



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP064Jun19

In the matter between:

NU AFRICA DUTY FREE SHOPS (PTY) LTD

Applicant

and

DISTELL LIMITED

Respondent

Panel:	Yasmin Carrim (Presiding Member) Thando Vilakazi (Tribunal Member) Sha'ista Goga (Tribunal Member)
Heard on:	23, 24, 29 and 30 November 2022
Reasons issued on:	19 September 2023

REASONS FOR DECISION AND ORDER

Introduction

- [1] This matter involves a self-referral by Nu Africa Duty Free Shops (Pty) Ltd (“Nu Africa”) of a complaint against Distell Limited (“Distell”) in terms of section 51(1) of the Competition Act No. 89 of 1998, as amended (“the Act”) after the Competition Commission (“Commission”) decided not to refer the matter.
- [2] Nu Africa seeks an order declaring that Distell’s conduct to cease the supply of liquor products to Nu Africa constitutes an abuse of dominance in contravention of section 8(c) (now section 8(1)(c)) of the Act, as well as costs of suit.
- [3] Distell opposed the complaint referral, and seeks its dismissal, together with an order for costs.

- [4] The matter was heard before the Tribunal from 23 November 2022, with evidence concluding on 30 November 2022. Nu Africa called Ms Prudence Shongwe (“Ms Shongwe”) and Mr Vusi Shongwe (“Mr Shongwe”) as factual witnesses, and Ms Sarah Truen (“Ms Truen”) as an expert economist. Distell called Ms Suzanne Le Roux (“Ms Le Roux”) as a factual witness, and Dr Paula Armstrong (“Dr Armstrong”) as an expert witness.

Factual background

- [5] We first detail the factual background surrounding this complaint referral and the genesis of the dispute between the parties in order to contextualise these reasons and the decision that follows.

- [6] Nu Africa is a retailer of duty-free alcohol¹ to diplomats, marine traders and other persons entitled to duty-free products in the South African market.² Various alcoholic beverages that Nu Africa sells are manufactured by Distell.³ Nu Africa has bonded warehouses situated in Cape Town and Pretoria, and a diplomatic store in Pretoria. Nu Africa also exports duty-free alcohol products into various African markets, including Zambia and Zimbabwe, and supplies duty-free products to bond customers.

- [7] Distell is a manufacturer and supplier of alcoholic beverages. Distell has since 2014 supplied products to Nu Africa for purposes of on-sale to the duty-free market and for export. Nu Africa is not licensed to supply duty-free products into the local duty-paid market.

Reduction and cessation of supply

- [8] From approximately January 2017, Distell noticed an increase in reports received from its sales staff about Distell products being sold at “hugely reduced prices”⁴ in various duty-paid retail outlets. This suggested that the products had been sold to these outlets at reduced prices without excise duties or taxes, which

¹ and other goods not relevant to these proceedings.

² In South Africa, Nu Africa’s clients are diplomatic missions, seafarers, ship chandlers and the like.

³ Nu Africa’s Founding Affidavit (amended referral), Pleadings Bundle at para 9.1, p. 5.

⁴ Witness Statement of Ms Le Roux, Pleadings Bundle at para 7.1, p. 250. Reports were also received from a competitor of Distell as well as other duty-paid retail customers.

Distell took as an indicator that the products had originally been intended for sale to duty-free customers or the export market.

[9] During 2017, Distell implemented various measures to combat what it had identified as illicit trade (“tax leakages”⁵) involving its products. The measures were intended to distinguish products intended for resale in the duty-free market, and to enable Distell to identify which of its customers had been sold the duty-free products subsequently found in the duty-paid market. These measures included⁶:

9.1. Applying customer specific “export only” and “duty free only” stickers bearing unique customer (identification) numbers on certain high-risk brands.

9.2. Placing back labels indicating “export/duty free only” on certain high-risk brands.

[10] In her witness statement, Distell’s factual witness Ms Le Roux explained that Distell also uses a system of unique lot numbers for each alcohol product it manufactures. Unique lot numbers are printed on the bottle during the production process, as well as on the outer carton in which the bottle is encased, and the pallet sticker. Distell states that it is able to use the lot numbers, recorded at various stages in its system and on invoices issued to customers, to identify which duty-free or export customer purchased the liquor in question even if the unique customer specific stickers have been removed.⁷

[11] However, it seems that these measures were not successful in curbing illicit trade activity as Distell’s sales staff continued to report illicit activity in the market. In particular, Distell alleges that products destined for the duty-free market were

⁵ Tax leakages refer to the broad type of illicit trade wherein the required excise tax on legally produced alcohol beverages is not paid in the jurisdiction of production. The sale of duty-free alcohol in the duty-paid market falls within this category. Witness Statement of Ms Le Roux, Pleadings Bundle, p. 230.

⁶ Witness Statement of Ms Le Roux, Pleadings Bundle, p. 238-239. In a September 2017 internal memorandum prepared by Ms Le Roux, she notes that while Distell did not have a formal strategy for combating illicit trade at the time, it had nonetheless implemented these measures along with a new pricing model to curb illicit trade (Pleadings Bundle, p. 326).

