competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019331

In the matter between:

Altech Netstar (Pty) Ltd **Applicant / Excipient**

And

Lekoa Fitment Centre **1st Respondent**

In re

The Complaint referral between:

Lekoa Fitment Centre **Complainant**

And

Altech Netstar (Pty) Ltd **Respondent**

Panel : Yasmin Carrim (Presiding Member),
Norman Manoim (Tribunal Member)
Medi Mokuena (Tribunal Member)

Heard on : 21 October 2014
Reasons issued on : 20 November 2014

Reasons for Decision and Order

Introduction

[1] On 21 October 2014 the Competition Tribunal ("Tribunal") was called on to determine whether an exception raised by the excipient, Altech Netstar ("Netstar"), that a complaint brought against it by Lekoa Fitment Centre ("Lekoa") discloses no cause of action was to succeed. As something of a subsidiary issue we were required to determine whether certain amendments which Lekoa sought to bring to remedy the

allegedly defective complaint referral were validly made in terms of Competition Tribunal Rule 18.

Background

[2] We consider it necessary to briefly explain the relationship between Netstar and Lekoa, and their respective positions in the market at hand.

[3] Netstar is the pioneer of vehicle recovery services in South Africa and has been operative in that business since the mid-1990s. Lekoa operated a fitment centre and performed certain work for Netstar in terms of an agreement, "the Fitment Centre Agreement", the material terms of which were as follows:

- Lekoa would perform the "*installing, registering, re-registering and servicing of Altech Netstar Products*" to a particular quality standard; and
- Netstar would pay Lekoa a pre-determined fee for each time it performed that "*installing, registering, re-registering and servicing of Altech Netstar Products.*"

[4] The relationship between the parties reached breaking point during the course of 2013, resulting from alleged non-compliance by Lekoa with certain technical and other performance standards provided for in the agreement. Lekoa, on the other hand, alleges its grievance stems from monies owed to it. The contractual relationship ended in early 2014 when Netstar terminated for alleged material breach by Lekoa.

The Complaint and Referral:

[5] On 16 June 2013, Lekoa filed a complaint with the Competition Commission ("Commission"), in the prescribed form, alleging that Netstar had engaged in "*unfair practices, unpaid resources, unpaid work, unfair pricing, differential treatment, unstandardized quality system, abuse of power, restraint of trade, and unfair termination of contract*". The relief sought by Lekoa was "*an alternative approach, resolution for a mutually beneficial model*, "*rescind the termination of the contract*", "*rescind the restraint of trade*", and "*redress for inherent losses*". The specific section of the Competition Act[1] ("the Act") allegedly contravened was section 2(e), i.e. the

[1] Act No. 89 of 1998, as amended

section dealing with one of the purposes of the Act viz. the opportunity for small businesses to participate equitably in the economy.

[6] The Commission investigated the complaint and on 11th June 2014 issued a Notice of Non-referral in terms of section 50 of the Act.

[7] Dissatisfied with the Commission's decision to non-refer, Lekoa referred the complaint directly to the Tribunal ("Referral") in terms of section 51 of the Act. In response thereto, Netstar raised an exception on the basis that Lekoa failed to comply with Tribunal Rule 15(2)[2] in that it neglected to make out a cause of complaint necessary to sustain a complaint referral. Netstar also informed Lekoa that section 2 of the Act does not set out what is prohibited.

[8] Presumably in an attempt to cure the alleged "defects" to which Netstar referred, Lekoa sought to make three amendments to the Referral ("the Amendments"). The material change brought about by the amendments was that Lekoa now alleged that Netstar had contravened sections 5(1), 8(c) and 9(1) of the Act. In addition to bringing the Referral within the prohibited sections, Lekoa still persisted with its allegation that Netstar had contravened section 2(e) of the Act.

