



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: CR100Sep19/AME034May22

In the *amendment application* between:

COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
COROBRIK (PTY) LTD	First Respondent
BUSON STRUCTURES AND PRECAST (PTY) LTD t/a	Second Respondent
SMARTSTONE KWAZULU NATAL	

Case no.: CR100Sep19

In re: the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
COROBRIK (PTY) LTD	First Respondent
BUSON STRUCTURES AND PRECAST (PTY) LTD t/a	Second Respondent
SMARTSTONE KWAZULU NATAL	

Panel	: M Mazwai (Presiding Member)
	: L Mncube (Tribunal Member)
	: G Budlender (Tribunal Member)
Heard on	: 2 August 2023
Order issued on	: 15 November 2023
Reasons issued on	: 15 November 2023

REASONS FOR DECISION AND ORDER

Introduction

- [1] On 2 August 2023, the Tribunal heard an application by the Competition Commission (“Commission”) for leave to amend and supplement a complaint referral filed under case number CR100Sep19 (“the referral”). The purpose of the proposed amendment was to extend the scope of the referral to include a contravention of price fixing (as contemplated in s 4(1)(b)(i) of the Competition Act) in addition to the existing referral of a contravention through market allocation (as contemplated in s 4(1)(b)(ii) of the Act).
- [2] Smartstone Kwazulu-Natal (“Smartstone”) opposed the application.¹ Corobrik (Pty) Ltd did not do so.
- [3] We have decided that the application for amendment is to be granted.
- [4] The reasons for this decision are set out below.

Background

- [5] On 28 February 2018, the Commission initiated a complaint against Smartstone (and Corobrik, the first respondent). It alleged that the respondents have an agreement and/or are engaged in a concerted practice to divide markets by the allocation of customers for the manufacturing and supply of bricks, pavers and blocks in contravention of s 4(1)(b)(ii) of the Competition Act. In the initiation form (Form CC1), the conduct is alleged to be ongoing.
- [6] On 16 September 2019, the Commission referred to the Tribunal the complaint of market division by allocation of customers by way of a bilateral agreement codified in a Distribution Agreement. The Commission alleges that the prohibited practice arises from clause 4 of the Distribution Agreement, which is said to provide that Smartstone agreed not to supply products directly to

¹ Smartstone was initially cited as Bosun Structures and Precast (Pty) Ltd. That entity adopted the trading name of Smartstone Kwazulu-Natal in 2015.

customers in competition with Corobrik, but instead to supply them to Corobrik, which would sell them directly to customers in the open market. In its referral, the Commission sought a declarator that the respondents have contravened s 4(1)(b)(ii) of the Act.

- [7] In its answer to the referral, filed on 31 January 2020, Smartstone submitted *inter alia* that the relationship is vertical in nature. The Distribution Agreement and the relationship between Corobrik and Smartstone are, it asserted, on a proper construction a contract manufacturing agreement, in terms of which Smartstone is contracted by Corobrik to manufacture exclusively for Corobrik certain clearly identifiable, unique Corobrik-branded products that Corobrik is itself unable to manufacture.
- [8] During the period November 2021 to February 2022, Smartstone made discovery of documents relevant to the proceedings. The Commission thereafter, on 25 February 2022, filed two witness statements, one of them by its lead investigator Mr Kgashane Kgomo. In that statement, Mr Kgomo for the first time made an allegation of price-fixing in contravention of s 4(1)(b)(i) of the Competition Act.
- [9] The alleged conduct underlying this allegation of price fixing is that the respondents met regularly at their premises to discuss and agree on prices, prices increases and discounts for cobbles and flagstones. These meetings were attended by named individuals who met in instances, cited as examples, from 2003 to 2011. The price increases are alleged to have taken place bi-annually. The alleged price-fixing conduct was referred to in the same minutes as the alleged market division.
- [10] Smartstone and Corobrik both objected to the introduction of this new issue, and Smartstone brought an application to strike out the price fixing allegations from Mr Kgomo's witness statement.² At a pre-hearing conference ("pre-hearing") held on 22 April 2022, the Commission was directed to file an amendment application in relation to these new allegations. While Corobrik

² Transcript p 47.

ultimately did not persist with its objection, Smartstone continues to do so. This is the matter that is the subject of this decision.

