134/CR/Dec07

competitiontribunal
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09 July 2010

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Competition Commission and SA Breweries Ltd & 13 Others
Case no.: 134/CR/Dec07

Please see attached the reasons for the decision in the separation application in the above matter.

Kind regards

Tebogo Mputle

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: 134/CR/DEC07

SOUTH AFRICAN BREWERIES LIMITED	**First Applicant**
SAB's APPOINTED DISTRIBUTORS (2nd -14th Respondents)	**Second Applicant**
and	
COMPETITION COMMISSION	**Respondent**

In the matter between:

COMPETITION COMMISSION	Applicant
and	
SOUTH AFRICAN BREWERIES LIMITED	1st Respondent
AFRICA'S BEER WHOLESALERS (PTY) LTD	2nd Respondent
BOLAND BEER DISTRIBUTORS (PTY) LTD	3rd Respondent
ERMELO BEER WHOLESALES (PTY) LTD	4th Respondent
GREYTOWN BEER DISTRIBUTORS (PTY) LTD	5th Respondent
MAKHADO BEER WHOLESALERS (PTY) LTD	6th Respondent
MIDLANDS BEER DISTRIBUTORS (PTY) LTD	7th Respondent
MKUZE BEER WHOLESALERS (PTY) LTD	8th Respondent
SOUTHERN CAPE BEER DISTRIBUTORS (PTY) LTD	9th Respondent
STEFQUO (PTY) LTD	10th Respondent
VRYHEID BEER DISTRIBUTORS (PTY) LTD	11th Respondent
MADADENI BEER WHOLESALERS (PTY) LTD	12th Respondent
WESTONARIA BEER DISTRIBUTORS (PTY) LTD	13th Respondent
THOHOYANDOU BEER DISTRIBUTORS (PTY) LTD	14th Respondent

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member), and Merle Holden (Tribunal Member)
Heard on	:	12 May 2010
Order Issued	:	13 May 2010

Reasons: Separation Application

Introduction

[1.] On 13 May 2010 the Tribunal issued an order in which it granted the separation application which was brought by South African Breweries Limited ("SAB") and its appointed distributors.[1] These are the reasons for that decision.

[2.] The application for separation of issues was motivated on the basis of convenience and prejudice to the respondents. The Commission opposed the application. Before considering the merits we sketch out briefly the events leading up to this point.

Background

[3.] On 21 December 2007 the Commission referred to the Tribunal a complaint against SAB and its appointed distributors in which it alleged that:

[3.1] SAB's distribution agreements with its appointed distributors constituted a concerted practice in contravention of section 4(1)(b)(ii), alternatively that SAB's wholesaler agreements and franchise agreements are agreements between parties in a vertical relationship which is prohibited by section 5(1) of the Competition Act (No. 89 of 1998) (the "Act").[2]

[1] This refers to the second to fourteenth respondents in the main matter. The second to eleventh respondents (including fourteenth respondent which was joined later in the proceedings) are liquor distributors with whom SAB has concluded wholesale distribution agreements, and the twelfth and thirteenth respondents are SAB's franchisees with whom SAB has also concluded franchised agreements.

[2] Refer to paras 7-8 of the complaint referral.

[3.2] SAB engaged in minimum resale price maintenance in contravention of section 5(2) of the Act.[3]

[3.3] SAB is guilty of price discrimination in contravention of section 9 of the Act[4]; and

[3.4] SAB abused its dominance by engaging in practices which require or induce retail outlets not to deal with SAB's competitors in the market for the manufacture and sale of beer and the market for the distribution of liquor in contravention of section 8(d)(i) and/or section 8(c) of the Act.[5]

[4.] The progress in these proceedings has been remarkably slow. In the first instance the Commission's complaint was referred to the Tribunal some three years after a complaint had been lodged by the Big Daddy's Group of companies[6] and other liquor wholesalers and retailers.[7] The proceedings at the Tribunal have been plagued by a number of interlocutory disputes between the parties over the last few years. For ease of convenience we have set out in **annexure A** to these reasons, a chronology of these disputes.

