



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR031Jun15

In the matter between:

The Competition Commission

Applicant

And

Global Sustainable Risk Control Management (Pty) Ltd

First Respondent

Real Tree Trading 1 (Pty) Ltd

Second Respondent

Panel	: Yasmin Carrim (Presiding Member)
	: Mondo Mazwai (Tribunal Member)
	: Andreas Wessels (Tribunal Member)
Heard on	: 31 May 2017
	27 July 2017
Order Issued on	: 3 November 2017
Reasons Issued on	: 3 November 2017

Reasons for Decision

INTRODUCTION

- [1] This case concerns a complaint referral by the Competition Commission ("the Commission") against Global Sustainable Risk Control Management (Pty) Ltd ("Global") and Real Tree Trading 1 (Pty) Ltd ("Real Tree"), collectively "the respondents".
- [2] The Commission alleges that on 22 October 2013, the respondents entered into an agreement to fix prices for induction training services, in contravention of section 4(1)(b)(i) of the Competition Act, 89 of 1998, as amended ("the Act").

- [3] The Commission's claim is founded primarily on an e-mail from the Managing Director of Global to the Commission, in which Global allegedly confesses to having agreed with Real Tree to not supply induction training services below a certain specified price.
- [4] The Commission also relied on the interrogation of representatives of Global and Real Tree respectively during its investigation as well as a settlement agreement concluded between Global and the Commission, in which Global admitted that it contravened section 4(1)(b)(i) of the Act.¹ The Commission has asked us to infer an agreement from these pieces of evidence.
- [5] Real Tree denies that it entered into a price fixing agreement as alleged and has asked us to dismiss the case.

BACKGROUND

- [6] When the Commission referred the complaint, Global and Real Tree were competitors in the market for the provision of induction training services to contractors² of ArcelorMittal South Africa Limited ("ArcelorMittal"), a large steel producer with one of its major plants in Vanderbijlpark. Global has since exited the market³. Prior to Real Tree's entry into the market in October 2013, Global was the sole supplier of these services to ArcelorMittal's contractors.
- [7] According to Real Tree it was approached by ArcelorMittal to do a presentation on its competencies and capabilities to provide safety induction services to ArcelorMittal's contractors. Prior to this, Vanderbijlpark Estate Company NPC ("Vesco"), the holding company of Real Tree, provided labour broking services to ArcelorMittal. Vesco was also the landlord to premises leased by Global.
- [8] Real Tree was registered as a vendor to ArcelorMittal on 6 August 2012⁴, but only commenced providing safety induction training services to ArcelorMittal's contractors on 3 October 2013 in competition to Global.
- [9] While Global was the sole supplier to ArcelorMittal contractors, it charged R250 per person for the safety induction training. When Real Tree entered the market, it

¹ Competition Commission and Global Sustainable Risk Control Management (Pty) Ltd case no CR031Jun15/SA121Oct16.

² The induction and training services consist of safety, health, environment, risk and quality (SHERQ) training, systems implementation in the construction, mining and engineering sectors. See record, pages 146-147 and 174.

³ See transcript dated 27 July, pages 220 and 223.

⁴ Real Tree's answering affidavit, record page 66 at paragraph 5.6.

advertised the same services at R200 per person. Global responded to this by reducing its price from R250 to R200. Real Tree reduced its price further to R180 per person.

- [10] A few days after Real Tree entered the market, on 7 October 2013, the Commission received a complaint from Global alleging that Real Tree was abusing its dominance by charging prices that were below Global's costs ("predation complaint"), which Global allegedly could not match. Global alleged that Real Tree was a non-profit company closely associated with ArcelorMittal, and could therefore afford to charge R180 per person, a price which as mentioned, Global could not match.
- [11] On 25 October 2013, the Commission received an e-mail from Global essentially advising that its complaint against Real Tree was no longer a concern since Real Tree had agreed with Global at a meeting on 22 October 2013 *"to drop their prices to meet [Global's] at R200/person."*⁵
- [12] It is common cause that Global and Real Tree had a meeting on 22 October 2013. What is in dispute is whether Real Tree and Global agreed to fix the price of safety induction services at this meeting. The Commission alleges that they did, while Real Tree denies it. The high water mark of the Commission's case is that indeed the respondents reached an agreement which lasted eight days.
- [13] The matter was set down to be heard on 4 October 2016. We were informed at the commencement of the hearing that Global had settled with the Commission, and were requested to stand the matter down while the settlement agreement was being prepared. This took Real Tree by surprise.
- [14] On resumption of the hearing on the same day, the Commission and Global confirmed that they had concluded the settlement agreement and requested that we confirm it. Having heard the submissions from them, we confirmed the settlement agreement as an order of the Tribunal. In light of these developments, Real Tree requested a postponement of the matter to reconsider its position. The Commission had no objection to the postponement, which we duly granted.

