competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.:CR098Jul17/RVW131Aug17

In the review application between:

ESTON BRICK & TILE (PTY) LTD Applicant

And

THE COMMISSIONER OF THE COMPETITION COMMISSION First Respondent

THE COMPETITION COMMISSION Second Respondent

COROBRIK (PTY) LTD Third Respondent

Case no.:CR098Jul17

In re the matter between:

THE COMPETITION COMMISSION Applicant

And

COROBRIK (PTY) LTD First Respondent

ESTON BRICK AND TILE (PTY) LTD Second Respondent

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Anton A. Roskam (Tribunal Member)
Heard on	: 27 March 2019

Order issued on : 21 October 2019

Reasons issued on : 21 October 2019

REASONS FOR DECISION

Introduction

[1] This is an interlocutory application brought by a firm that is a respondent in a prohibited practice case that seeks to review the decisions of the Commission to institute proceedings against it. In the complaint referral, the Commission alleges the firm entered into a collusive market division agreement with one of its competitors.[1]

[2] The firm in question is Eston Brick and Tile (Pty) Ltd ("Eston"). It brings this application to review and set aside the following:

2.1 The decision of the first respondent, the Competition Commissioner, ("Commissioner") to initiate a complaint against Eston and Corobrik (Pty) Ltd ("Corobrik") on 19 April 2017; and

2.2 The decision of the second respondent, the Competition Commission ("Commission") to refer the complaint against Eston and Corobrik, pursuant to which it was referred on 4 July 2017 ("the present complaint referral").

[3] Corobrik, which is the other respondent in the present complaint referral, and the third respondent in this interlocutory application, filed a notice to abide and elected not to participate in the proceedings.[2]

[1] Although the case has been referred to the Tribunal, along with four other separate, but related referrals, it has yet to be heard. Apart from the referral no other pleadings have been filed in the complaint referral proceedings.

[2] Record of proceedings in CR098Jul17/RVW131Aug17 ("Record") p714.

[4] For simplicity we will refer to the parties from now on by their names and use the term the 'Commission' to apply to both the Commissioner and the Commission, unless in the context it is necessary to do otherwise.[3]

[5] In the present complaint referral, the Commission alleges that under the guise of a distributorship agreement, Eston has entered into a collusive market division agreement with Corobrik, thus contravening section 4(1)(b)(ii) of the Competition Act, No. 89 of 1998 ("the Act").[4]

[6] However, the legality of this distributorship agreement was considered by the Commission in 2008, but it decided at that time not to refer it to the Tribunal.

[7] Why has the Commission now decided to refer this case some nine years later? This question is the essence of the present review. Eston alleges that this change of mind in respect of the same agreement was irrational. It also alleges that it had a legitimate expectation to be heard before the complaint was initiated or referred, but it was not.

[8] The Commission for its part, contends that the prior decision to non-refer was based on a hardship consideration and not a consideration that Eston was not liable. It has now decided to initiate and refer the same agreement because it is in possession of new information. A functionary is entitled to change its mind when the facts change. The Commission therefore argues that such an approach is not irrational, and moreover, the doctrine of legitimate expectation does not apply.[5]

[9] The dispute between these parties requires us to consider, in some detail, the history leading to the present complaint referral.

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[3] The Act states that decisions to initiate are made by the Commissioner (Section 49(B)), but decisions to refer a complaint the Commissioner initiates, are made by the Commission (section 50(1)). Technically the difference is that the Commission is a reference to the Commissioner and any Deputy Commissioner then in office (Section 19(2)).

[4] See complaint referral para 12, Record p12. The initiation however related to both subsections 4(1)(b)(i) and 4(1)(b)(ii). See *ibid*, para 11. To paraphrase them these subparagraphs of 4(1)(b), respectively, provide that an agreement between competitors is unlawful if it involves; (i) price fixing or (ii) dividing markets by allocating customers, suppliers or territories.

[5] See answering affidavit, paras 13.17 to 13.19, Record pp672-3.

Facts

The distributorship agreement

[10] Eston makes clay bricks and pavers. Its area of operation is the Kwa-Zulu Natal region, where its factory is located. Up until 1998, it operated as a fully integrated firm, in the manufacturing and distribution of bricks. However, Eston, a small player, fell on troubled times. Consequently, on 21 October 1998, in an attempt to ameliorate the production and financial difficulties it had been experiencing, Eston concluded a distributorship agreement ("the Distributorship Agreement") with Corobrik, one of the largest manufacturers, distributors and exporters of bricks and building products in Africa at the time.

