IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT CASENO: CR191Oct17
CC CASE NO: 2017JUL0014

In the exception application:

INTERACTION MARKET SERVICES HOLDING (PTY) LTD	**1st Applicant**
BOTHA ROODT (PRETORIA)	**2nd Applicant**
and	
THE COMPETITION COMMISSION	**Respondent**

In *re* the matter between:

THE COMPETITION COMMISSION	**Applicant**
and	
BOTHA ROODT(JOHANNESBURG)	**1st Respondent**
BOTHA ROODT (PRETORIA)	**2nd Respondent**
SUBTROPICO (PTY) LTD	**3rd Respondent**
INTERACTION MARKET SERVICES HOLDING (PTY)LTD	**4th Respondent**
DAPPER MARKET AGENTS (PTY) LTD	**5th Respondent**
DW FRESH PRODUCE CC	**6th Respondent**
FARMERS TRUST CC	**7th Respondent**

NOORDVAAL MARKET AGENTS (PTY) LTD	**8th Respondent**
MARCO FRESH PRODUCE AGENCY	**9th Respondent**
WENPRO MARKET AGENTS CC	**10th Respondent**
WENPRO MARKET AGENTS (KZN)	**11th Respondent**
PRINSLOO & VENTER MARKET AGENTS	**12th Respondent**
FINE FOODS (PTY) LTD	**13th Respondent**
DELTA MARKET AGENTS (PTY) LTD	**14th Respondent**
INSTITUTE FOR MARKET AGENTS	**15th Respondent**

Panel	: N. Manoim (Presiding Member)
	E. Daniels (Tribunal Member)
	M. Mokuena (Tribunal Member)
Heard on	: 14 August 2018
Decided on	: 29 October 2018

Interlocutory Applications: Reasons for Decision and Order

Introduction

[1] This is an exception application, by Botha Roodt (Pretoria) (the "Second Applicant" and also the Second Respondent in the main matter) and Interaction Market Services Holdings (Pty) Ltd (the "First Applicant" and also the Fourth Respondent in the main matter) brought in response to the referral by the Competition Commission of a complaint against Botha Roodt (Johannesburg) and fourteen other respondents on 10 October 2017.

Background

[2] On 07 July 2017, the Commission initiated a complaint in terms of section 49B (1) of the Act, against the respondents for charging farmers a fixed commission for selling fresh produce on their behalf. The Commission complaint referral is based on the findings that the respondents entered into an agreement and/or engaged in a concerted practice to fix the commission they charge farmers for selling fresh produce on behalf of the farmers at the fresh produce markets in the country in contravention of section 4(1)(b)(i) of the Act. This section reads as follows:

> *"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 –*
>
> *(a) …*
>
> *(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;"*

[3] The Commission submits that the respondents who are Fresh Produce Market Agents who act as intermediaries between farmers and buyers of freshly produced fruit and vegetables are all members of the Institute of Market Agents South Africa ("IMASA"). According to the Commission, they agreed to charge fixed commission fees for all fruit and vegetables delivered to them by farmers. In effect, the Commission argues that the respondents reached an agreement in contravention of the Act.

[4] The Commission alleges that the practice by the respondents of charging fixed commissions dates to 1970 when it was authorised under the Commission for Fresh Produce Markets Act, 1970 (Act No 82 of 1970) ("the Commission Act").

[5] The two applicants have not filed an answer to the referral which was filed by the Competition Commission on 10 October 2017. Instead they have elected to file interlocutory applications as they are of the view that they are prejudiced by the Commission's failure to clearly and with particularity plead the material facts or points of law relevant to the complaint that is alleged by the Commission. The applicants submit that they do not know the case they have to meet in respect of the Complaint Referral and as such are unable to plead.

[6] These objections are raised by way of two separate exception applications.

[7] The applications were heard together on 14 August 2018. For convenience we will deal with both together in this decision.

Rule 15

[8] Rule 15(2) (a) and (b) of the Tribunal Rules stipulate that a Complaint Referral must be supported by an affidavit setting out a concise statement of the grounds of the complaint and the material facts or points of law relevant to the complaint and relied on by the Commission.

[9] The applicants state that the allegations contained in a complaint referral must therefore disclose a competition law contravention on the part of the respondent. Should a complainant fail to do so, it will necessarily[1] have failed to set out a cause of action against the respondents in the Complaint Referral.

[10] In keeping with the guiding principle of fairness, the complaint must be pleaded with sufficient particularity, to enable the applicants to ascertain what case they are required to meet. It would, clearly, be unfair to expect a respondent to plead to a case in circumstances where the material facts relevant to the grounds of complaint are not pleaded or are otherwise so vaguely pleaded that the scope of the complaint is unclear.

Cause of action

[11] The applicants submit that the cause of action has been inadequately pleaded. To establish a contravention of section 4(1)(b)(i) of the Act, the Commission must show that there was an agreement between all the respondents and that the Commission must plead that there was a meeting of minds, or consensus between them.

