COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: CRP054Aug21/EXC126Nov21
CRP054Aug21/EXC169Jan22

In the consolidated *exception* applications between:

LICIATRON PROPRIETARY LIMITED	First Applicant
NATIONAL EMPOWERMENT FUND	Second Applicant

And

SAVELA MINING RESOURCES PROPRIETARY LIMITED	Respondent

Case no.: CRP054Aug21

In re the complaint referral between:

SAVELA MINING RESOURCES PROPRIETARY LIMITED	Applicant

And

NATIONAL EMPOWERMENT FUND	First Respondent
LICIATRON PROPRIETARY LIMITED	Second Respondent

Panel:	Andreas Wessels (Presiding Member) Enver Daniels (Tribunal Member) Thando Vilakazi (Tribunal Member)
Heard on:	7 June 2022
Order and Reasons issued on:	4 August 2022

ORDER AND REASONS FOR DECISION

INTRODUCTION

[1] The applicants, Liciatron (Pty) Limited ("Liciatron") and National Employment Fund (the "NEF"), took exception, in this application, to the complaint referral brought by the respondent, Savela Mining Resources (Pty) Limited ("Savela").

[2] At the heart of this matter is the nature and formulation of the private complaint referral instituted by Savela against the NEF and Liciatron (the "Excipients") on 2 August 2021. Savela privately referred to the Competition Tribunal a complaint against the NEF and Liciatron for "*collusion*", "*corruption*" and "*unfair competitive practices*" in relation to the NEF's decision to decline Savela's funding application made to it in 2012. The NEF subsequently approved Liciatron's funding application in 2016 for a mining project that, Savela alleges, was substantially the same as the application it submitted — in contravention of section 4(1)(b) of the Competition Act, 89 of 1998, as amended ("the Act").[1]

[3] The facts underlying the alleged conspiracy relate to one Mr Thabiso Tlelai ("Mr Tlelai"),[2] who served as a non-executive trustee at the NEF that served on the NEF's board of trustees and board investment committee until 2012. It is alleged that Mr Tlelai, founder of Liciatron in 2014, took improper advantage of his former position at the NEF by using information obtained in the course of performing his official NEF duties to approach and buy all the shares of Milogranite (Pty) Ltd ("Milo"), a company that held the rights to a mining project in Castleton. He later applied for funding for the same mining project on behalf of his own company, Liciatron, allegedly using the same documents Savela had submitted. Savela further alleges that Mr Tlelai "*ganged up*" and "*colluded with his former NEF colleagues*" to ensure that NEF funding was awarded to Liciatron following its funding application in 2014.[3] Liciatron was granted

[1] Savela's legal representatives indicated during the Tribunal pre-hearing of 11 October 2021 that this is the section of the Act relied on to found contravention (Liciatron 'Founding Affidavit' (4 November 2021) hearing bundle at p 223 para 17).
[2] Mr Tlelai unfortunately passed away on 31 October 2020 (Liciatron 'Founding Affidavit' hearing bundle p221 para 13).
[3] Savela 'Complaint Referral' (2 August 2021) hearing bundle at p13 para 11.

funding of R15 million[4] in 2016 to establish and clear the mining area, acquire capital equipment and cover operational costs.

[4] The Excipients excepted to the compliant arguing that it does not evoke the Tribunal's jurisdiction because it does not give rise to a restrictive horizontal practice, or any other prohibited practice, contemplated in Chapter 2 of the Act. They submitted also that the complaint does not disclose a cause of action, in the form of a contravention of the Act, and is vague and embarrassing. The Excipients also said that the complaint has hopelessly prescribed since the alleged events occurred more than nine years before the complaint's referral to the Tribunal.

[5] The Excipients sought dismissal of Savela's complaint with costs because the defects in the pleadings are incurable.

[6] We find that the exceptions must be upheld and Savela's complaint referral be dismissed, with the costs following the result.

[7] Our reasons for this decision follow.

Background

[8] The relevant factual nexus is as follows:

8.1 On 18 August 2009, Milo, with Savela as its Black Economic Empowerment ("BEE") partner (as to 22% shareholding),[5] was granted mining rights to mine granite on the Castleton Farm for a 30-year period.[6]

[4] Though Savela alleged this amount to have been R14.3 million, the Excipients clarified that the value of the loan was for R15 million (NEF 'Founding Affidavit' (25 January 2022) hearing bundle p416 para 18.6; and Liciatron 'Founding Affidavit' hearing bundle p230 para 39.6).