⁷ Witness Statement of Ms Le Roux, Pleadings Bundle, p. 247.

found in the local duty-paid market with the customer specific export only or duty-free only stickers removed.⁸

[12] Distell asserts that it initially allocated Nu Africa export only stickers bearing the identification number 0026 and subsequently 0044. While Nu Africa does not dispute that its allocated number in the relevant period was 0044, it claims that on various occasions it had (erroneously) also received alcohol products bearing identification numbers 0014 and 0026.⁹

[13] On 1 June 2017, Hardus Greyling of Distell sent Nu Africa (and other duty-free retailers) a letter in which it informed Nu Africa that it could not supply the requested volumes of alcohol requested by Nu Africa because it had implemented monthly allocations to restrict supply of certain alcohol products *“for all customers within the South Africa Duty Free business in order to prevent the sale of duty free products on the duty paid market”*.¹⁰

[14] Following this, Nu Africa alleges that Distell decreased supply of alcoholic beverage products to it significantly.¹¹

[15] In October 2017, Distell again informed a number of its customers of various efforts it had made to curb the illicit trade of alcohol products. In its letter to Nu Africa, it reiterated that *“Distell shall be entitled to immediately cease the supply of liquor products to a duty-free customer, if any product sold to such customer is found in the domestic market”*.¹²

[16] According to Ms Le Roux, Distell has, since 2017, placed at least 15 retail outlets and duty-free customers (including Nu Africa) on ‘stop-supply’ after it became

⁸ Witness Statement of Ms Le Roux, Pleadings Bundle, p. 239.

⁹ Nu Africa Heads of Argument, at para 3.11.4. Also see p. 2239-2240 of the discovered documents bundle and para 11.2.3.3 of Nu Africa’s amended Founding Affidavit, Pleadings Bundle, p. 17.

¹⁰ Pleadings Bundle, Annexure FA9, p. 46-47. The schedule provided by Distell indicated monthly allocations various products, namely Amarula Cream Liqueur, Gordon’s gin, Harrier, Klipdrift, Olof Bergh brandy, Richelieu brandy, Scottish Leader, Three Ships whisky and Viceroy.

¹¹ Witness Statement of Ms Shongwe, Pleadings Bundle, p. 142-143 at paras 8.11 and 8.14.

¹² Pleadings Bundle, Annexure D, p. 324.

clear to it that products supplied for sales to the duty-free market had been found on their premises or in the duty-paid market without a valid explanation.¹³

[17] Distell ceased supply to Nu-Africa on 18 June 2018.

[18] Distell's explanation for this is that investigations it had conducted between January 2017 and July 2018 identified substantial quantities of alcoholic products that were destined for the duty-free market in the duty-paid market.¹⁴ By using the lot numbers that appeared on the bottles, Distell states that it was able to determine that a significant proportion of these products had originally been sold to Nu Africa. Ms Le Roux notes that although lot numbers apply to large production runs of alcohol, in 'many' of the identified instances where duty-free customer stickers were removed, the lot numbers on these bottles of alcohol could be matched back to batches that had only been sold to Nu Africa.¹⁵

[19] Distell then sought legal advice on whether it could stop supply to Nu Africa on this basis. It received advice that the terms and conditions of its supply to Nu Africa allowed it to cease supply immediately. Distell did not act immediately, and further investigations were conducted from February 2018 which, it claims, confirmed that Nu Africa had been misrepresenting where products were being sold and distributed.¹⁶

[20] A July 2018 investigation report recorded that Distell had ceased supply to Nu Africa,¹⁷ in addition to recording that "*a number of reports were received where Distell products were found in the local market with clearly visible signs that the "Export Only" QR stickers have been removed. It was established that all these products were sold to one duty-free customer, Nu Africa*".¹⁸ The four instances referred to were discovered on 25 October 2017, 10 November 2017, 15

¹³ Pleadings Bundle, p. 249-250. Ms Le Roux lists 15 retail outlets and 4 duty-free clients (including Nu Africa) that Distell had placed on 'stop-supply'.

¹⁴ Pleadings Bundle, p. 17; Nu Africa Heads of Argument at para 3.11.8, p. 7-8.

¹⁵ Witness Statement of Ms Le Roux, Pleadings Bundle, p. 251.

¹⁶ Witness Statement of Ms Le Roux, Pleadings Bundle, p. 251.

¹⁷ Discovery Bundle, p. 61.

¹⁸ Discovery Bundle, p. 60.

December 2017 and 19 May 2018.¹⁹ In one of the instances, the QR sticker had not been removed, and the export only sticker bore the Nu Africa code.²⁰

[21] It is the cessation (rather than the reduction) of supply of alcohol products to Nu Africa on 18 June 2018 that Nu Africa alleges is the exclusionary conduct of Distell in contravention of section 8(1)(c).

[22] Specifically, Nu Africa alleges that Distell's conduct adversely affected its ability to compete²¹ or expand²² in the domestic duty-free market and reduced competition in the market. It further alleges that the exclusionary act also has "an effect on the ability of Nu Africa to compete with *inter alia* Distell (and for that fact Limpopo Duty Free) in the export market to Zimbabwe and Zambia".²³

Relevant markets

[23] In the submissions and testimony by the economic experts for both Nu Africa and Distell, there was a detailed exchange regarding the definition of relevant economic markets. The various submissions had regard to a number of factors, including:

- 23.1. Whether different types of alcohol product fell into the same relevant market;
- 23.2. Whether separate markets for spirits and different types of spirits should be defined (given Distell's portfolio of products is largely of spirits);
- 23.3. Whether and how distinctions should be drawn to further segment the spirits market according to price and other attributes (e.g., between value, proprietary and premium spirits); and
- 23.4. Whether duty-free sales constitute a separate market.

[24] We do not draw conclusions on the above potential delineations of the market. Distell, for our purposes, operates in the upstream market as a manufacturer

¹⁹ Discovery Bundle, p. 2711.

²⁰ Discovery Bundle, p. 60.

²¹ Pleadings bundle, Annexure "FA18", p. 69.

²² Founding Affidavit, Pleadings Bundle, p. 9.

²³ Nu Africa Heads of Argument at para 1.6.3.

and supplier of various alcoholic beverages. Most relevant for this matter is its supply of various types of spirits to Nu Africa and others, and its dominance within key spirits categories.

[25] Distell accepts that it meets the thresholds for dominance in particular (upstream) market segments, and it accepts that it is subject to the regulation of section 8(1)(c) of the Act.²⁴ Therefore, for our purposes, the question of dominance need not be analysed further.