[5.] One worth mentioning and relevant to the issue of separation is the exception to the complaint delivered by SAB on June 2008 in relation to the section 8 complaint which then led to the filing of a supplementary founding affidavit by the Commission in which it purported to set out the competitive harm on which it relied in its section 8 complaint.

[6.] Of particular relevance to this application is the prehearing conference held on 8 September 2009. At that conference the presiding member had canvassed a possible separation with the parties, as requested by the 2nd – 14th respondents ("the distributors"). At that time both SAB and the

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[3] Refer to para 9 of the Complaint referral.
[4] Refer to para 11 of the complaint referral.
[5] Refer to para 10 of the complaint referral.
[6] These refer to liquor wholesalers or retailers, trading primarily in the Eastern Cape and some parts of the Western Cape.
[7] This was on 25 November 2004. The Commission extended the investigation period by consent of all the parties until the end of December 2007.

Commission were opposed to such separation and the following timetable was agreed upon:

[6.1] Filing of any further and better discovery applications on or before 23 October 2009.

[6.2] Hearing of further and better discovery applications if necessary on 30 November 2009

[6.3] Filing of factual witness statements by the Commission on or before 19 February 2010

[6.4] Filing of factual witness statements by the respondents on or before 12 March 2010

[6.5] Filing of expert reports by the Commission by 1 April 2010

[6.6] Filing of expert reports by the respondents by 20 April 2010

[6.7] Hearing date from 04 to 28 May 2010, and continue from 02 to 27 August 2010, if necessary.

[7.] The Commission filed its application for further and better discovery timeously. However it appears that the process was fraught with disputes between the parties which led to the Commission seeking to compel SAB to hand over documents it sought. The Commission's application to compel discovery was initially set down for 30 November 2009. That hearing was however postponed, on request by the Commission, after SAB provided it with an undertaking to consider its request. SAB only clarified its position in its answer of 11 February 2010. In its answer SAB opposed the application on the basis that some of the documents sought by the Commission related to a period post December 2007 and the information sought was accordingly irrelevant. The Commission's discovery application was then rescheduled for hearing on 19 May 2010 but was postponed once more to 2 June 2010 by consent of all parties to allow them time to settle outstanding discovery

issues. This hearing was postponed further and the application, which was modified in light of our order of separation, was only heard on 14 June 2010.[8]

[8.] The most immediate trigger for the separation application however was the failure by the Commission to file its witness statements on the agreed dates. Instead of filing factual witness statements the Commission served subpoenas on various witnesses to attend and testify at the hearing. These included Mr Zulu and Mr Gciliza who represent the eighth and twelfth respondent respectively, and three representatives of Brandhouse Beverages, a competitor of SAB, whose evidence had not been foreshadowed or referred to in the complaint referral.[9] The Commission justified its tardiness on the basis that SAB at that time had failed to make full, adequate and proper discovery. SAB challenged this and consequently brought an application for the dismissal of the complaint on 23 March 2010. The Tribunal dismissed that application and further made an order that the witness statements, and/or transcripts or summaries were to be filed by 24 March 2010 and on 6 April 2010.[10]

[9.] When the Commission eventually did file its factual witness statements the interlocutory wrangling continued. SAB brought another application to strike out or alternatively rule as inadmissible, the Brandhouse evidence (which related to the section 8 complaint) on the basis that it went beyond the scope of the case pleaded in the complaint referral and referred to events that occurred after the relevant period of the complaint referral. This issue was ultimately resolved by the Commission's decision to initiate a second section 8 complaint against SAB based on the Brandhouse evidence.