[11] The arrangement meant that Eston exited the downstream distribution market and manufactured its products solely for Corobrik. Eston maintains that, but for the agreement, it would have had to close operations and exit the industry entirely. The agreement improved its fortunes because it removed the cost and financial risk of its unsuccessful marketing and distribution operations.[6] Clause 4 of the Distributorship Agreement –identified to be the most relevant clause for purposes of the Commission's present complaint referral –sets out the extent of the distributorship arrangement. It is worth setting the clause out in full:

> *"4. Sole Distributorship*
>
> *4.1 For the duration of this agreement, Eston appoints Corobrik as sole distributor of the products and Eston will not sell the products, except to Corobrik.*
>
> *4.2 Corobrik shall market, sell and distribute the products in conjunction with its own bricks.*
>
> *4.3 The products may be marketed and distributed under Corobrik's trademarks and Eston will not have the right to use any such trademarks itself.*
>
> *4.4 Corobrik may market, sell and distribute the products under Eston's trademarks. Corobrik will however acquire any right to*

[6] Record p25.

use Eston's trademarks except in respect of the products marketed and distributed by it in terms of this agreement and for the duration of this agreement.

4.5 Corobrik will, at its own expense, operate the dispatch office at Eston and provide appropriate staffing and computer equipment to do so. Security is to be provided by Eston. Corobrik's employees, representatives and agents will comply with Eston's security and confidentiality requirements and regulations."[7]

[12] Also relevant to the price fixing allegation, although not presently pursued, but of importance to the history of this matter, is clause 6.1 which states:

> *"Should Corobrik not be able to sell the entire output of bricks manufactured by* [Eston], [Eston] *shall be entitled to sell the difference; provided that a reasonable opportunity shall be given to Corobrik to sell the same and the price of any bricks sold by them shall not be less than that at which Corobrik is at the time selling such bricks on their behalf."*[8]

[13] These clauses in the Distributorship Agreement featured in three subsequent investigations by the Commission. How central they were to each investigation goes to the heart of the rationality debate.

The 1999 Investigation

[14] Eston had its first engagement with the Commission in 1999, the same year that the Act came into force. The case came about as a result of a complaint brought to the Commission by a company that distributed bricks. It complained that it was not able to supply bricks for a series of property developments being undertaken in Kwa-Zulu Natal by the Tongaat Group, because the latter had given Corobrik, one of Tongaat's subsidiaries, the exclusive right to supply bricks for the developments. Tongaat, not Eston, was the respondent in this investigation.[9]

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[7] Record p19.
[8] See also Commission reasoning in its report, record p509.
[9] Under case number 1999Oct37. For the investigation report at the time see Record pp574-581.

[15] The Distributorship Agreement featured in this investigation because the Commission had written to Eston in 1999, enquiring about, *inter alia*, the nature of its relationship with Corobrik.[10]

[16] The 1999 letter addressed to Eston reads as follows:

> *"The Competition Commission is conducting an investigation into an alleged anti-competitive conduct in the building brick industry. To assist the Commission in finali[s]ing this matter as speedily as possible, you are requested to supply us with the following information.*
>
> 1. *Is you[r] company involved in the manufacturing and/or supply of clay bricks?*
> 2. *Should the answer to the above question be yes, could you supply a list of the types of clay bricks that are manufatured/supplied by your company;*
> 3. *Have you ever supplied any contractor and/or homeowner that is/was involved in the developments at Umhlanga Ridge Phase 3; Broadlands Phase 1; Somerset Park Phases 1, 2 & 3; Zimbali Coastal Forest Estate and/or The Gardens; La Lucia Ridge or any other Moreland Development Property? Should there be any, please supply us with details of such customers as well as their contact numbers.*
> 4. *When they have made a spelling mistake in a source and you are quoting them, do you quote the mistake as is or do you change it?*
> 5. *Is there any relationship between your company and Corobrik e.g. subsidiary or contractual?*
> 6. *Do you regard your company as a competitor of Corobrik in the manufacturing/supply of clay bricks?*
> 7. *Any other information that you deem to be appropriate for this investigation.*
>
> *Your urgent response in this matter will be greatly appreciated."* (Our emphasis).

[10] Record pp104 – 105.

[17] Eston responded to the Commission by enclosing a copy of the Distributorship Agreement with an explanation of their relationship with Corobrik.[11] Their explanation reads as follows:

> *"6. The agreement with Corobrik (Pty) Ltd was concluded for the following reasons:*
>
> *6.1 We were experiencing low sales volumes coupled with plant operational and quality problems. Credit control and bad debts were also a problem and management was considering whether it as financially viable to continue to operate the factory. One of our options was the closure of the plant and if we had been forced to close the plant this would have resulted in a loss of 270 jobs to the local community, quite apart from major financial loss.*
>
> *6.2 Part of our arrangement with Corobrik (Pty) Ltd, not recorded in the distributorship agreement was that Corobrik (Pty) Ltd would assist us by providing us with technology know-how to enable us to overcome problems in the plant. Corobrik (Pty) Ltd has done this, and improvements have been made, and further improvements are intended to be made to the plant.*
>
> *6.3 The potential closure of the Eston plant was indeed a reality. If the Commission requires my further information relating to this aspect, please advise.*
>
> *6.4 The technological expertise received from Corobrik (Pty) Ltd, together with the marketing arrangements covered by the distributorship agreement, has provided management with the confidence to keep the plant operating and to make further investment in plant and equipment."*[12]

[11] Record p106.
[12] Record pp106 – 107.