[26] Nu Africa operates in the downstream market as a reseller of duty-free alcoholic beverages supplied by Distell and other manufacturers, to diplomatic clients, embassies, ship chandlers and the like. It also exports duty-free products to other African markets including Zambia and Zimbabwe. Distell also supplies products to these African markets, and there is some debate about whether it does so directly or indirectly through agents and/or distributors.²⁵

[27] Distell is not a competitor of Nu Africa in the duty-free market in South Africa, nor is it vertically integrated into the downstream market, as this is prohibited by the terms of its license in South Africa. It is a manufacturer of alcoholic beverages and a supplier to Nu Africa such that the parties exist in a vertical relationship to one another, which is accepted by Nu Africa.²⁶

Legal framework: Section 8

[28] The referral is based on section 8(1)(c) of the Act which is a general provision dealing with exclusionary acts. Section 8(1)(c) prohibits a dominant firm from engaging in an exclusionary act, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. An

²⁴ Distell Heads of Argument at para 11.

²⁵ There was some debate about whether Distell was directly supplying African markets as a competitor. In its Heads of Argument, Nu Africa states that Distell has 'agents' in Zambia and Zimbabwe and therefore that it competes with Nu Africa in these markets (Nu Africa Heads of Argument at para 3.5). The Tribunal was not provided with direct evidence in this regard, and it appears that Ms Truen had not been privy to her client's information confirming that Distell had its own agents trading in the export markets. However, in the hearing Ms Truen conceded that it was more likely that Distell operated through appointed distributors supplying into the relevant African markets, rather than it supplying directly to these markets. Hearing transcript dated 29 November 2022, p. 466-468.

²⁶ Founding Affidavit, Pleadings Bundle, p. 5.

“exclusionary act” is one that “impedes or prevents a firm from entering into, participating in or expanding within a market”.²⁷

[29] The Tribunal established the following approach to section 8(c) (now 8(1)(c)) of the Act in *Competition Commission v South African Airways (Pty) Ltd*.²⁸

“In summary, we find that the Act sets out the following approach to exclusionary practices. In the first place we examine whether the conduct in question is exclusionary in nature. In terms of section 8(c) that would be conduct that fits the definition in the Act for what constitutes an exclusionary act. In terms of 8(d) it is conduct that meets the definitions set out in the sub-paragraphs of that section. If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain.

Thus far the onus of proof in terms of both sections is on the complainant. Here the treatment of the onus in the two sections now diverges.

In terms of 8(c) we then consider whether the anti-competitive effect outweighs any efficiency justification for the conduct. If it does we can find that there has been an abuse of dominance. Here again the onus is on the complainant....

²⁷ Section 1 of the Act.

²⁸ *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01) (“SAA”).

...It is now appropriate to answer our prior questions. An anti-competitive effect is something different to an exclusionary act. This does not make the reference to an exclusionary act somehow superfluous. It firstly signals that we are analysing an exclusionary as opposed to an exploitative abuse. Because we know we are dealing with an exclusionary as opposed to an exploitative abuse, it helps guide our analysis of the alleged anti-competitive effects of the conduct." (Our emphasis)

[30] What the Tribunal means in SAA is that under section 8(1)(c) of the Act an applicant or complainant, Nu Africa in this case, must show the elements of the exclusionary conduct as well as the anti-competitive effects. Thereafter the evidential burden shifts to the respondent to show that the conduct was justified for some pro-competitive gain. As section 8(1)(c) of the Act is a rule of reason prohibition, the conduct complained of will only be prohibited if the applicant has shown that it has an anti-competitive effect and the respondent has not been able to show that its technological, efficiency or other pro-competitive gain outweighs the anti-competitive effects.

[31] In other words, the Tribunal is tasked to engage in a weighing up exercise to assess whether the alleged conduct by the dominant firm, even if it was to have some anti-competitive effect, would nevertheless be justified.

Analysis

Jurisdiction of the Tribunal

[32] This matter raises a question about the jurisdiction of the Tribunal to consider claimed anti-competitive effects of the conduct which arise in Nu Africa's export markets. Specifically, Nu Africa alleges that the cessation of supply to it by Distell had anti-competitive effects both in South Africa (in the duty-free market) as contemplated by the Act²⁹, as well as on the degree of competition in certain export markets (Zambia and Zimbabwe).³⁰

²⁹ Answering Affidavit, Pleadings Bundle at para 21.2; p. 78.

³⁰ Nu Africa Heads of Argument at para 7.26, p. 49; and paras 4.2 – 4.3, p. 10-11.

- [33] Firstly, Nu Africa competes in the duty-free market with other duty-free resellers of Distell products (and those of other manufacturers) to diplomats, embassies, ship chandlers and the like within the Republic of South Africa. Nu Africa identifies its competitors in the domestic duty-free market as Big Five Duty Free, Ambassador Duty Free, Tabac Duty Free, Flamingo Duty Free, and Assortive Duty Free.³¹
- [34] Secondly, Nu Africa submits that it competes with Distell³² and Limpopo Duty Free to export duty-free alcohol to African countries, in particular, Zambia and Zimbabwe. Nu Africa further submits that this economic activity takes place in South Africa in that Nu Africa and Limpopo Duty Free are South African companies, as is Distell, that purchase their products from Distell in South Africa and export them to Zambia and Zimbabwe from South Africa.
- [35] The Act applies to all economic activity within or having an effect within South Africa.³³ In this regard, the Supreme Court of Appeal in *ANSAC*³⁴ made it clear that the inquiry on effects is required to focus on “*whether there are sufficient jurisdictional links between the conduct and the consequences*”.³⁵ The CAC has also made it clear in *Competition Commission v Bank of America Merrill Lynch International Limited and Others*³⁶ that the conduct complained of needed to have direct and foreseeable substantial consequences in South Africa.³⁷
- [36] In this matter, we are primarily concerned with the effects of the conduct on Nu Africa’s ability to compete in the duty-free market in South Africa and thus competition in this market.
- [37] Nu Africa’s claim, that its ability to compete with Distell or its agents in supplying products to other African markets has also been impeded by the conduct of Distell, implies that there has been some disruption in the intensity of competition between suppliers to those markets. However, this assessment falls outside of

³¹ Founding Affidavit, Annexure “FA5”, Pleadings Bundle, p. 33.