[5] The issue of whether Savela acquired the 22% shareholding in Milo remains disputed between the parties. (Savela 'Answering Affidavit Annexure "Founding Affidavit deposed to by Peter Miles in the High Court matter of Milo Granite Proprietary Limited and others//The Minister of Mineral Resources and Energy and others, dated 21 July 2020"' hearing bundle p708-714 paras 26-42).

[6] In terms of section 22 of the Mineral and Petroleum Resources Development Act No. 28 of 2002 ("MPRDA").

8.2 On 14 March 2011, Savela approached the NEF[7] for funding of the infrastructure and operations of the business.

8.3 After correspondence with Savela, on 11 May 2011 and 19 July 2011 requesting further particulars and documentation; on 5 November 2012 the NEF declined Savela's funding application. The NEF rejected the application on the basis that the commercial viability of the business case could not be assessed because the achievability of the projected revenues had not been adequately substantiated.

8.4 Over a year later,[8] on 24 March 2014, Liciatron was incorporated (by Mr Tlelai). Mr Tlelai had ended service at the NEF 15 months earlier on 15 December 2012.

8.5 On 9 April 2014, Liciatron concluded an agreement to acquire the entire issued share capital in Milo[9] - and notified the Department of Mineral Resources and Energy (the "Department") of the change in control of Milo (in compliance with legislation[10] relating to mining right ownership).

8.6 On 14 June 2016, Liciatron applied to the NEF for funding; and on 8 December 2016 the NEF approved Liciatron's request for funding in the amount of R15 million.[11]

8.7 Soon after this, on 7 June 2017, the Director General ("DG") of the Department consented to the transfer of 74% of the shares in Milo to Liciatron - as the remaining shareholding belonged to Savela and could

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[7] The NEF is a funding institution that employed the late Mr Tlelai as a non-executive trustee and a member of the investment committee for the period 16 December 2009 to 15 December 2012. (Savela 'Complaint referral' hearing bundle p 25 para 3.)
[8] Sixteen (16) months and two (2) weeks later.
[9] From the initial shareholders of Milo, being Miles Project Management Solutions Trust, Tambuki Trust, Rand International Capital Trust and Mr Peter Miles (Liciatron 'Founding Affidavit' hearing bundle p224 para 19).
[10] In terms of section 11 of the MPRDA.
[11] NEF 'Founding Affidavit Annexure "LM6": NEF Letter of Approval dated 8 December 2016' hearing bundle p477.

not be sold without the requisite consents. The Department also instructed that Liciatron form an employee trust which will acquire 4% of the issued share capital in Milo.[12] On Liciatron's account, this is the first it learned of Savela's ownership in Milo.[13]

8.8 Milo appealed the DG's decision to refuse the transfer of the remaining 26% shares in Milo to Liciatron. On 16 August 2019, the Minister of Mineral Resources and Energy set aside the DG's decision to approve the transfer of 74% of the shares in Milo to Liciatron. Milo again held 74% of the issued share capital and was obliged to deliberate the matter with Savela and the Workers' Trust to resolve issues before the mining right could be transferred.[14]

8.9 On Savela's version it was in July 2020 that it "*stumbled*" upon an NEF communique to Savela where at the bottom of the letterhead the list of NEF trustees included Mr Tlelai.[15] It was also that month, on 21 July 2020, that Milo applied to the High Court for the administrative review[16] of the Minister's decision.[17]

8.10 On 12 August 2020, Savela requested information from the NEF on Mr Tlelai in terms of the Promotion of Access to Information Act[18] (PAIA). On 5 February 2021, Savela again corresponded with the NEF, in the proper form, requesting information and clarity from the NEF in terms of PAIA. On 14 June 2021, the NEF responded to Savela's PAIA request providing information relating to Mr Tlelai, providing that he served as an NEF non-executive trustee from 16 December 2009 until

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[12] Savela 'Complaint Referral Annexure "SAV07": DG Decision dated 7 June 2017' hearing bundle p30-31.
[13] Liciatron 'Founding Affidavit' hearing bundle p224 para 22.
[14] Savela 'Complaint Referral Annexure "SAV08": Minister's Decision dated 16 August 2019' hearing bundle p 32-33.
[15] Savela 'Complaint Referral' hearing bundle p8 para 11.2.
[16] In terms of Promotion of Administrative Justice Act No. 3 of 2000.
[17] Savela 'Answering Affidavit Annexure "Founding Affidavit deposed to by Peter Miles in the High Court matter of Milo Granite Proprietary Limited and others//The Minister of Mineral Resources and Energy and others, dated 21 July 2020" North Gauteng High Court, Case No. 35922/2020' hearing bundle p691-722.
[18] Act No. 2 of 2000.

