February 2019
Order issued on	: 25 July 2019
Reasons issued on	: 25 July 2019

REASONS FOR DECISION

Introduction

- [1] In this case we have to decide whether two firms who produce asphalt, a product used to tar road surfaces, met in 2008 to enter into a market division arrangement.
- [2] The complaint has been referred to us by the Competition Commission ("Commission") against two asphalt producers, Roadspan Surfaces (Pty) Ltd ("Roadspan" – the first respondent) and Much Asphalt (Pty) Ltd ("Much Asphalt" – the second respondent).

[3] The Commission alleges Roadspan agreed not to set up an asphalt production plant in Gauteng in competition with Much Asphalt and in return to remain a customer of Much Asphalt for the supply of asphalt in that province. According to the Commission, this conduct amounts to a contravention of section 4(1)(b)(ii) of the Competition Act, 89 of 1998 ("the Act").

[4] This provision states:

"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between firms in a horizontal relationship and if it involves any of the following restrictive horizontal practices(ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services."

[5] Roadspan is vertically integrated; in the upstream market it produces hot asphalt, a substance used in road paving (the "upstream market") and downstream it is engaged in road paving using the asphalt (the "downstream market"). Much Asphalt operates only in the upstream market.

[6] It is common cause that a meeting between the two firms took place on 22 May 2008. At the time of the meeting Roadspan was a recent entrant into the downstream market. Shortly after entering the paving market Roadspan had acquired asphalt production equipment from a firm known as Black Top Services (BTS), then in liquidation, at an auction.

[7] Why would this purchase have concerned Much Asphalt? Because by purchasing the equipment Roadspan was taking the first steps in entering the upstream production market, where it had not been active before. The geographic market for this product is regional. Much Asphalt only competed in some of the regional markets. For this reason it wanted to know if Roadspan intended to enter Gauteng, a region in which it was active. This became the subject of the 22 May 2008 meeting where according to the Commission the alleged collusive agreement was struck.

[8] The Commission's central allegation is described in the complaint referral in this way:¹

¹ See complaint referral paragraphs (paras) 15-16, Record (R) pages (pgs.) 10-11.

"In 2008, Mr Phillip Hechter of Much Asphalt and Mr James Whitehouse of Roadspan met to discuss Roadspan's strategy for the acquired asphalt plants. Mr Phillip Hechter of Much Asphalt and Mr James Whitehouse of Roadspan agreed in the aforesaid meeting that Roadspan will not enter and supply asphalt in Gauteng where Much Asphalt is active and will remain a customer of Much Asphalt in Gauteng. To date, Roadspan has not commissioned its asphalt plant in Jet Park, Gauteng" (Our emphasis. We deal with the significance of the underlined sentence later in this decision.)

- [9] The respondents admit that the meeting took place on this day and that discussions took place over whether Roadspan was going to enter the production market in Gauteng but deny that any agreement for it not to do so was reached.²
- [10] This case then turns on which version of this meeting is the more probable.

The nature of the evidence

- [11] Given that this case turns on what happened at a particular meeting one might have expected to hear testimony from at least one person who had attended it and could recall what had happened. However, no witness at the hearing was able to do so.
- [12] The Commission called as its only witness its investigator Fhatuwani Mudimeli. But Mudimeli as the investigator could not contribute any direct evidence about a meeting he did not attend. Nor was he led as an expert. Instead his task as a witness was to trawl through the discovered documents and to point out which ones the Commission relied on to prove its case.
- [13] The respondents did not shed any light on what happened at the meeting either. Roadspan called only one witness, Mr James Whitehouse. At the relevant time Whitehouse was the chief executive officer of Roadspan and had attended the meeting on 22 May 2008.³ But Whitehouse testified that his recollection of the meeting ten years later, was no longer reliable.

² See first respondent's answering affidavit (AA) para 20, R pg 18 and second respondent's AA para 19, R pg 33.

³ Whitehouse was its director from 13 March 2008 until 11 March 2010.

- [14] Much Asphalt did not lead any witnesses. Prior to the hearing it had proposed calling Mr Phillip Hechter, who at the time was the managing director of Much Asphalt and who had also attended the 22 May 2008 meeting. Although he was available to testify, Much Asphalt elected not to call him after Roadspan had closed its case; nor did it call any other witness.
- [15] Not surprisingly given the limited nature of the oral evidence this case must be decided on an interpretation of the documentary evidence that exists, both preceding and succeeding the meeting.

