competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 63/CR/Sep09

In the application for a Tribunal Directive:

Allens Meshco (Pty) Ltd	First Applicant
Hendok (Pty) Ltd	Second Applicant
Wire Force (Pty) Ltd	Third Applicant
Agri Wire (Pty) Ltd	Fourth Applicant
Agri Wire North (Pty) Ltd	Fifth Applicant
Agri Wire Upington (Pty) Ltd	Sixth Applicant
Cape Wire (Pty) Ltd	Seventh Applicant
Forest Wire (Pty) Ltd	Eighth Applicant
Independent Galvanising (Pty) Ltd	Ninth Applicant
Associated Wire Industries (Pty) Ltd t/a Meshrite	Tenth Applicant

AND

Competition Commission	First Respondent
Cape Gate (Pty) Ltd	Second Respondent
Consolidated Wire Industries Limited	Third Respondent

In the application brought by Cape Gate (Pty) Ltd

Cape Gate (Pty) Ltd	Applicant

AND

The Competition Commission	First Respondent
Allens Meshco (Pty) Ltd	Second Respondent
Hendok (Pty) Ltd	Third Respondent
Wire Force (Pty) Ltd	Fourth Respondent
Agri Wire (Pty) Ltd	Fifth Respondent
Agri Wire North (Pty) Ltd	Sixth Applicant
Agri Wire Upington (Pty) Ltd	Seventh Applicant
Cape Wire (Pty) Ltd	Eighth Applicant
Forest Wire (Pty) Ltd	Ninth Applicant
Independent Galvanising (Pty) Ltd	Tenth Applicant
Associated Wire Industries (Pty) Ltd t/a Meshrite	Eleventh Respondent
Consolidated Wire Industries (Pty) Ltd	Twelth Respondent

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) and Medi Mokuena (Tribunal Member)
Heard on	:	23 April 2010
Order Issued	:	28 May 2010

Reasons for Decision and Order

[1] This is an application for discovery of certain documents from the Competition Commission ("the Commission") brought by the first to tenth applicants against the Commission .The ten applicants are amongst twelve respondent firms in a case brought by the Commission, alleging collusion in the market for wire and wire related products. To avoid confusion between parties to this interlocutory application, and the complaint referral to which it relates, we will refer to the applicants *in casu* as the applicants, but when we refer to 'respondents,' we refer to not to respondents in this case, but the respondent firms in the complaint referral proceedings.

[2] By the time we got to hear this application some of the documents originally sought by the applicants had either been furnished by the Commission or were no longer sought.[1] We thus confine ourselves in this decision to those that remain in dispute.[2]

Legal Principles to be applied

[3] We begin by considering the legal principles involved in this type of application and then we proceed to apply those principles to the documents

[1] Items 1and 3, as listed in the Notice of Motion, were provided, whilst items 13 and 14 were no longer sought by the applicants.
[2] An application for discovery brought by Cape Gate Pty Ltd, which confined itself to the documents subsequently produced by the Commission, was for this reason not proceeded with.

sought. This is a discovery application brought to discover documents that are allegedly referred to in the Commission's complaint referral. Discovery is sought to enable the applicants to file answering affidavits. Note that this is not a discovery application for the purpose of trial.

[4] We have been asked to apply rule 35(12) of the High Court rules to this application.[3] In terms of Rule 55(1)(b) of the Rules for the conduct of proceedings of the Competition Tribunal ("Tribunal rules") we may in the case of a lacuna in our rules apply the High Court rules. Initially on the papers there was an arcane debate between the parties as to whether a procedural lacuna truly existed and hence, if it did not, could the High Court rules be invoked. During oral argument this debate was not persisted with.

[5] We are frequently confronted with the question as to whether rule 35(12) applies to our proceeding. Whilst in the past we have not though that a formal answer was required the procedural debates that bedevilled this case indicates that perhaps a more considered answer would give welcome guidance to litigants.

Rule 55(1) states :

55. Conduct of hearings

1. *If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter –*

    a. *may give directions on how to proceed; and*

[3] High Court Rule 35(12) states "*Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.*"

b. *for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules.*

[6] The first thing to note about the rule is that it confers a *discretion* to apply the High Court rules. When we find that a procedure is not made certain from our rules we are not obliged to apply the High Court rules but *may* decide to do so. Secondly, the discretion is to have "regard to" the High Court rules - this is something less exacting than importing the entire rule once one has identified a lacuna. There is good reason for this. The Tribunal has often stated in the past that its proceedings are sui generis.[4] Uncritical borrowing of a High Court rule in toto may lead to impracticality. We are also required as an administrative tribunal to proceed informally but to do so fairly. We see no reason to formally adopt rule 35 to applications to compel discovery of documents to refer to pleadings. Basing that discretion on administrative fairness to respondents is a sufficient basis for finding our powers to order discovery when appropriate.[5] We do not need to find rule 35 through the door of tribunal rule 55 to do so. Granted in most cases the outcomes would be identical regardless of which approach we adopted. But there may be subtle distinctions in some cases – although not in this one- where outcomes may differ. The choice also has procedural implications. We would not require the service of a notice as does rule 35. In our proceedings an application to discover that met the requirements of Tribunal rule 42 would suffice, although

