REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA OF SOUTH AFRICA

HELD IN CAPE TOWN

CAC CASE NO: 193/CAC/Jun21

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED. NO

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SIGNATURE **DATE: 25 March** 2022

In the matter between:

THE COMPETITION COMMISSION Appellant

And

INTERACTION MARKET SERVICES HOLDINGS (PTY) LTD Respondent

In re: Exception Application

INTERACTION MARKET SERVICES Applicant

And

THE COMPETITION COMMISSION

Respondent

JUDGMENT

SIWENDU AJA

Introduction

[1] The contentions in this appeal are whether in prosecuting a complaint under section 4(1)(b)(i) Competition Act No 89 of 1998 (the Act), it is incumbent on the Competition Commission (Commission) to plead a detailed market definition and define the geographical markets where the alleged contravention occurred. The Court is also asked to determine whether it is essential for the Commission to provide (1) details of the value chain where the contravention happened in the relationship between the respondents; and set out (2) the manner and extent to which the alleged contravention had an effect on competition in any relevant market.

[2] A determination of the above contentions has a bearing on the Commission's ability to progress the prosecution of a complaint it brought against fifteen respondents including Interaction Market Services Holdings (Pty) Ltd (IMSA). IMSA is a voluntary association in which the respondents are members.

[3] The Commission claims that the respondents were agents of South African farmers and acted as intermediaries between buyers and farmers to sell fresh fruit and vegetables at various markets throughout the country. It alleges that

the respondents agreed and/or engaged in a concerted practice[1] to fix the base commission charged to farmers for selling the fresh produce.

[4] The Commission alleges that IMSA enforced the prohibited practice directly through its structures. It alleges further that of approximately 97 agents, 60 are members of IMSA including the respondents. The appeal emanates from two successive exceptions raised by IMSA and other respondents against the Commission's referral complaint.

[5] After hearing the first exception, the Competition Tribunal (Tribunal) upheld it and ordered the Commission to file a supplementary affidavit to cure certain defects it found in the referral complaint. IMSA raised a second exception notwithstanding the supplementary affidavit filed by the Commission on 30 November 2018 to cure the defects. Following a second hearing, the Tribunal[2] issued an order[3] directing a further supplementation. On 26 May 2021 the Tribunal furnished its reasons for upholding the second exception.

[6] The Commission challenges the orders by the Tribunal on account that the Tribunal erred. It contends that the Tribunal's decision is dispositive of the question whether or not the Commission can prosecute its case without first defining the relevant market. A further compelling argument made before us is that, in imposing the erroneous requirements, the case would be decided on an incorrect formulation of the Commission's cause of action and the law. If left unchallenged, the broader consequence, is that in prosecuting cartels, the Commission will be bound to first conduct a market definition exercise and provide evidence of anti-competitive effects where such an exercise is not required in law.

[7] Consequently, the Commission seeks an order declaring that it has substantially complied with Tribunal Rule 15(2).

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[1] A "concerted practice" means co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.
[2] CT Case No CR191OCT17/EXC248JAN19.
[3] The second exception was heard on 31 October 2019 and the order was issued on 27 November 2019.

Background

[8] In October 2017, the Commission referred a complaint to the Tribunal, for an order declaring that the respondents breached section 4(1)(b)(i) of the Act and were liable to pay the administrative penalty prescribed in section 58(1)(a)(iii) read with section 59(2) of the Act.

[9] Various respondents namely, Botha Roodt (Pretoria), IMSA, and DW Fresh Produce CC first excepted to the referral complaint, contending that the allegations against them were unsubstantiated and were pleaded in overbroad and imprecise terms inconsistent with Tribunal Rule 15(2). Part of their complaint was that the case against them was not cognisable under section 4(1)(b)(i) of the Act because the Commission had not alleged facts to show:

- cooperation and or coordination which replaced their independent action amongst the respondents;
- competitor contact leading to the concerted practice;
- concerted interdependent action in a co-operative and co-ordinated way with other respondents amongst others.

[10] The respondents complained further that when they sought particulars and facts of the collusive agreement alleged, the Commission first declined to provide the particulars.

[11] It is not necessary to rehearse the grounds already dealt with in the first exception, save to point out that, after the first hearing, on 7 November 2018, as already alluded to above, the Tribunal upheld the exception and ordered the Commission to set out:

- the manner in which section 4(1)(b)(i) of the Competition Act 89 of 1998 had been contravened;
- The relevant market(s);
- The geographical markets(s) in which this contravention took place;
- Full detail of the agreement and how it was enforced;
- The manner and extent that this alleged contravention has on competition in any relevant market

[12] The Commission complied and filed a supplementary affidavit by Mr Ramoshaba on 30 November 2018.