Hearing process

- [16] The hearing was initially scheduled for three days to commence on 19 to 21 November 2019. However, we only utilised two of the three days. At the end of the hearing we did not set a date for final argument, but we asked both sides to submit written heads of argument after which we would decide if we wanted oral argument. After considering both sides heads of argument we have decided that we do not require oral argument.

Defences rejected

- [17] Before we deal with the respondents' defence on the merits – i.e. that there was no agreement – we must deal with two other procedural defences raised by the respondents but which we have rejected.
- [18] The first, raised by Roadspan, was that the Commission had cited the wrong entity in its group. According to Roadspan, the entity cited as the first respondent, known as Roadspan Surfaces, was at the relevant time, only a paving company, not an asphalt production company. When Whitehouse attended the auction it appears he bid on behalf of Roadspan Surfaces.⁴ But when the assets were purchased they were then housed in another entity known as Roadspan Asphalt Plant (Pty) Ltd ("RAP"). RAP then transferred these assets to Roadspan Surfaces in 2010. RAP was subsequently deregistered in 2013.

⁴ See his witness statement, para 10.

[19] Roadspan contends that RAP would have been the party that concluded the agreement had there been such an agreement. But there are no facts however to indicate that this was so. The letter from Whitehouse that initiated the meeting of 22 May 2008 emanated from Roadspan not RAP.⁵ It appears to have been irrelevant to him which entity he represented on the day - he appeared to be unconcerned with this corporate nicety. Both firms in any event were owned by the same holding company Roadspan Holdings (Pty) Ltd. An agreement, had there been one, reached by Whitehouse at the meeting wearing his Roadspan hat, would have effectively been carried out by RAP.

[20] Indeed, the point that the wrong party was cited was not pursued with any great vigour by Roadspan until the hearing. It was not raised in the answering affidavit when points such as these are typically argued by way of exception. Moreover, when asked in examination in-chief to set out the salient facts about the corporate structure, Whitehouse seemed uncertain as the following extract in the transcript illustrates:

MR WHITEHOUSE: Initially as far as I recall on the day of the auction, we didn't have more than one company. We only had one company. So, the offer was made in the name of Roadspan Surfaces. Shortly thereafter a second shelf company was ... in fact, two other shelf companies were acquired and we created a new structure where we transferred the shares in Roadspan Surfaces into Roadspan Holdings and then into just a second subsidiary called Roadspan Asphalt Plants.

ADV TRENGOVE: So, from that time on the structure was a holding company and then a paving subsidiary, Roadspan Surfaces and a manufacturing subsidiary, Roadspan Asphalt Production. Correct?

MR WHITEHOUSE: Plants, I think it was."

[21] For this reason, we will decide in the Commission's favour that the correct entity was cited.

[22] The second argument raised was that the proceedings were unfair because of the considerable time lag between the time of the meeting (May 2008) and the eventual referral. Although the complaint was initiated on 10 February 2009 it was only referred on 16 November 2016; more than seven years later. Whilst one may have some

⁵ The letter head says the firm is called Richtrau No 199.

sympathy with the respondents about what is a lengthy delay, we do not think the period was such as to justify dismissing the case on this ground alone.

- [23] Nevertheless, it is fair to keep this time lag in mind in assessing evidence. For this reason, we have not made any credibility finding against Roadspan because Whitehouse's recollection of the meeting was hazy. Nor, as the Commission had asked us to do, have we drawn an adverse inference from Hechter's failure to testify. His legal team's submission that he could not add much to the case on this aspect seems reasonable given the significant time lag.

Background

- [24] In 2007, Black Top Surfaces ("BTS"), a vertically integrated asphalt production and paving company found itself in financial difficulty. Sometime in November 2007, Whitehouse, who worked in private equity at the time, was approached to see whether he would be interested in purchasing the business of BTS. Whitehouse had no prior experience in asphalt production and at the time did not take up the offer. Thereafter BTS was liquidated.
- [25] On 12 February 2008, Whitehouse was contacted by the erstwhile managers of BTS about forming and funding a new paving company to fill the gap that had been left by BTS. This time Whitehouse accepted the offer. There were two reasons why he had changed his mind. The price was very attractive and with the advent of the World Cup in 2010, the demand for paving was likely to exceed the current supply capacity. He agreed to fund a new venture and bring in other investors.
- [26] In February 2008, Amrite (Pty) Ltd, a company controlled by Whitehouse and two other investors, acquired a shelf company by the name of Richtrau No 199 which was later changed to Roadspan. The company then began, *inter alia*, to purchase paving equipment and infrastructure previously owned by BTS. At this stage Roadspan was only a paving company. It did not produce its own asphalt but purchased the latter from Much Asphalt.⁶ From thereon, Roadspan began to secure paving contracts and generate turnover despite its infancy.