- [11] By the time of the hearing, Smartstone's objections had been distilled to two issues. First: Can the Commission be permitted to amend its complaint referral to add an entirely new complaint where it has not first initiated (expressly or tacitly) the complaint nor investigated the new complaint? Second: Smartstone contends that even if a new complaint under s 4(1)(b)(i) could be initiated (tacitly or otherwise), this is not the basis on which the Commission brought this application. It was only in its replying affidavit in the amendment application that it for the first time alleged that it had tacitly initiated the new complaint. Smartstone also complained that the Commission sought in its heads of argument to give new evidence in relation to that allegation.

The powers of the Commission and the Tribunal with regard to a matter that has not been referred to the Tribunal

- [12] A complaint against an alleged prohibited practice may be initiated by the Commissioner.³ In addition, a private person (the "complainant") may submit a complaint to the Commission.⁴
- [13] Upon initiating or receiving a complaint, the Commissioner "must" direct an inspector to investigate it.⁵
- [14] At any time after it has initiated a complaint, the Commission may refer it to the Tribunal.⁶ If the complaint was submitted to it, the Commission must within a year either refer it to the Tribunal, or issue a notice of non-referral. If the Commission issues a notice of non-referral, the complainant may itself refer the complaint directly to the Tribunal.⁷

³ Section 49B(1)

⁴ Section 49B(2)(b).

⁵ Section 49B(3).

⁶ Section 50(1).

⁷ Section 51(1).

[15] The Tribunal “must” conduct a hearing into every matter referred to it in terms of the Act, subject only to the rules of the Tribunal.⁸

[16] There are two routes through which a matter not initially referred to the Tribunal may be considered by it:

16.1 The Commission may amend its initial referral, if necessary with the leave of the Tribunal.⁹ If the initial referral is amended, the Tribunal is then obliged to conduct a hearing into the amended referral: s 52(1). The Commission may not refer a complaint unless it initiated the complaint, or the complaint was submitted to it.

16.2 The Commission may elect to bring a matter which has not been referred to the Tribunal to the attention of the Tribunal and ask the Tribunal to entertain it. The decision of the Constitutional Court in *Senwes*¹⁰ makes it clear that the Tribunal has the power to consider relevant matters which are brought to its attention, and that it is not limited to those matters which have been referred: “Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry”. In that situation, the Tribunal has a discretion as to whether to entertain the complaint, but is not obliged to do so.

[17] The present matter is not a *Senwes* case. *Senwes* dealt with the situation where a non-referred complaint is brought to the Tribunal’s attention during the course of deciding a referral. In such a situation, the Tribunal has a discretion as to whether to entertain the matter.

[18] As we have noted, in this matter, a pre-hearing was held to determine the way forward.¹¹ The Tribunal, by agreement between the parties, directed the Commission to follow the first course, by making an application for amendment.¹² That is the application before us.

⁸ Section 52(1).

⁹ Rule 18 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

¹⁰ *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (“*Senwes*”).

¹¹ See para 10 *supra*.

¹² Pre-Hearing Direction dated 25 April 2022, bundle, p 10.

The initiation of a complaint

[19] In the Yara case,¹³ the issue before the Supreme Court of Appeal was what matters the Commission may refer to the Tribunal in terms of s 52. That raised the question whether “initiation” is necessary before a complaint may be referred to the Tribunal; and if so, what constitutes an initiation.

[20] The Court considered a submission by the Commission that there is no justification for insisting on an initiation of every new complaint. The Court held:

“[32] Once an investigation has been set in motion because of an initiation by the commission or a submission by a complainant, so the argument went, there is no reason for requiring that new complaints discovered during the investigation should first be initiated by the commission before they can be investigated and referred to the tribunal. Insistence on initiation of every new complaint in these circumstances, so the commission argued, would amount to substance being rendered subject to form. The commission found support for its argument in s 50(3)(a)(iii) of the Act which provides that, when private complaints are referred to the tribunal, the commission may add particulars to the original complaint. In the context of s 50(3) as a whole, so the commission argued, 'particulars' must be understood to include separate complaints. This means, so the argument concluded, that s 50(3)(a)(iii) allows the commission to add new complaints which were not included in the initial complaint, without requiring that the new complaint be separately initiated.

