competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IR029JUN2023

In the interim relief application between:

Streamlight FX (Pty) Ltd	First Applicant
Iron Ice (Pty) Ltd	Second Applicant

And

Genesis One Lighting (Pty) Ltd	Respondent

Panel	:	G Budlender (Presiding Member)
	:	T Vilakazi (Tribunal Member)
	:	L Mncube (Tribunal Member)
Heard on	:	24 April 2024
Order issued on	:	18 June 2024
Reasons issued on	:	18 June 2024

ORDER AND REASONS FOR DECISION

INTRODUCTION

1. This is an application for interim relief in terms of section 49C of the Competition Act, 89 of 1998, as amended (the "Act"). The applicants, Streamlight FX (Pty) Ltd ("Streamlight") and Iron Ice (Pty) Ltd ("Iron Ice"), contend that the conduct of the respondent, Genesis One Lighting (Pty) Ltd ("Genesis") in the market for the supply and distribution of lighting

products and services constitutes a prohibited practice in contravention of sections 4(1)(a) and (b)(ii) of the Act.

2. The parties have been involved in civil litigation in the Gauteng Division of the High Court (Johannesburg). This application arises from an interdict ("the restraint")[1] which the High Court issued in the course of that litigation.

THE INTERIM RELIEF APPLICATION

3. On 31 January 2023, the applicants lodged a complaint with the Competition Commission ("Commission") in respect of the conduct of Genesis. The complaint alleges that Genesis seeks to enforce a restraint against Streamlight and Iron Ice which, the applicants contend, constitutes a prohibited practice as contemplated in section 4(1)(b)(ii) of the Act.[2]

4. The complaint alleges that the restraint is a concerted practice that constitutes market division in that it allocates specific customers and suppliers to competitors as contemplated in section 4(1)(b)(ii) of the Act. The complaint further alleges that the restraint operates to divide the lighting market as it precludes Streamlight and Iron Ice from participating

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[1] Attached as annexure "Y" to the notice of motion.

[2] In the present application, the applicants also relu on section 4(1)(a) of the Act. However, the complaint which was lodged with the Commission does not refer to section 4(1)(a). Nothing turns on this for [present purposes.

in the market in respect of the protected customers and protected suppliers listed in the restraint.

5. On 3 March 2023, The Commission advised Streamlight and Iron Ice that the matter is being investigated. On 18 May 2023, the complaint was transferred to the cartels division of the Commission for further investigation. The Commission has since requested an extension of twelve months until January 2025 to complete its investigation.

6. On 9 June 2023, Streamlight and Iron Ice filed this application for interim relief with the Tribunal. The notice of motion does not refer to urgency, but there are paragraphs in the founding affidavit that seek to make out a case of urgency.[3]

7. In this application, the applicants seek the following orders:

   7.1 The respondent is interdicted and restrained from enforcing the restraint issued by the High Court, and/or from requiring that the applicants abide by the restraint;

   7.2 The operation of the restraint is suspended;

   7.3 The relief sought in paragraphs 7.1. and 7.2 above operates and/or remains in force until the earlier of –

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[3] Applicants' Founding Affidavit at para 40, pg 21 of the consolidated hearing bundle.

7.3.1 A final determination of the applicants' complaint in terms of the Act that the restraint (and enforcement of the restraint) constitute a prohibited practice as contemplated in terms of section 4(1)(b)(ii) and is declared void; or

7.3.2 A date that is six months after the date of the granting of the order sought in paragraphs 7.1 and 7.2 above.

7.4 During the period of the interdict:

7.4.1 any profits that accrue to the applicants as a result of this order will be put into a separate trust account to be held by the applicants in favour of the respondent; and

7.4.2 the applicant must keep a record of all sales and purchases to customers and suppliers respectively listed in the restraint (the 'record').

RELEVANT FACTUAL BACKGROUND

The parties and their businesses

8. Streamlight was established in 1994. It conducts business in the lighting industry, which is inclusive of lighting design, import/export, product development, supply and after sales goods and services. It distributes imported lighting solutions, fixtures and lamps. Its primary business

includes the supply of lighting fixtures, including the distribution and re-sale of imported light emitting diode (LED) lamps.

9. Iron Ice was established in 2018, and closed down in October 2022. It was established for the primary purpose of importing LED lighting products for supply to its customers (wholesale and retail), as well as to invest in LED technology and development in the South African market.

10. Genesis is a supplier of premium LED lamps, luminaries and lighting fittings. Its products are sourced primarily from suppliers and manufacturers in China.

The relationship between the parties

11. During January 2015, Genesis employed Bradley Lloyd Jamieson ("Jamieson") as a sales representative and with responsibility for new business development.