⁶ Much Asphalt was owned by Murray and Roberts and in February 2013, it was sold to Newshelf 1260 (Pty) Ltd. See R pg 28: Much Asphalt's AA, para 2.

- [27] On 09 May 2008, Whitehouse was approached by Amakhosi Auctioneers to enquire whether Roadspan was interested in bidding for the BTS asphalt production assets ("BTS assets") at an auction which was due to take place on 13 May 2008. At this stage Roadspan was still only involved in the downstream market. Purchasing these assets would mean that it was now entering the upstream production market. Roadspan successfully bid and obtained the BTS assets which were located variously in Witbank, Stillfontein, Kimberley, Villers (Schaaprand), Welkom, Lichtenburg and Boksburg (Jet Park).
- [28] On 14 May 2008, a day after the BTS auction, Whitehouse was informed by one of his employees Gert Koen ("Koen"), that Bennie Greyling ("Greyling"), an employee of Much Asphalt, had expressed his annoyance that Roadspan had purchased the BTS assets at the auction. The basis for this annoyance appears two-fold. Much Asphalt was Roadspan's asphalt supplier in the Gauteng area. Were it to self-supply this might constitute a threat to Much Asphalt. Secondly, Much Asphalt had also been a bidder for the assets in a consortium with a firm called Roadmac (not to be confused with the similar sounding Roadspan) also a paver. It had not taken kindly to having been outbid by the newcomer.
- [29] This conversation between Greyling and Koen became the catalyst for the alleged market division agreement between the two respondents which led to the current case. Whitehouse appears to have panicked about what he perceived as a threat from Greyling to Roadspan. Recall at that stage Roadspan was entirely dependent on the larger Much Asphalt for supply. In addition, Much Asphalt had granted Roadspan a credit facility of R10 million.
- [30] Whitehouse decided he needed to defuse the situation with Greyling. This is the context of a key letter dated 14 May 2008, from Whitehouse to Greyling, where he explains Roadspan's reasons for purchasing the BTS assets and it seems intended to assuage the suspicions of Greyling that the purchase constituted a threat to Much Asphalt.
- [31] Whitehouse explains in this letter that the decision to purchase the BTS assets was made at the last minute when Roadspan learned that Roadmac were intending to

acquire the assets. He then states the decision to acquire the assets were largely “strategic”. He stated that:⁷

“As you know, we have spent a considerable amount of money funding a roads surfacing business and we were extremely concerned that we would end up being prejudiced, particularly in the more remote geographical regions, if there was no independent party from whom we could acquire asphalt. Our concern is purely to be able to compete on an even playing field.”

- [32] To reassure Much Asphalt that Roadspan did not wish to frustrate its relationship with it, Whitehouse further wrote:⁸

“Obviously we value Much [Asphalt] in terms of your strategic relevance to Roadspan’s future success and we would prefer not to take any decisions that compromise our ability to find a suitable way forward with you. Hence if you think there would be any merit in setting up an urgent discussion, we would rearrange our diaries to accommodate such a meeting?”

- [33] Although Whitehouse wrote the letter to Greyling, he had copied it to Phillip Hechter, Greyling’s senior. Much Asphalt’s response to the letter came in an email the following day emanating not from Greyling, but Hechter. Hechter’s email is interesting for its switch in tone from a friendly engagement to a latent threat.⁹

- [34] It starts off disarmingly. Hechter makes the obvious point that Whitehouse is: “.. *under no obligation to explain your business strategies to anyone else least of all Much Asphalt.*” Hechter then reassures Whitehouse that Greyling’s perceived annoyance was no more than a reflection of Much Asphalt’s “...*confusion and concern.*”

- [35] Thus far the content appears innocuous. But then comes the twist: The confusion and concern is explained, according to Hechter, because:

“[A] company whom we believed was our strategic partner was now acquiring asphalt plants in areas that would put Roadspan in direct competition with Much

⁷ R pg. 636: Letter from Roadspan to Much Asphalt, dated 14 May 2008.