“[33] I do not agree with this line of argument. As was said in Woodlands,¹⁴ the Act insists on an initiation of a complaint by the commission as a juristic act — by way of a decision to set the process in motion — before there can be a formal investigation into that complaint. As I see it, the same goes for s 50(1) which provides that the commission

¹³ Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA).

¹⁴ Woodlands Dairy (Pty) Ltd v Competition Commission 2016 (8) SA 108 (SCA).

may refer a complaint to the tribunal “after initiating the complaint”. When s 50(3) refers to “a complaint as submitted by the complainant”, it must be understood as a complaint against a specific prohibited practice submitted by a complainant. Adding particulars means no more than further information to support that complaint. It cannot mean a new complaint about a different prohibited practice not raised by the original complaint.”

[21] The Court then considered what constitutes the initiation of a complaint. The Court pointed out that s 49B(1) does not require any formalities in the initiation of a complaint. All that is required is a decision by the Commission to open a case. That decision can be informal, and it can also be tacit.¹⁵

[22] The Competition Appeal Court had previously laid down a “referral rule”, which stated that a referral will be set aside if it goes wider than the complaint submitted by the complainant or initiated by the Commission. The SCA held that complaints submitted by private persons have to be distinguished from those initiated by the Commission. While there is good reason to follow a strict referral rule in the former case, the latter requires no more than an informal decision by the commissioner, and it makes no sense in those circumstances to require that the referral by the commissioner be confined to the parameters of the original complaint.¹⁶ In this matter, the complaint was initiated by the Commission.

[23] The Court held further:

“[25] Not unexpectedly, the formalism insisted upon by the CAC [with regard to complaints initiated by the Commission] gave rise to difficulty where the investigation following upon a complaint revealed some anti-competitive conduct other than that objected to in the original complaint.¹⁷ The panacea proposed in Loungefoam (para 48) is for the commission ‘to amend the original complaint initiation, institute an

¹⁵ Para [22].

¹⁶ This is drawn from the headnote of the judgment published in the South African Law Reports at 405F, which in our opinion accurately summarises the thrust of the judgment.

¹⁷ As happened in this case.

investigation (however cursory) and then refer this complaint . . . to the tribunal . . .'. But in the judgment of the CAC in the present case it specifically held (in para 39) that there is no provision in the Act or the rules of the tribunal for amendment of a complaint. With regard to a complaint submitted by a private person this must clearly be so. I cannot see how the commission can amend the complaint submitted by another. But it seems equally clear that the same position does not necessarily prevail with regard to complaints initiated by the commission."

[24] The Court held further:

"[28] Once it is appreciated that the initiation by the commission demands no more than an informal and even tacit decision to set the process in motion, it becomes apparent that the enquiry into whether or not the commission can introduce a new complaint by amending a complaint initiated by itself, is inappropriate. All the commission has to do is to decide to initiate a new complaint, to investigate that complaint and, if appropriate, refer that complaint to the tribunal. If the commission already has enough information to warrant a referral, the intervening investigation can be quite cursory, as envisaged by the CAC in Loungefoam. What also seems clear to me is that the concept of an informal initiation — by way of a decision to open a case — leaves no room for the referral rule as applied by the CAC. To demand that the referral correspond with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate."

[25] Counsel for Smartstone contended that what ought to happen in this matter is that the Commission should "initiate" a complaint with regard to the additional matter which it wants the Tribunal to consider, then investigate the matter, and then refer it to the Tribunal. He said that this could be done in a "cursory" manner. He submitted that these steps had not been taken, and that amendment of the referral was therefore impermissible.