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[4] See The Competition Commission and American Natural Soda Ash CHG Global (Pty) Ltd Case No.: 49/CR/Apr00 at page 14-15; National Association of Pharmaceutical Wholesalers Others and Glaxo Wellcome Others Case No.: 45/CR./Jul01 per par 55 "*Our Complaint Referral proceedings as we have observed previously in Botash (1) are sui generis and cannot be classified as either action or application proceedings as they have aspects of each. Like trial proceedings the pleadings may be supplemented by evidence, but unlike trial proceedings the pleadings are in affidavit form and contain some if not all the evidence that may be led in the proceedings. It may well be that in some cases the matter can be resolved entirely on the papers and in this respect they resemble High Court application procedures, but unlike those proceedings (except where there is a referral to oral evidence in exceptional cases) hearings are not necessarily confined to the pleadings and additional documentary and oral evidence is typically adduced*".

[5] See Norvatis SA (Pty) Ltd and others v The Competition Commission and others (CT 22/CR/B/Jun 01, 2.7.2001) per par 41 "*The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises*"; Simelane NO and others v Seven-Eleven Corporation SA (Pty) Ltd and another [2001–2002] CPLR 13 (SCA) par 16.

it would be advisable for an applicant to request documents by way of correspondence first from the opposing party to obviate the need for litigation.

[7] Having now dealt with the basis of our discretion, we now consider what principles we would apply to cases to compel discovery of documents referred to in pleadings.

[8] The first principle we apply is that where a document is relied on to support a relevant allegation in the pleading, it should be provided, usually by way of attachment as an annexure to the pleading, although for practical reasons this may not always be possible. Typically if one quotes from a document it should be provided. However a document may also be relied on without being expressly quoted, and in these circumstances it should be provided as well. For instance the pleader may rely instead of making use of direct quotation, on a summary of what is contained in the document.

[9] The second principle we apply is that the inference of the existence of a document is not sufficient to create an obligation to disclose such a document. This is an approach consistent with one taken by the High Court in a rule 35(12) case.[6]

Application of the principles

[10] The first principle has largely been adhered to by the Commission in its approach to the present referral, but it has not applied it consistently. For this reason documents which are all partially quoted in the complaint referral, but not attached, must be produced to the applicants. We itemise them below in accordance with the numbers in the applicants' notice of motion followed by the paragraph in the complaint referral to which they relate.

Item 8. **AD PARAGRAPH 28.4**

Item 8.1 - The email from De Kock of Hendok dated 30 August 2007 to the third respondent;

[6] See *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (c) paras 15-18

Item 8.2 - The email from Van der Bank in terms of which he forwarded the email of de Kock to Van der Bank of Cape Gate.

Item 9. **AD PARAGRAPH 28.6**

Sms of Van der Bank dated 6 August 2008 to Bushy Botha of the twelfth respondent.[7]

Item 10. **AD PARAGRAPH 29.1.1**

The email dated 24 October 2006 from Gert Jacobs to Bushy Botha and Ronnie Kallan.

Item 11. **AD PARAGRAPH 32**

The distribution agreement prepared by Edward Nathan for the twelfth respondent and concluded with Agri Wire on 9 May 2006.

[11] The remaining documents sought are not expressly referred to in the referral nor is their content relied upon to make averments in the referral to which fairness might require a respondent to consider in order to plead. For this reason we have refused the application to produce these documents. We explain briefly below what the requests were and why we do not consider the applicants require production of them to file their answer.

Item 2

In paragraph 20 of the referral the Commission summarises the basis of the complaint. It alleges that over a period of time the respondents fixed prices, divided markets and tendered collusively. It alleges that they did so "...in various meetings and by way of exchange of correspondence and short

[7] We were advised that the short message service ("sms") referred to, item 9, is available to the Commission in documentary form and so this has been included in the list.

message services (SMS's)....." In response to this the applicants make the following request:

> *"AD PARAGRAPH 20 of the referral -item 2 of the Notice of Motion*
>
> *The correspondence and short message service exchanged between the respondents to allegedly fix prices of wire products, divide markets by allocating customers and to tender collusively in relation to supply of cable and armouring wire."*

It is clear from paragraph 20 that it is a summary of the case – indeed the paragraph is headed "Basis of the complaint" - and that the Commission does not rely on the contents of the documents for the purpose of this allegation. It simply refers to them in a generic fashion as the various means in which the alleged contraventions of section 4 of the Act found their form. The applicants do not require what would amount to pre-trial discovery in order to answer this allegation.