[18] At the conclusion of the investigation, the Commission team recommended to its Exco that the complaint should not be accepted.[13] Nevertheless, they added a rider to their conclusion; they suggested that Tongaat be cautioned about this type of exclusive arrangement.[14]

[19] Eston heard nothing further from the Commission until November 2007, when the Commission contacted Eston again. This contact was not related to the 1999 complaint, but to the research the Commission was conducting into the brick industry, which formed part of a broader study into the costs of construction infrastructure.

The 2007 Research Study

[20] In a letter to Eston dated 16 November 2017, the Commission advised as follows:

> *"The Commission is currently undertaking an independent research into the structure of the industries that will have to respond to the infrastructure spending program which was initiated by the Government of South Africa in 2006 as part of eliminating binding constraints to growth, poverty eradication and development. The public sector will drive infrastructure investment worth R370 billion. In this regard, the Commission has decided to pro-actively analyse the markets of bricks. The Commission has identified you as one of the industry players who can assist in this research. This will be followed up by a visit from the officials of the Commission for a general discussion on the bricks market."*[15]

[21] During the course of the infrastructure research study, Eston and the Commission exchanged correspondence. They also had a telephonic conference where Eston explained the background to, and the nature and effect of, the Distributorship Agreement.

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[13] Recall this complaint emanated from a private complainant and not the Commission.
[14] See Record p582 where the investigators state; "The respondent [Tongaat] to be warned that his (sic) sale agreements should never contain specifications that relate only to Corobrik products otherwise charges in terms of section 5(1) and 8(c) of the Act (sic).
[15] Record p108.

[22] The minute of the telephonic conference is reproduced below:

Record of telephone call 6/12/07

Eston Brick & Clay	**P Morgan**	(031) 781 1687

Corobrick has no ownership stake at Eston

General

1. What is your product range? ***bricks (face and non face bricks)***

2. **Who are your competitors in relation to specific brick products and geographic regions? *Concrete blocks***

3. What is the current operating capacity and the maximum production capacity of your brick plants? **Negotiated with Corobrik**

4. **Please indicate whether you will be expanding capacity in the near future and if so what impact this will have on your sales in volume and value terms.**

5. Do you have problems in acquiring your major inputs in the production of bricks? Have you faced any input cost increases? **Not at all the clay/shale is on the farm (oil used for the tunnel kilns and buy oil from Fuel Firing Systems who in turn buy from Sasol) Contractors are hired to mine the clay on the farm. 170 people from nearby township are employed and mostly are affiliated with National Union of Mineworkers.**

Market for bricks

6. Who are your main customers of bricks? **Only customer is Corobrick**

Do you have any exclusive supply agreements in relation to your sales of bricks? Indicate whether they are national or regional? If so, please elaborate. There is a formal arrangement with Corobrik. Every year prices of each specific product line are negotiated. Volumes to be produced are suggested by Corobrick. Have to manufacture to Corobrik 's specification. Corobrick pay Eston a percentage on manufacture and the balance is paid by Corobrick on purchase of stock. By all intents and purposes stock produced belongs to Corobrick. The agreement has been in place for the last 9 to 10 years. Corobrik has a sales lady on the Eston site.

Why Engage in the agreement? Eston has no transporting facility, Corobrik's has a strong distribution network with centres throughout. The Agreement is negotiated annually. If any party wants to leave the agreement there is a notification period of 3 to 6 months

7. How do you decide on pricing? **Eston looks at cost and decides on what margin they want then they negotiate with corobrik**

8. Provide your sales in volume and value (revenue) terms for the last five years.

   39 million bricks a year produced by Eston
   Of which 28.7 million are stock bricks, the rest face

The 2008 initiation

[23] On 21 July 2008, the Commission initiated a formal complaint investigation into allegations of a contravention of sections 4(1)(a), 4(1)(b) and/or 8(a) of the Act.

[24] We don't have a copy of this initiation in the record, but we find a reference to it in the final report of the investigation.

[25] In this final report the investigators first explain the genesis of this initiation and how it arose from the 2007 infrastructure research study:

> *"The Commission's preliminary assessment of the industry as a result of the study suggested that there may be anticompetitive behavior by some of the clay face brick manufacturers in contravention of sections 4(1)(a), 4(1)(b) and 8(a) of the Competition Act."*[16]

[26] The report is lengthy; mostly because it focusses on several issues, including another distributorship agreement. The style of the report was first to identify the problem and then, having done so, to discuss the outcome of the investigation. In identifying the problem, the investigators noted that Eston and Corobrik used to compete with one another in the KZN market for clay bricks prior to entering into the Distributorship Agreement. The report then states: "*If these agreements are proven, the Commissioner believes the parties could be found guilty of contravening sections 4(1)(b) and 4(1)(a) of the Act.*"

[27] It is not clear whether the reference to '*these agreements*' is a reference to the Distributorship Agreement or the existence of prior agreements not to compete with one another that preceded the conclusion of the Distributorship Agreement.

