



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 73/CR/Jul12 (015438)

In the matter between:

COOLHEAT CYCLE AGENCIES (PTY) LTD

Applicant

and

THE COMPETITION COMMISSION

Respondent

In re:

The complaint referral between:

THE COMPETITION COMMISSION

Applicant

and

FRITZ PIENAAR CYCLES (PTY) LTD AND 19 OTHERS

1st - 20th Respondents

Panel : Norman Manoim (Presiding Member)
Medi Mokuena (Tribunal Member)
Anton Roskam (Tribunal Member)

Heard on : 17 February 2014

Order issued on : 17 February 2014

Reasons issued on : 20 February 2014

REASONS: EXCEPTION APPLICATION

Introduction

1. This is an exception application brought by Coolheat Cycle Agencies (Pty) Ltd ("Coolheat"), a wholesaler of bicycles and cycling equipment, which is one amongst twenty respondents facing a charge that it has contravened section 4(1)(b)(i) of the Competition Act, Act 89 of 1998, (the "Act").¹
2. On 17th February we heard oral submissions from Coolheat and the Competition Commission (the "Commission"). On the same day we issued our order dismissing the exception. A copy of this order is annexed hereto marked A.
3. We set out below our reasons for dismissing the exception application.

Background

4. This is the second exception application brought by Coolheat in this matter. In an earlier decision where we determined an exception brought by other respondents including Coolheat, we set out the facts of the case and its history. For reasons of brevity they are not repeated here, but can be gleaned from that decision.²
5. The essence of the case is that the Commission alleges that retailers and wholesalers of bicycles and cycling accessories had agreed to raise the retail price of these goods through agreements involving both retailers and wholesalers. In these reasons our focus is on the role of wholesalers, as Coolheat is a wholesaler. Wholesalers are alleged to have agreed to raise the margins available to retailers by increasing the recommended retail price. They are able to do so according to the Commission because wholesalers are responsible for advertising retail prices.
6. A key element of the Commission's case is a meeting that took place in September 2008 attended by several wholesalers and retailers, amongst them the

¹ Coolheat is the eleventh respondent in the case. At the time of this decision some respondents have entered into consent agreements with the Commission.

² *Omnico (Pty) Ltd and 2 Others v The Competition Commission: Case No 73/CR/Jul12*. See paragraphs 9 – 17 in particular.

respondents and Coolheat. The Commission also relies for its case on meetings that preceded this meeting as well as subsequent emails that were exchanged.

7. The Commission alleges that these meetings resulted in an agreement or agreements or concerted practices to directly or indirectly “....*fix a purchase price or any other trading condition.*” Accordingly, the Commission concluded the firms had contravened section 4(1)(b)(i) of the Act.³ (Although the Commission relies on the contraventions constituting agreements or alternatively concerted practices it relies on the same facts for these allegations. For this reason as a convenient short hand we will simply refer to agreements but it can be assumed that the reasons apply to both)
8. Several wholesalers excepted to the referral and alleged that it was, at least in relation to their role in the alleged contravention, vague and embarrassing. They argued that the lack of particularity could not be cured and the case against them should be dismissed. We shall refer to this as the first exception.
9. On 9 April 2013 we upheld the first exception partially, by requiring the Commission to provide further particulars on certain issues, which we set out in our order. However, we dismissed the remaining relief sought by the excipients, in particular that the case against them be dismissed.
10. The Commission then provided the further particulars by way of an affidavit from its investigator on 14 May 2013. In response, Coolheat then brought a further application for exception (the second exception) on 19 June 2013. Again, as was the case with its relief in the first exception, Coolheat sought an order dismissing the case against it.
11. It is this second exception that is the subject matter of this decision.
12. The present exception, unlike the first exception, does not make out a case that the particulars are vague and embarrassing. Now Coolheat argues what is known in practice as a ‘pure’ exception, i.e. an objection that even if the facts alleged by the

³ Paragraph 53-4 of the Complaint referral, record page 27.

Commission are assumed to be correct, it nevertheless fails to disclose a cause of action because it is bad in law. Since it is bad in law it cannot be remedied by any more further particulars and Coolheat sought an order dismissing the referral against them.⁴

13. To understand the basis of the exception we have to consider the further particulars provided by the Commission that gave rise to it.

The Commission's further particulars

14. From our previous decision we know that the Commission's case that the wholesalers were party to an agreement alternatively a concerted practice to fix prices, was not entirely clear. The Commission has in its further particulars remedied this. Indeed, Coolheat cannot complain that the case is not clear to them and certainly in oral argument it made no complaint of this kind.