Item 4

In paragraph 24 of the complaint the Commission alleges that a firm known as CWI had applied for corporate leniency and that it had granted it corporate leniency on 28 August.

The Applicants seek the "conditional corporate leniency granted to the 12th respondent (CWI) .." We understand from submissions made during argument that what is sought here is the document in which the Commission sets out its conditions of leniency. Although the referral does not make it clear that this exists in documentary form, counsel for the Commission advised us that it did. Nevertheless this paragraph, as is perfectly clear, does not rely on the contents of the document. It simply records that leniency was granted. It is the act of granting leniency that is alleged. Indeed there is no reference to a document at all.[8]

[8] Applying the principle in *Penta*

The applicants do not need access to the document in terms of which leniency was granted in order to answer.

Item 5

In paragraph 26.1.1 of the referral the Commission alleges that the respondents agreed on a national price lists for their products and the Commission attaches this price list (annexure NN2) to the referral. In annexure NN2 (as opposed to in the referral affidavit) there is a small note which says "These prices must be read in conjunction with CWI (Pty)(Ltd)'s conditions of sale." The applicants seek these conditions of sale. The reference in one document, which has been annexed, to another, does not constitute a reference to the secondary document in the referral. The Commission makes nothing of the conditions of sale in its referral and the allegation concerns the prices in the lists which are attached. The applicants do not require the conditions of sale to answer.

Item 7

In paragraph 28.3.3 read with paragraph 28.3.2 the Commission alleges that meetings were held on various dates specified at which the respondents wanted to reinforce adherence to allegedly collusive agreements. It is alleged that after these meetings national price lists would be circulated on the express understanding that the participants in the meetings would use the price lists as the basis for their own pricing of the relevant products. The Commission then attaches two price lists dated respectively 2007, and 2008 which it alleges evidence the price similarities. The applicants seek all the national price lists that were alleged to have been circulated at the specified meetings. Although price lists are referred to the Commission does not rely on their content in this paragraph – indeed it is not clear that the Commission even has them in its possession. The allegation relates merely to the act of circulating price lists. The applicants do not need to have regard to their content – assuming they are still in existence – in order to plead.

Item 6

In paragraph 28.3.1 of the referral there is again mention of a national price list, except this time it is mentioned in the singular. The context is that at a meeting in October 2001 of the respondents agreed to return to using " the national price list less agreed discounts" The applicants seek this price list. Once again there is no reliance on this document and hence the applicants do not require it in order to plead. However there is some ambiguity as to whether the Commission is alleging reliance on a single national price list – in which case the applicants are entitled to know whose it is – or if the Commission means that each is to return to using its own national price list – which we understand is being alleged to be the case for later period.(See paragraph 28.3.3. of the referral which we referred to earlier) For this reason we believe that any unfairness to the applicants about this ambiguity may be cured by further particulars on this aspect and we have formulated relief to this effect accordingly.

Item 12

The Commission alleges in paragraph 33.1 of the referral that the respondents were engaged in collusive tendering and itemises three tenders where this took place. The applicants seek copies of the tenders submitted by the respective respondents in respect of each of the three tenders. There is no reliance here on tender documents nor indeed is any document even referred to. The principle discussed above in relation to the *Penta* case would apply equally here. The applicants do not require the tenders to plead.

Order

After having heard the parties the Competition Tribunal orders that in respect of the application of inspection and transcription of documents–

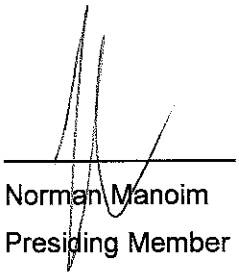
[1] The applicants be provided with the following documents being items 8, 9, 10 and 11 of the Notice of motion;

[2] That in respect of paragraph 28.3.1 and the reference therein to *"..the national price list"* the Competition Commission must provide further particulars with regard to what is meant by the "national price list". If the Commission is referring to a single firm it should state this and the name of the firm concerned; if more than one, which firms national price lists are being referred to;.

[3] The application in respect of items 2, 4, 5, 6, 7 and 12 is dismissed.

[4] Within 20 business days after being served with the particulars referred to in paragraph 2 above the applicants must file their answering affidavits.

[5] There is no order as to costs



Norman Manoim
Presiding Member

Concurring: Yasmin Carrim and Medi Mokuena