[28] The answer to this no longer matters for the purpose of understanding what happened with this investigation. This is because at the conclusion of the

[16] See "*Enforcement and Exemptions final report*", Record p456.

investigation, the investigators found that there had been no section 4(1)(b) contravention. This is captured in the following paragraph of the report:

> *"Further to the above, there is no evidence to suggest that the agreement in question was concluded as a result of Corobrik or Eston's strategy to avoid competing with each other. We submit that with or without the agreement, Eston was not an effective competitor to Corobrik in both markets for manufacturing and for the sales and distribution of bricks. The team is of the view that even if the parties are to be viewed as parties in a horizontal relationship, the agreement did not result in any substantial lessening or prevention of competition in the market.*[17]
>
> *Accordingly, the investigation team does not find that the Respondents have contravened any provision of the Act and therefore recommend that a Notice of Non-Referral be issued in this case."*[18]

[29] However, in a later part of the report where the facts are dealt with in greater detail the investigators state:

> *"Eston concede (sic) that prior to the agreement* [the Distributorship Agreement] *it competed with Corobrik although it was not an effective competitor due to its internal issues. .... Based on the evidence submitted, it is clear that by the time Eston concluded an agreement with Corobrik, it had already taken a business decision to exit the market for distribution and to concentrate on manufacturing brick I (sic) order to avoid exiting the market completely."*[19] (Our emphasis).

[30] It is not clear from the report how the conclusion was reached that Eston had decided to exit the market prior to the conclusion of the Distributorship Agreement. Most likely, given the reference to discussions the team had with Eston's Mr. Morgan, he was the source of this information.[20] This fact is the most important conclusion reached in relation to the section 4(1)(b) investigation. What the investigators had concluded was that the Distributorship Agreement represented

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[17] Record p591.
[18] Record p591.
[19] Record p617.
[20] Record p615.

a vertical, not a horizontal agreement, because Eston was, at the relevant time of the conclusion of the agreement, no longer a competitor of Corobrik.

[31] The issue of market division is not considered in the report which restricts the analysis to price fixing. However, if it had been considered, one can assume that the investigators would have reached the same conclusion as they did with regard to price fixing; viz. that since Eston was no longer a competitor of Corobrik at the time of the conclusion of the Distributorship Agreement, there could not have been a contravention.

[32] Also interesting in this report, for what transpires later, is that the investigators at the same time examined a distribution agreement between Corobrik and another brickmaker, Era Bricks (Pty) Ltd t/a Rosema Group ("Era"). Era had two plants in Gauteng and had in 1998, entered into a distribution agreement with Corobrik in terms of which it "*... outsourced its sales and marketing function to Corobrik.*"[21]

[33] The team only considered whether the arrangement between Era and Corobrik constituted price fixing and concluded that it did not. The team does not seem to have considered the issue of market division. Nor did the report consider any similarity in the nature of the agreements between Eston and Era, or the fact that they seem to have both been concluded at the same time, that is, in 1998.[22]

[34] The earlier part of the report also notes that Corobrik has exclusive supply agreements with a "number *of smaller brick manufacturers around the country*" in terms of which they appoint Corobrik as their exclusive distributor. The identities of these firms do not appear in the report.

[35] The report does not indicate that there was anything collusive about these arrangements, seemingly because the firms had previously been owned by Corobrik and the arrangement was facilitative of their entry into the market.[23]

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[21] Record p612.
[22] The only comparison done was in respect of the pricing arrangements, which were found to differ between the agreements. Record p616.
[23] Record p591.

[36] This report then served before the Commission at one of its meetings. We don't have an account of that meeting in the record. We only know the outcome of the meeting from a letter that was subsequently sent on the Commission's behalf to Eston. In that letter, dated 28 June 2011, the Commission advised Eston that the complaint would not be referred.

[37] But the letter came to this conclusion for a different reason to that of the investigators.

[38] The letter read as follows:

> *"On assessing the evidence before the Commission and specifically the Corobrik Eston agreement ("Distributorship Agreement") our conclusion was that there are competition concerns in KwaZulu/Natal region arising from the distributorship agreement.*
>
> *The Commission found that the agreement was entered into between parties in a horizontal relationship who were competitors at the time of concluding the agreement and are potential competitors. As a result of the agreement, a competitor ("Eston") was effectively removed from competing with Corobrik in the market for manufacturing and distribution of clay face bricks and had an effect on competition.*
>
> *However, the Commission took into account the financial difficulties experienced by Eston which led to the conclusion of the agreement. Further, the Commission considered the potential loss of employment, reduction of output and product choice that would likely have resulted if Eston had closed its manufacturing facility."* (Our emphasis)
> *In light of the above, the Commission will not refer any part of the complaint to the Competition Tribunal."*[24]

[24] Record pp101 – 102.

[39] There is nothing in the record to explain why the Commission, at the time, concluded that there had been a contravention when its investigators had reached the opposite conclusion. The only thing we can derive from the letter is (i) that the Commission concluded, as a matter of fact, that the firms were still competitors at the time of the conclusion of the Distributorship Agreement and (ii) that they *"... are potential competitors."*

[40] There matters stood until 2017.

