competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CRP221Feb17/Exc074Jun17

In the exception application between:

AIR PRODUCTS SOUTH AFRICA Applicant

and

ALBA GAS (PTY) LTD Respondent

Case No.: CRP221Feb17/AME092Jun17

And in the amendment application between:

ALBA GAS (PTY) LTD Applicant

and

AIR PRODUCTS SOUTH AFRICA (PTY) LTD First Respondent

Case No.:CRP221Feb17

In re the complaint referral between:

ALBA GAS (PTY) LTD Complainant

and

AIR PRODUCTS SOUTH AFRICA Respondent

Panel	: Norman Manoim (Presiding Member) : Medi Mokuena (Tribunal Member) : Enver Daniels (Tribunal Member)
Heard on	: 20 July 2017
Order Issued on	: 23 November 2017
Reasons Issued on	: 23 November 2017

Introduction

[1] This matter concerns two interlocutory applications, an amendment application and an exception application, arising from a private complaint referral brought by Alba Gas (Pty) Ltd ("Alba") against Air Products South Africa (Pty) Ltd ("Air Products"). Air Products is the applicant in the exception application, which Alba opposes. Alba, in an attempt to rectify the grounds of exception raised by Air Products, brought an amendment application.

[2] At the beginning of the hearing Air Products' advised the Tribunal that it is not opposing the amendment application, even though it was initially partially opposed. The Tribunal accepted that for purposes of the exception application, it will take into consideration the supplementary affidavit of Alba.

[3] The Tribunal, in terms of its order below, grants the amendment application brought by Alba, upholds the exception application brought by Air Products, and dismisses the main application. Our reasons for such follow.

Background

[4] On 20 February 2017, Mr Anderson on behalf of Alba, an unrepresented complainant, referred a complaint against Air Products to the Tribunal following a notice of non-referral by the Commission.[1] Alba self-referred the complaint to the Tribunal in terms of section 51(1) of the Competition Act of 1998, Act 89 of 1998 (the Act).

[5] Alba is an industrial gas distributor in Roodepoort, Gauteng. Air Products a manufacturer, supplier and distributor of industrial and specialty gas with a network of independent distributors, of which Alba was one. Alba and Air Products' contractual relationship dates back to

[1] The Certificate of non-referral was issued on 24 January 2017.

February 2002 as an accredited industrial gas distributor. At the time of hearing this matter, Alba was no longer distributing gas following a contractual dispute, which is not before this Tribunal in this application.

[6] In its complaint referral, Alba sought an order (i) declaring Air Products "guilty of anti-competitive behaviour", (ii) imposing a relevant administrative penalty, and (iii) ordering Air Products to pay damages to Alba for loss of current and future earnings due to its anti-competitive practices.

[7] In its complaint, Alba did not cite any section of the Act, which Air Products is alleged to have contravened. It however, broadly alleged that Air Products sought to close it down by introducing a rival gas distributor in the area it was contracted to service. In addition, Alba alleged that Air Products gave the new entrant preferential pricing. On Alba's version, the detrimental effect of introducing a new competitor was compounded by the fact that Alba was contractually bound to exclusively purchase its industrial gases from Air Products, which prevented it from purchasing from other suppliers and this ultimately led to its exit from the market.

[8] On 20 March 2017, Air Products filed its answering affidavit. Air Products primarily submitted that Alba's complaint was procedurally and technically defective for a number of reasons. Chief among which was that the complaint did not contain a concise statement of the grounds of the complaint and the material facts or points of law relevant to and relied on by the complaint. Air Products additionally alleged that the complaint referral is vague, embarrassing, and/or fails to disclose a cause of action.

[9] Air Products submitted that the only possible conclusion that could be reached on a fair reading of Alba's complaint is that Alba alleges that Air Products contravened s9(1) of the Act, as gleaned from the repeated allegation that Air Products offered favourable pricing to Alba's rival.

[10] Air Products went on to respond on the merits of the complaint Alba raised. Air Products articulated the historical relationship between itself and Alba, arguing broadly that Alba's exit from the market could be entirely laid at the feet of financial mismanagement, as opposed to anti-competitive practices.

[11] Alba, in its reply of 10 April 2017, indicated that:

> *"The Respondent's continual referral to S 9(1) of the Competition Act would suggest their understanding of the matter was that of Alba Gas (Pty) Ltd seeing their behaviour and actions as the Respondent trying to be dominant in the market."*[2]

At the stage of drafting the reply, Mr Anderson of Alba was still acting as an unrepresented party.

[12] With the submission of a reply signaling the close of proceedings, the Tribunal convened a pre-hearing on 23 May 2017 to determine the further conduct of proceedings. In a direction issued that day, the Tribunal made provision for Air Products to bring an exception application, which it did on 09 June 2017.