³² Distell has agents in Zambia, for example, whose exclusivity they wish to retain.

³³ Section 3(1) of the Act.

³⁴ *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and others* 2005 (6) SA 158 (SCA) (“*ANSAC SCA*”).

³⁵ *ANSAC SCA* at para 29.

³⁶ *Competition Commission v Bank of America Merrill Lynch International Limited and Others* (175/CAC/Jul19)

³⁷ *Ibid.*

our jurisdiction because as a matter of law, we do not have the jurisdiction to decide on competition effects in other African markets in this matter.

[38] In her testimony, Ms Truen stated that she had included an analysis of Nu Africa's export sales of Distell and other products to illustrate "the motive for refusal to supply, regardless of jurisdiction"³⁸. This relates to Nu Africa's argument that Distell's cessation of supply to Nu Africa was motivated by its incentive to strengthen its position and/or that of Limpopo Duty Free in supplying African markets (specifically, Zambia and Zimbabwe) in which Nu Africa was growing as a rival. We note Ms Truen's proposition to the extent that Distell may have had an incentive to disrupt competition from Nu Africa in export markets by removing its supply to Nu Africa in South Africa.

[39] However, even if we were to consider the effects in other African markets, we would need to have regard to information about the dynamics of competition in those markets including market structure, key players, the number and nature of buyers, competing sources of supply into those markets including imports, and market outcomes. We are not empowered in terms of the Act to call for this information from market participants in these markets over which we do not have jurisdiction, nor have we (or the Commission) been provided with this evidence.

[40] Ultimately, we can only consider the evidence provided in respect of the alleged impediment on Nu Africa to effectively compete in the relevant South African duty-free market.

[41] Before turning to assess the effects of Distell's conduct on Nu Africa from a competition perspective, we note that there were several factual disputes raised by Nu Africa regarding Distell's entitlement to cease supply.

[42] Distell submitted that it found a substantial number of alcohol products destined for the duty-free market in the duty-paid market, and that Distell conducted

³⁸ Expert witness testimony of Ms Sarah Truen, at slide 25.

investigations and found that large volumes of these products had been sold to Nu Africa.³⁹

[43] Distell argues that its conduct to cease supply of alcohol to Nu Africa is not a matter of competition but a matter of contract law and regulation – Nu Africa was in breach of the supply contract between it and Distell. It was supplying product into the duty-paid market in contravention of the terms of its contract and regulations governing the industry, including those issued by the South African Revenue Services (“SARS”).

[44] Evidence was led on the large amounts of liquor ordered by embassies and the evidence of Ms Shongwe was that it was not up to Nu Africa to do anything about suspicions of illegal on-sale of duty-free products and she was of the view that its competitors would sell in large quantities if Nu Africa did not. A subsequent investigation done by SARS in late 2019 confirmed that embassy staff (diplomats) were engaging in illicit trade in the duty-paid local market, whereby the SARS Commissioner explained: *“Presently, no control is exercised over what goods are purchased by diplomats or in what quantities at point of sale. Review of shopping patterns of certain diplomats, however, has revealed shocking abuses”*.⁴⁰

[45] Nu Africa contests the inference that it had been involved in illicit trade, arguing that it is likely that the products found in the duty-paid market that bore the Nu Africa sticker could have been sold to another retailer just as it had received products bearing incorrect stickers in the past.⁴¹ It also maintained that Distell’s investigations into when and how its product entered into the duty-paid market were not thorough and there was a likelihood of errors on the part of Distell. Nu Africa asserts that it has never had its license revoked by SARS for trading in contravention of SARS regulations.⁴² It also argued that it could not control if its customers such as diplomats on-sold duty-free products to others.

³⁹ Answering Affidavit, Pleadings Bundle at para 16, p. 17; Nu Africa Heads of Argument at para 3.11.8, p. 7-8.

⁴⁰ Discovery Bundle at para 50, p. 5357.

⁴¹ Hearing transcript dated 25 November 2022, p. 50; and Nu Africa Heads of Argument at para 5.1.11, p. 15.

⁴² Nu Africa Heads of Argument at para 3.6.

[46] In our view there is no need for us to determine any of the factual disputes between the parties on whether Distell was entitled in contract to cancel supply to Nu Africa for purposes of a competition assessment. In other words, we assume that supply has ceased to Nu Africa. From that starting point we assess whether this has led to anti-competitive effects in any relevant market within our jurisdiction.

Anti-competitive effects

[47] To begin with, we reiterate the principle established in *SAA* that “*the definition of an exclusionary act is descriptive of a conduct’s ‘type’, not its ‘gravity or extent’... For this reason the Act requires a finding both in terms of paragraphs (c) and (d) that the complainant not only establishes that there has been an exclusionary act, but also that it has an anticompetitive effect*”.⁴³ This points to the fact that we need to determine the gravity and extent of the alleged exclusionary act with reference to its anti-competitive effects, which we now turn to consider.

[48] The core theory of harm advanced by Nu Africa relates to the cessation of supply leading them to lose their ability to offer customers a complete portfolio of products. Nu Africa’s customers often prefer to purchase a combination of products that it supplies and not only Distell products.⁴⁴ Nu Africa mixes stock to meet these orders by reselling its purchases from Diageo, KWV and other liquor manufacturers to meet its client’s particular requirements. This is where the issue of the cessation of supply by Distell is said to have impacted them most.⁴⁵ Factually, we need to understand whether this occurred (a cessation of supply meant they could not offer a portfolio of products and customers therefore left Nu Africa), whether this had an adverse effect on Nu Africa, and whether this in turn affected competition in the market.