⁸ Ibid.

⁹ R pg 637: E-mail from the Hechter to Whitehouse, dated 15 May 2008.

Asphalt. I am sure you will have some understanding of our astonishment at this unexpected turn of events."

[36] Hechter wrote further:¹⁰

"If we are to realise the potential of our alliance then there needs to be mutual trust and a clear understanding of each others strategies where they impact on each other."

[37] The email ends with Hechter agreeing with Whitehouse's proposal for a meeting.

[38] But there is another item of documentary evidence relevant to the meeting and which precedes it. On 16 May 2008 the Much Asphalt board held a meeting where two items of interest are recorded under the heading "*Strategy*". First, that a mandate is given to Gauteng Asphalt to purchase asphalt plant up to a particular amount, subject to due diligence and regulatory approval. Second is the following item referring presumably to the pending meeting with Roadspan: ¹¹

"Roadspan purchased Black Top Surfaces asphalt plants on auction, Meeting to be held to determine their strategy in respect of these plants."

[39] This then is the backdrop to the meeting of 22 May 2008 on which the Commission's case hinges, because it is here, at least according to the complaint referral, that the market division agreement was struck.

[40] Although both Whitehouse and Hechter attended the meeting, (we are not sure who else attended) and were available as witnesses (recall that only Whitehouse testified), and his recollection was vague and did not add much. While both were interrogated about the meeting by the Commission during the course of its investigation, even then, at this earlier date, (the interrogation takes place in September 2009), their recollections were unilluminating.

¹⁰ Ibid.

¹¹ R pg 714. Hechter and Greyling, according to the minute attended this meeting. See pg 712.

[41] Hechter in his interrogation by the Commission during the investigation in 2009 explained his motivation for meeting in this way: ¹²

“ Well I wanted to know from him, because we had this discussion for a long time now about setting up and that you know, we are going to supply them, we give them a line of credit. You know, I thought I have the right to say okay, you have changed your business strategy , are you actually going to be putting up asphalt plants all over the show, because I mean, I need to know that. You know I'm on the line here for ten million rand.”

[42] It is not surprising that the Commission would have been sceptical about this answer. Was this a supplier simply worried about losing a valued customer or a supplier worried about the entrance of an erstwhile customer as a competitor?

[43] Certainly, on the construction of the two contemporaneous emails, the evidence of the aggressive response of Greyling to the purchase of the BTS assets, and the financial leverage that Much Asphalt had over Roadspan because of the credit line, as evidenced by the comment from Hechter during the interrogation, there is a distinct possibility that the conversation at the May 2008 meeting ended in an agreement that Roadspan would not enter the Gauteng market to produce asphalt in return for continuing to receive a source of supply on favourable credit terms from Much Asphalt.

[44] Thus far we have concentrated on those documents which preceded the meeting. But the Commission also relied on a Much Asphalt board minute which purported to comment on what had been the outcome of the May 2008 meeting.

[45] In this minute which is dated 21 July 2008 the following is stated under the heading “Roadspan Surfaces”:¹³

“Appear to have forsaken their aggressive stance for a more pragmatic co-operative approach. A recent meeting with Roadspan leave[s] us with the distinct impression that the relationship is moving away from confrontational to seeking a mutually beneficial alliance.”

¹² Transcript (T) of Commission interrogation of Hechter dated 1 October 2009, R pg 456. Note that reference to the credit facility for Roadspan is also mentioned in Much Asphalt's AA. See para 18.

¹³ R pg 289.

- [46] This it seems is the essence of the Commission's case to prove the existence of the agreement.
- [47] It is true that the Commission also relies on past board documents of Much Asphalt to shift the probabilities further in its favour. These documents contained various items where the Much Asphalt board considers the threat of likely entrants into the upstream or downstream market. None of these entries, which Mudimeli, the Commission's investigator took us through, was directly relevant to establishing whether there had been an agreement reached with Roadspan. At best they were relevant only to establish that Much Asphalt monitors any new entry into its market with concern. But there is nothing unusual about that. Many firms in competitive markets monitor competitor entry. Nor does it amount to probative similar fact evidence that Much Asphalt trades off security of supply to a new rival against threat of upstream entry. This documentation does not advance the Commission's case and can therefore be disregarded.
- [48] Finally, the Commission appreciated that if it had to discharge its burden on the probabilities, there needed to be evidence that Roadspan was likely to enter the production market in Gauteng. It is common cause that it was not yet operating a production facility at the time of the meeting. To advance its possible entry theory, the Commission relies on references to the asphalt production equipment that Roadspan had purchased from BTS and appeared to be situated at Jet Park, Benoni and thus in Gauteng. Was this the intended production facility for Roadspan in Gauteng? The Commission seems to have thought so. Recall that in the complaint referral the Commission alleged that *"To date, Roadspan has not commissioned its asphalt plant in Jet Park Gauteng"*.
- [49] In addition, the board strategy document prepared by Roadspan's executives in May 2008, referred to earlier, contains on one page a diagram with blocks under the heading *"Project management"*. One block refers to *"Gauteng new establishment"*.¹⁴ Beyond this reference the document contains no further explanation to what this refers to.

