



COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: 38/CR/Apr12 (016907)

In the matter between:

SASOL CHEMICAL INDUSTRIES LIMITED

APPLICANT

and

OMNIA GROUP (PTY) LIMITED

RESPONDENT

In re:

The complaint referral between:

OMNIA GROUP (PTY) LIMITED

APPLICANT

and

SASOL CHEMICAL INDUSTRIES LIMITED

RESPONDENT

Panel: Norman Manoim (Presiding Member)

Yasmin Carrim (Tribunal Member)

Medi Mokuena (Tribunal Member)

Heard on: 3 December 2013

Order issued on: 18 December 2013

Reasons issued on: 18 December 2013

REASONS FOR THE DECISION IN APPLICATION FOR SEPARATION

Introduction

In this matter we have to decide whether an application brought by Sasol Chemical Industries Limited ("SCI") being the respondent in main case, to have an issue separated for prior consideration should be granted.

- [1] On 5 April 2012, the Omnia Group (Pty) Ltd ("Omnia") referred a complaint against SCI to the Tribunal, following the Competition Commission's decision to decline to refer any complaint against SCI to the Tribunal.
- [2] In its referral Omnia alleges three specific complaints against SCI arising from a supply agreement for ammonia that it had concluded with SCI in May 1996. In brief Omnia alleges:
1. Excessive pricing of ammonia charged to Omnia by SCI for the period May 2006 to December 2008 in contravention of section 8(a) of the Competition Act 89 of 1998 ("Act") ("the excessive pricing complaint");
 2. Price discrimination in ammonia prices charged to Omnia and AECI/AEL by SCI for the period January 2008 to December 2008 in contravention of section 9(1), in that SCI is alleged to have charged AECI/AEL a lower price than that charged to Omnia ("price discrimination complaint");
 3. A catch-all allegation of exclusionary conduct by SCI in contravention of section 8(c) and/or S8(d) that impeded Omnia from expanding within the markets for the supply of limestone ammonium nitrate and ammonium nitrate solution as well as other nitrogen-based fertilizers during the period May 2006 to December 2008 by failing and/or refusing to negotiate a revised ammonia price for a period of 30 months as well prohibiting Omnia from purchasing from other suppliers or importing ammonia during that period ("exclusionary conduct").
- [3] SCI brought this application before the Tribunal for an order to separate the following issue, referred to by it as a "question of law", from the remaining issues in the referral proceedings, and to require us to rule on this aspect first:

"As a matter of law, can a price agreed pursuant to a long term contractual formula, with pricing reviews, that is not excessive at the time that it was

negotiated, become excessive at a later point in time, namely the complaint period?" ("Separated Question")

- [4] The long-term contractual relationship between the firms for the supply of ammonia is summarised as follows¹:
1. The parties entered into a long-term supply agreement for the supply of ammonia in May 1996;
 2. This agreement aimed to approximate Omnia's import alternatives for ammonia through the use of a contractual pricing formula based on the import parity price of un-dumped ammonia imports;
 3. The contractual formula accounted for two key components in replicating IPP, namely the ammonia prices FOB from the relevant global sources of ammonia supply and the applicable freight rates for ammonia to be delivered to South Africa from these locations. These components of the contractual formula were then weighted, utilising Omnia's actual imports at the time that the supply agreement was concluded;
 4. A discount was then applied to the contractual formula;
 5. The contractual formula was subjected to an annual review mechanism;
 6. The agreement itself contained termination provisions for either party on two years written notice.²
- [5] SCI contends that the price it charged Omnia, for purposes of its referral, is the contract formula, as amended and applied and not the monthly amount required as payment from Omnia, which Omnia contends. SCI submits that it is this conceptual dispute between the parties in the referral which should be separated from the other issues in the referral and be determined by the Tribunal prior to it hearing the remainder of the case.³
- [6] SCI's rationale for the separation is that such separation will streamline the resolution of the issues in the referral proceedings by providing clarity as to the nature and extent of evidence that is required to be led before the Tribunal, or,

¹ Applicant's Heads of Argument paginated page 65 and 66 para 10.

² See page 5 of the Transcript.

³ Applicant's Heads of Argument paginated page 66 para 11.

if we were to decide the separated issue in its favour, by disposing altogether of the most complex and evidence-intensive claim against SCI, namely that for excessive pricing.⁴

[7] SCI argues that the separated question is capable of separation due to the fact that it is purely a question of law that can be determined by legal argument. Yet it concedes that the issue would require some consideration of the facts but submits that it could be determined by a limited recourse to the common cause facts contained in the founding, answering and replying affidavits regarding the contractual supply relationships between SCI and Omnia.⁵ No hearing of further evidence is necessary.

[10] Omnia opposes the separation application. The central plank of its opposition is that the issue sought to be separated by SCI is not only a question of law which could be disposed of by legal argument only but requires the Tribunal to have some recourse to factual evidence regarding the contractual supply relationship between the parties. The parties' affidavits differ as to what the correct facts are, as well as on what facts are relevant to the complaint referral. Contrary to SCI's averment, there is thus no agreed or common set of facts in the affidavits against which a legal question can be determined. Moreover Omnia takes issue with the very formulation of the separated question in that it assumes that Omnia has conceded that the price was not excessive at the time it concluded the contract with SCI. It submits that the affidavits filed in the referral proceedings were never intended to present all of the evidence but merely to set out certain key facts and arguments. Omnia has not pleaded that the price at the time of the conclusion of the contract was not excessive, simply because it has limited its complaint to a particular time period. SCI cannot, from this, infer that Omnia has conceded that the price was not excessive prior to that period. Finally, it submits, as a matter of fairness, the parties also have the right to test allegations made in the opposing affidavits by way of cross

⁴ Applicant's Heads of Argument paginated page 62 and 63 para 3-4.