[9] Netstar then alleged that the Amendments failed to comply with Competition Tribunal Rule 18.[3] Netstar neglected, however, to specify the basis upon which the amendments were non-compliant and when clarity regarding the alleged non-compliance was sought at the hearing of the matter on 21st October 2014, Netstar elected, correctly so in our view, to not pursue this argument with any real conviction.

[10] Having essentially abandoned the Rule 18 non-compliance argument, Netstar's principal submission then became that notwithstanding the Amendments, assuming they were procedurally valid, the Referral would remain materially defective and thus excipiable for the reasons set out hereunder. In other words, what we were ultimately called on to determine was whether the Referral as amended, contained the necessary allegations to sustain a complaint referral.

---

[2] Tribunal Rule 15(2) provides that a complaint referral must contain a concise statement of the grounds of the complaint, and the material facts and points of law relied upon.

[3] Tribunal Rule 18 merely provides that '*The person who filed a Complaint Referral may apply to the Tribunal by way of Notice of Motion in Form CT6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed.*"

[11] When read together with the sought amendments, the Referral appears to be founded on sections 5(1), 8(c) and 9(1),as well as persisting with section 2(e), each of which will be considered in turn hereunder.

[12] The hearing of this matter was held on 21st October 2014. Netstar was represented by Advocate Mooki on the instruction of Webber Wentzel Attorneys while Lekoa was represented by its owner Mr Sibanda, assisted by his spouse Mrs Sibanda.

Respondent's Section 2(e) Allegations

[13] Prior to amendment the Referral relied solely on an alleged contravention of section 2(e).

[14] Section 2 of the Act sets out the purpose of the Act and provides, in part, that the Act seeks to "*promote and maintain competition in the Republic in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy*".[4]

[15] As correctly argued by Netstar, a purpose clause is not a prohibition clause and a firm cannot be found to have contravened the Act on the basis that its conduct was in breach of one of its purposes. Purpose provisions are aspirational and they seek to animate the objects of the Act as a whole. They certainly do not impose obligations on firms. To determine what is prohibited requires one rather to consider Chapter 2 of the Act, where the forms of proscribed conduct are set out in sections 4 – 9.

[16] The exception in respect of section 2(e) is therefore well-founded as it relates to a material error of legal understanding on behalf of Lekoa.

[17] The ghost of section 2(e) was still relied on by Lekoa at the hearing although in oral argument it was presented as relevant to the proper interpretation of section 5(1), as we go on to consider below.

[4] Section 2(e) of the Act.

Respondent's section 5(1) Allegation

[18] Section 5(1), at its simplest, prohibits an agreement between firms in a *vertical relationship*[5] if it has the effect of substantially and adversely affecting competition in a defined market.

[19] When one considers the relief sought by Lekoa, even cursorily, it becomes immediately evident that certain aspects thereof, particularly in respect of the section 5(1) allegation, are inherently contradictory. Lekoa alleged that the Fitness Centre Agreement contravened section 5(1) of the Act yet it sought a declaration that Netstar's termination of that very same agreement be rescinded. If the agreement was in fact unlawful for running afoul of section 5(1), the Tribunal is certainly not competent to rescind the termination thereof. Alternatively, if the contract does not contravene section 5(1), we are not competent to declare it a vertical anti-competitive agreement.

[20] At the hearing of this matter, the Tribunal enquired from Lekoa whether it understood the difficulty with the relief sought in respect of its 5(1) allegation and Mr Sibanda indicated, rather unequivocally, "*I perfectly understand that*".[6]

[21] Notwithstanding the inherent difficulty in the relief sought by Lekoa, the Tribunal sought to enquire whether the alleged vertical arrangement between Lekoa and Altech warranted cause for concern.

[22] Lekoa alleged that the terms of the agreement "imposed" upon it by Netstar prevented it from dealing with any products or services of Netstar's competitors. This, so it argued, contravened section 2(e) of the Act in that it "*retarded the development of small businesses*". While section 2(e) sets out one of the objectives for which competition in the economy must be promoted, and while it is something to which we have regard when dispensing our functions in general, it is undoubtedly not the appropriate test to employ when determining whether a particular agreement runs afoul of a specific provision of the Act.