15 December 2012 serving on the board of trustees and the board investment committee. Non-executive trustees are prohibited from having an interest in transactions considered by the NEF Board and its sub-committees whilst serving as trustees and for a period of 6 months after expiry of their term of office.[19]

8.11 Savela filed its complaint with the Competition Commission on 18 May 2021 and, after investigation, the Commission issued a certificate of non-referral on 8 July 2021; which prompted the instant, Savela complaint referral.

Parties Arguments

[9] Savela's complaint is that the NEF's decision to decline its funding application in favour of Liciatron was a conspiratorial act that removed equality from the process. Granting funding on a basis other than fair competition deprived Savela equitable opportunity to acquire the funding to participate in the economy. The fact that the NEF did not wait to see the outcome of the Departmental approval process (which was only issued on 25 June 2017) constituted a conflict of interest on the part of the NEF and Liciatron (as Mr Tlelai's former colleagues did not conduct the requisite due diligence and ensured the funding was allocated to Liciatron) and evidenced corruption, collusion, and unfair competitive practices.

[10] As mentioned above, the Excipients object to the nature and form of the competition complaint as framed by Savela for reasons that it does not evoke the jurisdiction of the Tribunal in terms of any provision of the Act, discloses no cause of action, is vague and embarrassing, and has prescribed.

[11] They argued that the Tribunal cannot extend itself to disputes that do not fall within the Act's ambit and if it were to do so it will have strayed from its powers

[19] Savela 'Complaint Referral Annexure "SAV03": NEF Response dated 14 June 2021' hearing bundle p25-26.

and be acting *ultra vires*.[20] The Excipients submitted that the alleged conduct in this matter does not engage any of the provisions of the Act; citing the SCA's pronouncements in *Seven-Eleven* that "*[i]n determining the issue of jurisdiction one must establish whether the character of the conduct complained of coincides with the character of the prohibited conduct*."[21]

[12] In this regard, the Excipients contend that Savela relies on section 4(1)(b) of the Act but the complaint as pleaded does not disclose facts which fall within the ambit of section 4:

12.1 There is no horizontal relationship between Savela and the NEF. Parties must be in a horizontal relationship to engage section 4. The fact of Liciatron applying for funding and the NEF approving its application does not make the NEF and Liciatron competitors or potential competitors in a narrow or broad sense.

12.2 Savela has not set out the product and geographic market in which NEF and Liciatron are said to compete.

12.3 Liciatron was formed in 2014, two years after the rejection of Savela's funding application by the NEF and was not in existence at the time of the alleged prohibited conduct. Mr. Tlelai, who was involved in founding Liciatron, in 2014 was not a competitor nor potential competitor to the NEF.

[13] Despite Savela having not pleaded contravention in terms of these sections of the Act, the Excipients also argue that the conduct described in the complaint cannot be said to fall under either of section 5, 8 or 9 prohibited practices.

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[20] *Menzi Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Seven-Eleven Africa (Pty) Ltd*, (480/01) [2002] ZASCA 141; [2001-2002] CPLR 13 (SCA); [2003] 1 All SA 82 (SCA) (26 November 2002) ("***Seven-Eleven***"). They also referred to the "Phutuma cases": *Phutuma Network (Pty) Ltd v Telkom limited* (37/CRRJul10 CT) (2011) ZACT 12 and *Phutuma Networks (Pty) Ltd v Telkom SA (Pty) Ltd* (108/CAC/MAR11) [2012] ZACAC.

[21] *Seven-Eleven*.

13.1 No facts or evidence was led to support an averment that Liciatron is a dominant firm.

13.2 Even if the relationship between the NEF and Liciatron were to be characterised as vertical in nature, the Complaint does not allege any facts or evidence to sustain a restrictive vertical practice complaint in terms of section 5.

13.3 Furthermore, Liciatron's funding application to the NEF and its approval would not have an effect of substantially preventing or lessening competition in any market; or lead to minimum resale price maintenance.

[14] In addition, the Excipients argued that the complaint is vague and embarrassing in that it does not disclose a cause of action in the form of a contravention of the Act either under section 4(1)(b) and/or any other section of the Act. On their version, the Excipients argue that Savela cannot be allowed to use the Tribunal as a forum to promote its own commercial interests in the context where the pleaded facts actually evidence a shareholder dispute (relating to Savela's claim that it is entitled to 22% shareholding in Milo) which is pending in the High Court.

