IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)

Case No: 73/CR/Jul12

In the matter between:

OMNICO (PTY) LTD	First Applicant
CYTEK CYCLE DISTRIBUTORS CC	Second Applicant
COOLHEAT CYCLE AGENCIES (PTY) LTD	Third Applicant

and

THE COMPETITION COMMISSION	Respondent

In Re:

THE COMPETITION COMMISSION	Applicant

and

FRITZ PIENAAR AND 19 OTHERS	1st - 20th Respondents

Panel	: Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) and Medi Mokuena (Tribunal Member)
Heard on	: 20 February 2012

Reasons issued on : 09 April 2013

REASONS AND ORDER
9TH TO 11TH RESPONDENTS' EXCEPTION APPLICATIONS

Introduction

[1] On 20 February 2013, the Competition Tribunal (the "Tribunal") heard three exception applications brought by Omnico (Pty) Ltd ("Omnico"), Cytek Cycle Distributors CC ("Cytek") and Coolheat Cycle Agencies (Pty) Ltd ("Coolheat") (the "excipients"). These exceptions came about as a result of a complaint referral filed by the Competition Commission (the "Commission") against the applicants together with 17 other firms. The excipients are the 9th, 10th and 11th respondents respectively in the complaint referral. In the referral the Commission alleges that all 20 respondents (who are either wholesalers or retailers of bicycles and bicycle accessories) have contravened section 4(1)(b)(i) of the Competition Act , 1998, (the "Act").

[2] In this application the applicants seek a dismissal of the Commission's referral. The applicants, all of whom are wholesalers, raised a common set of exceptions. For this reason we deal with the exceptions in the same decision.

Background

[3] In September 2008 the Commission received information from an anonymous source indicating that retailers and wholesalers in the cycling industry had had meetings to discuss pricing, in particular how to embark on a common approach to setting margins for bicycles and accessories.

[4] Based on the above information, the Commission initiated a complaint on 5 March 2009 against two alleged instigators of the meetings,

namely, Fritz Pienaar Cycles (Pty) Ltd ("Fritz Pienaar") and Melody Street 18 (Pty) Ltd ("Melody Street"). Fritz Pienaar and Melody Street are the 1st and 2nd respondents respectively in the complaint referral. The Commission later amended the initiation to include other respondents, after obtaining further information implicating those respondents. After conducting an investigation the Commission referred the complaint to the Tribunal against 28 respondents on 25 June 2010.

[5] On 10 June 2011 the Commission, however, withdrew the complaint against all 28 respondents.

[6] A fresh complaint into the allegations was initiated by the Commission on 18 July 2011.

[7] Since the filing of the July referral, the respondents in this case have followed different approaches. Some firms have filed answering affidavits, some have been involved in settlement discussions with the Commission, whilst others have filed exceptions. Some of these exceptions were withdrawn and we are now left to decide the present three.[1]

Industry background

[8] It was common cause amongst the Commission and the excipients that wholesalers supply particular retailers with their brand of bicycles.

[1] At a pre-hearing meeting held on 22 November 2012 it was agreed that all exception applications would be heard and decided by the Tribunal before the hearing of the merits of the case. At that time six respondents, namely Bowman Cycles (Pty) Ltd ("Bowman"), Omnico, Cytek, Coolheat, Dunkeld Cycles (Pty) Ltd ("Dunkeld") and the New Just Fun Group ("New Just Fun Group") had filed exceptions to the Commission's referral. Bowman, Dunkeld and the New Just Fun Group are the 7th, 16th and 20th respondents respectively in the complaint referral. By the time the hearing commenced only three applicants wished to proceed with their exception applications viz. Omnico, Cytek and Coolheat.

Wholesalers are responsible for advertising and hence recommend a retail price to their particular retailers. It is generally accepted that retailers either follow this price or discount below it.

Case background

[9] The Commission's case is that sometime in May 2008, members of the industry had meetings to discuss concerns about market conditions in the industry. The meetings included both wholesalers and retailers. Omnico was the only one of the excipients to attend these meetings. The referral provides little detail of what was said at these May meetings or if anything was agreed at them. As far as wholesalers are concerned, the referral states that amongst other matters, discussion concerned "*...support by wholesalers for retailers through the adjustment to the recommended retail selling price which would allow retailers to increase the mark-up on goods and increase their margins as well*".[2]

[10] These meetings culminated in a meeting in September 2008 attended by all the respondents in this matter and others. For present purposes the allegation is that all three excipients attended this meeting.