[23] In the interaction between Mr Sibanda and the panel members, it became evident that Lekoa, other than making repeated reference to its own plight as a small

---

[5] *Vertical relationship means the relationship between a firm and its suppliers, its customers or both.*
[6] Page 29 of the transcript.

business, could in no way refer the Tribunal to some lessening of competition in any relevant market, let alone in its own area of operation.

[24] Netstar explained that the agreement was an exclusive arrangement, which was not *per se* unlawful under the Competition Act. There were clear pro-competitive justification grounds for the exclusive arrangement. It had invested in the development of Lekoa as an exclusive Netstar agent. The agreement precluded Lekoa from dealing with competitors' products because the technology it would, and did, become acquainted with was proprietary to Netstar and competitively sensitive. It would be concerned about information about its technology becoming available to technicians and/or agents of competitors. Moreover, there would be concerns about the security of vehicles and the safety of passengers, if sensitive information about its technology and know-how[7] fell into the wrong hands. Fitment centres in a position similar to that of Lekoa had increased their turnover and margins by selling/installing a host of other products and services such as car radios, Bluetooth products, tyres, speakers, etc. Lekoa was not precluded from increasing its turnover and/or margins through achieving economies of scope in its business.

[25] However Lekoa was never concerned about the exclusivity clauses prior to the hearing. Evidenced by the lengthy record of correspondence which appears in the record, Lekoa's complaint has been about defending itself against allegations of deficient service. It has never in its papers, even once amended, alleged that it is harmed by the exclusivity clause(s) in the agreement; nor is its relief premised on excising them from the contract. This allegation appears for the first time in its heads of argument and appears to be something of an afterthought introduced in an attempt to avoid the exception.

[26] Furthermore, the exclusivity clause has become irrelevant for three reasons. The contract has been terminated; the grounds for terminating did not relate to Lekoa alleging breach of the exclusivity clause but rather the quality of its service, and the post-contract restraint of trade relating to the performance of work for Netstar's competitors has, as we explain below, been waived.

[7] For example where and how tracking units are installed into a motor vehicle.

Lekoa's Abuse of Dominance Allegations

[27] In addition to the section 5(1) allegation, Lekoa alleged that Netstar was in contravention of sections 8(c) and 9(1), i.e. general exclusionary conduct and price discrimination respectively. It is trite law that the delineation of a relevant market and the establishment of dominance within that market, howsoever defined, are fundamental to the pursuit of a section 8 or 9 case.

[28] The Referral however, neglects to make mention of any relevant market for competition purposes. Netstar informed Lekoa that its papers in respect of market definition were, at best, incomplete[8] and Lekoa's response thereto was wholly unsatisfactory. Lekoa merely stated that there exists a market and that Netstar enjoys dominance in that market.[9]

[29] At the hearing, the panel members once again engaged with Mr Sibanda whether there in fact was a relevant market that he might have identified, albeit in lay terms, in order to found a section 8 or 9 contravention. Mr Sibanda merely reasserted his previous submission that Netstar was dominant in the vehicle recovery services market yet made no mention of market shares or section 7 whatsoever.

[30] Lekoa's mere assertion that Netstar is dominant does not make it so. Further, Netstar asserts that its current market share of between 18% and 25% in the market for stolen vehicle recovery and fleet management services, assuming for the sake of argument that this is the relevant market, falls well below the dominance thresholds set out in section 7 of the Act.[10] We have had no evidence placed before us to cause us to think otherwise[11].

