competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR223Mar17/STR245Jan19

In the matter between:

Unilever South Africa (Pty) Ltd **Applicant**

And

Competition Commission **Respondent**

Case No.: CR223Mar17

In *re* complaint referral between:

Competition Commission **Applicant**

And

Unilever South Africa (Pty) Ltd **First Respondent**

Sime Darby Hudson Knight (Pty) Ltd **Second Respondent**

Panel	: Y Carrim (Presiding Member) : M Mazwai (Tribunal Member) : AW Wessels (Tribunal Member)
Heard on	: 04 February 2019
Decided on	: 04 February 2019
Reasons issued on	: 26 June 2019

REASONS FOR DECISION

Introduction

1. In these interlocutory proceedings, we were called to decide whether or not the Competition Commission ("Commission") could include Unilever's[1] corporate leniency application ("leniency application") into the trial bundle to be used as evidence against Unilever in the complaint referral proceeding. This dispute

[1] Unilever South Africa (Pty) Ltd.

emanated in the course of trial preparation when the Commission unilaterally included a copy of the leniency application in the trial bundle thereby triggering this application, which we have referred to as a 'strike out' application. The application was heard on 4 February 2019. The usual formalities applicable to a matter of this nature were dispensed with by agreement with the parties in the interests of expedition and to avoid any undue delay in the hearing of the complaint referral.[2]

2. On 4 February 2019, we granted Unilever's strike out application and issued our order to that effect which we attach as 'Annexure A' to these reasons. Our reasons for our decision are set out below.

Complaint Referral

3. On 1 March 2017, the Commission referred a complaint to the Tribunal against Unilever and Sime Darby Hudson Knight (Pty) Ltd ("Sime Darby") in which it alleged that the respondents from the period 2004 – 2013, entered into an agreement alternatively an arrangement to divide markets by allocating specific types of goods and customers in contravention of section 4(1)(b)(ii) of the Act.[3] The respondents are manufacturers and suppliers of bakery and cooking products.

4. The Commission seeks an administrative penalty of 10% of Unilever's turnover for engaging in the alleged prohibited practice. No relief is sought against Sime Darby in the main matter as it concluded a consent agreement with the Commission wherein it admitted to the abovementioned allegations and agreed to pay an administrative penalty of R35 million. The consent agreement was confirmed and made on order of this Tribunal on 20 July 2016.[4] Unilever has denied these allegations.

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[2] See our direction of 22 January 2019.
[3] Act No. 89 of 1998, as amended.
[4] *Competition Commission v Sime Darby Hudson Knight (Pty) Ltd* (CO247Mar16).

Unilever's CLP Application

5. It is common cause that on 4 April 2014 Unilever, through its legal representatives at the time, submitted a marker application to the Commission in terms of the Commission's corporate leniency policy (CLP). Upon receipt of the marker application, Unilever was informed by the Commission that it was indeed first through the door, as per the requirements of the CLP and that it had been granted marker status. Having secured such status, Unilever proceeded to submit its leniency application on 30 May 2014 and proposed therein that it would provide the Commission with full and frank disclosure and ongoing co-operation in exchange in respect of a number of agreements between Unilever and Sime Darby for the Commission to grant it leniency. The Commission however denied Unilever leniency.

The Strike Out Application

6. During the preparation of the indexed and paginated trial bundle for the hearing,[5] Unilever was alerted to the fact that the Commission sought to include its leniency application and attachments thereto as part of the trial bundle. Unilever objected to it and the matter was placed on the agenda for the pre-hearing conference, on 22 January 2019.

7. During the pre-hearing, the Commission persisted with the inclusion of Unilever's CLP application into the trial bundle. Mr Ngobese, on behalf of the Commission, acknowledged that even though the information contained in the leniency application was subject to litigation privilege, that privilege was in the hands of the Commission and in this case, the Commission had decided not to assert it.[6]

8. Mr Bhana, on behalf of Unilever, objected to the inclusion of the leniency application on the basis that these constituted "without prejudice" settlement discussions that took place between the Commission and Unilever as evidenced by a letter dated 15 September 2016 from Baker McKenzie.[7] The letter also

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[5] Hearing was set to commence from 4 – 8 February 2019.
[6] Pre-hearing (PH) transcript (T), page (pg.) 22, line (l) 52-56. It was not clear whether the Commission was waiving its privilege or merely not asserting it.
[7] PH T, pg. 23-24.

pointed out to the Commission that Unilever's leniency application was subject to negotiation privilege in the hands of Unilever as it was the party that put up the document.[8] Mr Bhana submitted that should the Commission continue with its approach in this matter, it would impact on a number of public policy issues.[9]