[11] The September meeting was preceded by an emailed invitation from the owner of the first respondent, Fritz Pienaar of FPC, a retailer.

[12] The email is addressed to bicycle wholesalers and retailers and invites them all to come to a meeting.[3] In it Pienaar refers to the existence of prior discussions between retailers and wholesalers. Pienaar states that the aim of the meeting is to "*...increase the profit margins of retailers*". The rationale for the meeting he explains is that retailers are not making enough profit. Pienaar then indicates that wholesalers will benefit from a healthy retail industry.

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[2] See complaint referral paragraph 50.4
[3] See record page 55 Annexure SM 6.

[13] The meeting to which the invitation refers occurs on 10 September 2008 and was allegedly minuted. The purported minutes are also annexed to the referral, as annexure SM2 and the Commission places great reliance on them to make out the essential elements of its case.

[14] Subsequent to this meeting Pienaar is alleged to have sent a further email to those who attended in which he states that it is *"...of utmost importance that we sign-up and state that you support this decision ..."* Recipients are asked by Pienaar to *"Please click here if you are supportive of higher prices in the Bicycling Retail sector..."*.[4] To avoid confusion with Pienaar's earlier invitation email we refer to this subsequent email as the follow-up email.

[15] The Commission goes on to allege that several of the respondents pursuant to the follow-up email, then indicated their 'agreement' by reference to a spreadsheet which it again annexes as an annexure.[5] The Commission names the firms who indicated *"...their agreement"*. Three wholesalers are named, but amongst the excipients, only Cytek's name appears.[6]

[16] As we understand the referral, the conduct on which the Commission relies on for its allegation that the respondents have contravened section 4(1)(b) of the Act are contained in a narration of the facts contained in paragraphs 39 – 47 of the referral. We say this because in paragraph 48 of the referral, the Commission states its legal conclusion and alleges that it is based on the factual narration contained in the preceding paragraphs: *"...this conduct* [presumably a reference back to 39-47] *is evidence of an agreement ...."* If this reading is correct, then the best summation of the case, at least as it affects the excipients, is that set out in paragraph 41 of its referral. We quote this in full for this reason:

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[4] Paragraphs 43-45.
[5] SM8.
[6] Paragraphs 48.7 to 48.9.

"41. The meeting was convened on 10 September 2008, in Midrand and the different ways in which retailers could increase their margins were discussed, as reflected in the minutes. These included:

41.1 Increasing gross margins by increasing mark-ups for cycling accessories from 50% to 75%, and for bicycles 35% to 50%;

41.2 A proposed time for the price increase (as from the 1st October 2008);

41.3 Getting rid of discounting and of shops undercutting each other;

41.4 Getting wholesalers to provide higher RRPs to the retailers and advertise that price to the public."

[17] Note the conduct allegations are not differentiated as between wholesalers and retailers. Indeed they are elided in this paragraph and in paragraph 52 which follows in which the legal conclusions are made. We discuss this more fully when we deal with the objections.[7] In paragraph 43, wholesalers again receive an express mention, but not in a manner that distinguishes them from retailers. Reference is made to the response to the follow-up email from Pienaar and the Commission says some retailers and wholesalers *"...agreed to the new proposed mark-ups".*

Grounds for the Exceptions

[18] As indicated above, the excipients' grounds on which the exceptions are based, are common. These grounds are that: (i) the complaint referral lacks the necessary averments to sustain a cause of action (i.e. the referral does not comply with the Tribunal Rule 15(2)), (ii) no horizontal agreement has been pleaded by the Commission and (iii) no agreement not to compete on price is alleged by the Commission.

[7] See annexure SM2 record page 32- 38.

[19] In relation to the first exception the excipients argue that the September 2008 meeting and minutes thereof are insufficient to support an alleged agreement let alone a concerted practice. If there is other evidence which the Commission relies on in order to support a case of concerted practice, they argue this should be specifically pleaded. If there are no facts of this type then the Commission should give clarity that its case alleges an agreement and not an agreement and a concerted practice. The excipients admitted that this exception was curable by the furnishing of further and better particulars.