[49] Nu Africa alleges that where clients want Distell products and Nu Africa is unable to supply them, the client would simply move their entire order to a new supplier

⁴³ *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 (28 July 2005) (“*SAA*”), at para 110; subsequently reiterated in *Uniplate Group (Pty) Ltd v The Competition Commission of South Africa* (176/CAC/Jul19).

⁴⁴ Hearing transcript dated 24 November 2022, p. 159.

⁴⁵ Nu Africa Heads of Argument at para 5.1.30, p. 19.

who can meet their requirements. In essence, if Nu Africa could not supply Distell products, it would then lose the entire order, including purchases of the non-Distell products.⁴⁶ According to Ms Truen⁴⁷, the competitive effects in the duty-free off-licence market as a result of Distell's refusal to supply include that Nu Africa loses both customers who seek to purchase Distell products alone, as well as some customers seeking to purchase a mixture of Distell and other products, as portfolio effects are present. No evidence was provided to support this.

[50] It was testified that there was a loss in turnover in the alcohol business and on Distell products in particular. In the hearing, Mr Shongwe testified that after Distell ceased supply to it, Nu Africa's turnover from its alcohol business, which constituted 90% of its business overall⁴⁸, decreased by approximately 35% over a period of a year.⁴⁹ He further estimated that the losses incurred by Nu Africa amounted to approximately R80 million to R100 million only on the Distell business.⁵⁰ We understood this to mean a decrease in turnover of R80-100 million from 2017 to 2018, although it is not clarified in Nu Africa's Heads of Argument or elsewhere.

[51] Nu Africa stated that the reductions in turnover occurred despite the fact that the business employed various strategies to sustain itself including sourcing Distell products from alternative suppliers, retailers in the duty-paid market such as Makro, and some of its competitors at higher prices (sometimes higher by 10% or more⁵¹). It therefore did not earn the same margins on these products as it previously earned when buying from Distell directly, these sales and those of other products were not necessarily profitable or sustainable⁵², nor could it obtain all the quantities it needed.⁵³

⁴⁶ Nu Africa Heads of Argument at para 5.1.31.

⁴⁷ Nu Africa Heads of Argument at para 5.4.18.

⁴⁸ Nu Africa Heads of Argument at para 6.1.10.

⁴⁹ Hearing transcript dated 24 November 2022, p. 199.

⁵⁰ Nu Africa Heads of Argument at para 5.2.10.

⁵¹ Nu Africa Heads of Argument at para 6.1.13.

⁵² Hearing transcript dated 24 November 2022, p. 170. We assume that the other products sold included reference to Ms Shongwe's testimony that from 2019 Nu Africa added other products for sale including items such as fridges, cigarette sales, perfumes and handbags in an attempt to compensate for the turnover lost as a result of the cessation of supply by Distell.

⁵³ Nu Africa Heads of Argument at para 6.1.12 – 6.1.16.

[52] The above constitutes the universe of evidence provided in testimony regarding the impact of the conduct on Nu Africa. The information focuses primarily on the effect on Nu Africa's business, and little is known or evidenced about how competition in the duty-free market as a whole was affected.

[53] The calculation of the "loss" of R80-100 million stated by Nu Africa was not provided and we were not presented with further evidentiary support (such as financial statements) in its various submissions beyond the statements made by Mr Shongwe, nor is there support for the claim to profit margin losses of 20-25%.⁵⁴ It is not clear what data is relied on, the assumptions made, and how the estimates were derived. This is surprising given the significance of this information for Nu Africa's case and that it is best positioned to analyse the information regarding its own financial position.

[54] The limited evidence that was provided by Nu Africa suggests that its sales of the products of other suppliers (other than Distell) in South Africa and through exports constitute by far the largest portion of Nu Africa's total spirits sales volumes.⁵⁵ As such, it is not clear to us the extent to which the cessation in supply to Nu Africa substantially affected Nu Africa's business, particularly in circumstances where Nu Africa was able to continue to procure Distell products from other sources for on-sale to its domestic and export customers, as we discuss below.

Nu Africa's continued presence in the market

[55] An appropriate consideration in our view is whether Nu Africa could reasonably and feasibly source and resell Distell products purchased from alternative channels. It seems Nu Africa was able to still supply its clients with Distell products, as Ms Shongwe explained: "*yes, we do make sure that our clients can get the supply, even though Distell is not supplying us*"⁵⁶. That is, despite the assertions that customers would move their orders to other duty-free businesses if they could not obtain the required Distell products from Nu Africa (noting we

⁵⁴ Nu Africa Heads of Argument at para 5.2.10.

⁵⁵ Expert witness testimony of Ms Sarah Truen, at slide 6.

⁵⁶ Hearing transcript dated 23 November 2022, p. 129.

were not presented with further evidence from clients or Nu Africa's records on this score), it is not likely that this had a substantial effect given that Nu Africa undertook significant efforts to ensure that it had stock of Distell products for its clients.

[56] The alcohol products sourced by Nu Africa through other channels are equivalent in terms of product attributes (especially where customers are loyal to a particular Distell brand of alcohol), albeit that they may be procured at higher prices (just as imperfect substitutes may still be considered as viable alternatives for consumers in the context of merger control and market definition).

[57] Nu Africa continued to source products from alternative suppliers on which it obtained significant volume discounts on bulk purchases from suppliers such as Makro⁵⁷, and/or it could buy stock from other duty-free retailers (which are purchased on a duty-free basis from Distell but sold to Nu Africa with a mark-up). It is likely that products obtained from these alternative sources were more expensive than if Nu Africa had sourced from Distell directly.⁵⁸ As such, although its profit margins might have been lower on Distell products sold, on balance it appears that Nu Africa could purchase the stock from other channels to support a portfolio offer, while making margins on other products within the bundle.