[10.] When the time arrived for the filing of its expert witness statements on 1 April 2010, the Commission, contrary to its assurances given at the dismissal

[8] At the time the Commission's application was limited to documents relevant to the separated complaint.
[9] SAB's other concern with the Brandhouse evidence is that Brandhouse only became a significant competitor of SAB subsequent to the date of the complaint referral.
[10] See dismissal order. After the Tribunal granted an order for separation, a further prehearing was held on 2 June 2010 in which it was decided that the Commission's expert reports in respect to the first separated matter would be filed on 5 July 2010 and the respondents' expert reports would be filed on 15 July 2010.

hearing, was unable to meet its obligations and instead requested a directive from this Tribunal regarding the impact of this on further proceedings. As a consequence of this, the matter was not ripe for hearing and the hearing dates for May were postponed. This left only the August 2010 hearing dates which, if the matter were to be heard at all, would result in a period of almost 6 years having elapsed since the Big Daddy's complaint was lodged.

Legal Framework

[11.] The Tribunal rules do not expressly deal with applications for separation. However Tribunal Rule 55 (1)(b) provides that the Tribunal may have regard to the High Court Rules in instances where a practice or procedure is not provided for in its own Rules.[11]

[12.] An application for separation is governed by High Court Rule 33(4) which provides that:

> *"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such a manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."*

[13.] In *King v King* decision[12] It was held that Rule 33(4) is aimed at the convenient and expeditious disposal of litigation and confers on the court the power to shorten the duration, or to facilitate the final determination, of actions.

[14.] Convenience and fairness are the key guiding factors in the determination of whether or not granting a separation would be suitable in the circumstances of the case. Moreover, the exercise is guided by the facts of each case and

[11] See sections 52(2) and (2A).
[12] 1971 (2) SA 630 (O) at 634F.

entails the weighing of all the advantages and the disadvantages of the separation in the circumstances of the case. This is seldom a simple exercise and requires careful consideration at all times. The Tribunal also enjoys a greater degree of discretion in determining matters of procedures and is required to conduct matters as expeditiously as possible.[13] These considerations must also be included in the balancing exercise.

[15.] Certainly as part and parcel of the inquiry what must be considered is whether there is an overlap of evidence, and if the evidence will overlap it *may* be inconvenient to grant a separation. However, the fact that such overlap *may* exist does not automatically lead to inconvenience - undoubtedly the assessment is not as narrow as it may seem. Other factors that may be considered in the balance include the extent of the factual and legal overlap and whether there are ways that the inconvenience can be obviated in the circumstances if the separation is granted.

Commission's Opposition of the Separation

[16.] The Commission advanced various arguments for why the separation was not convenient in the circumstances of this case. The Commission's contention was that there is no discrete "distribution case". It argued that the abuse and distribution cases are inextricably intertwined factually, particularly in respect of the section 8 and section 9 complaints in so far as SAB's overall strategy is concerned. Further that the questions relating to dominance and market definition straddle both the section 8 and section 9 complaints. Secondly it argued that the section 5(2) and 8 cases both dealt with incentives at retail level and therefore could not be separated.

[17.] For these reasons, the Commission made its own proposal as to what was convenient in the circumstances of this case. In order to salvage the August hearing dates the Commission argued in favour of a separated cases

[13] Section 55 of the Competition Act,1998 (as amended).

consisting of the section 4(1)(b) complaint and the non-retail leg of the section 5(2) complaint. The reason advanced by the Commission in this regard was that if it found that SAB's distribution model was best characterised as horizontal, there would be no need to go into the section 5(1) complaint, in which assessment of anti-competitive effects becomes relevant, as the complaints in those sections are pleaded in the alternative.

[18.] The Commission in its arguments relied heavily on the *Loungefoam decision*[14] which was decided by the Tribunal recently, in which a separation of issues was granted.

First Respondent's arguments

[19.] According to SAB, the distribution case is self-contained and easily separable, both legally and factually, from the abuse case, and to the extent that there may be any factual overlaps, evidence adduced in the distribution case, can again be used in the abuse case.