The 2017 Investigation

[41] The history of this investigation appears from the report that the Commission's investigators wrote, once the complaint had been initiated.[25] We will refer to this report as the first investigation report as there was a subsequent report given to the Commission, which we will refer to as the second investigation report.

[42] According to the first report, on 1 November 2016, the Commission was notified of an intermediate merger where Corobrik intended to acquire 100% shareholding in another brickmaker, Grahamstown Brick (Pty) Ltd, which trades as Makana. During the investigation of the merger, the Commission's merger department received a complaint from a customer of Makana.

[43] The customer, a firm called PE Brick Brokers CC, alleged that Makana refused to continue supplying it and forced it to *"start procuring from a single designated supplier"*[26].

[44] Earlier, in the same report, in a section headed "*Background*", the following is noted:

> *"During the investigation of the merger, the Commission obtained information detailing that each of the Second to Sixth respondents entered bilateral agreements with the first respondent [Corobrik] to fix prices and other trading*

[25] Record p620.
[26] Record p624 para 6.1(ii).

conditions as well as dividing the market for the manufacturing and supply of bricks, pavers and blocks of both clay and concrete."[27] (Note that in this report Eston is the third respondent).

[45] On 17 January 2017, the Commission met and accepted the recommendation by the Mergers and Acquisitions Division that the Cartels Division investigate whether the bilateral agreements between Corobrik and four other firms, including Eston, were collusive in nature.[28]

[46] Accordingly, the Commission initiated the complaint on 19 April 2017. This complaint comprised an investigation into sections 4(1)(b)(i) and (ii) of the Act. Importantly, unlike in the 2008 investigation which was confined to price fixing, this investigation also alleged market division.

[47] In the first investigation report, the investigators mention the previous 2008 investigations carried out in respect of Corobrik, Era and Eston. It states the following in this regard:

> *"4.1 On 28 July 2008, the Commission initiated a complaint against the first, second and third Respondents. The matter was investigated under case number 2008Jul3875.*
>
> *4.2 In its complaint, the Commission alleged that whilst being competitors in the market for the manufacturing and supply of clay bricks, the first Respondent had entered into supply agreements with the second and third Respondents.*
>
> *4.3 The Commission alleged that the conduct of the Respondents resulted in price fixing and that the first Respondent, being a dominant player in the market may have been charging excessive prices to the detriment of consumers.*

[27] Record p622.
[28] Record p695. We don't have the minute of this decision, but this is recorded in the first investigator's report. See para 3.1.

4.4 The investigation team found no evidence to suggest that the agreements between the Respondents amounted to direct or indirect price fixing nor that the agreements [were] concluded as a strategy to lessen or prevent competition between the Respondents.

4.5 The investigation team also found no evidence of excessive pricing by the first Respondent.

4.6 The Commission took the decision to non-refer the matter."

[48] While the first investigation report does state that the complaint was non-referred, it does not mention that the Commission's conclusion differed from that of the investigation team, and that it had concluded that there had been an agreement to remove a competitor, and that its reasons for not referring the case related to the hardship being faced by Eston at the time.

[49] The first investigation report contains a section headed *"Relevant evidence"*,[29] where the investigators state that they are in possession of all the bilateral agreements between Corobrik and the five other firms, including Eston. The report also cites the terms in the agreements upon which the investigators rely to make out their case for a contravention and which they state are present in all the distributorship agreements (these terms were described earlier).[30]

[50] The investigators recommended that a complaint be initiated against all the firms for having contravened sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act. The initiation is recommended against seven firms; Corobrik, the five other firms with which it had entered into agreements and Makana.[31] There is no mention of whether the Commission has in its possession any agreement between Corobrik and Makana.

[51] The minutes of the Commission meeting on 11 April 2017, show that the Commission accepted the investigator's recommendation and took the decision to initiate the complaint against Eston, Corobrik and the four other firms mentioned

[29] Record p624.
[30] Record pp 623-4.
[31] Record p625 para 7.1

in the report.[32] They do not, however, recommend an initiation against Makana. Beyond the recordal of the acceptance of the recommendation, the only explanation in the minute is that the initiation statement must be amended to show that the agreements between Corobrik and the other respondents are *"discrete agreements"*.[33] The decision to initiate constitutes the first decision that is the subject of this review.

[52] On 13 June 2017, the Commission held a meeting and considered the Cartels Division's referral report pursuant to the initiation i.e. the second investigation report.[34] The content of this report is, in material terms similar to the first.[35] There is greater legal analysis of the agreements, but no further evidence is referred to. The investigation team recommended that the complaint be referred as conduct contravening sections 4(1)(b)(i) and 4(1)(b)(ii).

[53] The Commission accepted the recommendation and decided to refer the matter to the Tribunal. This is the second decision that Eston seeks to review.

[54] The Commission then filed the referral on 4 July 2017. However, the referral is limited to an allegation that Eston and Corobrik had contravened section 4(1)(b)(ii) of the Act (i.e. market division) but there is no allegation of price fixing as the investigation team had additionally proposed. Separate referrals were then instituted in respect of the other four agreements.