[13] Dissatisfied with the supplementary affidavit, IMSA and the fifth respondent[4] raised a second exception, picking apart with granularity, the supplementary affidavit. I deal only with those aspects of the exception vital to this judgment.

[14] IMSA contended that the referral complaint fell short of the specific guidance by the Tribunal in the first order, as well as Rule 15(2) and that it did not disclose a cause of action under section 4(1)(b) of the Act. It stated for a second time that; the Commission's reliance on an agreement and/ or concerted practice caused confusion as it was not clear whether the Commission relied on the agreement and/or concerted practice or whether it was relying on the same evidence to allege both contraventions. It asserted that rather than cure the defects, the supplementary affidavit exacerbated them.

[15] IMSA held the view which found favour with the Tribunal; that it was obligatory for the Commission to disclose facts supporting allegations of *either* an agreement *or* a concerted practice, and, in the absence of facts supporting either of the two allegations, the Commission was obliged to state at the early stage of pleading whether its complaint was based on an inference.

[16] Furthermore, IMSA held the notion that the Commission ought to have pleaded material facts establishing the relevant markets and/or the geographic markets as well as facts pertaining to the respondent's horizontal relationship in order to pass muster under section 4(1)(b) of the Act. It contended that a reference to *"fresh produce market*" throughout the country was inadequate, and that unless self-evident, the Commission was obliged to plead why it defined the markets alleged. IMSA applied the same reasoning to the allegations of the concerted practice.

[17] Additionally, IMSA took issue with the allegations about the *"fixed commission*" charge as well as the allegations of its role in enforcing the agreement, complaining that there were no facts pleaded supporting allegations of its enforcement role rendering the allegations obscure, vague and ambiguous.

[18] Despite acknowledging that there had been compliance with aspects of its first order, the Tribunal upheld the exception on the grounds that the Commission

[4] The fifth respondent was a party, but later withdrew from the proceedings.

had not done so with "*precision.*"[5] The Tribunal reasoned based on *Netstar v Competition Commission*[6] that the Commission must plead either an agreement or a concerted practice. Persuaded by IMSA's argument, it held that the Commission must provide details of the facts supporting each of the impugned practices, failing which it must state whether the facts are to be inferred.

[19] Even though the Tribunal accepted that the Commission had properly defined the market, it nonetheless ordered the Commission to provide:

- Specific facts regarding the alleged agreement to fix the base commission charged – in particular, details of when, where, how and by whom was the agreement reached. Failing which, indicate if the agreement is to be inferred from other facts.
- Whether or not it relies on the same facts to allege the agreement as it does the concerted practice, if it relied on different facts for each element, indicate which facts relate to the alleged agreement and which facts relate to the concerted practice.
- To the extent that the Commission alleged the agents were in a horizontal relationship, to assist the respondents understand where the horizontal relationship was, describe the value chain more fully, and indicate where in the value chain the alleged horizontal relationship between the respondents and what services were at issue.
- The geographic markets where price fixing occurred.
- In so far as the alleged agreement by IMSA to fix base (9.5% cap price for produce delivered without pellets) commission charged at 9.5% for produce delivered without pellets, the Commission was to (1) clarify whether its case was that the capped price was indeed charged to farmers during the relevant complaint period; and (2) explain how this agreed maximum commission price cap when charged by competitors had negative consequences for competition.

[20] A weighty part of the Commission's complaint is that the decision of the Tribunal conflicts with established authority and principles governing exceptions.

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[5] Case number CR1910ct17/Exc248Jan19 para 49.
[6] 2011 (3) SA 171 (CAC) para 25.

Issues for determination

[21] We determine whether the Tribunal's order is correct - in particular whether in a case of a contravention under s 4(1) (b), it is incumbent on the Commission to supplement its referral complaint and furnish the respondents with (1) particulars of an agreement and/or a concerted practice, (2) the market definition, their geography, (3) the value chain where the price fixing conduct occurred in the horizontal relationship alleged as well as (4) the anti-competitive effects of the impugned conduct.