[20.] As part of the convenience analysis, SAB argued that the separation will provide the first opportunity for certainty in relation to its distribution business, which had been under a cloud of regulatory uncertainty for a number of years. It argued for a separated case consisting of the Commission's section 4(1)(b)(ii), 5(1), 5(2) and 9(1) case.

Second to Fourteenth Respondent's Argument for Separation

[21.] The second to fourteenth respondents associated themselves with SAB's approach in viewing the distribution case as discrete from the abuse case. They argued for the separation because of their interests as distributors, in the complaints under sections 4(1)(b)(ii) and 5(1) in that those complaints challenge their distribution agreements with SAB and themselves. They submitted that the section 5(2) and 9 complaints also relate directly to their

[14] *Loungefoam (Pty) Ltd and Vitafoam (Pty) Ltd* v *The Competition Commission* Case No: 103/CR/Sep8. This was decided o 4 December 2009.

terms of trade with SAB and which are central to their respective businesses. Their businesses were shrouded with regulatory uncertainty for almost 6 years. Furthermore they as appointed distributors have no interest in the Commission's abuse of dominance case under section 8 which is solely directed at SAB. It would be unfair to require the second to fourteenth respondents to be engaged in prolonged litigation, the outcome of which had no relevance for them. In the absence of a separation, the continuing delay will prejudice and would have significant impact on their respective business operations. Thus a separation is manifestly convenient in the circumstances of this case. The appointed distributors were also not agreeable to the terms of the Commission's proposed separation, which they argued, represented the maximum inconvenience for them.

[22.] The distributors further contended that the alleged overlaps, to the extent that they exist at all, are minimal in the context of the overall evidence relevant to those complaints, and could be obviated by allowing evidence in the first separated case to constitute evidence in the case for future determination.

Conclusion

[23.] The circumstances of this case are clearly distinguishable from those in the *Loungefoam decision.*[15] In that case an order of separation was granted in accordance with an agreed separation between the parties. However that order was subsequently withdrawn when it became clear that the issues could not be as easily separated as initially contemplated and that the parties could not agree on demarcation issues.

[24.] This case involves a number of discrete complaints which relate to on the one hand the relationship that SAB has with its appointed distributors at a wholesale level (section 4(1)(b) or 5(1), 5(2) and 9(1)) and those that it has with retailers (section 8 complaint). The fact that the Commission has now initiated a further complaint against SAB has created uncertainty about its current section 8 referral. Indeed there is no certainty whether this complaint will eventually be referred to the Tribunal or not. If it were referred it would be convenient because of the factual and legal overlaps, to consolidate the current section 8 complaint with that later complaint.

[15] Supra footnote 14.

However because of this uncertainty a consolidation of the matter in the near future can only be posited as a possibility not a probability. This distinguishes this case from *Loungefoam* where the Commission's factual case justifying the re-consolidation was complete and set out in its replying affidavits. This is not so in the present case.

[25.] The distribution complaint involves SAB's wholesale distributors (s4(1)(b) and/or s5(1)) as does the resale price maintenance charge (s5(2)). Although there will be some overlap between the contemplated section 8 case and the present section 9 claim in the distribution case since both entail proof that SAB is a dominant firm this aspect should not be overstated when we consider the question of separation. For purposes of the section 9 complaint, SAB has conceded the question of dominance[16] which will obviate the need to lead extensive evidence on market definition and power.

[26.] In our view the circumstances of this case justify the making of a separation order. The next question is to determine a sensible basis for separation. Whilst finding a separation that eliminates any form of overlap between the separated cases is unlikely the most practical is that along the lines proposed by SAB and the distributors. A clear fissure in the case is the distribution model in its various forms versus the section 8 case. There is no doubt that a clear coherent case can go forward in August based on the sections 4,5 and 9 complaints, and the Commission, when it is ready, can then proceed with its section 8 case. Any further postponement of the distribution case will be unfair to the distributors whose businesses have been shrouded with regulatory uncertainty for a prolonged period of time. If we were not to grant a separation along these lines we would require these relatively small businesses to engage, at their own cost, in a section 8 case, which the Commission by its own admission is not ready to proceed with and in which they have no legal interest whatsoever.

