COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017731

In the matter between:

COMPETITION COMMISSION	**Applicant**
and	
SAM LOUW NO	**First Respondent**
ANITA LOUW NO	**Second Respondent**
WELKOM KEY CENTRE CC	**Third Respondent**

Panel	:	Norman Manoim (Presiding Member) Mondo Mazwai (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	13-14 October 2014
Order issued on	:	18 December 2014
Reasons issued on	:	18 December 2014

Decision and order

Introduction

[1] This case concerns a complaint referral brought by the Competition Commission ("Commission") against Sam Louw N.O. and Anita Louw N.O. (trading as Louw's Key Centre) and Welkom Key Centre CC ("Welkom Centre"). For ease of reference Sam Louw N.O. and Anita Louw N.O. will be referred to as Louw's Centre. The Commission alleged in its referral that

Louw's Centre and Welkom Centre entered into an agreement as far back as 1988, not to sell locking products in each other's territories. The Commission alleges that the substance of the agreement was that each party to the agreement was allocated various territories in the Free State Province ("Free State") and in the Northern Cape Province ("Northern Cape"). As a result of such agreement both Welkom Centre and Louw's Centre are alleged to be in contravention of section 4(1)(b)(ii) of the Competition Act 89 of 1998 ("the Act").

[2] Louw's Centre is a Trust registered in accordance with the laws of the Republic of South Africa with its main place of business in Bloemfontein. Welkom Centre is a close corporation registered and incorporated in accordance with the laws of the Republic of South Africa with its main place of business in Welkom. Welkom Centre is owned by Mr John Shawe ("Mr Shawe"). Welkom Centre and Louw's Centre are both agents of Multi-Lock Africa ("MTL").They distribute and supply locking products on behalf of MTL. They both supply and distribute locking products such as security cylinders, matching keys, padlocks, electronic door solutions, multipoint locks and padlocks. They both sell locking products to end consumers such as households, tertiary institutions, financial institutions and the mining industry. The respondents are thus in a horizontal relationship as contemplated in section 4 of the Act.

History of the case

[3] The Commission's referral was a result of a complaint that was lodged by Mr Marnitz Du Plooy ("Mr Du Plooy") on 03 November 2011, about possible anti-competitive conduct between Louw's Centre, Welkom Centre and MTL. Mr Du Plooy was employed at Louw's Centre between 2001 and 2010, first as a key-cutter and later as a locksmith. In 2011 he started his own locksmith business. In his complaint, Mr Du Plooy alleged that there was an agreement between Welkom Centre, Louw's Centre and MTL not to sell MTL locking products in each other's territories.[1] On 23 November 2011, Mr Du Plooy

[1] See pages1-4 of the trial bundle part A.

withdrew his complaint in accordance with Rule 16(2) of the Rules for the Conduct of Proceedings in the Competition Commission. Following the complaint withdrawal, the Commissioner, acting in terms of section 49B(1) of the Act initiated a complaint on 11 September 2012 against the respondents for alleged market allocation in contravention of section 4(1)(b)(ii) of the Act.[2] The Commission's complaint whilst influenced by Mr Du Plooy's complaint was not identical to it.

[4] Upon completion of its investigation, the Commission found that Welkom Centre and Louw's Centre had concluded an agreement which contravenes section 4(1)(b)(ii) of the Act. The Commission also discovered that Louw's Centre and Welkom Centre divided the Free State and Northern Cape Provinces as follows:

- In the Free State, Louw's Centre was allocated and still operates in Bloemfontein, Ladybrand, Bethlehem, and Harrismith, whilst Welkom Centre was allocated and still operates in Sasolburg, Welkom, Virginia, Hebron, Kroonstad and Odendaalsrus.

- In the Northern Cape, Louw's Centre was allocated and still operates in Kimberly, Kuruman and Springbok, whilst Welkom Centre was allocated and still operates in all areas of the Northern Cape save for the above three areas.[3]

[5] In relation to MTL, the Commission issued a notice of non-referral after it became evident that MTL does not compete with Louw's Centre and Welkom Centre in the downstream market for the distribution of locking products, and was therefore not party to the horizontal arrangement between Welkom Centre and Louw's Centre.[4]

[2] See Form CC1 at page 5 of the trial bundle part A.
[3] See pages 14-15 of the trial bundle part B.
[4] See Notice CC8 at pages 39-41 of the trial bundle part A.

Commission's case

[6] The Commission then referred the matter to the Tribunal. In the complaint referral the Commission alleged that the respondents had contravened section 4(1)(b)(ii) of the Act by agreeing not to sell locking products in each other's territory. The Commission alleged that the products that formed part of the agreement were: security cylinders, matching keys, padlocks, electronic and multipoint locks.[5] The Commission submitted that the relevant geographic markets were the Free State and Northern Cape.