⁵ It is clear from the evidence that the phrase 'drop their prices' is an error since Real Tree was charging R180 per person and therefore to meet Global's prices, Real Tree would have had to 'raise' not 'drop' its prices. See page 196, lines 1-4 of transcript (27 July 2017)

THE EVIDENCE

- [15] By and large, the facts summarised above are common cause. What is in dispute is whether at the meeting of 22 October 2013 (i) prices were discussed; and/or (ii) an agreement on price was reached.
- [16] As mentioned, the Commission relies primarily on the e-mail of 25 October 2012 from Mr Tarboton, the General Manager of Global and has asked us to infer the existence of the alleged agreement from this e-mail. However, the Commission did not call Mr Tarboton as a factual witness, as explained below. The Commission's only witness was Mr Fhatuwani Mudimeli ("Mr Mudimeli"), a Senior Investigator in the Commission's Cartels division.
- [17] Real Tree called Mr Daniel Rudolf van der Westhuizen ("Mr van der Westhuizen"), the then director of Real Tree.
- [18] We now turn to consider this e-mail and other evidence relied on by the Commission.

E-mail of 25 October 2013

- [19] Having filed the predation case against Real Tree on 7 October 2013, Global sought to stop the Commission's investigation in its e-mail of 25 October 2013. The full content of the e-mail is set out below:

"Further to our above complaint, management at [Global] have met with management of RealTree Trading and we have been assured that they will adjust their pricing to bring it into line with our pricing model.

This is for Safety Induction Training at the ArcelorMittal Vanderbijlpark Steel Plant and we, [Global], have been the sole provider for the last four years in this field of supplying that training to ArcelorMittal Steel Vanderbijlpark.

As of the 4th October 2013, Real Tree Trading were given the opportunity of also providing the same training to contractors going into ArcelorMittal Steel premises and they initially made their pricing at R200/person as opposed to our pricing of R250-00/person. We then dropped our price to meet them on R200-00/person but they then dropped their pricing again

to R180-00/person, a price that we cannot meet as they have dominance in the market of being a Non-Profit Organization with the backing of ArcelorMittal and numerous commercial enterprises that generate cash flow for them.

It was because of this that we approached the competition commission but after our last meeting of Tuesday 22 October that have advised us that they are going to drop their prices to meet ours at R200/person..."

[20] Believing that it had found a smoking gun, the Commission did very little to investigate the alleged price fixing agreement. In its own referral affidavit, deposed to by Mr Fhatuwani Mudimeli, a senior investigator in the Commission's Cartels division, Mr Mudimeli states that: "...Mr Tarboton sent an e-mail to the Commission wherein he advised that, [Global] met with Real Tree on 22 October 2013 and agreed to match each other's price at R200 per person. As such there was no need for the Commission to continue with the investigation."⁶

[21] However, there are several difficulties with the Commission's case. First, the Commission seemed to have taken the e-mail as 'proof' of the agreement when the e-mail is a one-sided version of what apparently happened at the meeting of 22 October 2013, which the author of the e-mail itself, Mr Tarboton later denies.

[22] The e-mail from which the Commission wants us to infer price fixing is not corroborated by other objective evidence. Unlike in the recent Tribunal decision in *Dawn*,⁷ where the Commission alleged a market division between the two firms, the Commission had relied on an agreement signed by both Dawn Consolidated Holdings (Pty) Ltd and Sangio Pipe (Pty) Ltd for a *prima facie* case.⁸ The email sent by Mr Tarboton in this case was at best a basis for a reasonable suspicion that required further investigation.

[23] Second, as stated, the Commission did not call Mr Tarboton to testify. According to the Commission, Mr Tarboton was not willing to testify.⁹ It was however open to the Commission to subpoena him and yet the Commission chose not to. Mr Mudimeli

⁶ Complaint referral para 18 at record page 14 (Our emphasis).