- [26] At the hearing, there was some discussion about what the purpose would be of requiring this procedure to be followed, particularly in light of the statement by counsel for Smartstone that in all probability, Smartstone would have no objection to the referral being amplified in this manner.
- [27] It emerged that the underlying concern of Smartstone arises from s 67(1) of the Act. That subsection provides that a complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Tribunal. Smartstone contended that unless there was an initiation of the kind which they contended is necessary, which would fix the critical date, they would lose the protection provided by s 67(1).
- [28] The Constitutional Court has held that s 67(1) of the Act is a procedural time bar, and is capable of condonation.¹⁸ The protection provided by s 67(1) is therefore not absolute. One can however see the force in the argument advanced by Smartstone.¹⁹ It is not adequately answered by the argument advanced on behalf of the Commission, namely that the alleged prohibited conduct in this matter is in any event ongoing, so the three years referred to in s 67(1) has in any event not yet begun to run. The obvious retort to that is that it remains open to Smartstone to raise the s 67(1) defence that the alleged prohibited practice, if proved, has ceased. This is a matter for evidence.

Analysis

- [29] The complaint which the Commission initiated and investigated was an allegation that the respondents had divided the market in breach of s 4(1)(b)(ii) of the Act. That complaint was initiated and investigated by the Commission, and referred by it to the Tribunal. The Tribunal is obliged to conduct a hearing into it.

¹⁸ Competition Commission of South Africa v Pickford Removals (SA) (Pty) Ltd 2021 (3) SA 1 (CC) para [38], [41]-[42], [47]-[48] and [56].

¹⁹ This was also an issue raised in the Yara judgment as a reason why the Commission cannot add new complaints which were not included in the initial complaint, without requiring that the new complaint be separately initiated.

- [30] A process of discovery then took place. In the course of that process, Smartstone produced the minutes of a meeting between the respondents. The minutes disclosed a discussion which, the Commission alleges, constitutes evidence of dividing the market. The minutes also contained a recordal of a discussion between the parties about prices. The Commission contends that the minutes also disclose another form of prohibited conduct, namely price-fixing. It is this matter which the Commission wishes to bring to the attention of the Tribunal. It is not a matter which has been referred to the Tribunal.
- [31] This is precisely the sort of situation referred to by the SCA in paras [25] and [28] of the Yara judgment. The Commission contends that it initially had information about collusive conduct amounting to division of the market. It contends that the other evidence which has emerged during discovery discloses that the alleged division of the market was but one part of a broader system of collusive conduct, which included price-fixing. It wishes to refer that, too, to the Tribunal. It contends that the Distribution Agreement demonstrates both of these forms of prohibited collusive conduct.
- [32] In the light of the direction issued by the Tribunal at the pre-hearing, the Commission now seeks leave to amend its referral, to include the complaint of price-fixing. On the authority of Yara, it cannot amend its referral unless it has performed the juristic act of initiating a complaint in this regard.
- [33] The Commission seeks orders granting it leave to supplement its referral affidavit, and to amend its relief to seek an order declaring that the respondents have contravened s 4(1)(b)(i) and (ii) of the Act.
- [34] In the light of the history of this matter and the contents of paragraphs 7, 8 and 11 to 15 of the Commission's founding affidavit, we understand this to be a request for an order permitting it to amend its referral by including a complaint of price-fixing in breach of s 4(1)(b)(i) of the Act. The Commission contends that *"it is sufficient that the respondents have been afforded an opportunity to rebut the Commission's new case"* (para 15).