[13] The exception primarily seeks the dismissal of the complaint referral on the ground that it lacks the averments necessary to sustain the complaint that Air Products has contravened any prohibited practice provisions of the Act. In the alternative, the application sought an order declaring the complaint referral vague and embarrassing to an extent that prejudices Air Products in the conduct of its defense.

[14] The primary thrust of Air Product's exception was the lack of certainty regarding which section of the Act Alba alleges it contravened. On Air Product's argument, this absence was one of the reasons the complaint should be ruled non-compliant with the Act and dismissed. It is trite that

[2] Page 83 of the record, fourth paragraph.

a complaint must disclose a cause of action and not leave the opponent to guess what case it has to answer.

[15] On 26 June, Alba wrote to the Tribunal and Air Products requesting an extension of time to file its answer to the exception. Alba indicated that it had obtained legal representation and was intending to file an application to amend its referral. With the agreement of Air Products, the extension was granted.

[16] On 30 June Alba, through its newly appointed legal representative, submitted the amendment application under consideration. In its application, Alba sought to amend its complaint referral to cure the defects Air Products was complaining of by requesting that the Tribunal issue an order declaring that Air Products engaged in a conduct that contravened sections 8(1)(a) and 9(1)(c) of the Act.

[17] In response to the amendment application, Air Products submitted a supplementary affidavit to its exception application. In this affidavit, Air Products indicates that it no longer pursues the ground of exception that no section numbers were pleaded in the complaint referral. It does, however, submit that the complaint, as amended, does not have enough particularity to sustain a dominance or excessive pricing case. It alleged that the inclusion of an excessive pricing case takes the complaint beyond that which was non-referred by the Commission and thus, the Applicant would need to approach the Commission with the revised complaint before approaching the Tribunal with the issue.

[18] In further correspondence, Air Products clarified that it does not oppose the amendment application *per se*, but that this should not be interpreted to mean that Air Products does not object to certain amendments or that it concedes that the amendments wholly cure the defective complaint referral.

[19] On 12 July the Tribunal issued a direction ordering the amendment and exception applications to be heard simultaneously in one hearing.

Amendment Application

[20] Alba's amendment application sought primarily to clarify the sections of the Act it alleged Air Products violated. In its amendment application, Alba seeks to amend its referral by alleging that Air Products contravened section 8(1)(a) and 9(1)(c) of the Act.

[21] The Tribunal, importing the principles applied by the High Courts in amendment applications, has found that it will grant amendments in the instances where the application is not made *mala fide* and where the application would not cause harm to the opposite party which could not be remedied by a cost order if appropriate.[3]

[22] In the present matter, Alba submitted that the amendment was intended to cure the defects in the complaint raised by Air Products in its exception application. At the time of authoring the complaint referral, Mr Anderson of Alba was unrepresented. Soon after obtaining legal representation, the amendment was filed and we thus find that the application could not be considered to be *mala fide.*

[23] In its papers, Air Products neither alleged nor raised prejudice should the amendment be granted. It took the technical point that, were the amendment to be granted, the inclusion of an allegation of a section 8(1)(a) complaint, namely that Air Products was a dominant firm charging an excessive price, would take the complaint referral beyond that which was non-referred by the Commission. Consequently the complaint would have had to be referred back to the Commission for reconsideration. The original complaint made to the Commission by Alba is not before us, and we are thus not in a position to make a determination on whether the complaint need be referred back to the Commission, but our finding in other matters renders this issue moot.

[3] The Competition Tribunal v Yara South Africa (Pty) Ltd and another; In re The Competition Commission v Sasol Chemical Industries and Others 31/CR/May05 [24 February 2010] para 48; Competition Commission of South Africa v Sasol Chemical industries (Pty) Ltd, Kynoch Fertilizer (Pty) Ltd Africa explosives and Chemical industries Ltd 45/CR/May06 [1 April 2008] para 8.

[24] Alba responded timeously to the exception application even though it did not file an answering affidavit. During the hearing of these applications, the Tribunal considered the fact that Air Products submitted that it was not opposing the amendment application. We are satisfied that the amendment application was not made *mala fide* and did not in anyway prejudice Air Products.

[25] We grant the amendment application before us in line with our below order.

Exception application

[26] The Tribunal's approach to exceptions is well documented. Guided by considerations of fairness, the standard for referrals as set out in Rule 15 of the Tribunal's Rules must be adhered to.[4] Respondents are ultimately entitled to understand the case being made out against it.[5] In instances where this threshold is not met, the general approach is to allow parties the opportunity to amend, but each case is to be decided on its own facts.[6]

[27] In the present case, despite Alba specifying the sections (which was the *gravamen* of the exception) and the contents of its supplementary affidavit, we find that the requisite standard was not met and we uphold the exceptions.