⁷ *Competition Commission v Dawn Consolidated Holdings (Pty) Ltd and Three Others* Case number: CR023May15.

⁸ This is not to say that an agreement qualifies as such only if it is signed. 'Agreement' has the same meaning as defined in section 1 of the Act, which in this case, has not been proven even on the broader definition in the Act.

⁹ See page 96, lines 4-12 of transcript (31 May 2017).

testifying on behalf of the Commission said Mr Tarboton would be a hostile witness¹⁰ and would continue *"to lie and lie and lie"*¹¹.

- [24] Mr Mudimeli's stance on Mr Tarboton's lack of credibility and unreliability seems to stem from Mr Tarboton's answers given to the Commission during his interrogation. During his interrogation by the Commission conducted under section 49A of the Act¹², Mr Tarboton was asked about his e-mail of 25 October 2013 wherein he said an agreement was reached. He plainly denied that the agreement was reached as reflected in the extract from the transcript of his interrogation below:

"Mr Khotso Modise: So, you absolutely do not recall what you talked about in that meeting?

Mr Tarboton: I cannot recall it.

Mr Modise: The only record of what you talked about is reflected in this E-mail.

Mr Tarboton: Yes.

Mr Modise: And you say we must ignore that, because it is a lie. Is that your version?

Mr Tarboton: Yes

Mr Modise: Why do you even know that this is a lie, when you do not know about it?

Mr Tarboton: Because we never adjusted our pricing, we never had any agreement on pricing.

Mr Modise: I do not say you adjusted your price, no, I'm not talking about that you adjusted your price and I know we could go and check and then see that you did not adjust your price. But you talked about price and you recorded that in your e-mail.

Mr Tarboton: According to this E-mail.

Mr Modise: Yes.

Mr Tarboton: Yes, I did. And that is incorrect.

Mr Modise: Yes, you talked about the price and you recorded it and you want us to believe that that incorrect.

Mr Tarboton: Yes.

Mr Modise: Yet you tell us that you do not know, you absolutely do not know what you talked about in that meeting.

Mr Tarboton: Yes.

Mr Modise: You cannot recall the subject of your discussions on that day.

Mr Tarboton: I cannot recall all of them, no.

...

Mr Modise: Mmmm. But this one you want to say authoritatively you know that was not discussed the price?

¹⁰ See transcript dated 31 May 2017, page 97, lines 1-8.

¹¹ See transcript dated 31 May 2017, page 98, lines 2-4.

¹² The evidence of the interrogation transcript was introduced by Real Tree during the cross examination of Mr Mudimeli. See further transcript dated 31 May 2017, page 50, line 11.

*Mr Tarboton: Yes, yes. For the simple reason, at this stage I wanted these proceedings to be stopped against them.*¹³

- [25] Mr Tarboton's explanation for the meeting in his answering affidavit was that the working environment in the office premises which Global and Real Tree were sharing was 'uncomfortable'.¹⁴ It is common cause that Global rented office premises from Vesco, the holding company of Real Tree. The purpose of the meeting according to Mr Tarboton, was to clear the air between Global and Real Tree since they were competitors working on the same premises.
- [26] The Commission pressed Mr Tarboton during the interrogation to suggest that since Real Tree was allegedly undercutting Global, Real Tree's pricing was a concern, and therefore the meeting must have discussed (and agreed) prices. However, Tarboton denied this.
- [27] We could not test Mr Tarboton's evidence since he was not called to testify. It may well be that Mr Tarboton lied during the interrogation as suspected by the Commission. However, the alleged lie on its own, without other objectively corroborating evidence, is not enough to draw the inference of an agreement.
- [28] Turning then to the evidence of Mr van der Westhuizen of Real Tree. In his answering affidavit, he also denied that prices were discussed and that an agreement was reached at the meeting of 22 October 2013. According to him, the main purpose of the meeting was for himself and Mr Tarboton to meet each other since they were sharing the same premises and experiencing certain logistical problems.
- [29] In oral evidence he explained that:

*"The facilities, our trainers and our learners [were] using the same, call it facilities, the security control at the gate, the same parking area.... I wanted us, if there are problems, let's discuss it, because we know each other."*¹⁵ He further testified that the sharing of premises created confusion for customers coming to attend the safety induction training as they would sometimes show up at the wrong offices."