12. On 18 August 2015, Genesis and Jamieson concluded a confidentiality agreement. In terms of that agreement, Jamieson was required and undertook to keep confidential and not to disclose confidential information of Genesis without the prior written consent of Genesis.

13. Jamieson was appointed as a director of Genesis early in 2018. He tendered his resignation as a director on 29 May 2018. On 22 January

2019, he resigned from his employment at Genesis. However, he remained a shareholder.

14. It is alleged that Jamieson disseminated Genesis's confidential information to Streamlight, which was both a customer and a competitor of Genesis. It is further alleged that Jamieson and the directors of Streamlight set up a company, Iron Ice, to conduct business in competition with Genesis. It is further alleged that Jamieson used the information gained from his employment and involvement with Genesis to assist Iron Ice.

15. Prior to the establishment of Iron Ice, Streamlight was a customer of Genesis, in that it purchased LED bulbs from Genesis. Iron Ice was established for the purposes of distribution of LED lighting products. According to Streamlight, it purchased LED bulbs directly from Iron Ice from approximately November 2019 until October 2022 when Iron Ice closed its doors.

The High Court civil litigation between the parties

16. On 30 January 2019, Genesis instituted an urgent application to the Johannesburg High Court in which it sought an urgent interdict against Streamlight, Iron Ice and their directors.[4]

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[4] High Court Case Number 3212/19.

17. The application was based on the common law doctrine of unlawful competition. Genesis sought orders interdicting and restraining Streamlight and Iron Ice from utilising its confidential information, and an order for the return of such confidential information, and ancillary relief.

18. Streamlight and Iron Ice opposed the application.

19. On 18 March 2019, the High Court (per Mohalelo J) granted an interdict in favour of Genesis. Streamlight and Iron Ice (and their associated persons and entities) were prohibited from *inter alia*:

    19.1 dealing in any manner whatsoever with 160 named customers of the parties for the sale of any and all lighting products ("the protected customers"); and

    19.2 procuring lighting products from 27 named suppliers ("the protected suppliers").

20. The restraint was imposed pending the final determination of an action to be instituted by Genesis.

21. Streamlight and Iron Ice applied for leave to appeal against the restraint, and also applied in terms of section 18(2) of the Superior Courts Act[5] for an order suspending the operation of the order of 18 March 2019. On 31 May 2019, the High Court granted Streamlight and Iron Ice leave to appeal.

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[5] Act 10 of 2013.

The Court did not address the application in terms of section 18(2) of the Superior Courts Act.

22. Genesis then launched an urgent application for declaratory relief as to the status of the order. The Court advised that the parties should request clarity from Mohalelo J, who had heard the application for leave to appeal. It appears that the parties did not take any steps in this regard.

23. Streamlight and Iron Ice filed a notice of appeal, but failed to prosecute the appeal.

24. On 23 July 2021, Genesis applied for an order declaring that the appeal by Streamlight and Iron Ice had lapsed. That order was granted.

25. Genesis has instituted contempt proceedings against Streamlight and Iron Ice, alleging that they have failed to comply with the restraint. Those proceedings are pending.

THE APPLICANTS' CASE IN THIS TRIBUNAL

26. Streamlight and Iron Ice contend in their founding affidavit that the restraint contravenes sections 4(1)(a) and 4(1)(b)(ii) of the Act. As we have noted, they have however not filed a complaint in respect of section 4(1)(a) with the Commission. At the hearing of this application, counsel for Streamlight and Iron Ice stated that they longer wish to pursue their claim in terms of

section 4(1)(a).[6] We therefore do not address the allegation of a breach of section 4(1)(a).

27. Streamlight and Iron Ice allege that they and Genesis are competitors as they are all in the market for the supply and distribution of lighting products and services, and that they are therefore in a horizontal relationship for the purposes of section 4 of the Act.

28. They further contend that the restraint and its enforcement by Genesis amount to an agreement or concerted practice in that:

28.1 They necessitate compliance by the parties;

28.2 The restraint is an enforceable arrangement, understanding, plan or decision that:

28.2.1 limits commercial freedom by means of mutual action or abstention from action in the relevant market; and

28.2.2 binds the parties, and is regarded by the parties as binding on them;

28.2.3 is the product of a dispute between the parties, by which the parties regard themselves as bound; and

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[6] Transcript, page 43, lines 10-20.

28.2.4 reduces and indeed eliminates uncertainty as to the conduct to expect of the other in the market.

29. Under section 4(1)(b)(ii), Streamlight and Iron ice contend that the restraint divides markets between the competitors by way of allocating suppliers and customers. The restraint prevents Streamlight and Iron Ice from dealing with any mutual customers of the parties.