¹⁴ Roadspan Exco report for period ending May 2008. R pg 1028.

- [50] For the Commission to prove that Roadspan contemplated entering the Gauteng market it has to take these disparate facts and attempt to join the dots. Thus it has to show that the project management reference to "*Gauteng new establishment*" evidences the contemplation of a new production facility in the province and that the existence of production equipment in Jet Park is the means to achieve that and that as a result of the May 2008 meeting this production facility was never commissioned. This is a difficult question to answer in isolation from certain other facts relied on by the respondents and which are also part of the contemporaneous record.

Respondents' case

- [51] In their respective answering affidavits both respondents whilst admitting that a meeting between them took place on 22 May 2008 deny that an agreement was reached to geographically divide the market between them.
- [52] The respondents contend that the upstream market for the production of asphalt is regional in scope. What this means is that even if Roadspan had entered the upstream market for the production of asphalt in certain regions this did not make it a competitor of Much Asphalt in the Gauteng region, the region where the market division arrangement is alleged to have taken place. Roadspan's version was that it never intended to enter the upstream market in Gauteng but in other regional markets where there were no local upstream suppliers.
- [53] Much Asphalt's version was that it was a meeting between a supplier and its new customer to ascertain its customer's intentions in the future.

Analysis of the documents

- [54] Since Hechter did not testify and Whitehouse by his own admission could not recall what had been said at the meeting that had taken place ten years earlier we must, as stated earlier, look for the best evidence to the contemporaneous documents to assess the probabilities of what happened.

[55] Although the documents we have considered thus far seem to point in the Commission's favour, we have not yet considered other documents that shift the probabilities in favour of the respondents' version.

[56] The first and most significant is a board document drawn up by Hechter that appears to be his first recordal of what happened at the May 2008 meeting. Hechter prepared a document for the board headed "*Overview of trading for the month and year to date*". The sub-heading indicates it is the "*Overview May 2008*". Under a heading "*Competitor Activity*" the following appears:¹⁵

"Roadspan surfaces

Roadspan Surfaces acquired all the Black Top asphalt plants at the liquidation sale. A meeting was held with them to ascertain their long term ambitions in respect of asphalt, manufacture. No clear answers given and we will closely monitor the situation." (Our emphasis)

[57] If this is the first record of the 22 May 2008 meeting by Much Asphalt, and the Commission did not dispute this, then it would appear consistent at least with the respondents' version that no geographic market division agreement was reached. Rather it suggests that Roadspan had left Much Asphalt guessing as to its strategy.

[58] Of course, it might be that if Hechter had reached a market division agreement, he might have been circumspect about recording this in a document that served before his board of directors. But Hechter does not seem to be bothered by such concerns. The later July board document which the Commission relies on, which we quoted earlier, and which we now repeat, stated:

"Appear to have forsaken their aggressive stance for a more pragmatic co-operative approach. A recent meeting with Roadspan leave[s] us with the distinct impression that the relationship is moving away from confrontational to seeking a mutually beneficial alliance."

[59] If a mutually beneficial alliance had been struck after the 22 May 2008 meeting it is likely that Hechter would not have had any scruples about reporting this to his board.

¹⁵ R pg 717. It appears that this served before the board in June 2008.