[20] The second exception was taken against the characterisation of the agreement as a horizontal agreement. The agreement seems from the referral affidavit to be between wholesalers and retailers in terms of their recommended retail price ("RRP"). This potentially has both horizontal and vertical aspects, since wholesalers are in a vertical not a horizontal relationship with their customers the retailers, and, furthermore, there are two horizontal layers of potential agreement i.e. retailers having an agreement since they are in a horizontal relationship with one another, and similarly, for the wholesalers. The excipients submitted that the referral affidavit does not clearly lay out the horizontal agreement between the upstream (wholesaler) respondents. To this extent, they argued that the referral affidavit was vague and embarrassing. The wholesalers they argued did not know what case they had to meet. Again the excipients conceded that the embarrassment caused them could be cured by further and better particulars.

[21] The excipients argued that unlike the first two, the third exception could not be cured by further particulars because it discloses no cause of action in terms of section 4(1)(b)(i) of the Act and falls to be dismissed.

[22] In order to follow this argument, we must consider the language of Section 4(1)(b)(i), which states:

"(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if -

...

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition"

[23] The excipients argue that the RRP is neither the price nor a sales condition on sales by wholesalers to retailers. Rather it is the margin that they recommended to retailers. They further argue that section 4(1)(b)(i) is very specific about what would constitute a contravention. Cytek in particular suggested that should the Commission seek to pursue a case against the wholesalers this should have been pleaded under section 4(1)(a) of the Act.

Approach/Analysis

[24] In this decision we have to decide two issues. First, whether the Commission's pleadings suffice for the purpose of its case against the wholesalers in terms of section 4(1)(b)(i). Second, if we find that they do not, whether the pleadings can be remedied by further particulars or whether, as suggested in argument, this can never be a section 4(1)(b)(i) case.

[25] We have decided on the first issue in favour of the excipients. The Commission's pleading of the case against the wholesalers has become so entangled with that of the retailers, that it is unclear to the reader what the case is against the wholesalers. Whilst the Commission has provided the alleged minutes of the meeting their terms do not indicate the legal conclusions on which a case against the wholesalers can be clearly appreciated. What the Commission needs

to do is to translate those facts into legal conclusions. For instance as concerns the wholesalers it is unclear from the referral whether; (a) the wholesalers had an agreement amongst themselves or whether they all had the same arrangement with their respective retailers and hence an agreement between them (the wholesalers) is inferred; (b) if they did have an agreement between themselves what its contents were i.e. did they agree on the retail price or a wholesale price? Another possibility is that the agreement they reached concerned the price wholesalers would pay retailers for performing retail services i.e. this would be an agreement on purchase price for services as opposed to a selling price for goods; or (c) the agreement might be a more complex one relating to some interrelationship between the retail price and the wholesale price. Counsel for the excipients referred to this as a 'feedback mechanism'.

[26] More permutations are of course possible and we mention but a few, which highlights precisely the reason why the Commission needs to particularise this, so that the excipients can understand the case against them.

[27] Similarly it is also not clear what role the follow-up email plays in the Commission's case. We know that only one of the excipients replied. Is the reliance on firms that replied, a form of 'offer and acceptance' or does the Commission allege that the contravention had already taken place by what occurred at the September meeting and that the follow-up email and the response thereto are acts in furtherance of the earlier formed conspiracy or are relied on as collaboration of its prior existence or does it simply constitute evidence. This is not clear from the referral because as noted, paragraph 48 contains the phrase *"... who indicated their agreement as reflected on the spreadsheet..."*.This is an important issue that the Commission needs to clarify.

[28] We have set out in our order the particularity that is required in this respect and need not take this issue further as the detail required by the order is self-explanatory.

[29] The next issue requiring particularity is the nature of the alleged collusive conduct. Did it amount to an agreement, a concerted practice, or both? The Commission appears to rely on both. Case law suggests that if a concerted practice is relied on it needs to be specifically pleaded.[8] For instance, parties may commence with an agreement but later follow on conduct may constitute a concerted practice. Sometimes the difference may be theoretical and the distinction elides. Nevertheless, due to the case law this difficulty must at least be grappled with by the pleader when seeking to allege both as the Commission has in the present referral. It is unclear if the conduct that is relied on for the concerted practice is the same as that for the agreement or something different or additional thereto. This requires further particularity and we address this in paragraph 2.5 of our order.