[55] It is against this factual background that we consider the grounds of review.

Legal basis for review

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[32] Record pp627- 8.
[33] Record p628.
[34] Record p654.
[35] Record p692. It appears that Eston had brought the review based on an earlier draft that had been discovered to it See Item 14, Record p638. The correct document that served before the Commission is Annexure KK2 to the Commission's answering affidavit Record p692. Not much turns on this. The latter version is longer than the former as it contains greater legal analysis, but the facts relied on are the same.

[56] In terms of section 27(1)(c) of the Act, the Tribunal may review any decision of the Commission that may be referred to it in terms of the Act. It is not in dispute that we have jurisdiction to hear this review. The next issue is what legal standard to apply to the review.

Legal standard for the review

[57] It is now common cause that the provisions of the Promotion of Administrative Justice Act (PAJA) do not apply to reviews of the Commission's decisions of this type (i.e. to initiate and refer complaints) as they do not constitute 'administrative action' as it is defined in statute. This was decided by the Supreme Court of Appeal (SCA) in *Seven-Eleven* and has been followed in subsequent decisions.[36]

[58] That does not mean that these types of decisions cannot otherwise be reviewed. As Cora Hoexter points out in her excellent article on the growth of the doctrine of the principle of legality, courts have held that even when an action by a functionary does not constitute administrative action, as PAJA defines it, its exercise is not unconstrained and can still be reviewed by the courts applying that doctrine.[37] Although this doctrine first developed by asserting that a functionary could only act in terms of its powers, its ambit was expanded to include the requirement that the functionary must act rationally.[38]

[59] In an oft-cited passage, the Constitutional Court held:

> *"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be*

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[36] *Simelane & Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another* 2003 (30) SA 63 (SCA); See also *Competition Commission of South Africa v Telkom SA Ltd and Others* [2010] 2 All SA 433 (SCA) para 11; *Competition Commission v Yara SA (Pty) Ltd & Others* 2013 (6) SA 185 (26 November 2014) para 18.*Competition Commission v Computicket (Pty) Ltd* (853/2013) [2014] ZASCA 185 (26 November 2014).

[37] See Cora Hoexter, South African Administrative Law at a Crossroads: PAJA and the Principle of Legality, https://adminlawblog.org 28 April 2017.

[38] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC).

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."[39]

[60] That is the principle basis on which the current review rests. (As noted earlier there is a further argument around the application of the doctrine of legitimate expectation that we discuss later.)

[61] The entire argument of Eston can be expressed in brief terms. This is the third time the same agreement has been considered by the Commission. In 1999, it was given a copy of the Distributorship Agreement during the investigation of the Tongaat complaint, however, no action was taken against Eston at that time. Later, in 2008, the Commission decided not to refer a section 4(1)(b) complaint against it following a lengthy investigation. Yet, against this backdrop, it decided to refer the complaint in 2017. In 1999, the agreement was made known to the Commission and in both later cases, (2008 and 2017), the underlying cause for complaint was still the same agreement. In such circumstances the Commission must explain why it changed its mind or engage Eston before making its decision. It has failed to do so. In such circumstances, it must have a reasonable basis for changing its mind. Since it cannot explain this change of mind, it follows it acted irrationally.

[62] Eston further argues that the rationality enquiry also entails following a rational process. This, it submits, for the reasons given above, the Commission has not followed. Put more simply, Eston is arguing that both the basis for the decisions and the process followed in reaching them were irrational.[40]

[63] We will grant this for Eston. There is nothing in the 2017 investigator's report or the minutes of the Commission's meeting, where the decisions to initiate and refer took place, which explain why they were now referring a complaint they had previously decided not to.

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[39] *Pharmaceutical* at para 85.
[40] See Eston heads para 71.

[64] The real question is whether it was obliged to explain its change of mind on the decision to refer. If it was not, then a conclusion that this failure amounted to irrational behavior cannot be sustained. Rather, the question then turns on whether the decisions made on the information before the Commission in 2017 were rational, irrespective of what may have been decided previously.

[65] However, as the reasoning in *Seven-Eleven* and the cases referred to in that decision indicate, there is no obligation on the Commission to explain its decision to initiate and refer a complaint. It is an investigative, not a determinative, body. If the Commission does not have to justify why it has decided to refer a matter, because it is not administrative action falling into the domain of PAJA, then it follows, *a fortiori*, that it is not obliged to justify why it has decided to refer a matter it previously decided not to refer.

[66] Thus, to the extent that Eston seeks to pin its case for irrationality simply on the Commission's failure to explain why it had changed its mind, the case has no legal foundation.

[67] Moreover, even if it was suggested that the Commission had acted capriciously in changing its mind, the facts do not support such a conclusion either.

[68] A factual error repeated by Eston throughout the papers is to label the behavior of the Commission in 2017, as a *volte-face* on whether the Distributorship Agreement, the centre piece of the current referral, constituted a contravention of section 4(1)(b).[41] But the Commission has not done a *volte-face.* In 2008, the Commission, contrary to what its investigators had stated, concluded that there had been a contravention. It also made this clear to Eston at the time. Its reasons for not referring the complaint were based on the firm's financial plight at the time, as its letter to Eston explained.