30. Streamlight and Iron Ice argue that the Tribunal is empowered by section 65(2) of the Act to hear this application, and that the Tribunal has jurisdiction to adjudicate the interim application prior to the determination of the High Court matter since the relief sought in the High Court is contingent upon the order made by the Tribunal.[7]

GENESIS'S CASE

31. Genesis contends that the order of the High Court is binding between the parties. The order originated in a contractual and common law dispute

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[7] Section 65 (2) provides that:

If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and
(ii) the resolution of that issue is required to determine the final outcome of the action.

between the partes in which the High Court found that Streamlight and Iron Ice were unlawfully competing with Genesis by using its confidential information.

32. Genesis further contends that the High Court order is not an agreement between competitors. It is an order that grants relief concerning the misuse of confidential information pending finalisation of an action. The order does not allocate markets by consensus. The listed entities were identified by Genesis as its customers or suppliers.

33. Genesis further contends that the order does not have the object or effect of substantially preventing or lessening competition.

34. Genesis further submits that while the Tribunal has the power to adjudicate competition matters under the Act, it does not have jurisdiction over civil courts, and that the Tribunal cannot override a valid judicial order.

35. Genesis contends further that the appropriate remedy for Streamlight and Iron Ice is to approach the High Court or a competent appeal court, and to seek a variation or rescission of the interdict.

36. Genesis contends that the order of the High Court is valid until it is set aside. It submits that Court orders are binding and must be obeyed even if they may be wrong.

THE JURISDICTION OF THIS TRIBUNAL

37. This application raises the question whether this Tribunal can suspend or otherwise prevent the operation of an order which has been made by the High Court exercising its powers under the common law, on the basis that the implementation of the High Court order would result in a prohibited practice in terms of the Competition Act.

38. The Act contemplates that situations may arise in which an alleged prohibited practice is relevant to an action[8] in a civil court. The constitutional section 34 right of access to courts means that it must be possible for a party to raise the Competition Act issue, and have it determined by the Tribunal or the Competition Appeal Court, which have exclusive jurisdiction in that regard. The question is how that is to be done.

39. Section 65(2)(b) of the Act provides that if in any action in a civil court a party raises an issue concerning conduct that is prohibited in terms of the Act, that court must not consider the issue on the merits. If the issue is not one in respect of which the Tribunal or the Competition Appeal Court has made an order, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that:

    39.1 the issue has not been raised in a frivolous or vexatious manner;

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[8] Which we assume, without deciding, includes an application.

39.2 the resolution of that issue is required to determine the final outcome of the action.

40. The Act seems to contemplate that where a party which is engaged in civil litigation wishes to raise an issue concerning conduct that is prohibited in terms of the Act, that party should raise the issue in the civil court, and the court must then refer that issue to the Tribunal, subject to the exceptions which we have noted.

41. It is not at all clear that a party may participate in civil litigation, not raise in that litigation any issue concerning a prohibited practice that may bear on whether the court may make an order of the kind which is sought, and then, after the court has made an order, institute proceedings in the Tribunal for an order effectively nullifying the order made by the court.

42. This question raises profound questions as to the role of the Tribunal and its obligations under the Constitution. We are mindful of the fact that in terms of section 165(3) of the Constitution, no organ of State may interfere with the functioning of the courts. And we are also mindful of the fact that section 165(4) requires organs of state to assist and protect the courts to ensure their independence, imparticlity, dignity, accessibillity and effectiveness.

43. We also note that section 165(5) provides that an order issued by a court binds all persons to whom it applies.

44. It is not necessary to decide whether the Tribunal, an administrative body, could have the power to suspend an order made by a court. That is so because for the following reasons, the applicants have in any event failed to make out a *prima facie* case under the Act.

CONCERTED PRACTICE

45. Genesis sought an interdict in the High Court, and the High Court granted the interdict. The applicants contend that if they comply with that interdict, they will be engaging in a "concerted practice" which would be a prohibited practice in terms of the Competition Act, and that they should not be required to do so. Accordingly, this Tribunal should suspend the interdict.

46. In our opinion, when a party has opposed the making of an order against it, that order has nevertheless been made, and the party then reluctantly complies with it, the party is not engaging in a "concerted practice". Rather, it is complying with section 165(5) of the Constitution, which provides that an order issued by a court binds all persons to whom it applies.