9. In an effort to fully ventilate the issues, the parties were directed to file written submissions on their respective points. The matter was argued on 4 February 2019.[10]

10. At the hearing, Unilever primarily argued that its leniency application was subject to negotiation privilege (or settlement privilege) and thus protected from disclosure. It had pursued *bona fide,* without prejudice settlement discussions with the Commission where its *bona fides* were never questioned by the Commission and were in fact borne out by the fact that its disclosure during the negotiations was comprehensive, transparent and frank. Settlement discussions in their very nature are without prejudice and if the Commission were allowed to rely on admissions made therein it would chill the negotiation process as respondents would not be comfortable to negotiate with the Commission in the event that negotiations were unsuccessful, such admissions would be used against it.[11] With respect to the fundamental principle of negotiation privilege, Unilever submitted that this lies not only in the hands of the Commission but also in the hands of Unilever. As such, the negotiation privilege would persist until both parties had waived it.[12]

11. Secondly, Unilever argued that even if the Tribunal were to find that the leniency application was not privileged, it is in any case irrelevant and carries no evidentiary value and therefore is inadmissible in the Tribunal's proceedings.[13]

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[8] PH T, pg. 25-26.
[9] PH T, pg. 26, l 530-538.
[10] In addition to the strike out application, the Commission had sought a postponement of the main matter as it wished to consider discovered documents that were filed by Unilever with the Commission and Tribunal on 16 January 2019. In addition, the Commission also wished to file an expert report Unilever objected as it was of the view that the Commission ought to have filed an expert report as the agreed timetable made provision for such filing, and the Commission elected not to. During the same pre-hearing of 22 January 2019, we directed that both parties make submissions on postponement. On 30 January 2019, we issued our order granting the Commission the postponement as sought.
[11] *AGS Frasers International (Pty) Ltd v Competition Commission* (CR025May15) para 40-42.
[12] Unilever's written submissions para 32.
[13] Ibid para 35.

In addition, it was argued that the leniency application was irrelevant as it contained admissions of law and such admissions may always be withdrawn.[14]

12. Lastly, Unilever pointed out that its leniency application was subject to a confidentiality claim as a CC7 Form in relation thereto was duly filed. Section 44(2) of the Act, it argued, obligates the Commission to treat as confidential all information which has been claimed as such until it has been waived or the Tribunal has determined otherwise.[15]

13. The Commission disagreed with Unilever's above propositions.[16] First, the Commission averred that the CLP is used as an investigation tool, not a negotiation tool. The CLP expressly states in terms of paragraph 6.1 that it is a compliance tool that serves as an aid in cartel investigations.[17] It went on to argue that the CLP provides guidance to firms whom have failed to obtain leniency as a result of failing to meet the requirements under the CLP. Our attention was drawn to paragraphs 9.1.3.2 and 9.1.3.3 of the CLP, which state that the Commission may choose to conclude a settlement or consent agreement with firms or refer the matter to the Tribunal and seek a reduced fine or the firm can approach the Commission to engage in settlement of the matter. From the reading of these paragraphs, the Commission formed the view that settlement or settlement negotiations may only follow once immunity or leniency is *not* granted. On this reading, it was argued, the application for CLP itself is not a negotiation for settlement.[18]

14. Secondly, the Commission noted that Unilever made a passing comment that in previous instances, the Commission had resisted the disclosure of CLP applications and therefore could not comprehend why in this instance the Commission chose to act differently.[19] The Commission found Unilever's point to be at direct odds with the Competition Appeal Court's (CAC) approach in *Continental Tyres South Africa (Pty) Ltd and Others v Competition Commission*[20]

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[14] Ibid para 36.
[15] Ibid para 38.
[16] Commission's submissions para 2.12-2.13.
[17] Ibid para 2.14.
[18] Ibid para 2.16.
[19] Ibid para 2.18.
[20] 156/CAC/Nov17 & 157/CAC/Nov17.

where the court held that when a claim of privilege is asserted by the Commission, it is required to put up facts as to whether litigation was considered likely or not.[21] In the present circumstances, the Commission submitted, it did not meet this requirement and therefore cannot withhold the disclosure of the CLP application.[22] As such, there was no basis for excluding Unilever's CLP from the trial record.