[69] The Commission has only changed its mind about referring the complaint. It has always been of the view that the conduct contravened the Act. The investigator's

[41] See for instance para 18.1 of its replying affidavit.

conclusion to the contrary in 2008, was not that of the Commission's, and the two must not be confused. Moreover, the Commission states it had always viewed this non-referral decision as transient – it was the financial position of Eston then which with the passing of time had led the Commission to believe the situation had changed.[42]

[70] As a matter of law, the Commission, as the prosecutor in the competition system, is entitled to reconsider a prior decision not to refer a complaint. The test for rationality must be applied to the facts on which it has made the present decisions.[43] This does not mean that the history does not matter, it may well. If the prior decision of the 2008 investigators was rational, it would at least have some probative, but certainly not conclusive, value in evaluating the rationality of decisions made by the Commission in 2017, if both related to the same agreement. It is to this that we now turn.

[71] Although the agreement was looked at by investigators in 1999, this was not the purpose of that investigation. Eston was not even a respondent in it. Put differently, in 1999 the Commission's spotlight was on an abuse of dominance in the Tongaat group, not alleged market division between Corobrik and other brick making firms.

[72] In 2008, the agreement was in the zone of the searchlight. However, the investigators did not recommend referring the complaint in terms of section 4(1)(b), as they were satisfied that Eston had decided to exit the market prior to entering into the Distributorship Agreement with Corobrik.

[73] It appears that this factual conclusion was based on Eston's submission to them. Since they were investigating a complaint some nine years after the conclusion of the agreement it is understandable that they may have had no evidence to refute this submission. Although we know from this report that they were aware that Era

[42] See answering affidavit para 58, Record p688.
[43] The fact that it chose not to refer on ground of sympathy in the past is, if anything, the decision that might be considered irrational. Having concluded that a firm has contravened the Act, the Commission must refer the complaint. Its sympathy for the plight of the respondent can be expressed by way of seeking an appropriate remedy or to suggest, if applicable, the firm concerned apply for an exemption.

had a similar agreement with Corobrik, and that Corobrik had agreements with erstwhile subsidiaries, there is no evidence that they identified any links or considered market division as a possible theory of harm. Granted there are some passages in the 2008 investigation report which refer generally to section 4(1)(b) and not its subparagraphs, but there is no evidence of an analysis of market division by examining the agreements collectively, as was done in 2017. The emphasis in the 2008 report was on pricing behavior; excessive (section 8(a)) or collusive (section 4(1)(b)(ii)); neither are the subject of the current referral, which is confined to collusive market division as the theory of harm.

[74] Even if the Commission had no new evidence but had simply re-examined the facts from a different perspective, it was entitled to do so. The public interest in having cases brought to a hearing is more compelling than the disappointment of an individual firm which will, if the case has no merit, be able to defend itself in the hearing proceedings.

[75] In any event, by 2017, it is clear that the Commission had new evidence. First, from the submissions made by a customer during the investigation of the merger between Corobrik and Makana, they had evidence of a similar agreement that had been concluded between Corobrik and, allegedly, an erstwhile rival. Second, it appears from this complaint that there was at least *prima facie* evidence of an anticompetitive effect because the customer had complained about the removal of choice. Third, it had evidence that Corobrik had concluded at least three other agreements with brickmakers, similar in material terms to those concluded with Eston (if we exclude Eston and Era, the two it mentions specifically in 2008). Granted we don't know from the papers if the other agreements mentioned in 2008 between Corobrik and erstwhile subsidiaries are those referred to in this matter, even if they were, the Commission was entitled to view facts against a new changed context.[44]

[44] They are De Hoop Brickfields (Pty) Ltd, Clay Industry CC and Kopano Brickworks Ltd. See paragraph 11 of the present complaint referral, Record p12.

[76] Unlike in 2008, when its investigators considered the Eston and Era agreements separately, in 2017, the Commission, as is evident from the investigator's report, was thinking about them collectively. The Commission not only had more facts before it, but by viewing the agreements collectively as opposed to in silos, a new approach to analyzing the facts emerged which is consistent with following a rational approach.

[77] In the absence of an express agreement to collude, the Commission is entitled to rely on a case built on inference. Hence it is not irrational for the Commission to reach the conclusion that it has a *prima facie* case of market division where a similar pattern of behavior can be identified in four other agreements.[45]

[78] Whether these facts are correct and whether the inferences sought to be drawn are strong enough, is not a matter we have to decide now – they are a matter for a hearing. All we have to decide now is whether the decisions to initiate and refer in 2017 - essentially based on the same facts – are rational. For the reasons stated above, we conclude that they are, and that the standard for a proper initiation of a complaint in the case law has been met, and, *a fortiori,* a proper referral. [46]

[79] The case for arguing that the process adopted by the Commission, in reaching a decision, was hard to follow. It seems to be based on the same argument that the Commission did not explain to Eston why it had changed its mind before it referred the case. The Commission, as we have already explained it, was not required to do so. Nor had it changed its mind about the lawfulness issue. As noted earlier it seems at least from the Commission's papers that it expected that Eston understood that the non-referral was based on circumstances of hardship then and was thus transient and not a permanent stay of prosecution.