- [60] This raises the question which board minute entry reported back on the 22 May 2008 meeting. The one in May seems the more likely candidate than the one in July given its proximity to the date of the meeting. Mudimeli during cross examination fairly conceded that the July 2008 entry, on which he relied, was probably not referring to the 22 May 2008 meeting. He testified that it must have been the product of a later meeting. However, if there was a later meeting this has never been part of the Commission's case.
- [61] If the May 2008 board minute is the first record of the meeting, then it undermines the Commission's case. The statement that no clear answers were given suggests that no agreement had been reached that Roadspan would not enter the Gauteng asphalt production market.
- [62] What then does one make of the more incriminating later July 2008 minute suggesting euphemistically that Roadspan had moved to "*a more pragmatic co-operative approach*"?
- [63] No one from Much Asphalt has explained what this entry in the July 2008 board pack refers to because Hechter did not testify nor did he deal with this in his witness statement. Whitehouse could not take the document much further as this is not his company's document. He did however testify that because the two firms had a supplier and customer relationship, contacts between mid-level staff were frequent and this could be a reference to those interactions. Of course, this answer is speculative and does not explain why this entry appears under the heading competitor activity if it is referring to a customer relationship.
- [64] But since we have no other evidence of a later meeting without other evidence to provide context we cannot infer what the reference to a more co-operative approach means. Certainly, the respondents are right to argue that as far as the sequence of minutes is concerned the earlier minute recording "*no clear answers given...*" is the more likely candidate as the report back on the 22 May 2008 meeting. This as we explained earlier suggests an absence of consensus on any topic and certainly does not evidence agreement on a geographic market division.
- [65] Let us examine how Roadspan reported back on the May 2008 meeting.

[66] In a board strategy pack, prepared in May 2008, Roadspan's executive management explain why they bought the BTS equipment. They explain some of the consequences of the rapid purchase, one of which is that:¹⁶

"Much Asphalt, the market leader, initially took great exception to our purchase, then calmed down and offered to acquire some of our operations. This has, however, come to very little as their offer was not attractive."

[67] Although this board document was written sometime after the auction and served before a board meeting on 17 June 2008, we do not know if it was written before or after the 22 May meeting. But it is more likely, given the comment above, to have been written after the 22 May meeting. Although no mention is made of a meeting having taken place it does refer to an interaction between the two firms.

[68] Granted this minute is ambivalent. It does suggest that one solution proposed to the problem was that Much Asphalt would buy the assets from Roadspan to prevent the latter's entry. This would be consistent with the Commissions' case. However, the conclusion that nothing came of it suggests no agreement was reached.

[69] However, the onus to prove the existence of an agreement rests with the Commission. Absent a witness who attended the meeting the Commission has to rely on the contemporaneous documentary record. Here as noted the earliest recordal of the meeting from the side of Much Asphalt suggests that no market division agreement had been reached and that suspicion lingered from their side. On the Roadspan side the contemporaneous entry we referred to earlier suggested that the content of the meeting was about a proposed sale of the BTS assets which Roadspan rejected.

[70] While the prior correspondence suggested that reaching a market division arrangement would have been propitious for Much Asphalt, the post meeting documentation does not evidence that it was ever struck.

[71] Indeed, it seems that Much Asphalt was under the mistaken impression that Roadspan was intending to enter the Gauteng market as a producer, presumably shaken by its surprise purchase of asphalt production assets at the auction on 13 May 2008.

¹⁶ R pg 1013.

- [72] But there is no evidence that Roadspan ever intended to enter this market and here again this is where the Commission's case runs into difficulties.
- [73] First, Whitehouse was able to explain that the equipment housed at Jet Park was simply being stored. Moreover, the evidence was that the assets situated at Jet Park were described in internal documents, prepared at the time, as being "*incomplete*" i.e. that on their own they were insufficient for Roadspan to be able to enter the Gauteng market to produce asphalt.¹⁷
- [74] Second, we have in the record a strategy document from Roadspan which was hastily produced for the board to get a mandate to buy the BTS assets at the auction. Here the strategy is clear: to prevent rival Roadmac from buying the equipment and to ensure safety of supply in outlying areas. While it indicates that Roadspan, then only a paver, did want to enter the upstream production market to secure supply, there is nothing in the document to show it intended to enter the Gauteng market. Indeed, it mentions the places where it wants to enter and why. Gauteng is not mentioned amongst these.
- [75] This document is the strongest evidence that Roadspan at that time was not contemplating establishing a production facility in Gauteng. Moreover, its evidential value is enhanced by the fact that it was a confidential board document drawn up prior to any interaction between the firm and Much Asphalt over the BTS assets. (It even pre-dates the auction). If Roadspan had intended to use the BTS assets as a way to enter the Gauteng market this would surely have been stated in the document. The absence of such a statement of intent suggests that it was not contemplated at that time.
- [76] Whitehouse also explained why there were sound commercial reasons for the firm not to enter the Gauteng market. He explained that for technical reasons asphalt plants need to be located close to the sites where paving takes place, otherwise the