Conclusion

[31] While we are sympathetic to the difficulties faced by Lekoa and the fact that it has invested substantial amounts of money into establishing this business, Lekoa has

---

[8] *Inter alia* paras 30.3 and 30.4 in the Founding Affidavit in the Exception Application
[9] See paras 37, 38 and 154 in the Answering Affidavit in the Exception Application
[10] Para 30.3 of the Founding Affidavit in the Exception Application.
[11] Lekoa's response to Netstar's assertion regarding dominance, appearing at para 154 of the Answering Affidavit in the Exception Application, evidences its misunderstanding of "dominance" in the competition sense.

been unable to demonstrate that the vertical arrangement between the parties resulted in a substantial lessening or prevention of competition or that there was some exclusionary effect under section 8 or 9(1).

[32] In respect of the section 5(1) complaint, this appears, increasingly so, to be a contractual dispute as opposed to a competition law contravention. Lekoa was rather insistent that the matter belongs in this forum but when asked to unpack the actual competition harm being occasioned by Netstar, he was unable to do so. The closest Lekoa came to articulating a possible competition contravention was in relation to the exclusivity clauses in the contract which prevented it from working for a competitor. However this relief is now academic as noted earlier. The contract has been terminated and although the restraint on working with a competitor still operates post-termination, Netstar has indicated in its answering affidavit that it waived this right. Since this may have been the only relief Lekoa might have been entitled to, even on the most favourable reading of the papers as amended, the waiver means that it has effectively prevailed on this aspect. Insofar as it still seeks to enforce the contract, the relief sought in this respect is incompetent and we need not say much more thereon.

[33] Regarding the section 8 and 9 allegations, it is trite that delineating a relevant market and establishing dominance therein are fundamental yet Lekoa at no point defines a relevant market in the competition sense. Nor was Mr Sibanda able to do so at the hearing during an inquisitorial exchange between him and the Tribunal members on the panel. The failure to adequately address relevant market and dominance is fatal to Lekoa's abuse of dominance submissions. With that in mind, and the aforesaid decision of Netstar to not pursue the Rule 18 argument, we deem it unnecessary to make a finding on whether the Amendments in fact comply with Tribunal Rule 18. That is because, even if the Amendments were declared to form part of the Referral, the exception would succeed.

[34] In sum then we find that Lekoa has failed, notwithstanding the Amendments, to adequately lay the foundation for a competition law case before us. The glaring defects in its submissions have not been cured by the Amendments and the exception thus succeeds. Moreover, it was evident from our engagement with Mr Sibanda at the hearing, that the failure to disclose a cause of action in the Referral is unlikely to be cured by us granting Lekoa yet further opportunity to amend its submissions. We are also mindful of the burden which would be placed on Netstar if

it were required to answer a constantly changing case. For the reasons set out above, we find in Netstar's favour and the exception application succeeds.

Costs

[35] While in the ordinary course, costs follow a successful exception, we consider the matter before us as warranting a departure therefrom. As aforesaid, Netstar's submission regarding the Amendments' non-compliance with Tribunal Rule 18 failed to articulate the respect in which the amendments were non-compliant. This placed Lekoa in the unenviable position of being uncertain of how to remedy such alleged defect.

[36] We have also had regard to the fact that Lekoa was a small business and was represented by its owner, a layman. Although he was misguided as to the nature of the dispute, Mr Sibanda's conduct suggested that he did not approach this Tribunal in bad faith. Netstar, on the other hand, has been represented by a firm of attorneys and experienced counsel and has, as a result of the outcome of this application, avoided a lengthy trial. On balance we find that both fairness and the interests of justice require that we do not award costs against either party in this matter.

Accordingly the following order is made –

1. The exception application is granted
2. The Referral is dismissed
3. There is no order as to costs

Ms Yasmin Carrim

20 November 2014
DATE

Mr Norman Manoim and **Ms Medi Mokuena concurring.**

Tribunal Researcher: Shannon Quinn

For Netstar/Excipient: Adv. O. Mooki instructed by Webber Wentzel

For Lekoa/Respondent: Mr Gombera Sibanda