15. The Commission alleges that the wholesalers reached an agreement between themselves. Since wholesalers compete with one another this agreement is one between parties in a horizontal relationship. The nature of that agreement was to "*... directly or indirectly fix(ed) the selling price or other trading condition of bicycles and cycling accessories sold by the retailer respondent in contravention of section 4(1)(b)(i) of the Act*".⁵

16. The Commission then alleged that the content of that agreement between the wholesalers was to use the recommended retail price (RRP) as the "*... mechanism by which the downstream prices and margins of bicycles and accessories could be increased from October 2008 onwards*".⁶

17. The Commission says it was agreed that the retailer respondents would utilise the RRP and refuse to discount off it, to ensure higher prices. The benefit for the retailers is obvious, but the Commission explained that the wholesalers' rationale

⁴ See paragraph (b) of its prayer, record page 117.

⁵ See further particulars paragraph 10 record page 82 read with paragraph 11.

⁶ Ibid paragraph 13 record page 84.

was that if retailers were healthy they (the wholesalers) would benefit by getting paid timeously and in full by the retailers.⁷

18. The Commission then goes on to elaborate on the RRP pricing "mechanism" as it terms it. We quote here from paragraphs 25- 27 of the further particulars:

- 25) *"Given the fact the RRP is readily available to consumers through advertisements and the industry practice is to charge the RRP to a retail consumer, this "price" is not merely a recommendation that is of no significance in the market for the end consumer attending at a retail shop.*
- 26) *The price set by the wholesalers and subject to a known uniform mark-up, is, directly or indirectly, the price that will become known and charged to consumers by the retailers. The uniformity of an agreed increase in the mark-up between the wholesale price and the effect of this on the RRP is the mechanism by which the wholesaler respondents achieved the direct or indirect fixing of the selling price or any other trading condition of bicycles and cycling accessories, respectively, by agreement.*
- 27) *... it is this RRP pricing mechanism which was the subject of that meeting. Specifically the proposal was made that the RRP for bicycles be increased by a mark-up from 35% to 40% or 50% for bicycles and from 50% to 75% for bicycle accessories. This increase would result in the increase of the selling price of these products by a similar percentage".*

The basis of the exception

19. Coolheat argues that the wholesalers can only be found to have contravened section 4(1)(b)(i) if they collude on the wholesale price since that is the price they

⁷ Ibid paragraph 14, record page 85.

as competitors set and control. However, they do not control the retail price – retailers do – the most wholesalers can be said to affect this price is to recommend the retail price but since retailers are not bound to charge it they are free to charge a higher or lower price.

20. Thus, the absence of a horizontal agreement i.e. an agreement at wholesaler level to fix wholesale prices means the Commission has not alleged the necessary jurisdictional fact for its case under 4()(b)(i) and the case should be dismissed. Expressed differently, those who are parties to the agreement must operate at the same level in the supply chain as the outcome of their agreement – in this case price or other trading condition – is operative. If the agreement to which competitors are party has as its subject matter an outcome downstream from them, then such a case would fall outside of section 4(1)(b)(i).

21. The Commission raised three defences to this.

- 1) The exception was a repeat of the previous exception which had not been upheld;
- 2) The exception was not a proper exception as it did not allege that the Commission had not provided sufficient particularity; and
- 3) The exception relied on facts and law which more properly should be argued at trial, not by way of exception.

22. We do not agree with the Commission's first two arguments. Given a lack of particularity in the Commission's case against the wholesalers previously, Coolheat was at least entitled to argue its legal point with more certainty now that particularity has been obtained. The second argument that Coolheat cannot argue an exception based on a point of law is also wrong. There is nothing to prevent a respondent in an appropriate case from taking such an approach which accords with both our past practice and that in the High Courts, as it means that cases with no legal prospect of success can be nipped in the bud in their incipency.

23. However, we do agree with the Commission that this is not an appropriate case for us to decide on exception.

24. In order to succeed Coolheat must persuade us that the legal issue can be decided on the pleaded facts, which in this case constitute the referral as supplemented by the further particulars and secondly, that it is appropriate to decide the legal point now.
25. We find that Coolheat has failed to persuade us on either one.
26. Indeed the factual allegations around how the price is reached at retail level through the mechanism of an agreement amongst wholesalers is one material to the Commission's case and assumptions about what occurs at particular levels of the value chain would be made prematurely on this record. The Commission, as noted, describes in the further particulars, how the agreement between the wholesalers has a bearing on the retail price, because of the particular way this industry operates.
27. For the law point to be decided properly there needs to be clarity on what the factual issues that underpin it are. But there is not in this case. Although Coolheat argues that it accepts the Commission's facts for the purpose of exception it is clear from argument that it does not. It argues that retailers are free to charge what they want. But the Commission alleges that the RRP operates as a mechanism to determine retail price. It alleges that the RRP "*... is not merely a recommendation that is of no significance in the market for the end consumer attending at a retail bike shop.*"⁸
28. Clearly on this important fact there is a dispute of fact and Coolheat's contention that it accepts the Commission's facts, as it has to in order to make an argument on exception, is not correct.
29. Furthermore what is crucial to the Commission's case is not the labelling of the firms as wholesalers and retailers and the price as upstream and downstream, but an interrelationship between the wholesalers, the recommended price they offer

⁸ Ibid paragraph 25 record page 88.

and the price that retailers sell to their customers. This is not a straightforward matter, but requires an interrogation of the economic relationship that exists between the accused respondent firms who conclude an agreement and the outcome of that agreement in a retail price.