[22] The Court is indebted to Counsel for the Commission for the able assistance and for the concise Heads of Argument which were of valuable assistance to the Court. It is essential to state at the outset that the Commission sufficiently explained the horizontal nature of the relationship between the respondents in its supplementary affidavit. As argued by the Commission, neither the language of the act nor the logic of how the section operates requires that there be allegations that the respondents operate in the same geographical market in order to be considered competitors. That point need not be belaboured here. Rather, I deal with the more contentious grounds for the complaint simultaneously with submissions made by the Commission.

[23] For efficacy, the sequence followed in this judgment is to consider the legal questions first and determine whether the Tribunal's order is as envisaged by the Act. Thereafter, I evaluate the facts alleged in the referral complaint together with those facts alleged in the supplementary affidavit and consider whether the Commission complied with Tribunal Rule 15(2).

Applicable Principles and Submissions

[24] Competition Tribunal Rule 15(2) stipulates that:

> Subject to Rule 24(1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –
>
> (a) A concise statement of the grounds of the complaint; and
> (b) the material facts or points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be

While the framing of this rule is not dissimilar from Uniform Rule 18(4) of the High Court,[7] the pleadings in the High Court motion proceedings differ from proceedings before the Tribunal.[8] The Tribunal may adopt a more flexible approach to pleadings than is the practice in the High Court.

[25] Secondly, Section 37(1)(b) of the Act permits this Court to entertain appeals in respect of:

> (ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.

[26] There is no quarrel with the principle that if the Commission relied on an agreement, then proof of consensus to meet the statutory definition of an "*agreement"* would be required. Similarly, in so far as the *"concerted practice"* alleged, proof of a co-operative or co-ordinated conduct would be required.

[27] To structure the case advanced in the appeal, Mr Ngcukaitobi SC (for the Commission) pointed to the *sui generis* and inquisitorial in nature[9] of Tribunal proceedings. They differ from the adversarial nature of the proceedings before the High Court. He argued as observed by the Tribunal in *Competition Commission of South Africa and Others and United South African Pharmacies and Others,* that unlike in the High Court, the aim of the proceedings is to vindicate public interest.[10]

[28] Referring to the Tribunal's decision in *Invensys PLC and Others v Protea technology (Pty) Ltd and Others*[11] he argued that the Tribunal's proceedings involve an intersection of law and economics, often requiring complex economic analysis of the facts to advance a theory of harm. Moreover, the Tribunal has

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[7] 18 (4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto. Facts and not evidence must be pleaded.
[8] Competition Commission of South Africa v Arcelor Mittal South Africa Limited and Others [2013] All SA 234 (SCA) para 37.
[9] Section 52(2) of the Competition Act, states that subject to subsections (3) and (4), the Competition Tribunal- (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and (b) may conduct its hearings informally or in an inquisitorial manner; See also *Competition Commission of South Africa and Others and United South African Pharmacies and Others* (04/CR/Jan02) [2003] ZACT 4 (22 January 2003) and *Global v the Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products*.
[10] (04/CR/Jan02) [2003] ZACT 4 (22 January 2003).
[11] (31/IR/Apr11) [2012] ZACT 97 (21 November 2012).

repeatedly articulated the guiding principle to the determination of exceptions as one of fairness. Indeed, the Tribunal enjoys flexible powers including the power to order an amendment to the referral complaint[12] and the powers to direct the proceedings and call witnesses. Therefore it is not uncommon to subject a complaint referral to more than one iteration.[13] It follows that the approach to the assessment of the prejudice an excipient will suffer must vary.

[29] While there is consensus in the judgments between the Tribunal and the CAC[14] that an "*agreement"* and "*a concerted practice*" differ, the two causes of action are not always mutually exclusive or inconsistent. The CAC underscored that in many cases, the same evidence may be relied upon as pointing either towards an agreement or a concerted practice.

[30] A pertinent contrasting feature is that the observations by the CAC in *Netstar* were made after all the evidence had been led. I find that by requiring the Commission to plead upfront facts supporting either of the two forms of the prohibited practices, in particular the order to state what inferences the Commission relied on, before evidence is led the Tribunal erred.

[31] Firstly, the Tribunal ought to have properly delineated what the Commission may allege during the complaint referral stage from what the Commission was required to prove at the hearing stage. Secondly, in my view, it inadvertently shoehorned the Commission to a premature election about its case before all the evidence was led and assessed. Ultimately, whether there was undeniably an agreement or a concerted practice on the one hand, or whether this was to be inferred from the facts is a matter for evidence.

[32] The above approach is fortified by this Court's view in *Aranda Textiles Mills and Another v The Competition Commission.*[15] After conducting an extensive review of authorities here and abroad, the Court considered the role and application of

[12] *Competition Commission v Bank Of America Merrill Lynch International Ltd And Others* 2020 (4) SA 105 (CAC).
[13] *BAMLI*.