[7] Finally, the Commission alleged that the conduct by the respondents is still on-going.[6]

[8] The Commission sought the following relief:

1. *Declaring that the conduct of Welkom Centre and Louw's Centre contravenes section 4(1)(b)(ii) of the Competition Act, 89 of 1998("Act");*

2. *Interdicting Welkom Centre and Louw's Centre from contravening section 4(1)(b)(ii) of the Act;*

3. *Imposing an administrative penalty against Welkom Centre and Louw's Centre in an amount equal to 10% of their respective annual turnover for the preceding year in respect of the contravention of section 4(1)(b)(ii) of the Act, or such amount as the Competition Tribunal determines to be appropriate ; and*

4. *Granting the Applicant such further and/or alternative relief as the Competition Tribunal considers to be appropriate*[7].

[5] See page 12 of the trial bundle part B.
[6] See page 15 of the trial bundle part B.
[7] See Form CT1(1) at page 5 of the trial bundle part B.

Respondents' case

[9] In their answering affidavit the respondents did not place in dispute two key aspects of the Commission's case. They did not deny having been parties to the alleged agreement nor deny that it was still in existence.

[10] Given these concessions in the pleadings it is difficult to discern what their defence was. However it appears the defence case rested on three legs. In the first place they contended that the nature of the agreement was such that it was, as they described it, a 'gentleman's agreement' whose rationale was to help Mr Shawe, an erstwhile employee of Louw's Centre in Bloemfontein, establish his own business in Welkom. Its purpose, so they contended, was not to deny customers the right to shop around for the best prices and services.

[11] The second aspect of their defence was to assert, which the Commission does not dispute, that the agreement had been concluded in 1988 and thus 11 years prior to the commencement of the new Act on 1 September 1999. What it appears the respondents are saying is that the agreement, having been concluded before the commencement of the Act, had not been implemented in any active sense, post the operation of the Act, because it was not necessary for them to have done so and normal market circumstances prevailed – each firm acquired its natural customer base given its geographical location.[8]

[12] However despite this in their answering affidavit, the respondents do not deny the allegation the Commission made that the conduct is on-going.[9] Rather the respondents make the curious remark that "they continue to render services to clients in the areas where customers normally contact them."[10] This serves to reinforce rather than to contradict the Commission's assertion that the agreement is on-going.

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[8] See pages 33, 39 and 42 of the trial bundle part B. Also see page 6 of the transcript of the hearing.
[9] See page 41 of trial bundle part B, in the respondents' answering affidavit.
[10] Ibid

[13] The third line of defence was an attempt to confine the ambit of the complaint only to the MTL products, rather than, as the Commission alleges, to a range of lock products that included those of MTL. They argue that the Commission is confined to the facts of Mr Du Plooy's complaint, and since this was centred on MTL products, the Commission could not include any other products.[11]

Our Analysis

[14] We will deal with this third defence first - that the complaint must be restricted to MTL products. The complaint that was referred by the Commission to us is not the one that was lodged by Mr Du Plooy, but rather a new complaint that was freshly initiated by the Commission as we noted earlier. As a matter of law the Commission was therefore not confined to considering only MTL products, but was at large to consider the other products as well. When the Commission investigated the case it made this quite clear in the correspondence with the respondents when it alleged the following:

[15] "*The Competition Commission of South Africa has concluded its investigation of the alleged contraventions of the Competition Act, against Welkom Key Centre. The Commission found that Welkom Centre has contravened section 4(1)(b)(ii) of the Act by: Dividing markets by allocating specific territories in which to operate with regards to locking products.*"[12]

[16] It is also clear from the response of the respondents in reply that they understood this to be the case[13].

[17] Finally, when the Commission referred the case, it made it quite clear that its case was one of market division in respect of the following products viz.

[11] See page 172 0f the transcript of the hearing.
[12] See page 35 of the trial bundle part A.
[13] See page 33 of the trial bundle part A.

locking products such as security cylinders, matching keys, padlocks, electronic door solutions, multipoint locks and padlocks.

[18] We thus conclude that the Commission was entitled to refer the case in respect of all the products. We turn now to the question of whether the Commission has established this case in the evidence.

[19] The Commission firstly relies on the correspondence from the respondents obtained during the course of the investigation.

[20] Louw's Centre when responding to a letter the Commission sent during its investigation responded as follows:

"Our agreement with Welkom Key Centre applies to all products that we are mutually agents of and is not limited to Mul-T-Lock Products only."[14]

[21] Mr Louw did not refute this when he gave oral evidence so this concession must stand.

[22] In his correspondence Mr Shawe also mentions that the agreement concerned locking products.[15]

[23] We find therefore that the Commission's case is not confined to MTL products and has properly been referred to include all locking products as alleged and that this aspect of the agreement has been proved.