¹⁷ In Roadspan's Viability Study conducted prior to the purchase of the BTS assets at auction (See R pg 701), it is noted that there were three unassembled/incomplete plants on auction. The most significant of these being the former Alberton plant. The drier component has a capacity of 120 tons/hour which was located in Jet Park and a hot storage silo for this plant in Witbank. In an e-mail addressed to Mr Mudimeli from Whitehouse prior to his interrogation by the Commission, Whitehouse responds to Mr Mudimeli's information request pertaining to the 'Jet Park' plant. Whitehouse recalls there never having been a Jet Park plant but rather a "...reference to unassembled components that were included in the auction assets and that were stored on our Jet Park property (see R pg 218).

product dries up. Second, before a production plant can be established environmental approval has to be obtained from the authorities and that this process takes some time. Roadspan was eager to put in tenders for paving in the Gauteng province for the work anticipated around the 2010 World Cup. Much Asphalt was the most secure source of supply for it in the province. A decision to stay in the paving market at this time and not compete with its then upstream source of supply in Gauteng could well have been made unilaterally notwithstanding the aggressive posturing of Much Asphalt.

[77] However, there is certainly evidence in the record that Much Asphalt was uncertain about Roadspan's intentions. The record shows that Roadspan's presence at the auction and its successful bid had frustrated Much Asphalt, hence the aggressive response of Greyling. Nor did the meeting on 22 May 2008 allay its fears as a further entry in the same May 2008 board pack illustrates. One of its directors Spencer Van Eden notes as a "strategic risk", *"The purchase and commissioning of certain asphalt plants in our supply areas by Roadspan"*.¹⁸

[78] Although this suggests a high probability that Much Asphalt would have used the 22 May 2008 meeting to induce Roadspan not to enter the Gauteng production market, the same document, as we indicated earlier, makes it clear that whatever Roadspan may have told them, Much Asphalt remained suspicious. Hence his comments after the meeting that no clear answer had been given and that *"... we will closely monitor the situation"*.

[79] We find therefore that the Commission has not discharged its onus to prove that a geographic market division agreement was struck between the two respondents at their meeting on 22 May 2008. The documentary evidence suggests that at best such a possibility may have been mooted by Much Asphalt prior to the meeting, but both sides documents, prepared after the meeting, suggest no agreement was reached. Moreover, the evidence that Roadspan never contemplated entering the production market in Gauteng at that time is compelling and the evidence why it made no commercial sense for it not to do so at the time is also credible.

[80] Finally, we have to deal with the possibility that an agreement was reached at a later meeting i.e. sometime after the 22 May 2008 but before July 2008. This was the

¹⁸ Much Asphalt May board pack document item 8.1 R pg 732.

Commission's attempt to seize upon the remark in the July 2008 Much Asphalt board pack observing that there had been a change in attitude on behalf of Roadspan.

- [81] There are two problems with this second meeting theory. The first is a process one. The Commission's referral relies specifically on the 22 May 2008 meeting as does its witness statement. Despite this document having been discovered prior to the hearing there was no indication that the Commission would rely on the existence of a subsequent meeting to prove the existence of the alleged geographic market division agreement.¹⁹
- [82] Secondly, the remark itself, whilst curious, is not on its own, absent any other evidence, proof of a subsequent agreement to divide the market.
- [83] We find that the Commission has failed to set out facts or evidence before us that would, on a balance of probabilities, sustain a contravention of section 4(1)(b)(ii) of the Act.

¹⁹ In fairness to the Commission it did not rely on this in its heads of argument but we have nevertheless thought it needed to be considered once it had been raised by Mr Mudimeli.

Order

We accordingly make the following order:

1. The complaint referral under case number CR163Nov16 is hereby dismissed.
2. There is no order as to costs.



Mr Norman Mandoim

25 July 2019**Date**

Ms Yasmin Carrim and Mr Andreas Wessels concurring.

Tribunal Case Manager : Ndumiso Ndlovu

For the Commission : M Ngobese and T Ramoshaba

For the First Respondent : W Trengove SC and GD Marriot instructed by
Nortons Inc.

For the Second Respondent : J Wilson SC and M du Plessis SC instructed by
Bowmans