---

[4] See Invensys PLC and 2 others v Protea Automation Solutions (Pty) Ltd [1999-200] CPLR 299; National Association of Pharmaceutical wholesalers and others v Glaxo Wellcome and other [2001-2002] CPLR 251.

[5] National Association of Pharmaceutical Wholesalers And Others v Glaxo Wellcome and Other, Case No: 45/CRJul01 ('National Wholesalers') at page 18, paragraph 55; Rooibos Ltd v Competition Commission, Case No 129/CR/Dec08, para 6.

[6] BMW South Africa (Pty) ltd v Fourie Holdings 97/CR/Sep08; Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01; Telkom Limited and the Competition Commission of South Africa and Another Case number 55CR/Jul09.

Dominance and Price Fixing

[28] In the amended complaint referral, Alba alleges that Air Products contravened sections 8 and/or 9 of the Act.

[29] One of the primary grounds of exception raised by Air Products is that Alba has failed to properly define a relevant market in which Air Products is a dominant firm. In its exception application, Air Products submits that

> *"No allegations of dominance are made, and the complainant has made no attempt at all to even define a relevant market, which is a prerequisite for not only for the establishment of dominance (whether by market share or market power), but also the assessment of possible anti-competitive effects that may arise from the impugned conduct."*[7]

[30] In Air Products' supplementary founding affidavit to its exception application, filed after Alba filed its amendment application, the applicant submits:

> *"The bald allegation that Air Products is dominant, by reference to its engagement with Alba Gas alone, does not cure the complaint set out in the founding affidavit in this application that dominance has not been properly pleaded. Air Products persists with its objections in this regard, particularly insofar as no attempt has been made to proffer a market definition by reference to which dominance may be evaluated."*[8]

[31] It is trite that only dominant firms are able to contravene sections 8 or 9 of the Act and in order to establish dominance, a firm must meet one or more of the requirements set out in section 7 of the Act which stipulate that:

A firm is dominant in the market if:

a. It has at least 45% of the market;

---

[7] Exception Application, Founding Affidavit, 09 June 2017, page 113 of Hearing Bundle.
[8] Exception Application, Supplementary Affidavit, 11 July 2017, page 373 of Hearing Bundle.

b. It has at least 35% but less than 45% of that market, unless it can show that it does not have market power; or
c. It has less than 35% of that market, but it has market power.

[32] In its amended complaint referral Alba alleges that Air Products is a dominant firm in terms of section 7(c) of the Act. It submits that Air Products has market power, as defined in section 1 of the Act in that it has exclusive power to control prices of the products supplied to Alba. At no point in the pleadings does Alba make reference to the market in which Air Products exercises such market power.

[33] In submissions before the Tribunal, Mr van der Merwe for Alba argued that because Alba is contractually prohibited from sourcing gas at a cheaper price elsewhere, Air Products has the ability to behave in a manner that does not take into account the reactions of its competitors, customers or suppliers, bringing its actions under the definition of the exercise of market power. This 'market power', on Alba's submissions, results in Air Products being dominant in respect of the agreement entered into between Air Products and Alba.

[34] According to Alba, "*The firm can control the prices in respect of its customers and specifically in respect of the contractual relationship.*"[9] Implicit in the submissions from Alba is the argument that *contractual* power between contracting parties, equates to the exercise of *market* power in terms of the Act and that the relevant market can be defined as the provision of industrial gas to Alba.

[35] Alba conceded that except for the facts in its complaint and supplementary affidavit, it does not have additional and or other factual evidence to show that Air Products exercised market power. It also could not show that customers were paying a higher price than they

[9] Transcript of proceedings, 24 July 2017, Page 6 line 6-8.

used to, because of the conduct of Air Products. Alba did not allege anticompetitive motive in its complaint.

[36] In passing, it is worth mentioning that Alba did not refute the allegations of Air Products that Alba negotiated a price freeze when Air Products wished to effect a price increase. This demonstrates that Alba was still able to negotiate within the ambit of its contract with Air Products. However, our decision does not turn on that.

[37] Air Products rejects Alba's view, arguing that "*market power relates to power that is exercised within a market. It is not power that is exercised vis-à-vis a particular distributor, a particular client... We know the market is not Air Products. The market is packaged industrial gas.*"[10]

[38] We agree with Air Products that to define the relevant market as the provision of industrial gas to Alba, is too myopic a view of the competitive landscape relevant to this matter. It conflates the concept of market power derived from a firm's market position with power derived from a contract freely entered into by Alba. The fact that a firm may exercise characteristics of power against one player in a market because of the contractual relationship between the two, cannot be interpreted to imply that the firm would be able to do so on a broader level.