[15] CAC Case No: 190/CAC/Dec 20.

inferential reasoning in cartel cases. The Court reasoned that in the prosecution of cartel conduct, at best, a combination of direct and circumstantial evidence may be necessary. At worst, circumstantial evidence may be all that is available to prove cartel conduct. The court's duty is to assess all the evidence holistically. Logically, it follows that such inferences can only be drawn from proven facts at the hearing.

[33] What is more is that, it is permissible for the Commission to plead its case in the alternative, and allege a prohibited practice based on the same facts in terms of Tribunal Rule 15(3). The effect of the Tribunal's order is to deprive the Commission of the right to do so. It would be manifestly unfair to dismiss the Commission's case on account of particulars which are a matter for evidence. *Netstar* does not find application in the circumstances of the current case.

[34] Turning to the Tribunal's order for additional information about the definition of market, allied with the order to provide details of the anti-competitive effects of the price fixing conduct alleged, I agree that the Commission does not allege with any measure of detail, what the effect of the price fixing allegations were on the price consumers paid for fresh produce, whether directly and/ or indirectly.

[35] Mr Ngcukaitobi SC pointed the Court to various authorities. In *Competition Commission v Pioneer Foods (Pty)* Ltd,[16] the Tribunal had this to say about anti-competitive conduct under section 4(1)(b):

> "In South Africa, price fixing agreements and agreements to divide markets between competitors are considered to be the most egregious offences under the Competition Act. It is for this reason that the South African legislature has sought to create a per se offence under section 4(1)(b) and has recently introduced an amendment to the Competition Act which intends to create criminal liability for persons participating in cartel activity."

[36] Locating the import of section 4(1)(b), he argued that the Supreme Court of Appeal in *American Natural Soda Ash Corp v Competition Commission,*[17] a decision which predated Pioneer, stated as follows:

> "It is clear from its juxtaposition with s 4(1)(a) that s 4(1)(b) is aimed at imposing a 'per se' prohibition: one, in other words, in which the efficiency defence expressly

[16] (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010) Para 27.
[17] [2005] 3 All SA 1 (SCA) (13 May 2005) para 37.

> contemplated by sub-para (a) cannot be raised. The reason for the blunt terms of sub-para (b) is plain. Price-fixing is inimical to economic competition, and has no place in a sound economy. Adopting the language of United States anti-trust law, price-fixing is anti-competitive per se. All countries with laws protecting economic competition prohibit the practice without more. The fact that price-fixing has occurred is by itself sufficient to brand it incapable of redemption.

[37] He further contends that the section does not make a reference to: (a) efficiency or pro-competitive outcomes of an agreement or a concerted practice, or (b) implementation or effects of an agreement or concerted practice.[18] Significantly, in *Pioneer Foods (Pty)* Ltd,[19] the Tribunal, alluding to the decision in *American Soda Ash Corporation and Another v Competition Commission and Others*[20] had this to say:

> "Section 4(1)(b), as opposed to section 4(1)(a) defines the prohibited practices by reference to whether or not an agreement contains one or more features set out in the sub-sections of 4(1)(b) rather than by reference to their effect in a relevant market. Section 4(1)(b) constitutes an offence for which no justification grounds are admissible. Once the Tribunal has found that an agreement or concerted practice between or among competitors exists as contemplated in section 4(1)(b) that is the end of the matter. There is no further enquiry as to the effect of the conduct on the market or whether it was justified or not. This approach is confirmed by the Competition Appeal Court and by the Supreme Court of Appeal."

[38] The Court has no quibble with these authorities or line of argument save to point out that the decisions fortify the conclusion that these questions are best determined after all the evidence had been led. The Tribunal erred on this account.

Was there substantial compliance with Tribunal Rule 15(2)?

[39] It behoves that I now examine whether the supplementary affidavit substantially complies with Tribunal Rule 15(2) in light of the Tribunal's assessment that the Commission disclosed *"the bare minimum"* and has not done so *"with precision.*"

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[18] Section 4 (1) states that - 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.

[19] *Pioneer* Para 29.

[20] [2005] 1 CPLR 1 (SCA) at para 37.