¹³ Record page 227- 229.

¹⁴ Para 19 of the First Respondents answering affidavit record page 26.

¹⁵ Line 15- 20 at page 165 and lines 5-15 at page 164(transcript 27 July 2017).

[30] The Commission argued that these explanations should not be believed as Global and Real Tree had been sharing offices since January/February 2013, and therefore the explanation for a meeting some seven months later was implausible.

[31] Mr van der Westhuizen's explanation for the timing of the meeting was that, although Real Tree had been on the premises since January/February 2013, it was only when Real Tree became a competitor in October 2013 that it was necessary to meet because of *inter alia* the confusion with customers reporting at the wrong offices. He explained further that despite being on the same premises with Global for some months, he had not met Mr Tarboton since his offices were in town and not in the shared premises.¹⁶

[32] We have no evidence to the contrary. Even if we were to give the Commission the benefit of the doubt and disbelieve Mr van der Westhuizen, we are unable to draw the inference which the Commission seeks merely on the suspicion of a lie. We can only draw the inference if, on balance, the evidence as a whole stacks up. In this case, it does not, as elaborated on further below.

The 30 October 2013 E-mail

[33] In oral evidence, Mr Mudimeli tried to bolster the Commission's finding that there was an agreement through another e-mail from Mr Tarboton to the Commission dated 30 October 2013.¹⁷ In this e-mail, Mr Tarboton states that:

"We at [Global] have come up with a novel way to negate the pricing advantage being used by RealTree in the induction process by convincing our clients to go on a retainer package with us for a period of twelve months and thereby offering them other services included into the package.

In this way we are being able to sustain our business and ensure our survival as RealTree have not adjusted their pricing at this stage back to our level.

¹⁶ Line 15-20 at page 162 (transcript 27 July 2017)

¹⁷ Counsel for Real Tree queried the Commission's reliance on this e-mail since it was not referred to in the Commission's witness statement, and submitted that it was an after-thought by the Commission. However, as an administrative Tribunal with inquisitorial powers, the High Court rules to pleadings do not strictly apply to our proceedings.

*Furthermore, with Real Tree being part of Vesco Holdings, they are almost a part of our main client, ArcelorMittal Steel Vanderbijlpark and we would appreciate this being dealt with in confidence as we do not want to upset our relationship with ArcelorMittal Steel South Africa...*¹⁸

- [34] The Commission submitted that this e-mail (read with the e-mail of 25 October) shows that there was an agreement. According to the Commission, the fact that *"Real Tree have not adjusted their pricing at this stage back to our level"* as pointed out by Global in the e-mail is merely an indication of Real Tree cheating on the agreement which is relevant to the question of the implementation of the agreement, rather than its conclusion.
- [35] While it is correct in competition law that it is not necessary to prove the implementation of an agreement under section 4, in such a case, where an agreement is to be inferred from the contents of one email in circumstances where the author of the email has subsequently denied the contents thereof, proof of implementation would certainly have improved the probabilities of drawing the inference the Commission wishes us to make. This is not to say that the Commission must show implementation in every alleged section 4 contravention.
- [36] In this case, and apart from proof of implementation, the Commission has not demonstrated Real Tree's economic incentives, as a new entrant in the market to agree to fix prices as alleged. As a new entrant, and consistent with its lower pricing strategy, Real Tree was bound to win market share from Global. Mr van der Westhuizen's testimony was that all the clients were owned by Global. As a new entrant, Real Tree had to offer lower prices to compete for these clients, and has kept the price the same since. This evidence is not disputed¹⁹. No plausible explanation is postulated by the Commission as to why Real Tree would abandon its alleged undercutting strategy.
- [37] The Commission has not alleged or provided any evidence, for instance, that there was also an agreement between Real Tree and Global to allocate customers or markets i.e. that Real Tree was guaranteed a certain number of customers to make it worth its while not to compete with Global. In other words, it would have made economic sense

¹⁸ E-mail at page 144 of the record

¹⁹ The Commission's testimony was that it did a desktop analysis of prices by calling the customers of Real Tree and Global's to do a price comparison. The Commission's analysis showed that Real Tree had not adjusted its prices as alleged in Global's e-mail of 25 October.

for Real Tree to abandon its lower pricing (which was winning market share for it) in favour of guaranteed customers instead of having to compete for them.