⁵ Applicant's Heads of Argument paginated page 71 para 19.1.

examination, which would be precluded by a hearing separated on the basis sought by SCI.⁶

Tribunal's approach to separation applications

[12] The Tribunal has in a previous decision⁷ acknowledged that no Tribunal Rule exists which expressly deals with the separation of issues. Tribunal Rule 55(1)(b) states that *"if a question arises as to the practice or procedure to be followed in cases not provided by these Rules, the member may have regard to the High Court Rules"*.

[13] High Court Rule [Uniform Rule 33(4)] 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."

[14] According to Harms *"the basis for our jurisdiction to act mero motu is convenience."*⁸ The following quotation⁹ cited by Harms¹⁰ is instructive on the proper approach to the issue of convenience:

"The basis of the jurisdiction is convenience – the convenience not only of the parties, but also of the Court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the

⁶ Respondent's Heads of Argument paginated page 95 para 21.1.

⁷ South African Breweries Ltd and Others v Competition Commission CT Case No. 134/CR/DEC07.

⁸ See Harms, *"Civil Procedure in the High Court"*, paragraph B33.11.

⁹ S v Malinde 1990 1 SA 57 (A) 68.

¹⁰ Op cit 8.

application, when deciding an application under the sub-rule, the Court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs. So, the Court should not grant an application for a separate hearing “unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result”.

- [15] We are not persuaded that a separation will lead to the advantages claimed by SCI or that it would be convenient for the parties and the Tribunal alike.
- [16] At inception, the very formulation by SCI of the separated issue is in dispute. As we pointed out earlier Omnia opposes the contention by SCI that the price charged by SCI to Omnia was “...not excessive at the time that it was negotiated”. Omnia denies this contention and states “although we focus on a particular period for purposes of the investigation, what we do contend is that it [price] was unreasonable, it [price] was excessive and we do not accept that it wasn’t excessive at the time that it [price] was negotiated”.¹¹
- [17] Such a fundamental dispute – namely over the formulation of the very question to be determined separately - renders it difficult, if not impossible to assess whether a separated hearing would confer any convenience or advantage to the parties and the Tribunal alike. How are we able to answer the question put up by SCI, in the affirmative or in the negative, when the formulation of the question itself is in dispute? Put another way, if the prior question of what is to be separated is uncertain then it follows that an assessment of whether it would be convenient to do so – the subsequent question – cannot be made with any certainty either.
- [18] Even if for arguments’ sake we were to accept that the formulation of the separated issue is not in dispute, the separated issue – as conceded by SCI -

¹¹ See Transcript page 48.

is not only a question of law but rather a mix of law and fact in which the facts are disputed i.e. are not common cause. Because of this the Tribunal would be unable, were it to grant a separation, to arrive at a determination of the separated issue without first having to determine the disputes between the parties in relation to at least those facts that are required for the determination of the issue. Such a determination cannot be arrived at without permitting parties to lead evidence through witnesses and affording each of them an opportunity to cross-examine the other's witnesses.

- [19] Whilst SCI contended that the matter could be decided on the papers without the necessity for oral evidence, Omnia as we noted earlier disputes this and its view is the pleadings are insufficient to make this determination. This means that hearing oral evidence is unavoidable and this is likely to render the scope and duration of such a separated hearing unpredictable.
- [20] We cannot see any advantage to be gained by separating this issue from the others when the separated hearing itself would lack focus and be rendered open-ended by the myriad of disputes between the parties.
- [21] Furthermore there seems to be a degree of overlap between the facts relied upon by Omnia in the excessive pricing complaint and in its other complaints against SCI, giving rise to the likelihood that the same evidence may have to be traversed both in the separated hearing and in the hearing of the merits of the remaining complaints.
- [22] In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds*¹² the Court cautioned that if evidence will overlap, it may be inconvenient to grant a separation.
- [23] For the reasons discussed above we find that there is no convenience to be served by the separation. The formulation of the separated issue is itself in dispute, there are no common cause facts that the Tribunal could rely upon in the determination of the separated issue thus rendering the scope of the separated hearing open-ended and unpredictable and there may be an

¹² 1998(4) SA 466 (C).

overlap of the factual evidence between the separated hearing and the other complaints.

[24] Accordingly the application is dismissed. Costs are awarded in favour of Omnia, such costs to include the costs of two counsel.


YASMIN CARRIM

18 December 2013

DATE

Norman Manoim and Medi Mokuena concurring

Tribunal Researcher:

Derrick Bowles

For Sasol Chemical Industries Ltd:

Adv. D Unterhalter SC and Adv. M Le Roux,
as instructed by Bowman Gilfillan Attorneys

For Omnia Group (Pty) Ltd:

Adv A Subel SC and Adv P Farlam, as
instructed by Norton Rose Fulbright