[12] According to the applicants, the Commission must provide at least the dates on which the agreement was concluded, the place where it was concluded and the identities of the representatives of the parties at the time when the agreement was concluded.

[13] Sufficient information about the agreement must also be provided to enable the respondents to answer the allegations made against them. A mere reference to a fixed commission is impermissible given the ambiguities which may be associated with the term.

[14] A failure to plead these basic facts warrants an order that they be provided with these.

[15] The applicants submit that the Commission broadly refers to a practice of charging fixed commissions, which dates as far back as 1970 when such commissions were authorised

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[1] *Phuthuma Networks (Pty) Ltd v Telkom SA Ltd* [2013} 2 CPLR 445 para 9.

under the Commission Act.[2] The way in which these allegations have been pleaded in paragraphs 29 - 32 of the Founding Affidavit[3] suggests that the Commission is alleging, not that all of the respondents were entitled under the repealed legislation to agree on commissions and are still doing so, but rather that the repealed Act in one way or another fixed commissions in a way which amounts to collusion.

[16] In this case, the Commission has also relied in the alternative on the conduct constituting a concerted practice.

[17] A concerted practice is defined in the Act as:

> *"A co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement."*[4]

[18] The respondents complain that the Commission has not pleaded the facts giving rise to a concerted practice.

[19] A similar objection was raised in the Omnico case.[5] There we held:

> *"Case law suggests that if a concerted practice is relied on it needs to be specifically pleaded. For instance, the parties may commence with an agreement but later follow on conduct may constitute a concerted practice. Sometimes the difference may be theoretical and the distinction elides. Nevertheless, due to the case law this difficulty must at least be grappled with by the pleader when seeking to allege both as the Commission has in the present referral. It is unclear if the conduct that it relied on for the concerted practice is the same as that for the agreement or something different or additional thereto."*

Further:

> *"If the allegation of concerted practice relies on fact that differ from those relied on for the agreement these should be set out."*[6]

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[2] Founding Affidavit para 29.
[3] The abolition of fixed commission by the repeal of the 1970 Act in 1992.
[4] See section 1 (v) of the Competition Act 89 of 1998.
[5] *Omnico (Pty) Ltd and Others v Competition Commission, In re: Competition Commission v Pienaar and Others* (73/CR/Jul12).
[6] See *Omnico* op cit para 2.5 of the order.

[20] In this case, as we held in Omnico, the Commission should indicate whether it relies on the same facts to allege the concerted practice as it does for the agreement or if it relies on different facts, it must allege them.

Vague and embarrassing

[21] The applicants submit that the Commission's Founding Affidavit is impermissibly vague and embarrassing in certain important respects. Firstly, the term "agreement" pleaded by the Commission is unclear. The phrase "fixed commission fee", referred to in paragraphs 25 - 30 of the referral affidavit, could mean either a fee which is fixed over time as between the farmer and the agent or it could mean that the respondents have fixed the fees that they will charge farmers. The phrase is used in both senses in the referral. Secondly, it is unclear how an agreement to charge a commission of up to 9.5% could be characterised as collusive. It appears to be a price cap which would ordinarily be pro-competitive.

[22] The fact that the fixed commission fee pleaded in paragraph 27 of the referral constitutes a range, rather than the same commission, suggests that more than one agreement is at issue[7]. Alternatively, either that there is only one agreement, which provides a range ("5-6% or up to 9.5%") or that some respondents have agreed to a fixed fee of 5% while others have agreed upon 6%. These are very different cases and it is unclear which case the Commission is seeking to advance.

[23] On the issue of the relevant period of the alleged conduct, the Commission alleges that the respondents' conduct took place from at least 1970 and alleges, vaguely, that this conduct has continued. The Commission's lack of specificity regarding the alleged conduct on which it relies, and the relevant period prejudices the applicants in investigating the case against it.

[24] The fact that the applicants are not able to plead to the allegations made against them is evident from the answering affidavits of those that have tried to do so.[8] All of these respondents have raised the vagueness of the complaint referral in their answer in some form, either as a point in *limine* or through reserving their position to file further affidavits in due course.

[7] The respondents periodically agree to the applicable commission, and all charge the same one and what they agree to ranges between these pleaded ranges

[8] The answering affidavit amount to no more than bare denials.

[25] At the hearing of the matter, the Tribunal indicated that its prima facie view was that applications were good and gave the commission an opportunity to argue first.