[58] Regarding the slow-down in the growth of Nu Africa and losses incurred in its alcohol business, the evidence is ambiguous.

[59] The sale of spirits and liqueurs comprised approximately 96% of Nu Africa's domestic alcoholic beverage sales revenues in 2019⁵⁹, which are also the primary products supplied by Distell to it, such that much of the discussion on market definition and effects focused on this broad segment.

[60] Sales of spirits in the domestic market accounted for 63% of Nu Africa's total sales of spirits in 2017, the year preceding the cessation in supply, with the balance being export sales.⁶⁰

⁵⁷ Hearing transcript dated 24 November 2022, p. 205.

⁵⁸ Nu Africa Heads of Argument at para 6.1.13.

⁵⁹ Sarah Truen Witness Statement, Pleadings Bundle at para 7, p. 382.

⁶⁰ FTI Report, Pleadings Bundle, p. 446.

- [61] Estimations by Dr Armstrong assessing the period 2016 to 2018 show that Nu Africa's total export and domestic sales of Distell products (spirits) declined between 2017 and 2018 while those of other non-Distell spirits (across spirits categories) increased significantly.⁶¹ Furthermore, while Nu Africa's sales of Distell products declined in all segments, Nu Africa's sales of all spirits increased by ten times between 2016 and 2018.⁶²
- [62] Dr Armstrong's evidence is broadly consistent with Ms Truen's analysis which showed that Nu Africa's overall sales increased significantly in the 2018 and 2019 period, overlapping with the period of the cessation of supply in June 2018.⁶³
- [63] The same is true of Nu Africa's total export sales (revenue) of spirits in the period 2016 to 2018. Overall export sales grew significantly throughout this period even as sales of Distell products declined between 2017 and 2018.⁶⁴
- [64] This evidence suggests that while there may have been some adverse impact on Nu Africa of the cessation in supply of Distell products purchased from Distell throughout this period, it appears Nu Africa has been able to sustain the trajectory of growth in its overall alcohol business. This undermines its claim that it suffered significant harm from Distell's conduct.

The necessity for Nu Africa to retail Distell products

- [65] Despite the fact that Distell brands accounted for a limited proportion of Nu Africa's alcohol sales, it is plausible that they constitute "must-have" brands from the perspective of consumers and as part of the portfolio of products that buyers require when purchasing from Nu Africa.

⁶¹ FTI Report, Pleadings Bundle, p. 446.

⁶² FTI Report, Pleadings Bundle, p. 446.

⁶³ Nu Africa Heads of Argument at para 6.1.12.

⁶⁴ FTI Report, Pleadings Bundle, p. 448.

- [66] This argument was advanced by Ms Truen. The analysis provided by Ms Truen, notably as part of her analysis of market definition, supports her view that *“Distell’s market power in spirits is thus augmented by portfolio effects”*.⁶⁵ However, we find that while this assessment is helpful in terms of confirming the now common cause position that Distell has market power and is dominant in a number of segments, it does not take us any further in terms of assessing any anti-competitive effects of the alleged conduct given the factual position that Distell products continued to be available to customers from Nu Africa or other duty-free retailers. There is also limited evidence to demonstrate that prices at other duty-free retailers increased as a result of the change in Nu Africa’s ability to source directly from Distell.
- [67] During the hearing⁶⁶, Ms Truen noted that given the geographic characteristics of the off-licence retail alcohol market, effective competition depends on the presence of competing resellers within a convenient distance from the consumer. As such, by damaging Nu Africa’s competitive position, Distell has limited its ability to effectively compete in the duty-free market such that harm to the consumer, in terms of higher prices and restricted volumes supplied, is likely to follow. Specific evidence of harm to consumers was not provided.
- [68] Nu Africa also argued that harm could potentially be inferred from the significant change in the structure of the market. That is, whereas there were four competing retailers of duty-free alcohol products in the Gauteng catchment area before the cessation (including Nu Africa), the cessation of supply to Nu Africa meant that only three resellers remained in effect (and a shift from three to two in Cape Town). However, this argument cannot hold given Ms Shongwe’s own testimony that Nu Africa had made plans to, and indeed did, continue to supply its clients despite the cessation in supply. That is, Nu Africa did not exit or decline significantly as a competitor in the market – the structure of the market did not change in Pretoria or Cape Town.

⁶⁵ Sarah Truen Witness Statement, Pleadings Bundle, p. 396.

⁶⁶ Hearing transcript dated 29 November 2022, p. 458.

[69] We note also that embassy and diplomatic clients are not likely to be as price sensitive⁶⁷ as ordinary consumers such that they would turn away if the price of the Distell-brands portion of the basket of alcohol products they were purchasing at Nu Africa was higher by approximately 10% as Nu Africa argued. In any event, we were not presented with comprehensive evidence on the changes in customer numbers, exact prices and differentials between prices of products sold that were purchased from Distell versus those that were purchased from alternative sources such as other duty-free retailers for on-sale.

[70] Ms Truen provided an illustration to show that duties account for a large proportion of the price of cheaper bottles of spirits (up to 50%), compared to only 5% of the price of extremely expensive spirits which only constitute less than approximately 1% of Nu Africa's sales revenue.⁶⁸ While this illustration goes to the relative (price) substitutability of products procured by Nu Africa from duty-paid alcohol retailers such as Makro, it is not possible to draw conclusions about the viability or not of goods purchased from these retailers relative to alternatives that Nu Africa sourced from other duty-free retailers without information about the relative proportions of quantities (and their prices with and without volume discounts) that Nu Africa managed to procure and sell. We are simply advised by Nu Africa that it sourced from a range of different alternative sources of Distell products. As such, we cannot determine the full impact of the cessation of supply on its business. Evidence of a financial nature disaggregating Nu Africa's turnover, its composition, and change over time before and after the cessation would have assisted, particularly in confirming Mr Shongwe's evidence that Nu Africa suffered significant reductions in turnover in its alcohol and overall business *as a direct result of* the cessation of supply.