Our Analysis

15. It is widely understood that the CLP has been used as a tool by the Commission to aid the detection of cartel conduct. The CLP has been an extremely successful tool in the hands of the Commission since it was first introduced in 2004 as witnessed by its enforcement record in the bread, maize and wheat milling, construction and furniture removal sectors to name a few. The Commission through its CLP holds out the promise of leniency or immunity from prosecution, in whole or in part,[23] to a firm in exchange for frank and full disclosures about its own and horizontal competitors' involvement in cartel conduct. The granting of leniency is usually conditional upon the successful applicant assisting the Commission in proceedings against the other alleged cartel members.

16. The Commission in this case makes a distinction between the process of seeking leniency and a subsequent process of settlement negotiations. It labels its CLP as an "investigation" tool that is different from settlement negotiations. Even if we were to accept for argument's sake the Commission's distinction between the two, such distinction however cannot be validly made for purposes of without prejudice considerations. After all, what is the purpose of the CLP, as an *enforcement* mechanism, other than to arrive at some form of settlement or accommodation (i.e. full or partial immunity from prosecution) with the leniency applicant in exchange for a full and frank disclosure of *inter alia* the *modus operandi* of the cartel and the individuals/firms involved? As an enforcement mechanism it may serve to achieve different objectives such as the gathering of

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[21] *Continental Tyres* para 21.
[22] Commission's submissions para 2.20.
[23] *See Clover Industries Limited and Another v Competition Commission and Others* (81/CAC/Jul08) and the Tribunal's decision (103/CR/Dec06).

information much like other investigation tools would do. But unlike other investigation tools such as a search and seizure process, in the CLP the Commission holds out the promise of leniency if all the CLP requirements are met.

17. In any event nothing turns on this distinction, simply because in our view a leniency application is to be treated as being in the nature of without prejudice engagements between the Commission and the leniency applicant. Without prejudice engagements are found to be so because of their nature and not because a party simply labels them as such.[24]

18. In a leniency application a firm seeks leniency and in so doing may provide information and make admissions in the hope of being granted immunity from prosecution. The Commission by extending an invitation to an applicant through the CLP provides assurance of confidentiality and some protection from disclosure. These two principles are the gear levers that make the CLP process work as effectively as it does. Was it not the case, why would a party apply for leniency without the assurance that any *bona fide* admissions made, or information shared in that process would not be held against it were the application to fail? The Commission has in many cases sought to protect leniency applications from disclosure precisely for this reason namely that its cartel enforcement ability would be seriously compromised if it could not obtain information or evidence from a leniency applicant and its witnesses.[25]

19. It would be a different matter if Unilever had somehow conducted itself in a *mala fide* manner or that Unilever's answering affidavit stands at odds with the information given by it in the leniency application. But the Commission has not made out such a case. It simply seeks without more to use the without prejudice contents of the leniency application in the prosecution of the unsuccessful leniency applicant. Such a stance were it to be accepted would have a severe

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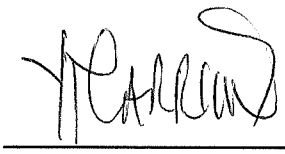
[24] Zeffert, pg. 703, drawing from *Milward v Glaser* 1950 (3) SA 547, *Gcabashe v Nene* 1975 (3) SA 912D at 914E, *Lynn & Main Incorporated v Naidoo and Another* 2006 (1) SA 59 (N). See also *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A).

[25] See *Competition Commission of South Africa v Arcelormittal South Africa (Pty) Ltd and Others* 2013 (5) SA 538 (SCA). See also *Continental Tyres* supra note 20.

chilling effect on the Commission's highly successful CLP and would be contrary to the public interest.

Conclusion

20. In view of the above, we found that the Commission had not made out a factual or legal basis for the disclosure and inclusion of Unilever's leniency application in the trial bundle as evidence in pending litigation against it. We were thus of the view that Unilever's application to strike out must succeed, as reflected in our order attached to these reasons.



Presiding Member
Ms Yasmin Carrim

26 June 2019
Date

Concurring: Ms Mondo Mazwai and Mr Andreas Wessels

Tribunal Case Manager:	Ndumiso Ndlovu
For Unilever:	R Bhana SC instructed by Baker McKenzie
For the Commission:	K Modise

'Annexure A'

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Panel	:	Y Carrim (Presiding Member) M Mazwai (Tribunal Member) AW Wessels (Tribunal Member)
Heard on	:	04 February 2019
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ORDER

In terms of Unilever's application to Strike Out Unilever's CLP application in the trial bundle, the Tribunal orders as follows:

1. The Strike Out application is hereby granted.

2. Reasons will follow in due course.

Presiding Member
Ms Yasmin Carrim

04 February 2019
Date

Concurring: Ms Mondo Mazwai and Mr Andreas Wessels