[24] It is also clear from the pleadings and evidence led before us that there is no dispute as to the relevant geographical market identified by the Commission in its referral papers.[16]

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[14] Ibid.
[15] See pages 15-16 of the trial bundle part A.
[16] Supra at footnote 3.

[25] The Commission has thus established the nature of the agreement, that it related to market division and the subject matter of the agreement, that it related to the locking products previously mentioned in paragraph 17.

[26] We now deal with the second aspect of the defence whether the agreement is on-going. As noted earlier this aspect has not been expressly denied on the pleadings as one would have expected had this been the respondents case. This alone would suffice to establish the Commission's case on this aspect, however we will also give the respondents the benefit of the doubt by considering whether the evidence establishes that the conduct was on-going in the sense that it continued after the Act came into operation in September 1999.

[27] Mr Louw was the only witness to testify for the respondents.

[28] During his cross-examination, Mr Louw testified that there was never any need for them to discuss the agreement because, for many years, it just continued as was initially agreed upon.[17] He was asked if he could give examples of instances when the two firms may have recently competed. Mr Louw, then mentioned a tender for Central University of Technology. He testified that if he had won the tender he would have given it to Mr Shawe.[18]

[29] In his correspondence with the Commission Mr Shawe makes it clear the agreement is on-going. Mr Shawe submitted that they have no problem with the market allocations as they have been working like that since 1998.[19]

[30] During the Commission's investigation, in response to a Commission's request for information letter dated July 2012, Mr Shawe replied as follows:

[17] See page 122 of the transcript of the hearing.
[18] See page 139 of the transcript of the hearing.
[19] See page 16 of the trial bundle part A.

[31] *"As far as the "gentleman's agreement" is concerned, when I opened Welkom Key Centre in 1988, Mr Louw and myself verbally agreed on the specific areas we would service. Although this agreement is not set in stone, we try to adhere to it as far as possible."*[20]

[32] In the same letter mentioned above, Mr Shawe submitted that he does not compete with Louw's Centre regarding the sales of locking products as they do not sell in one another's area. Mr Shawe went further to submit that they have no problem with the market allocations as they have been working like this since 1988.[21]

[33] Had the agreement not been of an on-going nature one would have expected Mr Shawe to state this, instead, on the contrary, he asserts its continuation. Had of course there been any ambiguity about this aspect one might have expected Mr Shawe to give evidence to this effect. The respondents provided a witness statement on his behalf, but elected during the course of the hearing not to call him. Mr Shawe's evidence in the correspondence on the on-going nature of the agreement has therefore not been refuted.

[34] The on-going nature of the agreement is also corroborated by the only witness for the Commission, the one –time complainant, Mr Du Plooy.

[35] Mr Du Plooy testified that during his employment at Louw's Centre from 2001-2010, he was never sent to do any work in the Welkom area as he knew that there was some arrangement between Welkom Centre and Louw's Centre not to interfere with each other's territory.[22] In addition to this, Mr Du Plooy in his witness statement submitted as follows:

"During my employment at Louw's Centre I became aware of the friendship between Sam Louw and John Shawe. John Shawe and Sam Louw would

[20] See page 25 of the trial bundle part A.
[21] See page 16 of the trial bundle part A.
[22] See pages 14-16 of the transcript of the hearing.

openly speak of the "arrangement" they had not to enter each other's designated territories at locksmith meetings."[23]

[36] Mr Du Plooy's version on this aspect was not challenged during his cross examination so it can be accepted. Given that Mr Du Plooy started working for Louw's Centre in 2001, when the Act had already been proclaimed, the respondents' submission that their agreement was only in operation before the Act was enacted, cannot hold water. Why would they still spoke openly about the arrangement at a time when on their version it had ceased.

[37] Mr Du Plooy further submitted in both his witness statement and evidence that after setting up his locksmith business, he approached Welkom Centre and was blatantly informed that it could not supply Mr Du Plooy, as he did not want to cross into Mr Louw's territory.[24]

[38] It is clear from the evidence and papers before us that the alleged conduct is in fact on-going. The respondents themselves in correspondence between them and the Commission make it clear that the agreement is still in place and they have no problem with their arrangement.

[39] The final attempt by the respondent to refute the on-going nature of the agreement was a reliance on geography. The respondents contended that an agreement between them was unnecessary give the distance of approximately 160 kilometres between their respective businesses.

[40] Yet Mr Louw's evidence shows that he offers services to customers at far greater distances. He mentioned that he operates in Kuruman which is 400km from Bloemfontein.[25] Thus distance would not have been a natural bar to doing services in each other areas; these are businesses

[23] See pages 5-6 of the witness statements file in Mr Du Plooy's witness statement.
[24] See page 3 of the trial bundle part A. Also see pages 24-25 of the transcript of hearing.
[25] See pages 104-106 of the transcript, also see page 138 of the transcript of the hearing.

accustomed to travel far to their customer base. Instead it is clear evidence that the gentleman's agreement is in fact still being adhered to.