[15] Savela submitted in answer to these objections that the NEF and Liciatron worked together to deny Savela funding. Mr Tlelai was part of the team that decided to decline Savela's application and was privy to Savela's competitively sensitive information which it later used to start Liciatron. Therefore, it is important to focus on the timeline of when the NEF declined Savela's application in November 2012, Mr Tlelai's resignation at the NEF in December 2012, and the incorporation of Liciatron in March 2014. According to Savela, the whole purpose of Mr Tlelai leaving the NEF was to form Liciatron, a company which later applied for funding for the same project (using the same documents) at the NEF where Savela had applied for funding.

[16] Savela avers that the act, process and conduct of the NEF and Liciatron amounted to a prohibited practice, which is anti-competitive in nature. The conduct was aimed to decline or deprive Savela an equal opportunity to participate in the economy. Therefore, the relationship between the Excipients should be treated as a cartel.

ANALYSIS

The Hearing

[17] The Excipients provided that if the Tribunal agrees with them on any of the first three grounds – lack of jurisdiction, no cause of action, or that the complaint is vague and embarrassing – it need not determine the prescription issue.[22] We agree with this proposition and our evaluation centres on these aspects. Necessary first is for us to set out Savela's concessions made during the hearing that relate to the three grounds of exception.

[18] In answer to Panel questions, Savela clarified that the conduct underpinning the complaint was that the NEF granted Liciatron funding and declined Savela's funding application; and when the NEF granted funding before awaiting the outcome of the section 11(1) application with the Department it demonstrated the corrupt nature of the dealings between the two.[23]

[19] During the hearing Savela's representative made multiple concessions:

19.1 "*it is our submission that, yes, it's <u>not</u> price fixing, it's not dividing the markets, but the conduct is collusive and is, the relationship is that of a cartel which is aimed at declining, or depriving, sorry, Savela an equal opportunity to participate in the economy of the country. And it is on*

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[22] Tribunal Transcript of Proceedings CRP054Aug21/EXC126Nov21 and CRP054Aug/ Exc169Jan22 (7 June 2021) p3.

[23] Transcript p29-30.

those bases that I submit that the conduct fall squarely within the jurisdiction of the Tribunal" (emphasis added).[24]

19.2 Savela agreed: "*it is indeed correct that Liciatron at the time when Savela applied for funding it was not in existence."*[25]

19.3 On horizontality, in answer to the question *do you allege that the NEF and Liciatron are competitors?*: "*On that notion, NEF and Liciatron are <u>not</u> competitors. NEF is the one that does funding and that gives funding*" (emphasis added).[26]

[20] The Tribunal probed Savela on where it saw opportunity to amend its papers in order to correct the defects in its case were it afforded an opportunity to amend. Savela was unable to provide a satisfactory answer.[27]

[21] During the hearing it remained the case that Savela did not pursue any argument that the conduct fell foul of any of the other prohibited practice sections of the Act.

Evaluation

[22] Savela's mounted case fails to characterize the conduct into a cognizable form of collusion. As provided for in *Seven-Eleven* canvassed earlier and *ANSAC*:

> *"In this country, where the prohibition is decreed by legislation rather than by judicial intervention, the prohibited form of conduct must be established by construing s 4(1)(b). Once the ambit of sub-para (b)'s prohibition has been established the enquiry can move to <u>whether or not the conduct in issue falls within the terms of the prohibition</u>. That is a*

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[24] Transcript p25.
[25] Transcript p25.
[26] Transcript p31.
[27] Savela argued that a cartel relationship between Liciatron and the NEF is evidenced by Savela having not been awarded the funding on the merits of the same application. Ultimately "*we submit that NEF could have done those checks and the act of not checking, doing – or doing those checks, Your Worship, was deliberate in order to make Liciatron to have an unfair competitive edge over Savela. Which is why we, it is our prayer that same be looked into in light of the Competition Act*" (Transcript p29-31).

> *factual question that must be answered by recourse to relevant evidence. There is in principle no reason why the enquiry should not be conducted in reverse. The enquirer might choose first to identify the true character of the conduct that is the subject of the complaint, and only then turn to whether the conduct (so characterised) constitutes price-fixing as contemplated by s 4(1)(b). …Whichever approach is adopted, the essential enquiry remains the same. It is to* ***establish whether the character of the conduct complained of coincides with the character of the prohibited conduct****: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry."*[28]

[23] The facts presented by Savela do not constitute conduct within any manifest understanding of the circumscribed, *per se,* collusive section 4(1)(b) offences: (i) "*directly or indirectly fixing a purchase or selling price or any other trading condition*"; (ii) "*dividing markets by allocating customers, suppliers, territories, or specific types of goods or services";* or (iii) *"collusive tendering*". Even though Savela uses words like "*collusion*" and "*cartel conduct*", it admits that the conduct does not relate to any of the circumscribed offences. Furthermore, Savela fails to describe the conduct (and present facts) that can be used to determine if the complaint can be described as either one of the three offences in terms of the Act.