[40] An appraisal of the supplementary affidavit, shows that it sets out the regulatory history of the fresh produce market, and the basis of Commission's complaint. The Commission states that the fruit and vegetable market was regulated by Fresh Produce Markets Act, 1970 (Act No 82 of 1970). Even though the Act did not prescribe applicable tariffs and/or commission, it authorised the Minister to set the tariffs or commission from time to time.

[41] The regulation of the fresh vegetable and fruit produce market ceased in 1992 when it was repealed by the Agricultural Produce Agents Act No 12 of 1992. The Commission asserts that despite the deregulation, and, irrespective of their respective location in the country, the respondents continued to charge the same commission in the same manner that applied during the regulation period. It also claims that the respondents have a presence in multiple fresh produce markets and the practice of charging the same base commission does not vary from market to market.

[42] In addition to the above, the Commission complains that the practice of charging the same base commission was not a unilateral decision by the respective agents. IMSA, an association in which the respondents are members, communicates what the base commission should be, and encourages them to charge a commission not below a certain base price for particular types of fresh produce through its structures. It claims the respondents do not deviate from the base commission set by IMSA.

[43] The maximum commission was set at 9.5% for fresh produce delivered without pallets. It has set the commission for categories of produce as follows:

- 5% for potatoes and onions
- 7.5% for all other fruits and vegetables, and
- 7.5% for all other fruits and vegetables delivered to the Respondent by farmers without pallets

[44] The Commission alleges that members of IMSA, acting under the auspices of the association *agreed* to fix the commission they charge, *alternatively* engaged in a concerted practice to fix the Commission. The Commission further clarified that the respondents engaged in a single concerted practice and/ or entered into an agreement to charge the same base commission, a conduct which could only

have been sustained if the participants had agreed, alternatively they knew of the co-ordinated practice and associated themselves with it. The compulsory percentages for each category of vegetable or fruit could not be clearer. No further particularity is required.

[45] A trite principle governing the adjudication of an exception is that allegations of fact by a complainant must be accepted as true. In this instance, the Tribunal accepted the role of the respondents as fresh produce market agents and intermediaries between farmers and buyers. As already alluded to above, it also accepted the horizontal relationship between them given that they are in the same line of business. It also accepted that the respondents were members of IMSA.

[46] Turning to the level of particularity required in the referral complaint, the Tribunal altered the applicable test requiring a degree of *"precision*." Yet, in *Paramount Mills (Pty) Ltd v Competition Commission*[21] this Court held that:

> "a party against whom a complaint has been lodged is clearly entitled to sufficient information to determine the nature of the prohibited practice", however "the enquiry as to the requisite level of understanding should not be sourced in the principles which apply to the nature of adversarial proceedings employed in a civil case.*"*

[47] I agree with the submission that the purpose of the exception is not to scrutinise pleadings for every flaw and imperfection.[22] It is not about the granularity of the facts alleged. The affidavit must contain sufficient "*concise statements*" of the grounds relied upon and "*material facts or point of law"* relied upon. The same applies to answering affidavits. Not all facts pleaded must be answered either, but only those facts that are material to the grounds of the referral must be answered.

[48] I find that the Commission sufficiently pleaded its case in the referral complaint read with the supplementary affidavit and has substantially complied with Rule 15(2). There is no prejudice to the respondents.

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[21] (112/CAC/Sep11) [2012] ZACAC 4 (27 July 2012) para 61
[22] *Living Hands (Pty) Ltd and Another v Ditz and Other* 2013 (2) SA 368 (GSJ)].

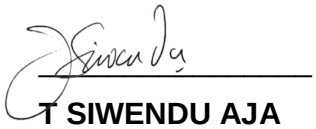
Conclusion

[49] There is compelling merit in the appeal. The effect of the decision of the Tribunal contradicts established jurisprudence of this Court. The orders place the cart before the horse. Their import has negative implications for future prosecution of cartel conduct. The decision and order falls to be set aside.

Accordingly, I make the following order:

a. The appeal is upheld.
b. The decision and order of the Tribunal is set aside.
c. The respondent is directed to file its answering affidavit within 10 days of this judgment.
d. There is no order as to costs.

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 25 March 2022.



T SIWENDU AJA

I concur

M VICTOR JA

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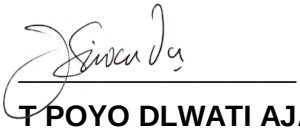
I concur



T POYO DLWATI AJA

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Counsel for the Commission: Mr Ngcukaitobi SC

With him: Mr Mehluli Nxumalo

Instructed by: Ndabanzaba Attorneys Inc

Heard on: 31 January 2022
Delivered on: 25 March 2022