[41] Finally we turn to the third aspect of the defence which relates to its rationale.

[42] This is expressed by Mr Louw in the answering affidavit as follows:

"*Save to state an agreement was concluded between the Trust and the third respondent, it is denied that it was intended or factually is in contravention of the section relied upon. I already set out how the two businesses were established, their fields of operation and the rationale for the agreement and the present state of affairs. The respective businesses also operate outside the areas, which were initially agreed upon.*"[26] (Our emphasis)

[43] Although the argument being advanced in this paragraph is not very clear, what it appears the respondents are relying on, is having a justification for the agreement which is not an anticompetitive one. However as the Commission rightfully submitted, the alleged conduct in this matter is a *per se* contravention and thus affords no justification. This was correctly held by the Supreme Court of Appeal("SCA") in *American Soda Ash*[27] *where the court emphasized:*

"*The Tribunal has found that once the conduct complained of is found to fall within the scope of the prohibition that is the end of the enquiry. There is no potential for a further enquiry as to whether the conduct is justified (an enquiry of the kind that is envisaged by s4(1)(a), and evidence to that end is not relevant and thus inadmissible. It is this finding that the Competition Appeal Court upheld and it is clearly correct.*"

[26] See page 37 of the trial bundle part B.
[27] American Soda Ash Corporation and Another vs. Competition Commission and Others [2005] 1 CPLR 1 (SCA) at para 37.

[44] This approach was also confirmed by the Tribunal in the *Pioneer Foods* case[28] where the court held the following:

"Hard core cartels, as contemplated in section 4(1)(b) of the Act are per se offences. There is no need for the Commission to show any anti-competitive effects and there are no justification grounds available to respondents. So egregious an offence is this, that harm to competition and harm to consumers is presumed by its mere existence. Moreover the extent of loss suffered or damage caused is presumed to be extensive."

[45] Although the respondents submitted that the agreement was watered down over time and no longer served any purpose in the market, we cannot agree that this is in fact true. As is well known in cases of cartels like this one, parties to a cartel agreement need not meet regularly to ensure that an agreement is adhered to. This approach was also recognised in the *Pioneer Foods* case, where the Tribunal held that to find that an agreement of co-ordination exists does not require evidence of daily co-ordination or attendances at each and every meeting.[29]

[46] During the hearing when the respondents were asked when exactly the agreement ceased, they were unable to give us an exact time of when the agreement ceased to exist, let alone an approximation of when the agreement was no longer adhered to.[30] Even when the respondents were asked during the hearing whether there is any evidence of competition between the respondents, between 1999 and 2014, such evidence was not forthcoming. Instead the evidence given during closing argument of the different clientele of the respondents only proved that the market was still indeed divided as agreed upon in 1988.[31]

[28] The Competition Commission and Pioneer Foods (Pty) Ltd, Case No: 15/CR/Feb07, at para148 page 50.
[29] Ibid at paragraph 34, page 10.
[30] See page 185 of the transcript of the hearing.
[31] See pages 188-189 of the transcript of the hearing.

Conclusion

[47] Based on the evidence before us, we are not convinced that the gentleman's agreement entered into by the respondents in 1988 has ceased to exist. To the contrary the respondents are still adhering to the gentleman's agreement as they have submitted themselves in various documents before us. Further the agreement was not confined to MTL products but to all the locking products that the Commission alleged in the complaint referral.

ORDER

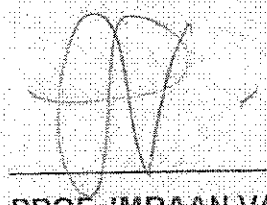
1. Louw's Centre is found to have contravened section 4(1)(b)(ii) of the Act, by agreeing to enter into an agreement to divide the Free State and Northern Cape markets in relation to the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks;

2. Welkom Centre is found to have contravened section 4(1)(b)(ii) of the Act, by agreeing to enter into an agreement to divide the Free State and Northern Cape markets in relation to the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks;

3. The agreement referred to in paragraphs 1 and 2 was in existence prior to 1 September 1999 and still persists at date of this order;

4. Welkom Centre and Louw's Centre are hereby ordered to immediately cease and desist from contravening section 4(1)(b)(ii) of the Act;

5. In relation to remedies, as agreed during the hearing, a further Pre-Hearing will be conducted to discuss the matter.



18 December 2014

PROF. IMRAAN VALODIA **Date**

Mr Norman Manoim and Ms Mondo Mazwai concurring.

Tribunal Researcher:	Caroline Sserufusa
For the Applicant:	Advocate Tererai Mafukidze instructed by the State Attorney
For the Respondents:	Advocate Rudie Cronje instructed by Koekemoer Attorneys