[24] Section 4 deals with restrictive horizontal practices by firms, which means there must be an agreement, or concerted practice, between competitors in a market.

[25] There has been no clear case pleaded of there having been an agreement or concerted practice. Savela infers a collusive agreement as between the NEF and Liciatron from outcomes but not with reference to direct evidence or the

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[28] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005] 3 All SA 1 (SCA) (13 May 2005) at para 44-47 (emphasis added).

prescripts of the Act. There are no facts pleaded detailing when or where an agreement might have arisen from.

[26] Savela conceded that the NEF and Liciatron are not competitors.[29] During the course of pleading it also failed to clarify this issue in its answering affidavit to the exception application, or in any further of its submissions. Indeed, the Excipients' arguments provide strong criticism against Savela's attempt to characterize the market relationship between the NEF and Liciatron as being horizontal.

[27] It would seem, the gravamen of Savela's complaint is as provided during the hearing:

> "*… my understanding is that NEF was supposed to apply a principle of equality between Savela and Liciatron. The parties that applied for funding from the same institution is Liciatron and Savela, which is why our submission is that NEF could have treated them both equally*."[30]

[28] This is a concern which is more likely a question of procedural fairness and the decision-making processes applied by a state institution in adjudicating applications. It is not a matter which falls within the jurisdiction of the Tribunal. (During the hearing Savela provided that no criminal case had been laid with the police.[31])

[29] The character of the conduct complained of does not coincide with the character of the prohibited conduct and we believe that no amendment of Savela's complaint could bring it closer to a cognizable complaint alleging contravention of a prohibited practice within the confines of the Act.

[30] Case precedent provides that in exceptional circumstances, where the exception goes to the heart of the complaint to the point where it cannot be

[29] Transcript p31.
[30] Transcript p31.
[31] Transcript p26.

cured by way of supplementary affidavit it can be in the public interest that the Tribunal dismiss the complaint referral entirely.[32]

[31] In light of the above, we find that Savela's complaint alleging cartel conduct fails to disclose a cause of action and is vague and embarrassing. Similarly, for any other potential restrictive practice in terms of the Act the complaint discloses no cause of action and Savela did not pursue any argument that the alleged conduct fell foul of any of the other prohibited practice sections of the Act. With regards to Savela's complaint about corruption and it being treated unfairly, the Tribunal lacks jurisdiction to deal with those non-competition related issues. The defects to Savela's complaint cannot be cured by way of amendment and the complaint is dismissed on this basis.

Costs

[32] Both parties argued for costs to follow the result. The Excipients argued for costs on a party-and-party scale including the costs of one counsel. Savela argued that costs should be awarded on a party-and-party scale.

[33] We determine that the costs should follow the result on a party-and-party scale including the costs of counsel.

CONCLUSION

[34] Therefore, the exceptions brought by the NEF and Liciatron are upheld on the terms provided for in the order that follows:

[32] See for example the Phutuma cases; *Discovery Health Medical Scheme and Another v Afrocentric Healthcare Limited* (CRP003Apr15/EXC265May15) and *Air Products South Africa v Alba Gas (Pty) Ltd* (CRP221Feb17/Exc074Jun17).

ORDER

Accordingly, we order that:

[1] The exception applications brought by Liciatron (Pty) Ltd and National Empowerment Fund under the respective case numbers CRP054Aug21/EXC126Nov21 and CRP054Aug21/EXC169Jan22 are upheld;

[2] The complaint referral brought by Savela Mining Resources (Pty) Ltd under case number CRP054Aug21 is dismissed; and

[3] Savela Mining Resources (Pty) Ltd is to pay the costs of Liciatron (Pty) Ltd and National Empowerment Fund on a party-and-party scale, including the costs of one counsel.

Dr Thando Vilakazi	**4 August 2022** **Date**

Mr Enver Daniels and Mr Andreas Wessels concurring.

Tribunal case managers:	Mpumelelo Tshabalala and Makati Seekane
For the Excipients:	Adv Tererai Mafukidze Instructed by TGR Attorneys
For Savela:	Teboho Motse of Motse & Associates Attorneys