[39] In his replying oral submissions, in response to argument from Air Products pertaining to the lack of market definition, Mr van Der Merwe submitted that "*it is common cause that we are talking about the* [provision of] *industrial gas in the West Rand Area.*"

[40] In the FFS Refiners case, in which the Tribunal upheld an exception brought against a claim of abuse of dominance, it was held that

> "*In order to succeed on an abuse of dominance claim, it is essential that the complainants plead dominance in respect of the market in*

[10] Transcript of proceedings, 24 July 2017, pages 39-40, lines 20-5.

which they allege abuse. This must be alleged in the complaint referral- it would not assist the respondent for this to be clarified only at the hearing or some later stage."[11]

[41] As important as the alignment of the market in which a firm is dominant and the market in which abuse is alleged, is the alignment of the market in which dominance is alleged and the market in which market power is allegedly exercised.

[42] In this case, even if the Tribunal were persuaded by the argument that the provision of industrial gas to Alba was a discrete component of the relevant market, the factual allegations made out indicate that Air Products exercised market power in the market for the provision of industrial gas to Alba Gas, but no allegations are made that it possessed market power in relation to the broader market for the provision of industrial gas in the West Rand area.

[43] In the matter before us, the allegations made out concerning the relevant market do not establish market dominance for the purpose of the Act. The failure to do so renders the pleadings incomplete and hence excepiable.

[44] Mr van Der Merwe indicated at the hearing that:

"*If the Tribunal is not with Alba Gas in respect of the definition of the market and the definition that Alba wants to give to that, that with all due respect would be the end of the exercise for purposes of determining whether air products is in fact a dominant firm.*"[12]

[45] Given that the Tribunal is not with Alba in respect of the definition of the market and as such, is not of the view that Alba has made a case strong enough to establish Air Products' dominance, there is no need to continue with the enquiry as to the other elements of section 8 and

[11] FFS Refiners (Pty) Ltd v Eskom and Others [2003] 1 CPLR 180 (CT) para13.
[12] Transcript of proceedings, 24 July 2017, Page 3, lines 13-18.

section 9 cases. What's left is to decide whether to allow Alba a further opportunity to amend its papers.

[46] In determining whether to grant the applicant a further opportunity to correct its pleadings, the Tribunal has held previously that it would:

> "*Not readily reach for a dismissal of a matter on the merits of a case without first satisfying itself that the prospects of success for a complainant are low and without first providing a party with an opportunity to clarify its case*"[13]

[47] However, The Tribunal has also held that public interest cannot be advanced by permitting the protraction of proceedings with little or no possibility of success,[14] especially in instances where the complainant may be at risk of his own unjustifiable persistence, which could result in in an adverse cost order.[15]

[48] Alba has had the opportunity to clarify its case through the amendment application. During the hearing of these applications, it admitted that it does not have additional arguments in relation to dominance than those ventilated at this hearing. It must also be noted that, at the time of bringing the amendment application, Alba had the benefit of viewing Air Products' comprehensive answering affidavit and exception application, replete with numerous references to case law explaining what would be required of an adequate referral. Alba failed to seize the opportunity to amend its complaint in a manner that would have brought it in line with Rule 15(2), which would have put the exception to rest and obligated Air Product to respond accordingly. This did not happen.

---

[13] Invensys PLC et al v Protea Automation Solutions (Pty) Ltd Case number 019315 (decision of 3 September 2014) para 20.
[14] Ibid, para 32.
[15] Amalgamated Real Estate Principal Group CC t/a Charter Property Sales v The Home Trader (Eastern Cape) (Pty) Ltd t/a East Cape Property Guide [2013 1 CPLR 282 (CT) para 28.

[49] It is perhaps appropriate at this stage to recognise Air Products and its legal team for acting with the utmost professionalism, and to commend their pragmatic approach to the dispute at hand.

[50] The circumstances of this matter do not call out to grant Alba a further opportunity to amend its papers. The proceedings would be unnecessarily prolonged more than they need to be thus denying swift justice for both parties. Both parties would suffer prejudice in respect of legal fees (Alba is not operating and does not have a source of income) already, with little to no conceivable change in the outcome of proceedings.

[51] We are of course, not insensitive to giving Alba the opportunity to prosecute its case, but that cannot be done at the expense of compliance with the Act.

[52] We therefore find that public interest is best served by upholding the exception application and dismissing the complaint, which we do in terms of our order below.

ORDER

The following orders are thus made:

1. The application to amend is granted as requested;

2. The exception application is upheld and the complaint referral under case number CRP221FEB17 is dismissed; and

3. No order is made in relation to costs.

Medi Mokuena

23 November 2017
Date

Norman Manoim and Enver Daniels concurring

Tribunal Researcher: Alistair Dey-van Heerden

For the Applicant: Greta Engelbrecht
Instructed by: Baker Mckenzie.

For the Respondent: AR Van Der Merwe
Instructed by: Vos Attorneys