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[45] The "pattern of behaviour" referred to here, is the exit of allegedly erstwhile rivals of Corobrik from the downstream market, where they compete with it, to become upstream sole suppliers who agree to appoint it as their sole supplier.

[46] See *Woodlands Dairy (Pty) Ltd and another v Competition Commission* [2011] 3 All SA 192 (SCA)*"... the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice."*

[80] Whether this inference from this letter of non-referral is correct or not, we need not decide. But as a matter of fact, Eston has not established that there has been any irrational process. Nor, is it clear that such a requirement applies to determinative decisions as part of the principle of legality; but we don't need to decide this point, given our decision on the facts.

Legitimate expectations review

[81] Finally, Eston argues that the challenged decisions can be set aside in terms of the doctrine of legitimate expectation.[47]

[82] Applied to the facts of this case, Eston argues that the letter of non-referral in 2011, gave rise to an expectation by Eston that its distributorship arrangement was lawful and did not contravene the Act. As we noted earlier, this is not correct. The non-referral letter states precisely the opposite. On this basis alone the doctrine is inapplicable.

[83] Next, we consider if the decision to non-refer, motivated by Eston's dire financial position at the time, gave rise to a legitimate expectation by Eston, that it be heard before a decision to refer was taken by the Commission.

[84] The Commission argues, in our view, correctly that the decision to refer is not a determinative decision and therefore the doctrine has no application to its decisions to refer.

[85] Eston argued in response that, since a Tribunal hearing exposes it to hardship in having to defend itself, it ought to have been heard prior to the decision to refer was taken. We were not referred to any decided case that was applicable to this situation for a non-determinative decision and, in this respect, we accept the Commission's argument.

[47] See Eston heads of argument para 1.

[86] Expressed differently, as the law currently stands, the principle of legality does not extend to the application of the doctrine of legitimate expectation to administrative decisions that are not of a determinative nature and are not covered by PAJA. For this reason, as well, this ground of review must also fail.

[87] This does not mean that we have no sympathy for Eston on this point. Mr. Ngcukaitobi, for the Commission, conceded that the fact that Eston was never told that its conduct was now being viewed in a new light was something the Tribunal could take into account as mitigation if it eventually found against Eston.

[88] We agree. Granted, the Commission ought, as a matter of good practice, have advised Eston that its conduct was now seen in a new light and offered it a reasonable opportunity to withdraw from the agreement before referring the conduct. Legally, however, the Commission was not obliged to do so; but the Commission's conduct could constitute significant mitigation should the case proceed and Eston is found to have contravened section 4(1)(b)(ii).

[89] Put differently, whilst this doctrine does not come to its aid now as a procedural right, it will be available to it, if necessary,[48] as a substantive issue to be considered at the hearing where the Tribunal, as the final decision maker, must have regard to it.

Conclusion

[90] We find that the decision taken by the Commission to initiate and refer the present complaint is only reviewable under the principle of legality. We find that the challenge under the principle of legality that the Commission acted irrationally in initiating and referring the present case has not been established. On the contrary

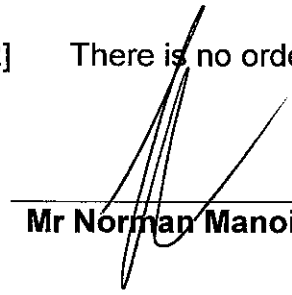
[48] We say 'if necessary' because if Eston succeeds on the merits the issue of an administrative penalty does not arise. If it is found liable, then these facts are pertinent to the issue of a remedy. For instance, in considering whether an administrative penalty is to be imposed the Tribunal first has to find that it is *"appropriate"* (Section 58(1)(a)(iii). But if it is considered appropriate it is also required to consider the various factors set out in section 59(3) which include, inter alia, *"the behavior of the respondent"*. (Section 59(3)(c)). Where the respondent firm was told on a prior occasion that no enforcement action would be taken against it and subsequently it is, then this speaks powerfully in its favour as to its behavior, at the very least during that period.

we find the Commission's decision, given the new facts available to it, and its new analysis of looking at the agreements collectively as opposed to individually, was rational. Lastly, we find that the doctrine of legitimate expectations does not apply as a matter of both fact and law. The application therefore fails.

Order

[91] The application is hereby dismissed.

[92] There is no order as to costs.



Mr Norman Manoim

21 October 2019

Date

Ms Yasmin Carrim and Mr Anton Roskam concurring

Tribunal Researchers:	Helena Graham and Alistair Dey van Heerden
For the applicant:	Adv. J. Wilson SC, *assisted by* Adv. A. Armstrong *instructed by* NSG Attorneys
For the Commission	Adv. T. Ngcukaitobi *instructed by* the Competition Commission