- [38] Other than the bald allegation of price fixing (based on the e-mail of 25 October 2013), the Commission brings nothing more than a theoretical possibility of collusion.

As mentioned, this is not to say that in every case the Commission is required to show implementation, or a form of market division as discussed.

- [39] However, in this case, we have taken the following factors into account:

- a. The e-mail of 25 October 2013 in which the Commission relies, is denied by its own author, Mr Tarboton. Mr Tarboton does not deny that he sent the e-mail, but denies the statement in the e-mail that Real Tree essentially agreed to match Global's prices of R200 p/p.
- b. The Commission elected not to call Mr Tarboton as a witness to explain his e-mail and subsequent denial.
- c. The Commission itself had reservations about Mr Tarboton's credibility.
- d. Real Tree denies that it agreed with Global to fix its prices at R200 p/p as alleged, and thereby corroborates Mr Tarboton's evidence (that Real Tree did not agree to fix prices with Global).
- e. Real Tree's prices, in fact, remained at R180 p/p from October 2013 and remained at that price at the time of the hearing.
- f. The Commission itself admits, in the founding affidavit, that it did not investigate the matter any further since Mr Tarboton had confessed to the agreement. However, it was incumbent upon the Commission to either (i) investigate this further when faced with contradictory statements from Mr Tarboton, especially in the knowledge that it did not intend to call Mr Tarboton as a witness; or (ii) to non-refer the complaint in the absence of supporting evidence.
- g. There is no plausible explanation by the Commission why Real Tree, as a new entrant would abandon its price cutting strategy without evidence of any form

of customer or market allocation to make it worthwhile for Real Tree not to compete.

- h. We also know from the papers that ArcelorMittal was the main but indirect client for the services provided by the respondents. We know from the evidence of Mr van der Westhuizen that ArcelorMittal became aware of the complaint and brought it to his attention. There is no indication that the Commission engaged with ArcelorMittal to understand ArcelorMittal's role, if any.

[40] With all the gaps in the evidence before us, we cannot reasonably infer an agreement from the e-mail of 25 October 2013 read with all the evidence before us.

Settlement Agreement

[41] The Commission also sought to rely on the settlement agreement it concluded with Global. The settlement agreement records that:

[42] "During October 2013 [Global] engaged in discussion, with the representatives of the second respondent [Real Tree], concerning the unit price to be charged in respect of health and safety induction training services. The discussions are captured in the email dated 25 October 2013, annexed hereto as Annexure "A". The Second Respondent advised [sic] the First Respondent that it would charge the unit price of R200 per learner for the aforementioned training. Based on this advice the First Respondent decided not to pursue a complaint lodged against the Second Respondent pertaining to its alleged abuse of dominance. The aforementioned conduct constitutes and infringement of section 4(1)(b)(i)".

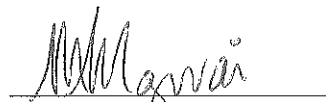
[43] There are many reasons why parties may settle a complaint with the Commission, with or without an admission of guilt. As mentioned, Mr Tarboton did not testify and we have no explanation from him of his reasons for concluding the settlement agreement. However, significantly the settlement agreement does not itself contain any further evidence of an agreement, other than the reliance on the e-mail of 25 October 2013. We have already made our finding regarding this e-mail, that it is insufficient to prove an agreement. Therefore not much weight can be placed on the settlement agreement.

CONCLUSION

- [44] For the above reasons, we have insufficient evidence to draw the inference that Real Tree and Global agreed to fix prices as alleged. Since the Commission has failed to prove an agreement to fix prices as alleged, it is not necessary for us to determine an administrative penalty.

ORDER

1. The complaint referral by the Commission is dismissed.
2. There is no order as to costs.



Ms Mondo Mazwai

Ms Yasmin Carrim and Mr Andreas Wessels concurring

03 November 2017

DATE

Tribunal Researcher: Ms Aneesa Ravat and Mr Ndumiso Ndlovu

For the Second Respondent: Adv Rafik Bhana SC instructed by PSN Incorporated

For the Commission: Adv Motloenya instructed by Kganare Botsi Khumalo
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