[26] Mr Ngobese who appeared on behalf of the Commission argued that the Commission had in fact pleaded its case with particularity. He specifically denies that the complaint referral is vague and embarrassing and that it does not disclose a cause of action. With reference to paragraph 25 of the referral affidavit, he states that the Commission has alleged only one agreement. The practice of charging fixed commissions dates to the 1970's when it was authorised under the now repealed Commission Act. When the Act was repealed they were all free to change the commission structure but failed to do so. The practice, therefore, continues to this day and is enforced by IMASA, of which the respondents are members. Significantly, though, Mr Ngobese tendered on behalf of the Commission to supplement the referral with details of how the agreement alleged by the Commission was enforced. The enforcement aspect is important because Mr Ngobese appears to have conceded that an agreement could be inferred and that it would be necessary to provide details of how the agreement was actually enforced. Mr Ngobese also argues that the respondents who are members of IMASA agreed amongst themselves that because they are members they will follow the encouragement or instructions given by that body. That, according to Mr Ngobese is the agreement.

[27] The difficulty with this argument is that is does not provide the applicants with any details whatsoever about the agreement. According to Mr Ngobese all the respondents agreed amongst themselves follow IMASA's directions.

[28] The applicants complain they do not have any information about the agreement and cannot plead to this allegation.

[29] It would, in our view, be very difficult for the applicants to plead because of the paucity of information on a critical element of the contravention.

[30] In respect of the alleged concerted action, Mr Ngobese, in essence, relies on the same argument advanced in respect of the agreement. According to him the details of the agreement and the concerted action are to be found in paragraphs dealing with the conduct in contravention of the Act, viz., paragraphs 26 -30.

[31] The difficulty with this, too, is that those paragraphs, apart from the bald statement made in them, contain no details about the practice. The Act defines a concerted practice as:

"*... co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement*".

[32] In our view, the respondents are entitled to details about the type of conduct and contact described in the definition to respond to this allegation.

[33] On the basis of the tender made by Mr Ngobese and the vagueness of information on the agreement, we are inclined to order the Commission to provide further particulars.

[34] In respect of the markets, it is not necessary to traverse this issue in any detail. It will suffice to say that the Commission's allegations on the market which it alleges is national are very vague. However, Mr Ngobese did indicate in response to a question from the Chair that he did not see a problem with amending the pleadings in respect of the markets.

[35] In respect of the fourth respondent's complaints about the fixed commissions, Mr Ngobese submits that the details are set out in the complaint referral.

[36] However, that misses the point of the complaint. Mr Snyckers who appeared on behalf of the fourth respondent (the first applicant) pointed out some of the difficulties in respect of the fixed commission fee. The repealed Act did not make provision for commission to be charged. Rather, it allowed the Minister to prescribe tariffs for certain services. The fixed commission fees are outlined in paragraph 27 as follows:

(a) 5% to 6% for potatoes and onions;
(b) 7.5% for all other vegetables and fruits; and
(c) Up to 9.5% for all fruits and vegetables delivered to them by farmers without pallets.

[37] These percentages suggest that different agreements may have been entered into, but it is very difficult to understand what exactly the agreements were in relation to the percentages.

[38] The Commission had investigated the complaint. It presumably understands how the fixed commission fee agreements were implemented by the respondents and must provide the respondents with those details to enable them to plead.

[39] Paragraph 27 is clearly vague and embarrassing.

[40] With reference to enforcement, Mr Snyckers also states that the word "enforcement" implies an agreement and, therefore, the Commission must provide the fourth respondent with full details of that agreement.

[41] Mr Marriott who appeared on behalf of the second applicant states that the Commission has not provided sufficient information to substantiate its claim that inferences can be drawn from what is alleged in the complaint referral affidavit. In respect of pricing, for example, there may be many reasons why prices are similar which would not justify an inference that there was some collusive agreement or concerted action. The latter must be specifically pleaded. He also raised his concerns about the interpretational difficulties associated with the fixed fee and aligns himself with the arguments advanced by Mr Snyckers.

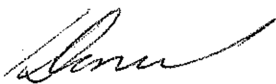
[42] The tenders made by Mr Ngobese on behalf of the Commission to supplement the referral with details of how the agreement alleged by the Commission was enforced and to amend the pleadings in respect of the markets suggest that the Commission acknowledges that its pleadings are defective and need to be amended.

[43] As is our normal practice in complaint proceedings involving the Commission as the complainant, we give no order as to costs.

Order

[1] The Applicants' exception application is upheld in the following respects:

[1.1] Within fifteen (15) business days of this order, the Commission must file a supplementary founding affidavit to the Complaint Referral to cure the defects in the Complaint Referral by complying with the provisions of Tribunal Rule 15(2), failing which the applicants in this matter are given leave to approach the Tribunal for an order that the Complaint Referral in so far as it relates to the applicants in this matter be dismissed.



7 November 2018

Member **Date**

Mr Enver Daniels

Concurring: Mr Norman Manoim and Ms Medi Mokuena

Case Manager:	Busisiwe Masina
For the Applicants:	Mr Gavin Marriott instructed by Webber Wentzel
	Mr Frank Snyckers instructed by Edward Nathan Sonnenbergs Inc
For the Commission:	Mfundo Ngobese and Ofentse Mutsudi