30. It is not fair to the Commission's case for us to assume at exception stage that this relationship is a mechanistic one; where retail and wholesale firms exist in discrete planes of a supply chain with decisions at one level having no effect on the autonomy of the other. Deciding this matter now means taking a view on this crucial allegation without the benefit of trial.

31. Thus this remains a question of fact best decided at trial. Secondly, the legal argument advanced by Coolheat is itself by no means uncontroversial. It relies on a particular interpretation of section 4(1)(b)(i) which we have not had any previous occasion to decide, nor is it one with which the Commission does not have a respectable counter legal argument to advance.

32. Coolheat, as noted, had argued that the section suggests that the price and those who set it must of necessity find themselves at the same level in the value chain.

33. But counsel for the Commission argued the interpretation of section 4(1)(b)(i) contains language which does not support these contentions.

34. We set out section 4(1)(b) below because it helps to follow this argument:

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(b) it involves any of the following restrictive horizontal practices :

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

- (ii) *dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
- (iii) *collusive tendering. (our emphasis)*

35. The Commission argues that there are several notable features in the language used in this sub-section which support its interpretation that the level of the conspirators who reach agreement and the price affected by their agreement, do not necessarily have to be the same. If the more narrow view of the interpretation contended for by Coolheat is correct, it argues, then why is there:

- 1) The use of the indefinite rather than the definite article to describe what the agreement involves;
- 2) The use of the term 'involves' suggestive of a less mechanistic relationship between parties to the agreement and its outcome; and similarly
- 3) The use of terms '*directly or indirectly*';

36. We do not need to decide now whether this argument is good. Indeed we have already stated that such a law point should not be decided in a vacuum without the benefit of trial. We only wish to illustrate that the Commission is not without a respectable argument on this point which is worthy of proper consideration, but after a trial.

37. Harms, in his treatise, prudently makes the point that the granting of an exception is discretionary and that there are occasions when it is not appropriate to decide a law point without the benefit of a trial of the facts.⁹

38. We consider the present one such an occasion. The exception raises issues of mixed points of facts and law, not purely ones of law. The legal point insofar as it may be considered severable from the factual issues (a point we do not accept is

⁹ Harms said "*The court may allow the question raised by an exception to stand over for decision at the trial especially if it appears that the question may be interwoven with the evidence that will be led at the trial*" – Civil procedure in the superior courts, B – 170(2).

correct) is novel, and one for which no relevant authority has been advanced and for which a respectable counter argument has been advanced. Hence it is not appropriate for determination now.

39. For this reason we decided the exception should be dismissed.

Costs

40. The Commission sought costs as well. It argued that Coolheat was repeating its previous objection and given the delay in this matter should not be indulged in its bringing of a further exception that mirrored the previous one.

41. We do not consider that this is a repeat of the previous objection. However, even if it is, as a matter of fairness until the Commission's case had been clarified by way of the further particulars, such an objection was harder to argue the first time around.

42. We also take the view that granting costs in such matters in prohibited practice cases involving referrals by the Commission is unprecedented and no case is advanced in this one to alter that view.¹⁰

43. We are mindful that in seeking costs the Commission was concerned about the delay in bringing this matter to a hearing – a fact the Commission fairly took some responsibility for in argument – and hence we included in our order, directions for the filing of further pleadings, given that Coolheat has yet to file an answer in this matter.



Mr. Norman Manoim

20 February 2014
Date

Mrs. Medi Mokuena and Mr. Anton Roskam concurring

¹⁰ *Omnia Fertiliser Ltd and The Competition Commission, Case No: 77/CAC/Jul08.*

Tribunal researcher : Ipeleng Selaledi

For the Coolheat : Adv. D Stephens instructed by Shaie Zindel Attorneys

For the Commission: Adv. MM Le Roux instructed by the Commission

ANNEXURE A

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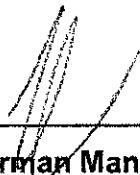
Heard on : 17 February 2014

Order issued on : 17 February 2014

ORDER: SECOND EXCEPTION APPLICATION

KINDLY TAKE NOTICE that after having heard the parties in the above matter the Competition Tribunal orders as follows:

1. The Applicant's Second Exception Application is dismissed.
2. The Applicant must file its Answering Affidavit to the Respondent's Complaint Referral within 20 business days of this order.
3. The Respondent must file its Replying Affidavit, if any, within 15 business days of the filing of the Applicant's Answering affidavit.
4. There is no order as to costs.



Mr. Norman Manoim

17 February 2014

DATE

Mrs. Medi Mokuena and Mr. Anton Roskam concurring