⁶⁷ Sarah Truen Witness Statement, Pleadings Bundle at para 55, p. 399. In the context of a discussion about occasion-based drinking patterns of higher income customers as part of defining the relevant market, Ms Truen notes: "While we do not have access to information on staff salary levels at diplomatic missions in Pretoria, it is reasonable to infer that diplomatic staff would on average have a higher income level than the average South African consumer".

⁶⁸ Sarah Truen Witness Statement, Pleadings Bundle at paras 49-51, p. 397.

Harm to Nu Africa

[71] What remains is an analysis of anti-competitive effects on the part of Nu Africa that does not match up to the test established in *SAA* and other matters. That is, we are required to evaluate the significance and substantiality of harm to a rival and/or harm to consumers. However, in the domestic market Nu Africa and Distell are not rivals. In addition, duty-free channel sales account for a very small proportion of Distell's total sales (at ██████ in 2017⁶⁹).

[72] The alleged incentive for Distell to seek to undermine its customer is not established or supported with evidence. If Distell's incentive was to undermine Nu Africa in favour of other duty-free resellers with whom Nu Africa competed in exporting to Africa, then a theory of competitive harm supported by the evidence needed to be put forward. As it stands, we are confronted with information that is at best ambiguous in terms of the nett effect of the cessation of supply on Nu Africa's business (which we are obliged to consider in terms of the Act), and limited information on the effect on consumers in South Africa.

[73] Given the above, we cannot conclude that there were significant anti-competitive effects arising from the alleged conduct. Even if we accept the evidence that there was some adverse effect on Nu Africa's business, it is not possible to determine from this evidence the extent to which Nu Africa's ability to compete was affected in light of the other evidence demonstrating how Nu Africa has been able to sustain its business, and the significance and substantiality of the overall effects on Nu Africa. In turn, it is not possible to determine from the available facts what the impact on consumers, directly or indirectly, has been.

Distell's justification for cessation of supply

[74] In the context of section 8(1)(c), even if there is evidence of an anti-competitive effect (which has not been found in the present case), the respondent may offer evidence of benefits that outweigh the anti-competitive effect.

⁶⁹ FTI Report, Pleadings Bundle, at para 29, p. 419.

- [75] Distell contends that its decision to cease supply to Nu Africa constitutes enforcement of a contractual provision entitling it to stop supply where any product supplied to a duty-free customer is found in the domestic market, or it comes to the attention of Distell that a customer is involved in any illicit activity. In addition, Distell believes it has a moral and legal duty to prevent this type of conduct and the resulting loss to the fiscus as “a responsible corporate citizen”.⁷⁰
- [76] Ms Le Roux, who gave evidence for Distell, dealt with the negative impact of illicit alcohol trading in her witness statement.⁷¹ The impact is summarised as (i) depriving the South African government of revenue⁷²; (ii) promoting criminality; (iii) encouragement of organised crime; (iv) loss of sales revenue to brand holders; (v) prevention of fair competition; (vi) undermining the regulatory regimes governing the legitimate industry; and (vii) adverse effects on public health.
- [77] Furthermore, Dr Armstrong also argued⁷³ that illicit alcohol trade in relation to Distell’s products can lead to significant reputational damage especially amongst end consumers who observe Distell products intended for export in the duty-paid market with export only labels. Moreover, this has a far-reaching effect on the final price at which their products can be sold in the duty-paid retail market given the high rate of excise taxes levied by the government.
- [78] Nu Africa contests the various claims made by Distell for various reasons. It alleges that Distell used the wrong identifier code for Nu Africa and despite discontinuing supply to Nu Africa, it appeared that the tax leakage was still occurring at the hands of embassy staff that were potentially reselling alcohol purchased on a duty-free basis. Furthermore, Nu Africa has disputed being responsible for the leakage of its products into the duty-paid market and has insisted that all sales took place legally and within the ambit of the law.

⁷⁰ Distell Heads of Argument at para 57.

⁷¹ Witness Statement of Ms Le Roux, Pleadings Bundle at para 3, p. 231-232.

⁷² Distell Heads of Argument at para 19.

⁷³ Hearing transcript dated 29 November 2022, p. 602.

[79] Nu Africa states that products had either been wrongly identified as having been delivered to Nu Africa given that there had, in the past, been product delivered to it as well with the wrong QR sticker and code attached.⁷⁴ A private investigator appointed by Nu Africa asserted that the parties who were selling the products “*are not clients of Nu Africa and have probably obtained the stock from a third party*”.⁷⁵ Notably, he asserted that Nu Africa is able to reconcile all purchases of product with valid sales. Distell argued that when Nu Africa was faced with the allegations of illicit trade, it did not offer to show such reconciliation to Distell.⁷⁶ The investigator was not called to give evidence at the hearing.

[80] Distell’s justifications for the cessation of supply relate to its concerns in general about illicit trade in alcohol products and the various harms arising to the economy and the duty-paid market, amongst others, as set out above. Although Nu Africa contests Distell’s position, we cannot dismiss the fact that Distell was within its contractual rights to cease supply if it believed that a violation of its illicit trade provisions had occurred.

Conclusions

[81] Regarding Nu Africa’s primary claim that Distell’s conduct has impeded its expansion, Nu Africa has not demonstrated that its business has not grown or continued to grow following the cessation in supply. The available evidence suggests otherwise, or at least that the impact is likely to have been ambiguous.

[82] If we accept, for the moment, that Distell as a dominant firm had the ability to exclude, the question then becomes whether it has the economic incentive (profit motive) to do so expressed as a plausible theory of harm. On the face of it, it seems unlikely that Distell would seek to exclude one of its customers in circumstances where having more customers (that are growing) means that it is able to sell more alcohol products and/or earn greater revenue and profits in the upstream market from these sales (other things being equal).