47. In the *Sekunjalo* case,[9] the Competition Appeal Court held[10] that in the process of identifying a concerted practice, it is necessary to identify what

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[9] *Mercantile Bank, A division of Capitec Bank Limited and Others v Surve and Others* (206/CAC/Oct22; 208/CAC/Oct22; 209/CAC/Oct22; 210/CAC/Oct22; IR153Dec21) [2023] ZACAC 2; [2023] 3 CPLR 33 (CAC).
[10] Para [36].

the object of the concertation was. The Court found that the Tribunal had in that case erred in conflating an outcome – exclusion from the market – with an anti-competitive effect.[11]

48. There are no doubt many possible forms of concerted practice. What they will all have in common is that the parties voluntarily act in a co-operative or co-ordinated manner in order to achieve their mutual benefit. In this matter, the applicants' (alleged) compliance with the order was not undertaken to achieve a benefit for them, except to the extent that it prevents them being pursued in contempt of court proceedings. Where a person undertakes an action (or refrains from an action) as a result of coercion, which is created by an order of court which it opposed, that is not concerted conduct. To hold that this is a "concerted practice" would be to do violence to the natural meaning of that term, and to the purpose of the provision.

49. In this case, there can be no sensible suggestion that the applicants and Genesis co-ordinated their conduct. To the contrary, they were and are at at loggerheads in that regard. Genesis wants the applicants to stop carrying on their business in certain ways, whereas the applicants wish to continue doing so, and insist that they are entitled to do so. The High Court made an order interdicting the applicants from carrying on their business

[11] Para [38].

in that manner. The applicants then attempted to appeal against that order. If they have now complied with that order (a matter which is in dispute), it can hardly be said that in doing so, they acted in concert with Genesis. Rather, they did what they did not wish to do. They complied (if they did so) not to further their own business, but to avoid being held in contempt of court and subject to sanction in that regard.

50. The applicants have accordingly failed to make out a *prima facie* case of a "concerted practice" in breach of section 4(1) of the Act.

UNLAWFUL COMPETITION

51. The premise of the order of the High Court is that the applicants engaged in unlawful competition. The Court exercised its common law power to prohibit unlawful competition. The present applicants appealed against the order of the High Court, but did not pursue their appeal.

52. The delict (civil wrong) of unlawful competition is long-established in our common law. The courts will interdict unlawful competition, and will order the wrongdoer to pay damages to a person who suffers a loss as a result of unlawful competition.

53. The then Appellate Division explained the basis of liability for unlawful competition in *Schultz v Butt*,[12] as follows:

> *"As a general rule, every person is entitled to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an iniuria for which the Aquilian action lies if it has directly resulted in loss".*

54. The High Court has the power to decide cases of alleged unlawful competition under the common law. In the High Court litigation between Streamlight and Genesis, the Court decided that the present applicants were competing unlawfully with the present respondent, and interdicted the applicants from continuing that activity. The applicants obtained leave to appeal, but allowed the appeal to lapse. The result is that the order of the High Court is final. It is *res judicata*[13] that the applicants had been engaging in unlawful competition with the respondent.

55. In this application, the applicants in effect ask this Tribunal to make an order that it is entitled to continue conduct which the High Court has found

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[12] 1986 (3) SA 667 (A) at 678.

[13] A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

constitutes unlawful competition. The jurisdiction of this Tribunal arises from the Competition Act. That Act prohibits various forms of statutory unlawful competition which are defined in the Act. It does not purport to legalise conduct which is unlawful under the common law. It is not the purpose of the Act to enhance and promote unlawful competition.

56. The Act prohibits various forms of conduct which would not be unlawful under the common law. This power of the Tribunal to prevent statutory unlawful competition does not extend to the power to authorise conduct which the courts have found to be unlawful under the common law.

57. One can test this proposition by reference to what would happen if a party brought proceedings in the High Court for an order to interdict a respondent from passing off its products as the products of the applicant. Where a court grants such an interdict, in one sense it may be said to be limiting competition: it is preventing the respondent from competing as effectively as it would wish, by passing off its products as the products of the applicant. We cannot conceive that the Tribunal would make an order which has the effect that a party has the right to engage in unlawful or unfair competition, by (for example) passing off its products as the products of its competitors - or by appropriating the business of its competitor by unlawfully obtaining and using confidential information of the competitor.

58. For this reason, too, this application must fail. The applicants have not met the first requirement for obtaining interim relief in terms of section 49C of the Act, namely that they must show that they have a *prima facie* right. The applicants have not made out any right to continue the unlawful competition which was found by the High Court.

CONCLUSION

59. In the circumstances, the application for interim relief is dismissed.

ORDER

60. The application for the interim relief order is dismissed.

61. Each party must bear its own costs.

Signed by:GEOFF BUDLENDER
Signed at:2024-06-18 12:15:58 +02:00
Reason:Witnessing GEOFF BUDLENDE

GEOFF BUDLENDER

Adv. Geoff Budlender SC

18 June 2024

Date

Presiding Member

Concurring: Prof.Thando Vilakazi and Prof. Liberty Mncube

Tribunal Case Manager: Nomkhosi Mthethwa-Motsa

For the applicants: Adv Ivan Miltz SC and Adv Roxanne Blumenthal Instructed by Hadar Inc

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