[27.] A separation along the lines proposed by the Commission would still require the distributors to participate in the section 8 litigation and would defeat the very purpose for which the separation is sought, namely considerations of convenience, fairness and expedition.

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[16] See para 10.3 of the referral affidavit; paras 93.4 and 93.5 of SAB's answering affidavit. Although it concedes dominance SAB does so based on a different market definition to that alleged by the Commission.

Order

[28.] In the circumstances the Tribunal makes the following order:

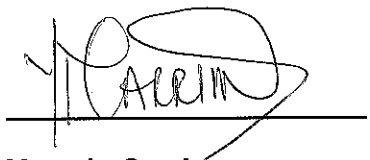
[28.1] The complaints against the First to Fourteenth Respondents under sections 4 (1)(b)(ii), 5(1), 5(2) and 9(1) of the Competition Act (No 89 of 1998) ("the Act"), found in paragraphs 7,8,9 and 11 of the founding affidavit in the complaint referral, ("the first separated complaint") will be heard and determined separately from the complaint under section 8 of the Act, found in paragraph 10 of the founding affidavit in the complaint referral ("the second separated complaint").

[28.2] The hearing of the second separated complaint will be stayed pending further directions by the Tribunal.

[28.3] The hearing of the discovery application on 19 May 2010 is limited to discovery required for the purpose of hearing the first separated complaint, and is postponed sine die in respect of the second separated complaint.

[28.4] The hearing of the first separated complaint is set down for the period 2 to 27 August 2010.

[28.5] There is no order as to costs.



9 July 2010

Yasmin Carrim **Date**

Presiding Member

Concurring: Norman Manoim and Merle Holden

Tribunal Researcher: Londiwe Senona

For the First Respondent	: D Unterhalter (SC) instructed by Bowman Gilfillan
For the Second to Fourteenth Respondents	: J Wilson instructed by Deneys Reitz
For the Commission	: A Gotz instructed by Mkhabela Huntley Adekeye Attorneys

Annexure A

Chronology of History of Interlocutory Applications

21 December 2007 - Commission files and serves its complaint referral to the Tribunal.

11 April 2008 -SAB files an application to strike out paragraphs 10.1 to 10.24 of Commission's complaint referral, principally on the ground that averments on these paragraphs are vague and fail to establish competitive harm. The Commission did not oppose this application on its reasoning to avoid delay.

8 June 2008 - Commission files and serves its supplementary affidavit to its founding affidavit in support of its complaint referral.

12 June 2009 -Commission files and serves application to join 14th respondent (Thohoyandou Beer Distributors).

18 June 2009 - SAB files and serves its notice of intention to raise a special plea.

25 June 2009 - SAB withdraws its notice of intention to raise a special plea.

9 September 2009 - Tribunal issues an order granting the joinder application.

23 October 2009 - Commission files and serves request for further and better discovery.

25 February 2010 - SAB files and serves application for dismissal of the Commission's complaint referral.

23 March 2010 - Tribunal issues an order dismissing SAB's dismissal application

1 April 2010 - Commission files and serves an application for a directive from the Tribunal as well as condonation in respect of its failure to file its expert witness statement.

13 April 2010 - SAB files and serves an application to strike out certain paragraphs of Brandhouse witness statements, and dismissing the complaint in paragraph 10 of the founding affidavit in support of the Commission's complaint referral.

14 April 2010 - Commission files and serves its notice to remove cause of complaint in SAB's strike out application

12 May 2010 -SAB and respondents bring application for separation

13 May 2010 - Tribunal issues order in the separation application

14 June 2010 -Tribunal hears Commission's further and better discovery application

15 June 2010 - Tribunal issues out order on Commission's further and better discovery application.

* * * Communication Result Report (9. Jul. 2010 14:43) * * *

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Please see attached the reasons for the decision in the separation application in the above matter.

Kind regards

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