⁷⁴ On this score, Distell’s version is that it had relied on lot numbers and not the stickers to identify products that had originally been sold to Nu Africa.

⁷⁵ Pleadings Bundle, p. 87.

⁷⁶ Pleadings Bundle, p. 87.

- [83] Given that Nu Africa and Distell are not rivals in the domestic market and leaving aside the issue of whether they compete in export markets, Nu Africa has not put forward a theory of harm related to *competition* as to why Distell would seek to exclude it as a customer from trading in the domestic duty-free market.
- [84] The proper approach to measuring an anti-competitive effect in terms of SAA, as set out in *Mandla-Matla Publishing (Pty) Ltd and Independent Newspapers (Pty) Ltd*,⁷⁷ is that the anti-competitive effect of exclusionary conduct may be proven by evidence of ‘actual competitive harm’ or by evidence of market foreclosure. The anti-competitive effect cannot simply be assumed to flow from the existence of exclusionary conduct. Therefore, in terms of section 8(1)(c), both the elements of the exclusionary act and its alleged anti-competitive effect must be proved in order to undertake the balancing required by the pro-competitive gains defence that is permitted in respect of these exclusionary acts.
- [85] Even if it was the case that Distell was redirecting buyers to Limpopo Duty Free, Nu Africa has failed to make out a critical component of a claim under section 8(1)(c), namely, that the conduct generated an anti-competitive effect, due to the ambiguous evidence put forth. We find that there are no anti-competitive effects emanating from Distell’s conduct.
- [86] If there is a plausible explanation, the applicant has not provided a theory or evidence to this effect. We ought therefore to conclude that an exclusionary act in terms of competition law and economic theory has not taken place and that Distell took a rational, legitimate commercial decision to not supply Nu Africa (and others) in accordance with its contractual entitlement to cease supply *inter alia* where products destined for the duty-free market are found in the duty-paid market and given the information it had regarding potential or actual illicit trade.
- [87] While section 3(1) of the Act confers jurisdiction over extra-territorial conduct which has effects in South Africa, the reverse is not true. The competition

⁷⁷ *Mandla-Matla Publishing (Pty) Ltd and Independent Newspapers (Pty) Ltd* (48/CR/Jun04) at paras 77-78.

authorities do not have jurisdiction to assess competition effects in other countries. This is a fundamental issue of legality. Our Act does not confer jurisdiction upon this Tribunal over the Zambian and Zimbabwean economies. Those countries have their own regulators, and we cannot impinge on the sovereignty of those regulators.

[88] But even if for argument's sake it could be said that we had jurisdiction over Zambian and Zimbabwean markets, there is no evidence to draw any conclusions about the impact of the cessation of supply on Nu Africa's export business or competition in those markets, or indeed competition between Nu Africa and Limpopo Duty Free as exporters of duty-free products to those markets. However, we conclude the issue of effects in other countries and export markets is outside of the Tribunal's jurisdiction.

[89] We cannot adjudicate on the subject of whether illicit trade did in fact take place on the part of Nu Africa. We focused instead on whether the cessation of supply by Distell amounted to exclusionary conduct in terms of the Act. Such exclusionary conduct, if it exists, must be shown to have had significant and substantial anti-competitive effects, which it has not been in this matter. The effect on Nu Africa's business is not evident, there is no evidence of substantial lessening of competition in the local (domestic) duty-free markets and any impact on consumers has not been demonstrated.

[90] In addition, we cannot dismiss the fact that Distell was within its contractual rights to cease supply if it believed that a violation of its illicit trade provisions had occurred. Alternatively, there was insufficient evidence pointing to an anti-competitive rationale for Distell to seek to undermine a customer, Nu Africa.

[91] In considering all the factors holistically and whether there is clear and non-speculative evidence about an exclusionary act and anti-competitive effects, we find that Nu Africa has failed to show any significant anti-competitive effects in the local (domestic) duty-free markets and we do not have the jurisdiction to make a finding on competition effects in other African markets in this matter.

[92] Therefore, the conduct by Distell to cease supply to Nu Africa does not amount to an abuse of dominance in terms of section 8(1)(c).

Costs

[93] Nu Africa prayed for costs of suit in its notice of motion and Distell sought for a dismissal of the complaint referral with costs against Nu Africa.

[94] As a general rule, each party participating in Tribunal proceedings is liable to bear its own costs under section 57(1). There are two exceptions that apply, and these are captured under section 57(2)(a) and (b). Section 57(2) provides the Tribunal with powers to award costs against an unsuccessful party in a complaint referral.

[95] Although it is apparent that the Tribunal is entitled to award costs against an unsuccessful party in proceedings emanating from a private referral in terms of section 51(1), given the size of Nu Africa and the fact that Nu Africa acted in a *bona fide* manner in bringing its referral to the Tribunal, we do not find it appropriate to award costs against Nu Africa.

[96] We thus make the following order:

ORDER

1. The complaint referral is dismissed.

2. No costs order will be made in this matter and each party is to bear its own costs in these proceedings.

Signed by: Thando
Signed at: 2023-09-19 16:34:23 +02:00
Reason: Witnessing Thando

Thando Vilakazi

Prof Thando Vilakazi

19 September 2023

Date

Ms Yasmin Carrim and Ms Sha'ista Goga concurring.

Case Managers:	Juliana Munyembate, Baneng Naape and Leila Raffee
For Nu Africa:	Adv. Reinard Michau SC, Adv. Johann Hershensohn and Adv. Palesa Nyapholi-Motsie instructed by Marius van Staden of Savage Jooste & Adams
For Distell:	Adv. Greta Engelbrecht SC instructed by Graeme Wickins of Werksmans Attorneys