[30] The second issue is whether the complaint can be remedied. We consider that it can. The excipients have contended they do not understand what the case is that they have to meet and hence the need for particularity, but at the same time they are sufficiently certain that there can never be a case made out against them in terms of section 4(1)(b)(i). In this respect the excipients' argument is circular. If the agreement is not properly alleged then it is premature to argue that something yet to be properly formulated can never contravene the section. Until we have further particularity from the Commission we cannot begin to consider such an argument let alone decide whether it is one that should be decided at exception stage. There is no basis laid for dismissing the case against the excipients on the basis of no cause of action, until the particulars have been supplied.

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[8] *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another 2011 (3) SA 171 (CAC) (15 February 2011)*, at para [27].

[31] We therefore make the following order:

ORDER

PART A

The Competition Commission must give further particulars regarding the issues set out in paragraphs 1 – 3 below.

1. Is it alleged that there was an agreement/concerted practice between wholesalers? If not, on what facts does the Commission rely to assert that wholesalers had contravened section 4(1)(b)?

2. If the Commission alleges that there was such an agreement/ concerted practice between wholesalers, then further particularity is required on the following –

   2.1. What facts does the Commission rely on to assert the existence of an agreement/concerted practice between the wholesalers?

   2.2. What was the content of the agreement/concerted practice?

   2.3. Is it alleged that the agreement had an effect on wholesale or retail pricing or both, and if so, how?

   2.4. Is it alleged that the agreement/concerted practice was implemented, and if so, details of the period of implementation should be provided.

      2.4.1. More specifically, apart from the email sent out, referred to in paragraph 42-45 of the referral and the

replies thereto, is there any allegation of any further conduct by the wholesale respondent firms thereafter, on which the Commission relies?

2.4.2. On what does the Commission rely for the alleged "*... indications of agreement...*" signified by those firms named in the spreadsheet. More specifically is it alleged that liability occurred already by attendance at the 10 September 2008 meeting, and if so, what reliance is placed on the firms who allegedly indicated their agreement as opposed to firms who are not so-named in the spreadsheet? The Commission has alleged that only one of the excipients had indicated agreement by means of clicking the email from Pienaar as reflected in the spreadsheet marked Annexure SM8. What is the legal significance of this alleged acceptance? How does the liability of the non-signifying excipients differ from that of the firm that allegedly did? More specifically had liability occurred already at or prior to the meeting and if so what is the significance of reliance on the subsequent "acceptance".

2.5. If the allegation of a concerted practice relies on facts that differ from those relied on for the agreement these should be set out.

3. If the respective respondents are implicated differently in the Commission's case this distinction should be indicated.

PART B

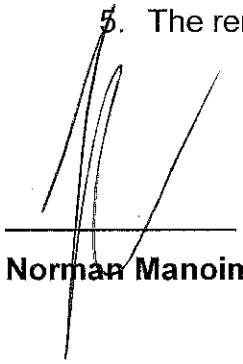
1. The Commission's further particulars should be supplied in the form of a supplementary affidavit, which may include more information than that indicated in Part A, but must, at a minimum, address itself to the particulars sought in Part A.

2. The supplementary affidavit should be filed within 20 business days of this order.

3. The respondents must file their answering affidavits, if any, within 20 business days of the filing of the supplementary affidavit.

4. The Commission must file its replying affidavits, if any, within 15 business days of the filing of any respondent/s answering affidavit.

5. The remaining relief sought by the respondents is dismissed.



Norman Manoim

09 April 2013
Date

Yasmin Carrim and Medi Mokuena concurring.

Tribunal Researcher : Ipeleng Selaledi

For Omnico : Adv. Jerome Wilson instructed by Lowndes Dlamini

For Cytek : Adv. Anthony Gotz instructed by Webber Wentzel

For Coolheat : Adv. David Stephens instructed by Shaie Zindel

For the Commission : Adv. Michelle Le Roux instructed by the State Attorney