- [35] In its answering affidavit in the application for amendment, Smartstone pointed out that the SCA in Yara held that a prerequisite to referral is an initiation and investigation of the complaint to be referred. Smartstone also pointed out that the Commission did not, in its founding affidavit, allege that the complaint of price-fixing had been instituted and investigated. That is so.
- [36] In the Commission's replying affidavit in the amendment application, Mr Kgomo contended that the Commission was not required, as a matter of law, to initiate a new complaint and refer it.²⁰ He then asserted that *"Even if it was required to freshly initiate a new complaint, the decision to seek leave to amend would be tantamount to tacitly initiating a new complaint and referring it to the Tribunal"*.²¹
- [37] On the authority of Yara, it was necessary for the Commission to decide to initiate the additional complaint, before referring it to the Tribunal. The SCA observed that the Act provides for no formalities for initiation, as such, that decision could be informal or tacit and can be inferred from the facts: *"Absent any evidence of an express – albeit informal- initiation, the question will be whether a tacit initiation had been established. That will be a matter of inference which depends on the enquiry whether or not it is the most probable conclusion from all the facts, that the Commission had decided to initiate the additional complaint?"*²²
- [38] There are two events from which a tacit decision to initiate a new complaint might be inferred: from the decision to file a witness statement (25 February 2022) which sets out the new complaint, and from the institution of the application for amendment of the referral (23 May 2022). It is in the nature of a "tacit" decision that the decision is not evidenced by (for example) a minute recording the decision. A tacit decision is inferred from the conduct of the party or parties concerned, seen in the light of the surrounding circumstances.²³

²⁰ Replying affidavit para 31.

²¹ Replying affidavit para 32.

²² Yara, supra, paras 21 and 29.

²³ In the context of deciding whether there has been a tacit agreement, "A tacit agreement is inferred from the surrounding circumstances and conduct of the parties": Paixão and another v Road Accident Fund 2012 (6) SA 377 (SCA) para [18].

Either of the events to which we have referred could plausibly be construed as reflecting a tacit decision.

[39] Whichever of those two events reflects the tacit decision, its date can be determined from the known facts. The result is that the date of the s 67(1) “trigger” is therefore also determinable.

[40] In our view there can be no doubt that:

40.1 The Commission tacitly initiated a new complaint.

40.2 The Commission wishes to amend the terms of the referral to the Tribunal.

40.3 Smartstone does not object in principle to the “amended” complaint being considered by the Tribunal. It is however concerned that the amendment of the referral should take place properly, and in a manner which will not have the result that it is effectively deprived of its right to rely on the procedural time-bar in s 67(1).

[41] It would have been desirable for the founding affidavit to make out the allegation of the tacit decision to initiate the new complaint. However, under the circumstances of this case, the Tribunal should not be hidebound as to formalities. In our view, the Tribunal should consider the application for amendment on its merits.

[42] We consider that the following factors are relevant to the merits of the application for amendment:

42.1 It is clear what additional complaint the Commission wishes to refer to the Tribunal. It is a price-fixing complaint.

42.2 There is a reasonable explanation for why the original referral did not include the price-fixing allegation, namely that the Commission was

not aware of the underlying facts until Smartstone had made discovery.

42.3 The additional element of the referral (alleged price-fixing) is closely related to the original referral, in that it is said to arise from the same Agreement (the Distribution Agreement) between the same Parties, and to have been part of a single scheme between the parties.

42.4 Smartstone sensibly does not object in principle to the “new” referral being considered together with the original referral.

42.5 Allowing the amendment will not deprive Smartstone of its rights under s 67(1) of the Act.

42.6 Any other prejudice can be remedied by Smartstone being given the opportunity to file a supplementary answer to the amended referral.

[43] Under the circumstances, we conclude that the application for amendment of the referral must be granted. The application to strike out accordingly falls away.

Conclusion

[44] For the reasons set out above:

44.1 The application for amendment is granted.

44.2 Smartstone is directed to file a supplementary affidavit, addressing the facts and issues which arise from the amendment, within 15 business days of the date of this order.

[45] No order is made as to costs.

ORDER

1. The application for amendment is granted.
2. Smartstone is directed to file a supplementary affidavit, addressing the facts and issues which arise from the amendment, within 15 business days of the date of this order.
3. No order is made as to costs.

15 November 2023

Advocate Geoff Budlender SC

Date

Ms Mondo Mazwai and Professor Liberty Mncube concurring

Tribunal Case Managers:	Mpumelelo Tshabalala and Matshidiso Tseki
For the Applicant:	Adv Katlego Monareng instructed by Mogaswa Attorneys
For the Respondent:	Adv A Gotz SC assisted by Adv L Buchler instructed by Whitesman Lurie Attorneys